Court File No. CV-24-00716511-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

MAPLEVIEW DEVELOPMENTS LTD., PACE MAPLEVIEW LTD. and 2552741 ONTARIO INC.

Respondents

IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

BRIEF OF AUTHORITIES OF MAPLEVIEW AND PACE MAPLEVIEW

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Lawyer for the Respondents, Mapleview Developments LTD. and Pace Mapleview LTD.

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4	*DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation* 2021 ABCA 226;
5	*Confectionately Yours Inc., Re* [2002] J.J. NO. 3569 [ONCA];
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10	*Lai (Bankruptcy), Re*, 2005 CanLII 17915 (ON SC).
11	*Dhawan v. Shails et. al.*, 2018 ONSC 7116, 2018 CarswellOnt 19811.
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15	*Royal Bank v. Jones*, 2009 CarswellOnt 4063.
16	*Times Square Holdings Ltd. v. Shimizu*, 2001 BCCA 667, 2001 CarswellBC 2563.

TAB 1

2018 ONCA 253
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2018 CarswellOnt 3694, 2018 ONCA 253, [2018] O.J. No. 1381, 141 O.R. (3d) 192, 290 A.C.W.S. (3d) 20, 420 D.L.R. (4th) 657, 57 C.B.R. (6th) 171, 8 P.P.S.A.C. (4th) 181

Application under section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, and section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43.

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc./Dianor Resources Inc. (Respondent / Respondent)

P. Lauwers, S.E. Pepall, Grant Huscroft JJ.A.

Heard: May 23, 2017
Judgment: March 15, 2018
Docket: CA C62925 (M47498)

Proceedings: affirming in part *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Daniel J. Matson, Roderick W. Johansen, for Appellant, 2350614 Ontario Inc.
Shara N. Roy, for Respondent, Third Eye Capital Corporation
Dylan Chochla, for Receiver of Dianor Resources Inc., Richter Advisory Group Inc.
Delna Contractor, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets
Natural resources
II Mines and minerals
II.3 Ownership and acquisition of mineral rights
II.3.e Mining lease
II.3.e.iv Rents and royalties
II.3.e.iv.C Miscellaneous
Natural resources
II Mines and minerals
II.5 Remedies
II.5.f Vesting orders
Personal property security
X Statutory liens
X.6 Miscellaneous

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 Co. had acquired royalty rights — Notices of agreements granting GOR's were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GOR's be terminated or reduced — Motion judge approved sale to successful bidder Third Eye and granted vesting order purporting to extinguish GOR's — Motion judge rejected 235 Co.'s argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights were found to be fair and receiver paid this amount to 235 Co., which were held in trust — 235 Co. appealed — Third Eye brought motion for order quashing 235 Co.'s appeal as moot since 235 Co. did not seek stay of vesting order which operated to extinguish GOR's when it was registered on title — It was premature to quash appeal — 235 Co.'s GORs constituted interest in land but further submissions were requested on whether motion judge had jurisdiction to grant vesting order free and clear of 235 Co.'s GOR's in sale to Third Eye and whether 235 Co. was entitled to remedy.
Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous
At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 Co. had acquired royalty rights — Notices of agreements granting GOR's were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GOR's be terminated or reduced — Third eye was successful — Motion judge approved sale to Third Eye and granted vesting order purporting to extinguish GORs — Motion judge rejected 235 Co.'s argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights were found to be fair and receiver paid this amount to 235 Co., which were held in trust — 235 Co was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 Co. appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Court declined to determine that appeal was moot since vesting order had been executed — Further submissions were requested on whether Superior Court had jurisdiction to grant vesting order free and clear of royalty rights and whether or not appeal was moot.
Personal property security --- Statutory liens — Miscellaneous
At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 Co. had acquired royalty rights — Notices of agreements granting GOR's were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GOR's be terminated or reduced — Motion judge approved sale to successful bidder Third Eye and granted vesting order purporting to extinguish GOR's — 235 Co. brought cross-motion for relief including paying under Repair and Storage Liens Act (Act) on basis that another company transferred surface rights to 235 Co. and since then, insolvent stored its assets on 235 Co.'s surface rights — Cross-motion was dismissed as insolvent was never lawfully displaced of its ownership of surface rights — There was no evidence of understanding that 235 Co. would be paid for alleged storage — Building structures and vehicles were on property because they were used to exploit insolvent's mining rights, drill cores were there because they were obtained in that exploitation: they were never given to 235 Co. for storage — Even if 235 Co. had storage lien, it would have no right to be paid what it claimed — Under s. 4(1) of Act, storer is entitled only to fair value of storage and not some rental value for land — 235 Co. appealed — Appeal dismissed — 235 Co., as purported owner of surface rights was not entitled to storer's lien respecting insolvent's surface works — Appeal was dismissed for same reasons concluded by motion judge.
Natural resources --- Mines and minerals — Ownership and acquisition of mineral rights — Mining lease — Rents and royalties — Miscellaneous

At request of insolvent company's lender (Third Eye), court-appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 Co. had acquired royalty rights — Notices of agreements granting GOR's were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GOR's be terminated or reduced — Motion judge approved sale to successful bidder Third Eye and granted vesting order purporting to extinguish GOR's — Motion judge rejected 235 Co.'s argument that claims would continue to be subject to GORs after their transfer to Third Eye holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights were found to be fair and receiver paid this amount to 235 Co., which were held in trust — 235 Co. appealed — Third Eye brought motion for order quashing 235 Co.'s appeal as moot since 235 Co. did not seek stay of vesting order which operated to extinguish GOR's when it was registered on title — It was premature to quash appeal — 235 Co.'s GORs constituted interest in land but further submissions were requested on whether motion judge had jurisdiction to grant vesting order free and clear of 235 Co.'s GOR's in sale to Third Eye and whether 235 Co. was entitled to remedy.

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APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), dismissing its cross-motion for lien and granting applicant's motion for vesting order; MOTION by applicant company for order quashing numbered company's appeal.

***P. Lauwers J.A.*:**

A. THE CONTEXT OF THE APPEAL

1 Dianor Resources Inc. was insolvent. At the request of the respondent, Third Eye Capital Corporation as a lender, the court appointed a receiver under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and s. 101 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43 ("*CJA*"), over the assets, undertakings, and property of the debtor, Dianor [1] .

2 Dianor's main asset was a group of mining claims. The claims with which this appeal is concerned were subject to, among other things, a "Gross Overriding Royalty" ("GOR") in favour of a company from which the appellant, 2350614 Ontario Inc. ("235Co"), had acquired the royalty rights. Notices of the agreements granting the GORs were registered on title to the surface rights and the mining rights.

3 The supervising judge made an order approving a bid process for the sale of Dianor's mining claims. It generated two bids, both containing a condition that the GORs be terminated or significantly reduced. Third Eye was the successful bidder.

4 At the request of the receiver, the motion judge approved the sale of the mining claims to Third Eye and granted a vesting order that purported to extinguish the GORs. 235 did not oppose the sale but asked that the property vested in Third Eye be subject to the GORs.

5 The motion judge rejected the appellant's argument that the claims would continue to be subject to the GORs after their transfer to Third Eye. He held, at para. 30: "that the GORs do not run with the land or grant the holder of the GORs an interest in the lands over which Dianor holds the mineral rights." The motion judge also held, at para. 38, that ss. 11(2), 100, and 101 of the *CJA*, gave him "the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just" including the authority to dispense with the royalty rights. He found the expert's valuation of the royalty rights to be fair and added, at para. 39:

> In my view, it is appropriate and just that a vesting order in the usual terms be granted to Third Eye on the condition that \$250,000 be paid to 235Co. or whatever entity Mr. Leadbetter directs the payment to be made. That is higher than the mid-point of the range of values determined by Dr. Roscoe.

6 The receiver paid this amount to 235Co. The funds are being held in trust pending the outcome of this appeal.

7 235Co also brought a cross-motion claiming payment for a debt owing under the *Repair and Storage Liens Act*, R.S.O. 1990, c. R.25. The motion judge dismissed the cross-motion.

8 In this appeal, 235Co seeks to set aside the order of the motion judge and to obtain an order that 235Co's GORs constitute a interests in land, along with consequential relief. Third Eye moved for an order quashing 235Co's Notice of Appeal on the basis

that the appeal is moot because 235Co did not seek a stay of the vesting order, which operated to extinguish the GORs when it was registered on title. Furthermore, the variation 235Co seeks to the vesting order is unavailable as the subject transaction was predicated on the elimination of the GORs.

9 For the reasons that follow, it would be premature to quash the appeal. I would hold that 235Co's GORs constitute an interest in land, but I would require additional submissions on whether the motion judge had jurisdiction to vest out 235Co's GORs in the sale to Third Eye, and if not, whether 235Co is entitled to a remedy. I would dismiss 235Co's appeal with respect to the lien claim.

B. OVERVIEW OF THESE REASONS

10 The preliminary issue raised by Third Eye is whether registration of the vesting order on title had the legal effect of rendering the appeal moot.

11 The central issue in this case is whether the GORs constitute interests in land within the meaning of the law outlined by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.). I conclude that the GORs are interests in land, contrary to the holding of the motion judge.

12 This gives rise to the related issue: if the claims are subject to the GORs, did the motion judge have jurisdiction to vest out the GORs?

13 If the motion judge had jurisdiction to vest out the GORs, then 235Co is not entitled to a remedy. But if he lacked this jurisdiction, then 235Co might be entitled to a remedy, including a possible remedy under the *Land Titles Act*, R.S.O. 1990, c. L.5 ("*LTA*"). Because neither the issue of jurisdiction nor of remedy was adequately argued by the parties in their factums or in oral argument, I would require additional submissions on the issues specified below, especially since they are of considerable importance to the insolvency practice.

14 Finally, I conclude that 235Co, as the purported owner of the surface rights, is not entitled to a storer's lien in respect of Dianor's surface works. I would dismiss the appeal on the lien claim for the reasons given by the motion judge and will not address it further.

15 I address, first, Third Eye's motion to quash the appeal and then address the remaining issues in sequence.

C. THE FIRST ISSUE: IS THE APPEAL MOOT?

16 The appellant did not seek a stay of the vesting order pending appeal before the vesting order was registered on title, although it could have done so on a timely basis. Generally, a vesting order cannot be attacked on appeal unless a stay order has been obtained: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed. (Toronto: Carswell, 2009), at Part XI, L]§21.

17 Third Eye submits that the appeal is moot because the vesting order was "spent" when it was registered, relying in part on *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.). In that case, a hotel was placed into receivership. The receiver found a purchaser. The court approved the sale and granted a vesting order in favour of the purchaser. A few days later, the sole shareholder of the company that operated the hotel discovered information about the identity of the group behind the purchaser. This was relevant because the group had previously entered into agreements to purchase the hotel for more money, but the transactions had failed to close. The sole shareholder sought to set aside the vesting order on the basis that the receiver had failed to disclose the identity of the group behind the purchaser.

18 This court quashed the appeal in *Regal Constellation* as moot. The conditions attached to the vesting order had been met and the vesting order (and the bank's mortgage) had been registered on title. Justice Blair stated, at para. 39:

> Once a vesting order that has not been stayed is registered on title . . . , it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In

> a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

19 Where no stay is obtained and the order has been registered, "innocent third parties are entitled to rely upon that change [in title]," as Blair J.A. noted, at para. 45 of *Regal Constellation*. Accordingly, the respondent argues that this appeal is moot.

20 It cannot be said that the appeal is moot in the particular circumstances of this case. The order is spent, but the remedy for rectification under the *LTA*, left open by Blair J.A. in *Regal Constellation*, may be available to the appellant, provided that several conditions are met: (1) the motion judge had no jurisdiction to vest out the GORs; (2) no innocent third party has relied on the title to its detriment; and (3) the appellant is otherwise entitled to the remedy.

21 Additional submissions are required. In particular, because I conclude the GORs are interests in land, does the fact that Third Eye had notice of 235Co's claim affect the application of *Regal Constellation*? Third Eye was aware that 235Co was considering an appeal on the day of (but prior to) the closing of the transaction.

22 Blair J.A.'s observation in *Regal Constellation*, at para. 49 was: "These matters ought not to be determined on the basis that 'the race is to the swiftest'." Was it appropriate for the court-appointed receiver to close the transaction before the expiry of the appeal period, having been advised that an appeal could be launched, and how does this affect the availability of a remedy?

23 As Blair J.A. recognized, vesting orders have a dual character as both a court order and a conveyance. Once an order is registered on title, it is effective as a registered instrument and has lost its character as an order. However, in my view, this does not mean that 235Co is necessarily without a remedy, if the GORs constitute interests in land. As Blair J.A. noted in *Regal Constellation*, the vesting order "cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system": at para. 39. If the GORs are interests in land, then the appellant's remedy is to be found under the *LTA*. In these circumstances, it would be premature to quash the appeal. It is to the issue of the nature of the interest that I now turn.

D. THE SECOND ISSUE: ARE THE GORS INTERESTS IN LAND?

24 As noted, I conclude that the GORs are interests in land, contrary to the holding of the motion judge. In this section of the reasons, I first set out the facts relevant to the issue, then discuss the governing legal principles, the motion judge's reasons, and finally, the proper application of the governing principles.

(1) The Facts Relevant to the GORs

25 The facts relevant to this issue are set out in the motion judge's decision at paras. 4, 5, and 17-22, which I paraphrase. Dianor's assets consisted mainly of certain mining claims in Ontario and Quebec, both patented and unpatented. The asset sale to Third Eye covered only the Ontario assets.

26 Dianor obtained the mining rights under a Crown Land Agreement and a Patented Land Agreement made with 3814793 Ontario Inc., a company controlled by Mr. Leadbetter and his wife Paulette A. Mousseau-Leadbetter. The terms of the Crown Land Agreement and the Patented Land Agreement, both dated August 25, 2008, govern. The relevant terms in each are virtually identical:

> Once the Optionee [Dianor] becomes the owner of a one hundred percent (100%) undivided interest in the Mining Claims, the Optionors [now 235Co] shall retain a twenty percent (20%) Gross Overriding Royalty ('GOR') for diamonds and a one and a half percent (1.5%) gross overriding royalty (GOR) for all other metals and minerals as calculated in accordance with Schedule 'A'. The Optionee shall have the right of first refusal to purchase the Optionors' GOR.

27 The Crown Land Agreement and the Patented Land Agreement state that the parties intend the GORs to create an interest in and to run with the land:

> 4.1. It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest.

28 Notices of the GORs were registered on title to the patented lands under s. 71 of the *LTA* and on the unpatented mining claims under the *Mining Act*, R.S.O. 1990, c. M.14. The parties did not treat the fact that 235Co came to hold the GORs as a live issue.

29 I turn now to the governing legal principles.

(2) The Governing Principles

30 The ruling precedent is the decision of the Supreme Court of Canada in *Dynex*, which changed the common law to permit a GOR to achieve status as an interest in land. I begin with a review of the common law before *Dynex* and the challenges it posed to mining in Canada, then consider how the court responded to the commercial realities of the mining industry in *Dynex*.

(a) The common law before Dynex

31 At common law, rights in relation to land are divided into corporeal and incorporeal hereditaments: Bruce H. Ziff, *Principles of Property Law*, 6th ed. (Toronto: Carswell, 2014), at p. 76. A corporeal hereditament is an interest in land that is capable of being held in possession, such as a fee simple. An incorporeal hereditament is an interest in land that is non-possessory such as easements, *profits à prendre*, and rent charges. Under each type of incorporeal hereditament, the holder has an interest in land.

32 Mining rights derived from the owner of the mineral estate are generally treated by the common law as *profits à prendre*, depending on the words of grant. A *profit à prendre* is "a real property interest entitling the holder to acquire some natural resource on land belonging to another": Ziff, at p. 321. More specifically, it is "a right to take something from the land of another. And it must be literally 'from' the land. The right must be to take . . . part of the land itself, e.g., minerals": Andrew Burrows, ed., *English Private Law*, 3rd ed. (Oxford: Oxford University Press, 2013), at s. 4.96.

33 To constitute a *profit à prendre*, a party must be granted the right to enter the lands of another and to exploit a natural resource: Ziff, at p. 399. See also, Alicia K. Quesnel, "*Modernizing the Property Laws that Bind Us: Challenging Traditional Property Law Concepts Unsuited to the Realities of the Oil and Gas Industry*" (2003) 41 Alta. L. Rev. 159, at pp. 172-173.

34 The Supreme Court stated in *Dynex*, at para. 21: "A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*". A working interest is a *profit à prendre* and is a right given by the fee owner (often the Crown) to a miner to enter the owner's land and extract minerals or resources from the property. The Court of Appeal of Alberta has stated:

> [T]he law is clear that a "working interest" in relation to mineral substances *in situ* is a particular kind of property right or interest in land. When the owner of minerals *in situ* (the Crown in this case) leases the right to extract these minerals . . . , the right to extract is known as a "working interest" . . . . This particular kind of interest in land is also commonly called a "*profit à prendre*", which allows a party to enter land and take a resource for profit.

IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing, 2017 ABCA 157, 53 Alta. L.R. (6th) 96 (Alta. C.A.), at para. 98, leave to appeal filed, [2017] S.C.C.A. No. 303 (S.C.C.).

35 At common law prior to *Dynex*, if a party did not have the right to enter and to extract a resource from the land, then it did not have a *profit à prendre* and did not have an interest in land — regardless of the parties' intentions. Moreover, as the Supreme

Court noted in *Dynex*, at para. 8: "At common law, an interest in land could issue from a corporeal hereditament but not from an incorporeal hereditament." On this logic, the right to a payment or to profits was not itself a *profit à prendre*, and a royalty right contractually carved out of a working interest could not confer an interest in land. Further, as Quesnel observed, once "the subject-matter of the grant [e.g., minerals]" is extracted from the ground and in possession, it becomes personal property. "The right . . . does not 'run' with the subject-matter of the grant after it has been [extracted] and reduced to possession": at p. 173.

36 To sum up the common law, the right to take resources from another person's land is a *profit à prendre* and is recognized as an interest in land. However, the right to a payment or to profits alone is not a *profit à prendre* and was not historically recognized as an interest in land.

37 Because an interest in land could not be granted out of an incorporeal hereditament, the common law posed commercial challenges to holders of working interests who needed to secure financing sources to allow for the exploitation of mining rights: Quesnel, at pp. 173-175.

(b) The practice in mining before Dynex

38 Working interests are common in the mining, oil, and gas industries of Canada and play an important role in the Canadian economy. Resource extraction is a risky business; ventures in resource extraction "require huge amounts of capital but only a small fraction are successful," as the Court of Appeal of Alberta observed in *Bank of Montreal v. Dynex Petroleum Ltd.*, 1999 ABCA 363, [2000] 2 W.W.R. 693 (S.C.C.), at para. 35.

39 Royalty agreements are one method used in the industry to provide incentives to key participants such as geological surveyors or drilling companies, or to those selling the claims, as in this case. In granting a GOR, the working interest holder grants royalty rights to a third party. These royalty rights are generally granted out of the lessee's working interest. The royalty amount is not tied to the profitability of the mine. Third parties who obtain royalty rights do not own the working interest or *profit à prendre* and have no independent ownership interest in the land.

40 As the Court of Appeal of Alberta noted in *Dynex*, it became industry practice to draft contracts with the intention of granting royalty holders an interest in land because it was commercially and practically expedient to do so. Key participants often prefer an interest in land rather than a contractual right against the lessee because this allows "investments in a particular piece of property, not in a particular operator or company. . . . The investment return on a royalty results from the success of the property regardless of who owns or is working the property", as the Court of Appeal of Alberta explained in *Dynex*, (at para. 36).

41 Interests in land provide incentives to key participants, mitigate financial risks, and provide better financing terms. As the Alberta Court of Appeal observed in *Dynex*, interests in land provide key participants with exposure to a potentially significant upside if the venture is successful. Granting such an interest as a form of compensation reduces the amount of initial capital necessary to fund a new venture. This allows the working interest holder to reduce its own exposure to loss and thereby spreads risk among key participants. Providing lenders with real property interests protects them in the event of an insolvency and leads to better financing terms for borrowers. The Court, endorsing an industry commentator's view, explained at para. 43:

> [T]he law should provide a framework within which unnecessary risks for those who invest or participate in oil and gas operations are removed. The oil and gas industry has created new devices to meet the high risks of the enterprise. Included among the new devices are non-operating interests which are used to make the sharing of the benefits of mineral ownership definite and certain, minimize taxes, make clear delegation of operating rights and make proper allocation of the risks and rewards of an operation without invoking many objectionable features associated with creating a conventional business association. Non-operating interests include royalty interests, overriding royalty interests, production payments, net profit interests and carried interests.

42 Consequently, for practical and commercial reasons, even before *Dynex*, parties often drafted royalty agreements with the intention of granting the royalty holder an interest in land rather than a contractual right against the lessee. See Nigel Bankes,

"Private Royalty Issues: A Canadian Viewpoint", Private Oil & Gas Royalties, Rocky Mountain Mineral Law Foundation, February 2003, at p. 21.[2]

43 In *Dynex*, the Supreme Court quite deliberately changed the common law in response to these commercial realities.

(c) Dynex and changes to the common law

44 In a nutshell, as I will explain more fully below, the Supreme Court in *Dynex* changed the common law of Canada for express policy reasons in order to permit a royalty interest, including a GOR, to become an interest in land, consistent with the industry practice. In this section of the reasons, I set out the facts in *Dynex*, and then review the reasons of the Court of Appeal of Alberta and the Supreme Court.

(i) The facts in Dynex

45 Dynex Petroleum had granted an overriding royalty on the net profit interests from its oil and gas properties to Enchant Resources Ltd. and an individual. The royalty interests were recorded on the title to the oil and gas properties by means of caveat. The Bank of Montreal was a secured creditor and wanted to sell the oil and gas properties free of the royalty interests of Enchant Resources and the individual. The motion judge ruled that the Bank could sell the properties free of the royalty interests.

(ii) The Ruling of the Court of Appeal of Alberta in Dynex

46 The Court of Appeal of Alberta decided that the royalty interest could be an interest in land despite the common law rule that an incorporeal hereditament could not give rise to an interest in land.[3] The Court adopted the dissenting reasons of Laskin J. (as he then was) in *Saskatchewan Minerals v. Keyes* (1971), [1972] S.C.R. 703 (S.C.C.), at p. 725, who held that a royalty interest could be an interest in land if the parties so intended. The parties' intent could be inferred from a number of factors, which the Court addressed at paras. 84 and 85.

47 I make two observations. First, the Court of Appeal of Alberta took a practical view, approving the approach taken in two lower court decisions: *Canco Oil & Gas Ltd. v. Saskatchewan* (1991), 89 Sask. R. 37 (Sask. Q.B.); and *Scurry-Rainbow Oil Ltd. v. Galloway Estate*, [1993] 4 W.W.R. 454 (Alta. Q.B.); aff'd 1994 ABCA 313, [1995] 1 W.W.R. 316 (Alta. C.A.); leave to appeal refused, (1995), [1994] S.C.C.A. No. 475 (S.C.C.). The Court noted, at para. 73:

> The approach of both Matheson J. in *Canco* and Hunt J. in *Scurry-Rainbow* was to examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words. Matheson J. stated at p. 47:
>
> > . . . The fact that Farmers Mutual did not utilize all of the wording, or type of wording considered by some persons as perhaps essential, can surely not detract from an otherwise clearly manifested intention to create an interest in the lands.
>
> And according to Hunt J. in *Scurry-Rainbow*, at p. 474:
>
> > There is in my view an unreality about placing too heavy an emphasis upon fine distinctions as the selection of words such as "in" rather than "on". Notwithstanding the significance that the courts have sometimes attached to these word choices, I doubt that parties who signed leases . . . should be taken to have intended to create an interest in land as opposed to a contractual right, as a result of such minuscule differences in language . . . *Rather, it is more appropriate to consider the substance of the transaction (namely, what were the parties actually trying to achieve?) and to regard the words they have used from that perspective*. [Emphasis added.]

48 Second, the Court of Appeal rooted its reasons in the practices and the exigencies of the oil and gas industry, as outlined above. At para. 29, the Court specifically endorsed the view of Hunt J. (as she then was), in *Scurry-Rainbow Oil Ltd.* that: "too

rigid a reliance on common law principles that have developed in vastly different circumstances can lead to results that are out of touch with the realities of the industry and that deviate from the sorts of solutions needed by the affected parties".

(iii) The Supreme Court's Ruling in Dynex

49 The Supreme Court recognized it was required to resolve a controversy that pitted an "ancient common law rule against a common practice in the oil and gas industry", in the words of Major J., at para. 4.

50 Justice Major summarized the Court's decision, at para. 21:

> In this appeal, to clarify the status of overriding royalties, the prohibition of the creation of an interest in land from an incorporeal hereditament is inapplicable. A royalty which is an interest in land may be created from an incorporeal hereditament such as a working interest or a *profit à prendre*, if that is the intention of the parties.

51 He adopted the view, at para. 22, that Canadian common law should recognize that a "royalty interest" or an "overriding royalty interest" can be an interest in land if:

> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

52 The Supreme Court knew that its ruling changed the common law and cited, at para. 20, the principles for doing so, expressed in *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842 (S.C.C.), at para. 42: to keep the common law in step with the evolution of society, to clarify a legal principle, or to resolve an inconsistency.

53 Consistent with these principles, Major J. stated, at para. 18: "Given the custom in the oil and gas industry and the support found in case law, it is proper and reasonable that the law should acknowledge that an overriding royalty interest can, subject to the intention of the parties, be an interest in land." He noted that the appellant "could not offer any convincing policy reasons for maintaining the common law prohibition on the creation of an interest in land from an incorporeal hereditament other than fidelity to common law principles."

54 Several points in the decision are of continuing importance. Justice Major noted, at para. 6: "For substantially the same reasons as the Court of Appeal, I conclude that overriding royalty interests can be interests in land." He added, at para. 19, that he much preferred that Court's "compelling insight into the evolution of the law". In my view, this language gives continuing relevance to the approach and the ruling of the Court of Appeal of Alberta, especially its statement, at para. 73, that a court must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances, as opposed to searching for some magic words."

55 I also note that Major J. approved the holding of Laskin J. in dissent in *Saskatchewan Minerals*. He noted, at para. 11, that: "The effect of Laskin J.'s reasons was to render inapplicable, at least insofar as overriding royalties, the common law rule against creating interests in land out of incorporeal interests." He described Laskin J.'s holding, at para. 12: "[T]he intentions of the parties judged by the language creating the royalty would determine whether the parties intended to create an interest in land or to create contractual rights only." This was the Supreme Court's ultimate holding in *Dynex*.

(3) The Motion Judge's Reasons

56 The motion judge stated, at para. 30: "I conclude and find that the GORs do not run with the land or grant the holder of the GORs an interest in the lands over which Dianor holds the mineral rights." He determined that neither the expression of the parties' intent to do so, expressed in s. 4.1 of the Crown Land Agreement and the Patented Land Agreement that the GORs would run with the land, nor the registration of the GORs, was sufficient to convey any interest in land.

The motion judge stated, at para. 26:

> In my view, the situation with 235Co. is exactly described by Roberts J. [in *St. Andrew Goldfields Ltd. v. Newmont Canada Ltd*., [2009] O.J. No. 3266, aff'd 2011 ONCA 377, 282 O.A.C. 106.] 235Co. has no right to enter the property to explore and extract diamonds or other minerals. That right belongs to Dianor. The only right 235Co. . . . obtained under the agreements was to share in revenues produced from diamonds or other minerals extracted from the lands. It is clear from the agreements that the royalties were to be a percentage of the value of the diamonds or other metals and minerals. The interest, out of which the royalty is carved, is not [an] interest in land.

57 The motion judge also referred, at para. 24, to the decision of the Court of Appeal of Quebec in *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323, [2013] R.J.Q. 1264 (C.A. Que.).

(4) The Principles Applied

58 In this section of the reasons, I apply the *Dynex* test and then consider the errors made by the motion judge in his reasoning. It is important to note that the legal documents on which the appellant relies were prepared after *Dynex*.

(a) The Dynex test

59 I repeat for convenience the test prescribed in *Dynex*, at para. 22, for determining whether a royalty right is an interest in land:

> 1) the language used in describing the interest is sufficiently precise to show that the parties intended the royalty to be a grant of an interest in land, rather than a contractual right to a portion of the oil and gas substances recovered from the land; and
>
> 2) the interest, out of which the royalty is carved, is itself an interest in land.

60 Dianor's interests in the claims were working interests or *profits à prendre*, which the common law unquestionably recognizes as interests in land. The GORs were carved out of Dianor's interests. The second element in the *Dynex* test is plainly met in this case.

61 In my view, the first element is also met. The Crown Land Agreement and the Patented Land Agreement expressly state that the parties intend the GOR to create an interest in and to run with the land. To repeat for convenience, s. 4.1 of each of the Agreements states:

> 4.1. It is the intent of the parties hereto that the GOR shall constitute a covenant and an interest in land running with the Property and the Mining Claims and all successions thereof or leases or other tenures which may replace them, whether created privately or through governmental action, and including, without limitation, any leasehold interest.

62 Apart from the plain language of the Agreements, in considering the surrounding context, the original GOR-holder took steps to register its royalty rights: notices of the GORs were registered on title to the patented lands under s. 71 of the *LTA* and on the unpatented mining claims under the *Mining Act*.

63 I agree with the Court of Appeal of Alberta in *Dynex*, at para. 73, that the court must "examine the parties' intentions from the agreement as a whole, along with the surrounding circumstances". Doing so in this instance makes plain their mutual intention to constitute the GORs as interests in land. It is express in the Agreements (based on the general principles of contractual interpretation), and the royalty rights-holder took care to register the interests on title.

64 I observe that the same result was reached with less supporting evidence in *Blue Note Mining Inc. v. Merlin Group Securities Ltd.*, 2008 NBQB 310, 337 N.B.R. (2d) 116 (N.B. Q.B.), aff'd 2009 NBCA 17, 342 N.B.R. (2d) 151 (N.B. C.A.). One issue was whether a net profit interest constituted a continuing interest in land that bound the purchaser. The motion judge determined that the agreement creating the interest did not contain the typical words "found in a conveyance of an interest in land": at para. 34. The only relevant words were "grant" and "in the mine". However, the motion judge held (and the Court of Appeal affirmed) that this was sufficient to grant an interest in land.

65 The contractual terms are not necessarily determinative of whether an interest in land was intended; the language does not require magic words to demonstrate the parties' intention. However, these words were present in the Agreements. In my view, the appellant's GORs constitute interests in land that run with the land and are capable of binding the claims in the hands of a purchaser.

(b) The motion judge's errors

66 The motion judge made three legal errors in his analysis. The first error was that he did not examine the parties' intentions from the royalty agreements as a whole, along with the surrounding circumstances; this was the burden of the previous section of these reasons.

67 The motion judge's second error was in holding that in order to qualify as an interest in land, the royalty agreements had to give the appellant the right "to enter the property to explore and extract diamonds or other minerals": at para. 26. The third error is in holding that: "The interest, out of which the royalty is carved, is not [an] interest in land" because it is expressed in the Agreements as only a right "to share in revenues produced from diamonds or other minerals extracted from the lands." The latter two errors come from a misapprehension of the *Dynex* test. I will address them in turn.

(i) Dynex does not require a royalty rights-holder to have the right to enter the property to explore and extract resources in order to qualify as an interest in land

68 In my view, a serious misapprehension has arisen in the application of *Dynex* in some cases, including some of those relied on by the motion judge.

69 In *Dynex*, Major J. used some precise language from the trial decision of Virtue J. in *Vandergrift v. Coseka Resources Ltd.* (1989), 67 Alta. L.R. (2d) 17 (Alta. Q.B.), at p. 26, to specify the test as to when a royalty interest can be an interest in land. However, the Supreme Court did not adopt the reasoning in *Vandergrift*. There is good reason for this, because *Vandergrift* is inconsistent with *Dynex* in a critical way.

70 In *Vandergrift*, the court did not conclude that the royalty right ran with the land but instead concluded that it was a purely contractual right, taking precisely the approach to the analysis that both the Court of Appeal of Alberta and the Supreme Court expressly disavowed in *Dynex*. Justice Virtue stated, at p. 28:

> One of the incidents of an interest in land one would expect to find in a royalty agreement intended to create an interest in land would be the right to the royalty holder to enter upon the lands to explore for and extract the minerals. A mere entitlement to an overriding royalty, without more, does not, in my view, carry with it the right to explore for oil and gas.

71 The purpose of the Supreme Court and the Court of Appeal of Alberta in *Dynex* was to step away from the requirement that a royalty right had to have the incidents of a working interest or a *profit à prendre* in order to constitute an interest in land, so that royalty rights could play their useful role in financing the industry and spreading risk.

72 Moreover, royalty rights-holders have no interest in working the land, nor do holders of the working interest or the *profit à prendre* want their operations to be subject to the working rights of a royalty rights-holder. This is precisely why the Alberta Court noted, at para. 43, that the royalty right was to be "non-operating", adding: "Non-operating interests include royalty interests, overriding royalty interests, production payments, net profit interests and carried interests."

73 I agree with Professor Bankes, who observed, at p. 23 of his article: "I do not think that the Court should be taken to have endorsed either the particular approach taken by Justice Virtue or the actual result that he arrived at in that case." This built on his earlier comment criticizing *Vandergrift*, at p. 18, on the basis that it "seems to want to turn the royalty owner's passive interest into a working interest."

74 I turn now to the motion judge's second error respecting the application of *Dynex*.

(ii) The language in which the calculation of the royalty right is expressed does not affect its characterization as an interest in land

75 As noted, the motion judge held, at para. 26, that: "The interest, out of which the royalty is carved, is not [an] interest in land" because it is expressed in the Agreements as only a right "to share in revenues produced from diamonds or other minerals extracted from the lands." This takes the mistaken approach of the court in *Vandergrift*, which was rejected in *Dynex*.

76 In my view, the motion judge's approach does not give due weight to the Supreme Court's approval, in *Dynex*, of the reasoning in the dissent of Laskin J. in *Saskatchewan Minerals*. Justice Laskin was a long-time property law professor before his judicial career. It is worth attending to his reasoning in *Saskatchewan Minerals*, where he made these observations, at pp. 724-725:

> In principle, a mining lessee whose holding is an interest in land in respect of which he has a royalty obligation should be able to grant or submit to an overriding royalty in respect of that interest to take effect as itself an interest in the lessee's holding.
>
> . . .
>
> This is not to say that every reservation or grant of a royalty creates an interest in land. The words in which it is couched may show that only a contractual right to money or other benefit is prescribed. However, if the analogy is to rent, then <u>the fact that the royalty is fixed and calculable as a money payment based on production or as a share of production, or of production and sale, cannot alone be enough to establish it as merely a contractual interest</u>. [Emphasis added.]

77 In my view, the fact that the GORs are calculated on production does not defeat the clear intention of the parties that the GORs constitute interests in land.

The cases referred to by the motion judge

78 I now turn to consider the cases on which the motion judge relied.

St. Andrew Goldfields

79 The first is *St. Andrew Goldfields*. Barrick Gold Corp. sold a mine to Newmont Canada Ltd. Part of the consideration was a net smelter return royalty agreement in Barrick's favour. Newmont was also required to obtain Barrick's consent to transfer any interest in the mine, failing which it would continue to be responsible for the royalty. Newmont later sold the mine to St. Andrew Goldfields Ltd. without first seeking Barrick's consent.

80 The situation was explained by Rouleau J.A., at para. 4:

> As found by the trial judge, Newmont Canada had misread the provisions in the Barrick royalty agreement, erroneously believing that the royalty was an insignificant flat rate of 0.013% NSR. In fact, it was a sliding scale royalty obligation that increased substantially as the price of gold increased. Believing that the low 0.013% NSR was an error on Barrick's part, Newmont Canada did not question Barrick on the provision nor did it seek to modify or change the clause.

81 The agreement between Newmont and St. Andrew Goldfields reflected the flat royalty rate but did not contain the multiplier.

82 Because Newmont did not get Barrick's approval for the transfer to St. Andrew Goldfields, it continued to remain liable to Barrick under the original agreement. It appeared that Newmont had made a unilateral error in its interpretation of the royalty provision in its agreement with Barrick and omitted the escalator in its agreement with St. Andrew Goldfields. The issue was whether St. Andrew Goldfields was nonetheless required to pay the higher royalty rate because the royalty interest ran with the land.

83 The trial judge's ruling was set out at para. 11:

> I hold that the Barrick royalty agreement is clear and unambiguous, that Newmont alone is responsible under the Barrick royalty agreement for payment of the royalties on net smelter returns for gold, silver and other minerals to [Barrick's assignee of the royalty rights] Royal Gold, and that St. Andrew is required to indemnify Newmont up to the flat rate of .013% of the net smelter returns for gold, silver and other minerals.

84 Newmont argued that St. Andrew Goldfields was obliged to pay the higher royalty rate because the royalty agreement constituted an interest in land. The trial judge followed the *Vandergrift* approach. She observed, at para. 104, that under the Barrick royalty agreement: "[T]he royalty holder retains no interest in or control over the kind of operations or activities that the owner of the property may carry out".

85 Further, although there was a provision that notice of the agreement could be registered, she held, at para. 105, that this was "not sufficient by itself to demonstrate that the parties intended to create an interest in land." Although the royalty agreement permitted Barrick to register the agreement on title, it had not done so.

86 However, the case did not turn on whether the royalty agreement created an interest in land that bound St. Andrew Goldfields, nor was that holding appealed. The appeal turned on the legal interpretation of the transactional documents and the effect of Newmont's failure to secure Barrick's consent to the sale of the mine. In this court, Rouleau J.A. noted, at para. 31:

> Faced with two contractual interpretations, the trial judge carefully considered the facts and the agreements and concluded that, correctly interpreted, the agreements provided that St. Andrew agreed to an indemnity of a royalty obligation stated to be 0.013% NSR [the lower royalty rate]. This is consistent with the many references in both the Newmont Canada-Holloway and Newmont Canada-Holloway-St. Andrew agreements to the amount of the Barrick royalty obligation being 0.013% NSR.

87 In the result, St. Andrew Goldfields was obliged to indemnify Newmont for the lower net smelter return, while Newmont was obliged to pay the net smelter return at the higher rate to Royal Gold, Barrick's assignee of the royalty rights. In my view, the decision in *St. Andrew Goldfields* has no application to this appeal.

Anglo Pacific

88 Nor does the Court of Appeal of Quebec's decision in *Anglo Pacific Group PLC* assist the respondent. In *Anglo Pacific Group PLC*, the Court looked at the royalty agreement to determine whether it assigned the attributes of ownership to the royalty holder. The agreement did not assign the attributes of ownership but only the right of the royalty holder to receive payment. The Court held that, because the royalty agreement did not give the royalty holder the right to enter, enjoy, or dispose of the property, the holder did not have a real right in land: at paras. 63, 77-81.

89 Although the facts in *Anglo Pacific Group PLC* are similar to this case, the Court did not apply the common law framework from *Dynex* but relied exclusively on the civil law of Quebec. A description of the civil law concepts applied by the Court shows they have no application in common law jurisdictions.

90 The Quebec Court held that to have a "real right" in land pursuant to the *Civil Code of Quebec*, one must have ownership: at paras. 53, 60. Ownership includes corporeal or incorporeal property: at para. 53. Thus, the owner of a mining claim is the owner of a "real right" in land: at paras. 70-71. However, in order to have ownership, one must have the attributes of ownership: at para. 53. The attributes of ownership under civil law include: the right of use (*usus*), of enjoyment (*fructus*), of free disposition (*abusus*), and "the ability to make one's own that which the property generates and that which is attached to it" (*accessio* — for example, buildings on the land or deposits in the land): at paras. 43, 53-54.

91 The owner of land can "dismember" his or her ownership by dividing the attributes of ownership with one or more third parties, who then acquire an interest in land: at paras. 54-55. For example, the holder may have the right to temporarily use and enjoy the property that belongs to another (*usufruct*). This transmits to the holder of the dismemberment the right of use

(*usus*) and enjoyment (*fructus*) for a certain time, and the true owner retains the right to dispose of the land (*abusus*) and the *accessio*: at para. 55.

92 The party to whom a dismemberment is granted will have a real right in land if he or she has the right to share in one of the above-noted attributes of ownership. Without such a right, the party has no "direct right on property": at para. 60. For example, the state "dismembers" its ownership rights in favour of a party when it assigns a mining claim to that party: at para. 70. The holder of a mining claim is the holder of a dismemberment and has a real right in land.

93 Although there are similarities between the civil law concepts and the *profit à prendre* under the common law, there are differences. Most importantly, the Court of Appeal of Quebec did not apply the common law framework from *Dynex* but relied exclusively on the civil law. *Dynex* is the governing law in Ontario; the decision of the Court of Appeal of Quebec in*Anglo Pacific Group PLC* has no bearing on this case.

Conclusion on the issue of whether the GORs constitute interests in land

94 I began my analysis by noting that the central issue in this case is whether the GORs constitute interests in land within the meaning of the law outlined by the Supreme Court in *Dynex*. For the reasons set out above, I conclude that the GORs are interests in land, contrary to the holding of the motion judge. In my view the deferential approach called for by the Supreme Court in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) has no application to this case in view of the motion judge's legal errors.

95 While the motion judge did purport to adjudicate the appellant's GOR claims, his erroneous determination that it was not an interest in land raises potential issues respecting the vesting order.

E. THE THIRD ISSUE: DID THE MOTION JUDGE HAVE JURSIDICTION TO ISSUE A VESTING ORDER THAT EXTINGUISHED THE GORS?

96 In this section of the reasons, I consider, first, the motion judge's reasons in order to set the context and then describe the positions of the parties regarding his jurisdiction to vest out the GORs. I next turn to the governing principles and then to their application.

97 The context for this issue is set by the conclusions I reached on the earlier issue of mootness. Because the GORs are interests in land, the appeal is not necessarily moot, particularly if the Superior Court did not have jurisdiction to issue the vesting order in these circumstances. The determination of this issue in 235Co's favour could entitle it to a remedy.

(1) The Motion Judge's Decision

98 The motion judge held, at para. 37, that:

> In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

99 He added, at para. 38: "I conclude that I do have the jurisdiction to grant a vesting order of the assets to be sold to Third Eye on such terms as are just." Pursuant to the order, the receiver allocated $400,000 in cash as compensation for the extinguishment of Ontario royalties in favour of the appellant and Essar Steel Algoma Inc. The appellant was paid $250,000 for its GORs, and the Court-appointed monitor of Essar was paid $150,000 for its royalty. The motion judge made the payment to 235Co a term of the order, explaining at para. 39:

> In my view, it is appropriate and just that a vesting order in the usual terms be granted to Third Eye on the condition that $250,000 be paid to 235Co. or whatever entity Mr. Leadbetter directs the payment to be made. That is higher than the mid-point of the range of values determined by Dr. Roscoe.

100 The motion judge expressed his opinion, at para. 40, that the Court would have been authorized to make the vesting order disposing of the royalty rights of 235Co "whether the royalty rights were or were not an interest in land."

(2) The Positions of the Parties

101 The appellant argued that if the royalty rights run with the land, then the motion judge had no authority under s. 243 of the *BIA* or s. 100 of the *CJA* to vest the mining claims in Third Eye pursuant to the sale process without leaving the royalty rights in place.

102 The respondent supported the motion judge's view that he had authority to make the vesting order, free of the royalty rights.

(3) The Issue

103 The issue is whether the motion judge, in the circumstances of this case — acting under s. 100 of the *CJA* and s. 243 of the *BIA*, its inherent jurisdiction, or the wording of the vesting order — had jurisdiction to approve a sale that vested out 235Co's proprietary interest.

(a) The Context

104 The motion judge noted that the sale of the mining claims was carried out in accordance with a court-approved bid process under ss. 100 and 101 of the *CJA* and s. 243 of the *BIA*, working together. It is important to reiterate that the motion judge was not acting under s. 65.13(7) of the *BIA*; s. 36(6) of the *CCAA*; ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA*. Neither the provisions of the *CCAA* nor the proposal provisions of the *BIA* apply to this case.

105 Sections 100 and 101 of the *CJA* provide:

> 100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.
>
> 101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.
>
> (2) An order under subsection (1) may include such terms as are considered just.

106 Section 243(1) of the *BIA* provides:

> 243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
>> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>>
>> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>>
>> (c) take any other action that the court considers advisable.

107 These provisions do not expressly authorize a court to take real property out of the hands of a third party.

(b) Does the Superior Court's inherent jurisdiction give jurisdiction to grant a vesting order in these circumstances?

108 The Superior Court of Justice has all of the jurisdiction, power, and authority historically exercised by courts of common law and equity in England and Ontario, as provided in s. 11(2) of the *CJA*. This power includes making vesting orders: *CJA*, at s. 100. However, this Court has interpreted these provisions as conferring no greater authority on the Superior Court than was previously recognized at equity.

109 The leading text — Houlden, *Bankruptcy and Insolvency Law of Canada*, at Part XI, L]§21 — notes:

> A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

110 The leading judicial authority in Ontario is *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.). In that case, Lang J.A. stated, at para. 19, that s. 100 of the *CJA*:

> [P]rovides a court with jurisdiction to vest property in a person but only if the court also possesses the "authority to order [that the property] be disposed of, encumbered or conveyed". Thus, s. 100 only provides a mechanism to give the applicant the ownership or possession of property to which he or she is <u>otherwise entitled</u>; it does <u>not provide a free standing right to property simply because the court considers that result equitable</u>. [Footnote omitted. Emphasis added.]

111 At equity and common law, a party must have a valid and independent entitlement to possession or ownership in order for a court to issue a vesting order that extinguishes a third party's real property interest. Several cases have held that the inherent jurisdiction of the Superior Courts does not confer the power to take real property from third parties simply because the court considers it equitable to other stakeholders. Rather, it gives courts authority to bring about a transfer of title to a party who is otherwise or independently entitled to it. See also *2022177 Ontario Inc. v. Toronto Hanna Properties Ltd.* (2005), 203 O.A.C. 220 (Ont. C.A.), at para 49. See also *Clarkson Co. v. Credit foncier franco canadien* (1985), 57 C.B.R. (N.S.) 283 (Sask. C.A.), at p. 284.

112 Although this court has referred obliquely to this issue in several cases, we have never faced it squarely.

(c) The Policy Context

113 The policy context is well set out by Wilton-Siegel J. in *1565397 Ontario Inc., Re*, [2009] O.J. No. 2596, 54 C.B.R. (5th) 262 (Ont. S.C.J.). In that case, a numbered company delivered an undertaking at closing to later transfer part of the real property to two parties. The company became insolvent, and a receiver was appointed. Although the undertakings were not registered on title until after the appointment of the receiver, the relevant parties had actual notice of them. The receiver attempted to sell the property free of the undertakings. The Court refused to permit the sale. Justice Wilton-Siegel stated, at para. 60:

> I know of no law that permits a court to authorize a receiver to terminate a proprietary interest in land in such manner. The effect of any such extinguishment . . . amounts to expropriation of the respondents' assets in favour of subordinate or unsecured creditors.

114 He added, at para. 67: "I do not think the Court has the authority to order a sale" of the third party's proprietary interests "on the basis proposed" by the receiver. Among the reasons he gave for refusing a vesting order, at para 68, was that the third party's interest was not subject to the receivership:

> Such interests in the Property reside in the respondents whose property is not subject to the receivership. . . . [The receiver] cannot have taken possession of, or otherwise have any interest in, the respondents' interests in the Property, regardless of the terms of the Receivership Order because the Order extends only to the assets of [the debtor]. As such, the [receiver] has

> no authority under the Receivership Order to sell the interests of the respondents. Nor does the Court have the authority to grant such an order in the absence of the appointment of a receiver over the respondents' property and assets.

115 See also *Blue Note Caribou Mines Inc., Re*, 2010 NBQB 91, 356 N.B.R. (2d) 236 (N.B. Q.B.), leave to appeal to N.B.C.A. refused, [2010] N.B.J. No. 267 (N.B. C.A.).

(4) The Context for Further Submissions

116 There are several situations in which courts have considered vesting orders that vest out a third party's proprietary interest. I address several, and there may be others.

(a) The "narrow circumstances" exception

117 Several cases have held that in some narrow circumstances, courts may issue a vesting order that extinguishes third party interests. Such circumstances appear to include situations where doing so would provide added certainty, and there is no evidence of competing proprietary interests: *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2012 ONSC 1868 (Ont. S.C.J. [Commercial List]), at paras. 5, 18, 20-21.

118 What are the narrow circumstances in which a Superior Court judge may issue a vesting order under s. 100 of the *CJA* that vests out a third party's proprietary interest, when s. 65.13(7) of the *BIA*; s. 36(6) of the *CCAA*; ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA* do not apply?

(b) The equities

119 Courts have also considered the "equities" in determining whether to issue a vesting order. Although the term, "equities", is an ambiguous word, the vesting order cases have tended to use it to describe their work in establishing priorities among interests. See, for example, *Meridian Credit Union v. 984 Bay Street Inc.*, [2005] O.J. No. 3707, rev'd [2006] O.J. No. 1726 (Ont. C.A.), and [2006] O.J. No. 3169 (Ont. S.C.J.). See also *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), rev'd 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.); and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120.

(c) Have commercial practices expanded the court's jurisdiction?

120 Finally, under the rubric of "equitable considerations", s.100 of the *CJA*, and the Superior Court's inherent jurisdiction, has the permissible reach of the vesting order grown to permit a court to vest out virtually any interests in an asset? See, for example, David Bish and Lee Cassey, "Vesting Orders Part 1: The Origin and Development" (2015) 32(4) Nat. Insol. Rev. 41; and "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32(5) Nat. Insol. Rev. 53.

(5) The Question Requiring Additional Argument

121 To summarize the discussion, the question to be addressed in additional argument before this panel is: Whether and under what circumstances and limitations (including the ones enumerated above) a Superior Court judge has jurisdiction to extinguish a third party's interest in land using a vesting order, under s. 100 of the *CJA* and s. 243 of the *BIA*, where s. 65.13(7) of the *BIA*; s. 36(6) of the *CCAA*; ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA* do not apply?

122 I turn now to the issue of remedy.

F. THE FOURTH ISSUE: REMEDY

123 Regrettably, the parties did not fully address what this court should do by way of remedy if it were to allow the appeal.

124 The appellant effectively seeks rectification of the register to reflect the GORs. I note that in *Sheard v. Peacock*, 2012 ONSC 4237 (Ont. S.C.J.), the motion judge treated the application to set aside the vesting order as an application for rectification.

125 As noted earlier, even though registration of the vesting order has effected a conveyance of the mining claims, the appellant is not necessarily without a remedy. As Blair J.A. observed in *Regal Constellation*, an aggrieved party like the appellant may seek a remedy under the regime established by the *LTA*.

126 Because this court has found that 235Co has an interest in land, it could be entitled to rectification of the register under ss. 159 and 160 of the *LTA*, which provide:

> 159. Subject to any estates or rights acquired by registration under this Act, where a court of competent jurisdiction has decided that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence of the decision the court is of [the] opinion that a rectification of the register is required, the court may make an order directing the register to be rectified in such manner as is considered just.
>
> 160. Subject to any estates or rights acquired by registration under this Act, if a person is aggrieved by an entry made, or by the omission of an entry from the register, or if default is made or unnecessary delay takes place in making an entry in the register, the person aggrieved by the entry, omission, default or delay may apply to the court for an order that the register be rectified, and the court may either refuse the application with or without costs to be paid by the applicant or may, if satisfied of the justice of the case, make an order for the rectification of the register.

127 However, providing a remedy gives rise to several difficulties. First, there is no information before the court on whether an innocent third party acquired an interest from Third Eye after the vesting order was registered, which would debar a remedy.

128 Second, in its Notice of Appeal, the appellant requested this court to vary the vesting order to remove the appellant's interest from the schedule of claims to be discharged from title of the property and to add its interests to the schedule of permitted encumbrances. The respondent submitted that this is not possible because its accepted Offer to Purchase was "predicated on the elimination of the GORs." The respondent argued that "[i]t was not open to the Motions Judge to impose additional terms on the Transaction that were not agreed to by the parties, and 235Co cannot ask for those terms to be imposed on appeal." I do not know whether the respondent would want to press this position in an argument about the appropriate remedy.

129 In the circumstances, it would not be prudent to exercise authority under s.134 of the *CJA* and ss. 159 and 160 of the *LTA* to rectify title without hearing argument from the parties on whether additional evidence is necessary, how it should be received, and on any other remedial issues arising from this decision.

G. DISPOSITION

130 The next phase of the appeal, assuming the parties choose to pursue it, requires case management to coordinate written submissions on the issues raised in these reasons and to consider the necessity of oral submissions, and I would refer the parties to the Registrar to make the necessary arrangements.

***S.E. Pepall J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Order accordingly.

Footnotes

1 The motion judge was not acting under s. 65.13(7) of the *BIA*; s. 36(6) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"); ss. 66(1.1) and 84.1 of the *BIA*; or s. 11.3 of the *CCAA*.

2 Online: http://law.ucalgary.ca/files/law/rmli-royalty-paper-feb-2003-final. pdf.

3 The Court of Appeal of Alberta did not decide the factual issue but sent it to trial, an outcome affirmed by the Supreme Court. The trial judge held that the documents in *Dynex* did not grant any interest in the land: 2003 ABQB 243, 1 C.B.R (5th) 188 (Alta. Q.B.).

TAB 2

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Sumitomo Canada Limited v. Minto Metals Corp. | 2024 YKSC 28, 2024 CarswellYukon 38 | (Yukon S.C., Jun 14, 2024)

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, [2019] O.J. No. 3211, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
  XIV.4 Sale of assets
Bankruptcy and insolvency
XVII Practice and procedure in courts
  XVII.4 Appeals
    XVII.4.a To Court of Appeal
      XVII.4.a.ii Time for appeal
Natural resources
II Mines and minerals
  II.5 Remedies
    II.5.f Vesting orders
Personal property security

X Statutory liens
X.6 Miscellaneous

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

Personal property security --- Statutory liens — Miscellaneous

Table of Authorities

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APPEAL by numbered company from judgment reported at *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 2016 ONSC 6086, 2016 CarswellOnt 15947, 41 C.B.R. (6th) 320 (Ont. S.C.J. [Commercial List]), respecting whether third party interest in land in nature of Gross Overriding Royalty could be extinguished by vesting order granted in receivership proceeding and governance of appeal.

***S.E. Pepall J.A.*:**

Introduction

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately $5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter. [1] The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least $32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor. [2]

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a $2 million credit bid, the assumption of certain liabilities, and $400,000 payable in cash, $250,000 of which was to be distributed to 235 Co. for its GORs and the remaining $150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of $250,000 and $150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of $250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value. [3]

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the $250,000 and $150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The $250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

(1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;

(2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and

(3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

20 The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109 (Ont. S.C.J.), at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

> Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .
>
> Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)[4] which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

(b) Potential Roots of Jurisdiction

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters"' in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

> On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

> A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.[5] In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the

parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

> A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

> That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

> Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

43 The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125;

and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

> 243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> > (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
> >
> > (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
> >
> > (c) take any other action that the court considers advisable.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

> 243(2) [I]n this Part, ***receiver*** means a person who
>
> > (a) is appointed under subsection (1); or
> >
> > (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
> >
> > > (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
> > >
> > > (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

The History of s. 243

48 The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

49 In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

> 47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> (a) take possession of all or part of the debtor's property mentioned in the appointment;
>
> (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
>
> (c) take such other action as the court considers advisable.

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

> It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]) [6] .

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce,

Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report"). [7]

55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009. [8] The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

> 243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following <u>if it considers it to be just or convenient to do so</u>:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
>
> (c) <u>take any other action that the court considers advisable.</u> [Emphasis added.]

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. <u>This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets</u>. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

61 The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

62 Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

> An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

> I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.
>
> However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described,

which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view

it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

87 In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed.,*Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at]§34:10 states:

> The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co's GORs?

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests. [9]

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

103 First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian*, *Romspen*, and *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

> . . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. <u>A royalty is an unencumbered share or fractional interest in the gross production of such working interest</u>. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

(1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;

(2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value $10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed $5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under r. 31 of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of "order *or* decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction. [10] Accordingly, the "[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to s.

101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of $1 million to $2 million, with 235 Co.'s GORs having a value of between $150,000 and $300,000, and Algoma's royalties having a value of $70,000 to $140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of $150,000 but 235 Co. wanted more than the $250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of $250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical

positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the $150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

> The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .
>
> In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:
>
> (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
>
> (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
>
> (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
>
> (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;
>
> (5) The respondent will not be prejudiced by extending the time;
>
> (6) There is an arguable ground or grounds of appeal;
>
> (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between $150,000 and $300,000. Before the motion judge, 235 Co. acknowledged that the payment of $250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under

any other statutory provision. Accordingly, it is entitled to the $250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of $30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

***P. Lauwers J.A.*:**

I agree.

***Grant Huscroft J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

2 The ownership of the surface rights is not in issue in this appeal.

3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:
A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

8 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("*Insolvency Reform Act* 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("*Insolvency Reform Act* 2007").

9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).

10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

TAB 3

1988 CarswellBC 516
British Columbia Supreme Court

Everex Systems Inc. v. Pride Computer Distribution Ltd.

1988 CarswellBC 516, [1988] B.C.J. No. 3089, 15 A.C.W.S. (3d) 56, 68 C.B.R. (N.S.) 24

EVEREX SYSTEMS INC. v. PRIDE COMPUTER DISTRIBUTION LTD.

Meredith J.

Judgment: February 23, 1988
Docket: Vancouver No. C875543

Proceedings: additional reasons to *Everex Systems Inc. v. Pride Computer Distribution Ltd.* (1987), 1987 CarswellBC 3654 ((B.C. S.C.))

Counsel: *P. Guy*, for receiver-manager.
A. Edgson, for defendant.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights
Headnote
Receivers --- Conduct and liability of receiver — Rights
Assignments — Who may assign — Court-appointed receiver-manager not having authority to assign debtor company into bankruptcy — Court not having power to authorize such assignment.
A court-appointed receiver-manager does not have the authority to execute an assignment in bankruptcy for the debtor company nor does the court have the power to authorize such an action.
Table of Authorities
Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

s. 31(1)

Company Act, R.S.B.C. 1979, c. 59

s. 108

s. 110

s. 111

s. 115

s. 116

Application by receiver-manager for authority to assign debtor into bankruptcy.

***Meredith J.*:**

1 My original reasons for judgment on this application of the receiver-manager for authority to assign in bankruptcy was heard 18th December 1987 [[1988] B.C.W.L.D. 551]. My reasons are dated 21st December 1987. I attach a copy of those reasons for reference [p. 26].

2 Since then, a number of considerations have occurred to me. These are referred to in my memoranda of 6th January 1988 and 4th February 1988. I attach copies of these memoranda as well [pp. 27 and 29].

3 Counsel for the receiver-manager has replied to my second memorandum. As I pointed out, s. 31(1) of the Bankruptcy Act, seemingly the sole authority for assignments, limits the making of an assignment to "an insolvent person". The receiver-manager is not, of course, insolvent. However, Mr. Guy submits that in making the assignment the receiver-manager would "make an assignment ... for Pride". I hold against that contention because the receiver-manager has been appointed by the court, and by virtue of the appointment ceases to be an officer of the corporation (Company Act, s. 111). Thus the receiver-manager after the court appointment must act in accordance with the directions of the court. The receiver-manager cannot thereafter instruct the corporation as an officer thereof. In any event, the directors of the corporation retain their powers except with respect to that part of the undertaking for which the receiver-manager is appointed (Company Act, s. 110). Thus the directors retain the authority to cause the company to execute an assignment in bankruptcy. The receiver-manager does not. Furthermore, I hold that the court has not any power to authorize the receiver-manager to execute an assignment in bankruptcy, ostensibly for the debtor, when the debtor has not done so. For this reason alone, the application must be dismissed.

4 Perhaps I need make no further reference to the submission made by the receiver-manager. But I am prompted to do so because I find it rather strange. The receiver-manager contends that it should be given authority to make the assignment in bankruptcy, notwithstanding that the effect of the assignment would be to:

(a) remove certain assets from the charge which the receiver-manager is there to enforce;

(b) so that the trustee in bankruptcy could carry on the proceedings against the creditor and the receiver-manager for wrongful seizure; and

(c) the trustee in bankruptcy could attack the security of the plaintiff if it were so advised.

It seems to me that none of these results are in the interest of the secured creditor, rather the reverse. If there is no result other than those mentioned, I am at a loss to know why the receiver-manager conceives it incumbent upon it to make the application at all.

5 The defendant is entitled to the costs of these proceedings.

Application dismissed.

APPENDIX 1

Heard - December 18, 1987
Judgment - December 21, 1987

December 21, 1987. *Meredith J.*: — I conclude that this application of the receiver-manager for authority to assign in bankruptcy must be refused, if only for the reason that on the face of the proceedings the plaintiff has not proven the debt upon which the receivership rests.

The plaintiff chose to take security for the huge unpaid balance of the purchase price of the goods sold, not on the goods but on the business of the plaintiff. It did not deliver the goods on consignment, nor did it take a specific charge on the assets delivered. The consequences were twofold. On the one hand, the defendant had put itself at the mercy of the plaintiff. The very survival of the defendant depended upon the goodwill of the plaintiff. On the other hand, the plaintiff, in choosing its form of security, chose to avail itself of the entire undertaking of the company, such as it might be, when the time came to demand the balance owing.

The receiver-manager, in effect, now wants to extend the rights of the plaintiff under the debenture. The effect of this would be to give the plaintiff priority of claim over other creditors. The ostensible reason, however, is to bring efficiency and order to the liquidation process. I think the opposite might be the effect. And, furthermore, a bankruptcy on top of the receivership would add greatly to the costs by whomever those costs are to be borne.

A number of questions arise out of the rather unusual circumstances of this case. I mention one. I question the standing of the solicitors, ostensibly acting for the defendant, to oppose the application in the first place, and to purport to defend the action taken by the plaintiff in the second place. The defendant approved the court order appointing the receiver-manager. That order put the receiver-manager firmly in command of all facets of the company operations, including the defence of suits. After the order was made, the defendant purported through its solicitors to enter a defence. Under the receiving order that would be for the receiver-manager to do as an officer of the court. In any event, the main defence pleaded is that the seizure was wrongful and that the claims of the plaintiff (including the claim for the receiving order which was already made) be dismissed. I find it difficult to see how the defendant can resist the propriety of the receiving order when it made no objection and has not appealed.

As I say, I think at the very least before bankruptcy is authorized in the ostensible name of efficiency and orderliness that the plaintiff should be sworn to be a creditor of the company, given that the plaintiff is engaged in pursuing the very rights for which it contracted.

The application is dismissed.

APPENDIX 2

January 6, 1988. Memorandum to counsel: — I have the letter of Mr. Guy, directed to the trial coordinator, dated 30th December 1987.

I think the whole question should be reconsidered and would ap preciate it if Mr. Guy would set the matter down for rehearing any day Monday to Thursday in the next three weeks at 9 a.m.

Perhaps in my reasons I have laid too much stress on the question of the proof of the debt upon which the receivership rests.

Although there may be authority to the contrary, I think it highly doubtful that the receiver-manager usurps the function of the directors so as to permit an assignment in bankruptcy to be made by it or, for that matter, that the court can order it. Under s. 108 of the Company Act, the receiver is required to bring the business to a halt. Under s. 110, where the receiver-manager is appointed, the powers of the directors cease "with respect to that part of the undertaking for which he is appointed". But that section does not vest in the receiver-manager the power of the directors. Under s. 111, the receiver-manager is an officer of the court and not of the corporation. He may thus apply to the court for direction concerning the management of the assets, or under s. 115 for termination of his fiduciary relationship, but surely not for an order directing what happens after the termination of his duties.

Section 116 makes it evident that the powers of the directors are intact except to the extent that they have ceased under s. 110. It seems to me to follow that it remains within the power of the existing directors to assign the company in bankruptcy if they resolve to do so. But the receiver-manager could not by that device divest itself of the responsibilities imposed upon it by the order of the court.

Even if I am wrong in this, before making a blanket order authorizing "an" assignment, I should wish to know who the proposed trustee in bankruptcy is to be, and that the proposed trustee would accept the appointment and is aware of the major responsibility that that appointment would entail. The responsibility I refer to is the conduct of the lawsuit against the plaintiff and the receiver-manager. Because if damages are awarded because the operations of the company have been wrongfully brought to a halt, the damages will be no doubt large and constitute the major asset of the company.

I had thought that it was conceded that the present directors of the company were functus on the appointment of the receiver-manager. I now see that cannot be the case if only because s. 116 authorizes the corporation to make an application to the court (which only can be done at the instance of the directors) and in any case under s. 110 the powers of the directors have not ceased. Thus the existing directors probably continue to have the right to continue the lawsuit against the creditor. But I continue to be confused about the status of the defence and counterclaim after the receiver-manager has been appointed.

I hope on the continuation of the hearing that counsel will have put their minds to these facets of the matter.

APPENDIX 3

February 4, 1988. Memorandum to counsel: — At the risk of prolonging consideration of the motion, I have these further observations to make upon which I would appreciate submissions from counsel, particularly counsel for the receiver-manager.

The motion is for an order that the receiver-manager "be authorized and directed to make an assignment for the benefit of creditors ..."

(1) Section 31(1) of the Bankruptcy Act, seemingly the sole authority for assignments, authorizes "an insolvent person" to make an assignment "of all of his property for the general benefit of his creditors." The first question then is whether the receiver-manager can be described as "an insolvent person".

(2) The second question is, since the assignment is of property, what property is it that the receiver-manager purports to assign? If the form of assignment simply says, as it probably will, "all his property", I think it important that the trustee know what property is conveyed to him by virtue of the assignment. Will this be a matter to be debated between the receiver-manager and the assignee?

(3) Assuming that the receiver-manager assigns something (for instance perhaps the assets claimed by the landlord, or assets claimed by virtue of an alleged preference if moneys were owing to the two officers of the company at all), then does the secured creditor give up his charge on those assets? It seems that recovery of property conveyed by the insolvent debtor by way of a preference cannot be recovered by the receiver-manager but only by a trustee in bankruptcy: see *Re Que. Trucks & Trailers Inc; Mercure v. Thermo King-Can. Ltd.*, [1968] Que. S.C. 418, 11 C.B.R. (N.S.) 115.

TAB 4

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Sumitomo Canada Limited v. Minto Metals Corp. | 2024 YKSC 28, 2024 CarswellYukon 38 | (Yukon S.C., Jun 14, 2024)

2021 ABCA 226
Alberta Court of Appeal

DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation

2021 CarswellAlta 1442, 2021 ABCA 226, [2021] 11 W.W.R. 480, [2021] A.W.L.D. 2564, [2021] A.W.L.D. 2567, 25 Alta. L.R. (7th) 211, 332 A.C.W.S. (3d) 216, 459 D.L.R. (4th) 538, 90 C.B.R. (6th) 15

DGDP-BC Holdings Ltd. (Appellant) and Third Eye Capital Corporation (Respondent) and PricewaterhouseCoopers Inc. (Respondent)

DGDP-BC Holdings Ltd. (Appellant) and Third Eye Capital Corporation (Respondent) and Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondents) and PricewaterhouseCoopers Inc. in its capacity as the court-appointed receiver of Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondent)

Jack Watson, Frans Slatter, Ritu Khullar JJ.A.

Heard: June 7, 2021
Judgment: June 17, 2021
Docket: Calgary Appeal 2001-0241-AC, 2001-0125-AC

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Subject: Estates and Trusts; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.e Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate
XIV.4 Sale of assets
Headnote
Bankruptcy and insolvency --- Priorities of claims — Secured claims — Marshalling of secured claims
Court approved interim financing loan secured by Interim Lenders' Charge (ILC) with appellant D Ltd. and respondent T Corp. as interim lenders, and granted debtor-in-possession ("DIP") loans priority — DIP Financing Term Sheet provided that both A Ltd. entities were joint and several borrowers and that ILC attached to assets of both entities — Monitor negotiated sale of A Ltd.'s assets to T Corp., and T Corp. applied for appointment of receiver as part of sale process — Supervising judge appointed P Inc. as receiver and issued receivership order which granted Receivers' Borrowings Charge (RBC) priority over ILC — D Ltd. appealed — Appeal dismissed — Consent requirement under s. 11.2 of Companies' Creditors Arrangement Act did not extend to charges created through other sources of jurisdiction like Bankruptcy and Insolvency Act (BIA) — Section 243(1)(c) of BIA gave supervising judges broadest possible mandate in insolvency proceedings to enable them to react to any circumstances

that arose — Supervising judge had discretion and jurisdiction to establish priority of RBC Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 243.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Court approved interim financing loan secured by Interim Lenders' Charge (ILC) with appellant D Ltd. and respondent T Corp. as interim lenders, and granted debtor-in-possession ("DIP") loans priority — DIP Financing Term Sheet provided that both A Ltd. entities were joint and several borrowers and that ILC attached to assets of both entities — Monitor negotiated sale of A Ltd.'s assets to T Corp. following approval by supervising judge, and T Corp. applied for appointment of receiver as part of sale process — Debt secured by ILC was allocated to both A Ltd. entities, with portion allocated to one entity used to pay off part of that entity's transaction and portion allocated to other entity being deferred — Sale of non-deferred entity closed with D Ltd. being paid sums owing to it under ILC that were allocated to non-deferred entity — D Ltd. appealed approval of sale — Appeal dismissed — Section 243(1)(c) of Bankruptcy and Insolvency Act included mandate to sell some assets of insolvent corporation while only paying out portion of DIP financing — DIP Term Financing Sheet always recognized that A Ltd. was made up of two separate entities — Reality was that there were two separate corporations and that bifurcated treatment of ILC might have been necessary or appropriate at some point — Supervising judge had discretion and jurisdiction to approve sale of A Ltd. assets free and clear of ILC even though charge was not paid in full.

Table of Authorities

Cases considered:

Canada North Group Inc (Companies' Creditors Arrangement Act) (2017), 2017 ABQB 550, 2017 CarswellAlta 1631, 52 C.B.R. (6th) 308, 60 Alta. L.R. (6th) 103, [2018] 2 W.W.R. 731 (Alta. Q.B.) — referred to

Canadian Airlines Corp., Re (2000), 2000 ABCA 238, 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

DGDP-BC Holdings Ltd v. Third Eye Capital Corporation (2020), 2020 ABCA 442, 2020 CarswellAlta 2308, 86 C.B.R. (6th) 161 (Alta. C.A.) — referred to

DGDP-BC Holdings v. Third Eye Capital Corp, PricewaterhouseCoopers (2021), 2021 ABCA 33, 2021 CarswellAlta 205, 86 C.B.R. (6th) 171 (Alta. C.A.) — referred to

Indalex Ltd., Re (2013), 2013 SCC 6, 2013 CarswellOnt 733, 2013 CarswellOnt 734, D.T.E. 2013T-97, 96 C.B.R. (5th) 171, 354 D.L.R. (4th) 581, 20 P.P.S.A.C. (3d) 1, 439 N.R. 235, 301 O.A.C. 1, 8 B.L.R. (5th) 1, (sub nom. *Sun Indalex Finance LLC v. United Steelworkers)* [2013] 1 S.C.R. 271, 2 C.C.P.B. (2nd) 1 (S.C.C.) — referred to

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Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, 2010 CSC 60 (S.C.C.) — considered

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc. (2019), 2019 ONCA 508, 2019 CarswellOnt 9683, 70 C.B.R. (6th) 181, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 11 P.P.S.A.C. (4th) 11 (Ont. C.A.) — referred to

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12178711 Canada Inc. v. Wilks Brothers, LLC (2020), 2020 ABCA 430, 2020 CarswellAlta 2300, 85 C.B.R. (6th) 9, 17 Alta. L.R. (7th) 228 (Alta. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

s. 31(1) — referred to

s. 243(1) — considered

s. 243(1)(c) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

s. 11.2 [en. 1997, c. 12, s. 124] — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — considered

s. 11.2(3) [en. 2005, c. 47, s. 128] — considered

Judicature Act, R.S.A. 2000, c. J-2

Generally — referred to

s. 13(2) — referred to

APPEAL by D Ltd. from order giving Receivers' Borrowings Charge priority over Interim Lenders' Charge and from order approving sale of A Ltd.'s assets.

***Per curiam*:**

1 Two appeals were argued together. They both arise out of the insolvency of Accel Canada Holdings Limited and Accel Energy Canada Limited.

2 The first appeal #2001-0125AC relates to the priority between a) an Interim Lenders' Charge given over the assets of the Accel Entities while they were in proceedings under the Companies' Creditors Arrangement Act, RSC 1985 c. C–36, and b) a later Receiver's Borrowings Charge given when a receiver was appointed to facilitate the sale of the assets of the Accel Entities. The leave reasons reported as DGDP-BC Holdings Ltd v Third Eye Capital Corp, 2020 ABCA 442 at para. 39 described the issue as follows:

> Can an order made in proceedings under the *BIA* or pursuant to section 13(2) of the *Judicature Act*, legally override the validity and priority of the charges contained in an earlier order granted pursuant to the *CCAA* in the same insolvency proceedings, without the consent of the person in whose favour the provision relating to validity and priority was given?

The crux of the dispute is that the supervising judge gave the later Receiver's Borrowings Charge priority over the earlier Interim Lenders' Charge.

3 The second appeal #2001-0241AC arises out of a subsequent order which approved the sale of the assets of Accel Energy. It was originally contemplated that the assets of Accel Energy and Accel Holdings would be sold *en bloc*, but when complications arose, it was decided to sell the assets of Accel Energy separately. When that transaction was approved by the supervising judge, she granted an order vesting the sold Accel Energy assets in the purchaser free and clear of all encumbrances, including the Interim Lenders' Charge. However, the Interim Lenders' Charge was not completely satisfied during the transaction. The amounts advanced under the Interim Lenders' Charge had been allocated between Accel Energy and Accel Holdings. Only the portion allocated to Accel Energy was paid off.

4 The appellant argues that it was not open to the supervising judge to bifurcate the Interim Lenders' Charge in this manner and that the transaction could not or should not have been approved unless the Interim Lenders' Charge was paid in full. In *DGDP-BC Holdings Ltd v Third Eye Capital Corp*, 2021 ABCA 33 leave to appeal was given. The appellant states the issues as being whether the supervising judge had the statutory or inherent jurisdiction or discretion to partially vest out the Interim Lenders' Charge without its consent, and if so, did she err in law in the way she exercised her discretion.

Facts

5 The facts are complex, but the essential narrative is as follows. In October 2019, the Accel Entities filed Notices of Intention to make a proposal under the Bankruptcy and Insolvency Act, RSC 1985, c. B–3. By November, the proceeding evolved into one under the *CCAA*, and PricewaterhouseCoopers was appointed as the Monitor.

6 In November, the Court approved an interim financing loan, secured by the Interim Lenders' Charge, which was described in the Second Amended and Restated DIP Financing Term Sheet as a "super priority (debtor-in-possession), interim, revolving credit facility". The appellant DGDP-BC Holdings Ltd (through its predecessor 228139 Alberta Ltd) and Third Eye Capital Corporation were the two interim lenders. Through the Interim Lenders' Charge, the Court granted the debtor in possession loans priority over the other creditors of the Accel Entities. About $38 million was authorized.

7 The Interim Lenders' Charge provided that Accel Energy and Accel Holdings would be acting jointly and severally as "Borrowers", and each (and certain affiliated entities) guaranteed the obligations of the other. Nevertheless, when the Monitor drew down funds, they were allocated either to Accel Energy or Accel Holdings, depending on which corporation was actually going to use the funds at the time.

8 The Court approved a process for the sale of the assets of the Accel Entities. Details about the sale process can be found in 2020 ABCA 442. The Monitor was able to negotiate a sale of the assets to Third Eye Capital. As noted, the originally contemplated combined sale of the assets of Accel Energy and Accel Holdings was found to be unworkable, and a sale of the Accel Energy assets proceeded, with an anticipated sale of the Accel Holdings assets to follow.

9 As part of the sale process, Third Eye Capital applied under the *BIA* and s. 13(2) of the Judicature Act, RSA 2000, c. J–2 for the appointment of a receiver to replace the senior management of the Accel Entities and facilitate the sale. The insolvency had therefore evolved from the *BIA*, into the *CCAA*, and then back to the *BIA*.

10 At this point, Third Eye Capital was wearing many hats. It was the primary secured creditor of the insolvent Accel Holdings, having advanced about $326 million. It was one of the interim lenders protected by the Interim Lenders' Charge and agent for the interim lenders. It was the successful bidder for the purchase of the assets of the Accel Entities. It was the applicant for the appointment of the receiver, to facilitate the sale of the Accel Energy assets to its nominee.

11 The supervising judge appointed PricewaterhouseCoopers as receiver pursuant to s. 243(1) of the BIA and s. 13(2) of the Judicature Act, RSA 2000, c. J–2. The critical fact is that Third Eye Capital did not just want a receiver, it wished to have a receiver appointed with the power to borrow and to have the Receiver's Borrowings Charge take priority over all of the other charges against the assets of the Accel Entities, including the prior Interim Lenders' Charge. The Receiver ultimately borrowed over $10 million. Over the objections of the appellant DGDP-BC Holdings, the Receivership order provided:

> 28. The priority of the charges created in the CCAA Proceedings (and continued by this Order) in relation to the Receiver's Charge and the Receiver's Borrowing Charge created hereunder, shall be as follows:
>
> > First - the Receiver's Charge;
> >
> > Second - the Receiver's Borrowings Charge;
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> > Third - the Administration Charge as defined in the CCAA Proceedings;
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> > Fourth - the Interim Lenders' Charge as defined in the CCAA Proceedings;
> >
> > Fifth - the Intercompany Advance Charge as defined in the CCAA Proceedings;
> >
> > Sixth - the Directors' Charge as defined in the CCAA Proceedings.

The priority given to the Receiver's Borrowings Charge over the Interim Lenders' Charge is the central issue in the first appeal.

12 As noted, the second appeal is from one provision of the Sale Approval and Vesting Order respecting the sale of the Accel Energy assets. The original DIP Financing Term Sheet had provided that both Accel Entities (Accel Holdings and Accel Energy) would be joint and several borrowers and that the Interim Lenders' Charge would attach to the assets of both Accel Entities. However, at the time of the sale of the Accel Energy assets, the debt secured by the Interim Lenders' Charge had been allocated by the Monitor to the two Accel Entities. Only that portion allocated to Accel Energy was to be paid off as part of the Accel Energy transaction. The portion allocated to Accel Holdings was deferred, and it was suggested that the appellant might not be paid in cash; rather its remaining debt might be converted to equity in the purchaser of the Accel Holdings assets or satisfied by some other non-cash consideration.

13 Subsequent to the filing of these appeals, the sale of the Accel Energy assets closed, and the appellant DGDP-BC Holdings was paid the sums owing to it under the Interim Lenders' Charge that had been allocated to Accel Energy. The Receiver's Borrowings Charge allocated to Accel Energy was also paid out from the sale proceeds. Other payments were made, for example, on account of arrears of lease payments, arrears of municipal taxes, and amounts required to put contracts with third parties into good standing. Sufficient cash was inserted into the sale of the Accel Energy assets to satisfy these claims, but there was no "surplus" consideration available to pay creditors.

The Priority Dispute

14 The supervising judge decided that the appointment of a receiver was called for. Third Eye Capital argued that the supervising judge had a discretion to set the priorities between the various charges in any reasonable fashion and that changes in the "risk profile" justified giving priority to the Receiver's Borrowings Charge. The appellant argued that the Receiver's Borrowings Charge should at best rank *pari passu* with the Interim Lenders' Charge. The supervising judge held:

> THE COURT: Thank you, Mr. Simard [counsel for Third Eye Capital]. With respect to the issue of the priority of the charges of the receiver's borrowings and the receiver's fees, I am prepared in this instance to make the direction that those be as per the paragraph of the draft order set out at paragraph 28. In other words, Mr. Czechowskyj [counsel for DGDP-BC Holdings], I am going to allow Third Eye Capital in these specific contextual circumstances to prime the current outstanding 38 million in DIP financing.
>
> My reasons for doing so are essentially that for the very things that you point out, Mr. Czechowskyj, COVID, the Russian/Saudi Arabia pricing war, the continued deterioration of the Alberta energy sector at the moment and the months-long and court-application-intense arrangement proceedings to date, there is -- a lot of the stakeholders have a lot invested, not just Third Eye Capital in this matter, seen being brought to a conclusion. It's difficult for me to assess the increased closing risk referred to by both the monitor and Mr. Simard based on the Veracity reports, but I support the application by Third Eye Capital for the receiver at this point, and I think it's appropriate at this time, given that I will control the come-back application for approval of the sale -- the purchase and sale agreement in whatever, you know, form it takes and that the mon -- excuse me, the monitor and soon-to-be receiver -- because I will -- obviously inherent in my decision is that I will be granting a receivership order -- is on the first line and has an obligation at law as well as under the order to have all of the interests of all of the stakeholders as it moves forward, so I'm satisfied on these circumstances that the priorities as outlined at paragraph -- draft paragraph 28 of the receivership order are appropriate, and I would make that direction.

The supervising judge's reasons did not directly engage the issue of whether she had jurisdiction to restructure the priorities as set out in para. 28 of the order.

15 The need for financing during restructuring proceedings is recognized in the *CCAA*:

> Interim financing
>
> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees

to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(4) In deciding whether to make an order, the court is to consider, among other things, . . .

The appellant particularly relies on the requirement in s. 11.2(3) that in some circumstances the priority of the Interim Lenders' Charge could only be varied with its consent. It is clear that if what became the Receiver's Borrowings Charge had been created under s. 11.2(1), those charges could not have been given priority without the consent of the appellant.

16 The respondents argue, however, that the Receiver's Borrowings Charge was not a charge granted under the *CCAA* and therefore does not fit within the provisions of s. 11.2(3). That section, they argue, only applies when two or more interim financing charges are made under the *CCAA*. Since the Receiver's Borrowings Charge was made under the *BIA*, it is not subject to the requirement for consent, and the wide jurisdiction given to supervising judges under the *BIA* allowed this supervising judge to set priorities.

17 The respondents rely on s. 243(1)(c) of the BIA, which authorizes the supervising judge to "take any other action that the court considers advisable". There is a similar wide-ranging discretion under s. 13(2) of the Judicature Act, but it does not enhance the analysis here. These provisions create a plenary and open-ended jurisdiction in the court. Technically they are not a part of the "inherent" jurisdiction of the court; they are a residual statutory jurisdiction, not part of the "inherent jurisdiction of superior courts of record": Century Services Inc v Canada (Attorney General), 2010 SCC 60 at para. 64, [2010] 3 SCR 379. However, the appellant is correct that in either case, the residual or inherent discretion would yield to any specific statutory provision that expressly or impliedly narrowed it.

18 How these various sections interact is a pure question of statutory interpretation. The provisions of the *CCAA* and *BIA* should be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statutes, the object of the statutes, and the intention of Parliament. Since the two statutes deal with the same topic, they should be interpreted and applied in a complementary way, with due regard to their different focuses: *Century Services* at paras. 24, 76, 78; Reference re Broadcasting Regulatory Policy CRTC 2010–168, 2012 SCC 68.

19 The proper interpretation of s. 11.2(3) of the CCAA is clear. The reference to "the security or charge" in that subsection can only be a reference to a security or charge under subsection 11.2(1). While the priority of a section 11.2 charge cannot be subordinated to another charge under that section without the consent of a prior holder of such a charge, that requirement of consent does not extend to charges created through other sources of jurisdiction, such as the *BIA*. The appellant did not enjoy a veto over the priority of the Receiver's Borrowings Charge as it argues.

20 The other side of the equation is that the supervising judge clearly has authority to authorize a receiver to borrow and to grant the receiver security. The very wide wording of s. 243(1)(c) of the BIA ("take any other action that the court considers advisable") has been interpreted to give supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise: Third Eye Capital Corporation v Dianor Resources Inc., 2019 ONCA 508 at paras. 57–58, 435 DLR (4th) 416. Further, s. 31(1) of the BIA provides:

31 (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

This provision clearly authorizes the order that was made. While the phrase "in priority to the creditors' claims" applies most directly to the pre-insolvency creditors of the insolvent corporation, there is no reason to limit the supervising judge's mandate to order the priority of borrowings made to facilitate the insolvency proceedings themselves. In addition, s. 243(1)(c) is wide enough to allow a supervising judge to set the order of priority.

21 In summary, the answer to the question on which leave to appeal was granted is that the supervising judge did have the jurisdiction or discretion to make the order granting priority to the Receiver's Borrowings Charge.

22 The parties did not contest whether leave to appeal was granted on the consequential issue, namely whether the supervising judge exercised her discretion to reorder the priorities between the Interim Lenders' Charge and the Receiver's Borrowings Charge in a reasonable way. As noted, a supervising judge's discretion is very wide, and it follows that the exercise of that discretion will not be disturbed on appeal in the absence of an error in principle, an error of law, or a wholly unreasonable decision.

23 Finding that a supervising judge has a discretion to subordinate a super priority (debtor-in-possession) credit facility obviously does not mean that it should routinely be done. The importance and necessity of providing funding in *CCAA* proceedings, and the need to give that funding super priority, are well recognized: Re Timminco Ltd, 2012 ONSC 948 at para. 49, 86 CBR (5th) 171; *Re* Canada North Group Inc, 2017 ABQB 550 at paras. 100–102, 60 Alta LR (6th) 103. Uncertainty in the priority given to those advances undermines the system and would "not represent a positive development": Sun Indalex Finance, LLC v United Steelworkers, 2013 SCC 6 at para. 59, [2013] 1 SCR 271. There is no indication, however, that the supervising judge disregarded these important considerations. She was entitled to decide that, in the context of this particular insolvency, it was necessary to give priority to the Receiver's Borrowings Charge to protect the overall interests of all of the stakeholders.

24 Some argument was directed to whether, at the time the Receiver's Borrowings Charge was granted, the *CCAA* proceeding was "successful", "unsuccessful", "continuing", or "terminated". The Receiver argues that once the insolvency transitioned from the *CCAA* to the *BIA* " . . . the CCAA Proceedings were no more". However, merely because the insolvency transitioned from one statute to the other did not mean that the Interim Lenders' Charge somehow disappeared or lost its priority or could just be disregarded. The Interim Lenders' Charge exists whether or not the *CCAA* proceedings are terminated and whether or not they are successful. The status of the *CCAA* proceedings was obviously relevant, as it was the apparent lack of success of the restructuring that led to the appointment of the receiver. However, the inability of the *CCAA* proceeding to achieve its desired objectives did not invalidate the prior Interim Lenders' Charge. The appellant still held that valid charge and was entitled to put forward the legitimate expectations that it had with regard to its priority. Circumstances had changed, but the background need to respect the position of debtor-in-possession financing remained.

25 The supervising judge concluded that giving priority to the Receiver's Borrowings Charge was justified by a change in the "risk profile". As the appellant points out, the change in the risk profile affected all the stakeholders, but this was still a relevant consideration. It is true that when the funds secured by the Interim Lenders' Charge were advanced, the interim lenders faced a certain risk profile. One component of that risk profile, however, was that the risk profile could change. An interim lender advancing debtor-in-possession financing is entitled to insist on security and insist on a level of priority. There is, however, no assurance that the interim lender will actually be repaid. One component of the risk profile is always that the anticipated restructuring will be unsuccessful, or for any other reason, there will simply not be enough funds to pay all the legitimate claimants.

26 At the time of the application for the receivership order, the respondents argued that the insolvent corporations were in dire financial straits and required additional funding in order to keep operating. If they had ceased operating, it was argued, a liquidation may have followed, resulting in losses to many. In that context, it was reasonable for the supervising judge to appoint a receiver, to give the receiver the power to borrow, and to establish the priority of the Receiver's Borrowings Charge. Certainly, one relevant consideration was which stakeholder should be subordinated to the receiver's borrowings. The appellant suggests that Third Eye Capital, as the major secured creditor, should have been expected to fund the receivership. There is no indication that the supervising judge disregarded this consideration.

27 In summary, the supervising judge did have the discretion and jurisdiction to establish the priority of the Receiver's Borrowings Charge. There is no indication of any error of principle in the way she exercised her discretion, nor can it be said that the ultimate decision was unreasonable. It follows that appeal #2001-0125AC must be dismissed.

The Bifurcation and Vesting Issue

28 The second appeal arises from the bifurcation of the Interim Lenders' Charge, its allocation between the two Accel Entities, and the subsequent sale of the Accel Energy assets without paying out the Interim Lenders' Charge in full. When the Accel Energy assets were sold, they were transferred free and clear of all encumbrances, including the Interim Lenders' Charge. Sufficient cash was built into the sale transaction to pay out the portion of the Interim Lenders' Charge and the Receiver's Borrowings Charge related to Accel Energy but not the portion related to Accel Holdings.

29 The appellant argues that the supervising judge had no discretion to bifurcate the Interim Lenders' Charge in this way, and even if there was such a discretion, it was not reasonably exercised.

30 A number of aspects of sales transactions under receiverships are well established:

(a) The assets of the insolvent corporation can be sold free and clear of encumbrances, even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors: *Dianor Resources*.

(b) If the insolvent corporation has more than one asset, individual assets can be sold free and clear of all encumbrances, again even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors. Any unpaid debts remain in place, and can be satisfied by subsequent sales of other assets.

(c) When assets are sold free and clear of all encumbrances, that could include encumbrances related to debtor-in-possession financing, even if the sale does not generate sufficient funds to pay out those encumbrances. Security and priority given to debtor-in-possession lenders provide no assurance that the loans will actually be repaid.

It is against this background that the appellant argues that there was no jurisdiction or discretion to vest the assets of Accel Energy in the purchaser free and clear of the Interim Lenders' Charge unless that charge was paid off in full. There is, however, no reason in principle to carve that exception out of the general propositions just stated.

31 As previously discussed, the power given to supervising judges in s. 243(1)(c) of the BIA to "take any other action that the court considers advisable" has been read very widely. That power would include the mandate to sell some of the assets of the insolvent corporation, while only paying out a portion of the debtor-in-possession financing.

32 Alternatively, the appellant argues that the discretion should not have been exercised in this case. The original DIP Financing Term Sheet had provided that Accel Holdings and Accel Energy would be joint and several borrowers and that the Interim Lenders' Charge would attach to the assets of both Accel Entities. The appellant argues that it was unfair to allocate the interim Lenders' charge between the two entities, and then allow the sale to proceed without paying off the charge in full. However, as previously noted, the debtor-in-possession lender is never assured that its loans will be paid back at all or in full. There is always a prospect that the insolvency will evolve unfavourably, meaning that there are insufficient funds to meet all legitimate claims. When exercising her discretion the supervising judge must weigh the legitimate expectations of all stakeholders against the changed circumstances.

33 The unique position of Third Eye Capital as a major secured creditor, as a DIP lender, as the agent of the DIP lenders, and as a supporter of the successful bidder for the assets was not lost on the supervising judge. Third Eye Capital might have been operating with an eye to its own best interests, but that is not necessarily and automatically an indicator that the order granted by the supervising judge was unreasonable. As Slatter JA observed in Wilks Brothers LLC v 12178711 Canada Inc, 2020 ABCA 430 at para. 72, 85 CBR (6th) 9:

> During the approval process, all stakeholders are allowed to identify their own best interests, and pursue those best interests. Acting in one's own best interests is not bad faith: *Bhasin v Hrynew*, 2014 SCC 71 at para. 70, [2014] 3 SCR 494.

The DIP Financing Term Sheet certainly created legitimate expectations, but as noted there was never an assurance that the DIP funding would be repaid. There is no indication on this record that Third Eye Capital did anything that specifically breached a contract or was tortious or otherwise offended against a law. Third Eye Capital was merely able to persuade the supervising judge that the sale and vesting order it proposed represented the proper balancing of the interests of all of the stakeholders. The appellant's disappointment at the outcome is not a basis for upsetting the decision of the supervising judge.

34 Notwithstanding that the original DIP Financing Term Sheet had provided that Accel Holdings and Accel Energy would be joint and several borrowers, it was always recognized that they were separate corporations, with separate primary secured creditors, and separate stakeholders. The Monitor from the beginning allocated the borrowings under the Interim Lenders' Charge between the two entities. The fact that the borrowings were joint and several was qualified early on in the initial *CCAA* order:

> 38 . . . The Amended Interim Financing Agreement contemplates that the Applicants are jointly and severally liable, and are cross-guaranteeing all DIP Advances (as defined therein) made by the Interim Lender. <u>The Interim Lender shall be required to first recover repayment of all DIP Advances made to a particular Applicant (and proceeds of DIP Advances approved by the Monitor to have been allocated to such Applicant) from the property of such Applicant.</u> Only in the event that the Interim Lender is unable to fully recover all such amounts from such Applicant's property, shall the Interim Lender be entitled to recover payment of such amounts, from the other Applicant's property.

As the appellant points out, this is a marshaling provision, which required the appellant to exhaust its remedies against one borrower before calling on the other. However, it does reflect the reality that there were two separate insolvent corporations, with separate businesses, and that bifurcated treatment of the Interim Lenders' Charge might at some point be necessary or appropriate.

35 The remedy the appellant seeks is to have the Interim Lenders' Charge reattach to the Accel Energy assets, even though they have now been sold free and clear of encumbrances. As the respondents point out, after the asset transaction closes, many remedies are simply unavailable: Resurgence Asset Management LLC v. Canadian Airlines Corp, 2000 ABCA 238 at para. 32, 266 AR 131. Unless this option was preserved under the sale agreement, it would be unprecedented to add conditions to the sale after the closing.

36 In summary, the supervising judge did have the discretion and jurisdiction to approve the sale of the Accel Energy assets, free and clear of the Interim Lenders' Charge, even though that charge was not paid in full. There is no indication of any error in principle in the way she exercised her discretion, nor can it be said that the ultimate decision was unreasonable. It follows that appeal #2001-0241AC must be dismissed.

Appeals dismissed.

TAB 5

2002 CarswellOnt 3002
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164 O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

IN THE MATTER OF THE PROPOSALS OFCONFECTIONATELY YOURS, INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC., CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.

Catzman, Doherty, Borins JJ.A.

Heard: April 8, 2002
Judgment: September 19, 2002
Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano
Benjamin Zarnett, *David Lederman*, for Respondent, KPMG Inc.
Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.a Accounts
Headnote
Receivers --- Remuneration of receiver — Accounts
Court-appointed receiver operated business of debtor companies pending going concern asset sale — Receiver presented report to court for approval — Report recommended that court approve receiver's fees and disbursements as well as fees and disbursements of receiver's solicitors — Shareholders of debtor companies objected to amount of fees and disbursements of receiver and solicitors — Motion judge refused to permit counsel for shareholders to cross-examine representative of receiver on report — Motion judge permitted counsel for shareholders as judge's "proxy" to ask questions of receiver's representative who was not sworn — Motion judge approved fees and disbursements of receiver and solicitors in amount submitted in report without any reduction — Shareholders appealed — Appeal allowed in part — Portion of order of motion judge approving accounts of receiver's solicitors set aside — Motion judge erred in failing to give accounts of receiver's solicitors separate consideration — Accounts of receiver's solicitors were ordered to be resubmitted, verified by affidavit and assessed by different judge — Shareholders had fair opportunity to challenge remuneration of receiver and questioning of receiver's representative was adequate substitute for cross-examining him, however receiver's representative could not speak to accuracy or reasonableness of solicitors' accounts — No representative of receiver's solicitors was available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.
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Atkinson Estate, Re (1951), [1952] O.R. 685, [1952] 3 D.L.R. 609 (Ont. C.A.) — considered

Atkinson Estate, Re, (sub nom. *National Trust Co. v. Public Trustee)* [1953] 2 S.C.R. 41, [1953] 3 D.L.R. 497, 1953 CarswellOnt 136 (S.C.C.) — referred to

Avery v. Avery, [1954] O.W.N. 364, 1954 CarswellOnt 200 (Ont. H.C.) — referred to

Bank of Montreal v. Nican Trading Co., 43 B.C.L.R. (2d) 315, 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397 (B.C. C.A.) — referred to

Belyea v. Federal Business Development Bank, 46 C.B.R. (N.S.) 244, 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27 (N.B. C.A.) — followed

BT-PR Realty Holdings Inc. v. Coopers & Lybrand, 1997 CarswellOnt 1246, 29 O.T.C. 354 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc., 20 B.C.L.R. (3d) 70, [1996] 7 W.W.R. 296, 50 C.P.C. (3d) 29, 41 C.B.R. (3d) 251, 76 B.C.A.C. 190, 125 W.A.C. 190, 1996 CarswellBC 1083 (B.C. C.A.) — referred to

Chartrand v. De la Ronde, 1999 CarswellMan 248, 9 C.B.R. (4th) 20, [1999] 9 W.W.R. 631, 139 Man. R. (2d) 36 (Man. Q.B.) — considered

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Murano v. Bank of Montreal, 111 O.A.C. 242, 163 D.L.R. (4th) 21, 1998 CarswellOnt 2841, 22 C.P.C. (4th) 235, 41 B.L.R. (2d) 10, 41 O.R. (3d) 222, 5 C.B.R. (4th) 57 (Ont. C.A.) — considered

Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc., 40 C.P.C. (2d) 280, 1989 CarswellOnt 464 (Ont. H.C.) — referred to

Prairie Palace Motel Ltd. v. Carlson, 35 C.B.R. (N.S.) 312, 1980 CarswellSask 25 (Sask. Q.B.) — considered

R. v. S. (R.D.), 1997 CarswellNS 301, 1997 CarswellNS 302, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 10 C.R. (5th) 1, 218 N.R. 1, 161 N.S.R. (2d) 241, 477 A.P.R. 241, [1997] 3 S.C.R. 484, 1 Admin. L.R. (3d) 74 (S.C.C.) — followed

Silver v. Kalen, 52 C.B.R. (N.S.) 320, 1984 CarswellOnt 165 (Ont. H.C.) — referred to

Toronto Dominion Bank v. Park Foods Ltd., 13 C.P.C. (2d) 302, 62 C.B.R. (N.S.) 68, 77 N.S.R. (2d) 202, 191 A.P.R. 202, 1986 CarswellNS 49 (N.S. T.D.) — referred to

Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd., 19 C.B.R. (N.S.) 252, 1974 CarswellOnt 73 (Ont. S.C.) — referred to

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Statutes considered:

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s. 21(2) — referred to

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s. 61(1) — referred to

s. 61(3) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 39.02(1) — considered

R. 57.01(3) — referred to

R. 74.17(1)(i) [en. O. Reg. 484/94] — considered

R. 74.18(1)(a) [en. O. Reg. 484/94] — considered

R. 74.18(9) [en. O. Reg. 484/94] — considered

APPEAL by shareholders of debtor companies from judgment reported at 2001 CarswellOnt 1784, 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), assessing fees and disbursements of court-appointed receiver and its solicitors.

***Borins J.A.*:**

1 This is an appeal by Mario Parravano and Barbara Parravano from the assessment of a court-appointed receiver's fees and disbursements, including the fees of its solicitors, Goodmans, Goodman and Carr and Kavinoky and Cook, consequent to the receiver's motion to pass its accounts. The motion judge assessed the fees and disbursements in the amounts presented by the receiver. The appellants ask that the order of the motion judge be set aside and that the receiver's motion to pass its accounts be heard by a different judge of the Commercial List, or that the accounts be referred for assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

Introduction

2 On October 3, 2000, on the application of the Laurentian Bank of Canada (the "bank"), Spence J. appointed KPMG Inc. ("KPMG") as the receiver and manager of all present and future assets of five companies ("the companies"). Collectively, the companies carried on a large bakery, cereal bar and muffin business that employed 158 people and generated annual sales of approximately $24 million. The companies were owned by Mario and Barbara Parravano (the "Parravanos") who had guaranteed part of the companies' debts to the bank. Upon its appointment, KPMG continued to operate the business of the companies pending analysis as to the best course of action. As a result of its analysis, KPMG decided to continue the companies' operations and pursue "a going concern" asset sale.

3 Paragraph 22 of the order of Spence J. reads as follows:

> **THIS COURT ORDERS** that, prior to the passing of accounts, the Receiver shall be at liberty from time to time to apply a reasonable amount of the monies in its hands against its fees and disbursements, including reasonable legal fees and disbursements, incurred at the standard rates and charges for such services rendered either monthly or at such longer or shorter intervals as the Receiver deems appropriate, and such amounts shall constitute advances against its remuneration when fixed from time to time.

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December 21, 2000, to complete the sale of substantially all of the assets of the companies for approximately $6,500,000. The transaction closed on December 28, 2000.

5 The receiver presented two reports to the court for its approval. In the first report, presented on December 15, 2000, KPMG outlined its activities from the date of its appointment and requested approval of the sale of the companies' assets. The second report, which is the subject of this appeal, was presented on February 2, 2001. The second report contained the following information:

• an outline of KPMG's activities subsequent to the sale of the companies' assets;

• a statement of KPMG's receipts and disbursements on behalf of the companies;

• KPMG's proposed distribution of the net receipts;

• a summary of KPMG's fees and disbursements supported by detailed descriptions of the activities of its personnel by person and by day;

• a list of legal fees and disbursements of its solicitors supported by detailed billings.

In its second report, KPMG recommended that the court, *inter alia*, approve its fees and disbursements, as well as the fees and disbursements of Goodmans, calculated on the basis of hours multiplied the hourly rates of the personnel. The total time billed by KPMG was 3,215 hours from October 3, 2000 to December 31, 2000 at hourly rates that ranged from $175 to $550. Its disbursements included the fees and disbursements of its solicitors. Each report was signed on behalf of KPMG by its Senior Vice-President, Richard A. Morawetz.

6 In summary, KPMG sought approval of the following:

• receiver's fees and disbursements of $1,080,874.93, inclusive of GST.

• legal fees of Goodmans of $209,803.46, inclusive of GST.

• legal fees of Goodman and Carr of $92,292.32, inclusive of GST.

• legal fees of Kavinoky & Cook of $2,583.23.

7 The Parravanos objected to the amount of the fees and disbursements of KPMG and Goodmans. Their grounds of objection were that the time spent and the hourly rates charged by the receiver and Goodmans were excessive. They submitted that the fees of KPMG and Goodmans were not fair and reasonable. They also sought to cross-examine Mr. Morawetz with respect to their grounds of objection. The motion judge refused to permit Mr. Pape, counsel for the Parravanos, to cross-examine Mr. Morawetz on the ground that a receiver, being an officer of the court, is not subject to cross-examination on its report. However, the motion judge permitted Mr. Pape as the judge's "proxy" to ask questions of Mr. Morawetz, who was not sworn. The motion judge then approved the fees and disbursements of the receiver and Goodmans in the amounts as submitted in the receiver's report without any reduction.

8 The appellants appeal on the following grounds:

(1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;

(2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and

(3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

9 For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion

judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

Reasons of the motion judge

10 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

11 In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

> Perhaps it is the height — or depth — of audacity for counsel for the Parravanos to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

After reviewing two of his own decisions — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — the motion judge concluded that because a receiver is an officer of the court who is required to report to the court in respect to the conduct of the receivership, a receiver cannot be cross-examined on its report.

12 In support of this conclusion, the motion judge relied on the following passage from his reasons for judgment in *Mortgage Insurance* at pp. 101-102:

> As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

14 The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to be his discretion to allow the Parravanos' counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

15 Nevertheless, the motion judge did permit Mr. Pape to question Mr. Morawetz. His explanation for why he did so, the conditions that he imposed on Mr. Pape's examination, and his comments on Mr. Pape's "interview" of Mr. Morawetz, are found at p. 27:

> Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that

necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm [sic] — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.

[There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

17 In assessing the receiver's accounts, the motion judge made the following findings:

(1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.

(2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.

(3) The receivership was difficult and "rather unique".

(4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".

(5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravanos.

(6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.

(7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

18 The motion judge assessed, or passed, the receiver's accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he empahsized that there was no contrary evidence from the appellants that, presumably, might have caused him to reduce the fees claimed by the receiver or its solicitors.

19 He referred to Spence J.'s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

20 He also noted that the appellants had relied on his own decision in *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) in which he had said:

[An indemnity agreement] is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the court house to the Royal York Hotel via Oakville.

As to the application of this observation to the circumstances of this case, the motion judge said at pp. 31-32:

> I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

Issues and Analysis

21 In my view, there are three issues to be considered. The first issue is the alleged bias of the motion judge against the appellants and their counsel. The second issue is the proper procedure to be followed by a court-appointed receiver on seeking court approval of its remuneration and that of its solicitor. This procedural issue arises from the second ground of appeal in which the appellants assert that the motion judge erred in precluding their lawyer from cross-examining the receiver in respect to the remuneration that it requested. The third issue is whether the motion judge erred in finding that the remuneration requested by the receiver for itself and its solicitor was fair and reasonable.

(1) Bias

22 I turn now to the first issue. If I am satisfied that the appellants were denied a fair hearing because the motion judge exhibited a demonstrable bias against the appellants and their counsel, it will be unnecessary to consider the other grounds of appeal since the appellants would be entitled to a new hearing before a different judge. As I will explain, I see no merit in this ground of appeal.

23 The appellants submit that the motion judge acted with bias against their counsel, Mr. Pape. They rely on the following circumstances as demonstrating the motion judge's bias:

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.

- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.

- the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.

- in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".

- Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.

- the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

24 Public confidence in the administration of justice requires the court to intervene where necessary to protect a litigant's right to a fair hearing. Any allegation that a fair hearing was denied as a result of the bias of the presiding judge is a serious matter. It is particularly serious when made against a sitting judge by a senior and respected member of the bar.

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal [at p. 667], that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

26 This test was adopted by a majority of the Supreme Court of Canada in *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193 (S.C.C.). Speaking for the majority, Cory J. expanded upon the test at pp. 229-230:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"[emphasis in original].

27 Cory J. concluded at pp. 230-31:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

28 My review of the transcript of the proceedings and the reasons of the motion judge leads me to conclude that the appellants have failed to satisfy the test. The most that can be said about the motion judge's reaction to the presence of a court reporter, his interjections during the cross-examination of Mr. Morawetz and his reference to Mr. Pape's lawyering in his reasons for judgment, is that he evinced an impatience or annoyance with Mr. Pape. In the circumstances of this case, the motion judge's impatience or annoyance with Mr. Pape does not equate with judicial support for either Mr. Morawetz or the receiver. To the extent that the motion judge's interjections during the examination of Mr. Morawetz reveal his state of mind, they suggest only some impatience with Mr. Pape and a desire to keep the examination moving forward. They did not prevent counsel from conducting a full examination of Mr. Morawetz.

29 Considered in the context of the entire hearing, the circumstances relied on by the appellants do not come close to the type of judicial conduct that would result in an unfair hearing. I would not, therefore, give effect to this ground of appeal.

(2) The procedure to be followed on the passing of the accounts of a court-appointed receiver

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

32 As I will explain, the problem in this case was that the receiver's accounts were not verified by an affidavit. They were contained in the receiver's report. As a matter of form, I see nothing wrong with a receiver including its claim for compensation in its final report, as the receiver has done in this case. However, as I will discuss, the receiver's accounts and those of its solicitors should be verified by affidavit. Had KPMG verified its claim for compensation by affidavit, and had its solicitors done so, the issue that arose in this case would have been avoided.

33 The inclusion of the receiver's accounts, including those of its solicitors, in the report had the effect of insulating them from the far-ranging scrutiny of a properly conducted cross-examination when the motion judge ruled that the receiver, as an officer of the court, was not subject to cross-examination on the contents of its report. Assuming, without deciding, that the ruling was correct, its result was to preclude the appellants, and any other interested person or entity, that had a concern about the amount of the remuneration requested by the receiver, from putting the receiver to the proof that the remuneration, in the context of the duties it carried out, was fair and reasonable. When I discuss the third issue, I will indicate how the court is to determine whether a receiver's account is fair and reasonable.

34 A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

> . . . the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order. . . . Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

36 I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

> One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints

> concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions* [footnotes omitted] [emphasis added].

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, *e.g.*, *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).[1] I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."[2] In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

39 The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order, as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

40 Where the receiver's disbursements include the fees that it paid its solicitors, similar considerations apply. The solicitors must verify their fees and disbursements by affidavit.

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, *e.g.*, *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle*, *supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont.

H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

(3) Fair and reasonable remuneration

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); aff'd [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, *e.g.*, *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

43 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* are used. The first technique is that the quantum of remuneration is fixed as a percentage of the proceeds of the realization, while the second is the assessment of the remuneration claimed on a *quantum meruit* basis according to the time, trouble and degree of responsibility involved in the receivership. He suggests that often both techniques are employed to arrive at a fair compensation.

44 The leading case in the area of receiver's compensation is *Belyea*. At p. 246 Stratton J.A. stated:

> There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

45 In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:

> The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

46 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bktcy.) in fixing the remuneration of a trustee in bankruptcy under s. 21(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 308 he stated:

> In fixing the trustee's remuneration, the Court should have regard to such matters as the work done by the trustee; the responsibility imposed on the trustee; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained. I do not intend that the list which I have given should be exhaustive of the matters to be considered, but in my judgment they are the more important items to be taken into account.

These factors were applied by Henry J. in *Hoskinson, Re* (1976), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

47 The factors to be considered in assessing a receiver's remuneration on a *quantum meruit* basis stated in *Belyea* were approved and applied by the British Columbia Court of Appeal in *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.). They have also been applied at the trial level in this province. See, *e.g.*, *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

48 The *Belyea* factors were also applied by Farley J. (the motion judge in this case) in *BT-PR Realty Holdings, supra*, which was an application for the reduction of the fees and charges of a receiver. In that case the debtor had entered into the following indemnity agreement with the receiver:

> Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

In reference to the indemnity agreement, Farley J. made the comment referred to above that "[t]his is not a license to let the taxi meter run without check."

49 He went on to add at paras. 23 and 24:

> While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

50 Farley J. applied the list of factors set out in *Belyea* and *Nican Trading* and added "other material considerations" pertinent to assessing the accounts before him. He concluded at para. 24:

> In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

51 I am satisfied that in assessing the compensation of a receiver on a *quantum meruit* basis the factors suggested by Stratton J.A. in *Belyea* are a useful guideline. However, they should not be considered as exhaustive of the factors to be taken into account as other factors may be material depending on the circumstances of the receivership.

52 An issue that has arisen in this appeal has been the subject of consideration by the courts. It is whether a receiver may charge remuneration based on the usual hourly rates of its employees. The appellants take the position that the receiver's compensation based on the hourly rates of its employees has resulted in excessive compensation in relation to the amount realized by the receivership. The appellants point out that the compensation requested is approximately 20% of the amount realized. As I noted in paragraph 20, the motion judge held that "subject to checks and balances" of *Chartrand v. De la Ronde* and *Prairie Palace Motel Ltd. v. Carlson*, a "fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent". It is helpful to consider these cases.

53 In *Chartrand* the issue was whether a master had erred in principle in reducing a receiver's accounts, calculated on the basis of its usual hourly rates, on the ground that the entity in receivership was a non-profit federation. Although Hamilton J. was satisfied that the master had appropriately applied the factors recommended in *Belyea*, she concluded that the master had erred in reducing the receiver's compensation because the federation was a non-profit organization. She was otherwise in agreement with the master's application of the *Belyea* criteria to the circumstances of the receivership. However, she added at p. 32:

> Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

54 In *Prairie Palace Motel* the court rejected a submission that a receiver's fees should be restricted to 5% of the assets realized and stated at pp. 313-14:

> In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd.

Conclusion

(1) Bias

55 As I concluded earlier, the motion judge did not exhibit bias against the appellants or their counsel rendering the hearing unfair.

(2) Cross-examination of the receiver

56 The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver's solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the motion judge on the passing of the receiver's accounts in implicitly not requiring that the receiver's and the solicitors' accounts be verified by affidavit. Whether the appellants' lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

57 Mr. Pape was not the appellants' original solicitor. The appellants were represented by another lawyer on February 9, 2001 when the receiver moved for approval of its accounts. The bank, which was directly affected by the receiver's charges, supported the fees and disbursements claimed by the receiver. Another creditor expressed concern that the receiver's fees were extremely high, but did not oppose their approval. Only the appellants opposed their approval. On February 16, 2001, which was the first return of the motion, the motion judge granted the appellants' request for an adjournment to February 26, 2001 to provide them a reasonable opportunity to review the receiver's accounts.

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

59 On March 13, 2001, the receiver wrote to the appellants to advise them of its position that any cross-examination in respect of the receiver's report to the court was not permitted in law. However, the receiver said that it would accept and respond to written questions about its fees and disbursements. On April 4, 2001, the appellants gave the receiver twenty-nine written

questions. The receiver answered the questions on April 10, 2001, and invited the appellants, if necessary, to request further information. The receiver offered to make its personnel available to meet with the appellants and their counsel to answer any further questions about its fees. By this time, Mr. Pape had been retained by the appellants. He did not respond to the meeting proposed by the receiver, but, rather, wrote to the receiver on April 12, 2001 stating that arrangements had been made for a court reporter to be present to take the evidence of the receiver at the hearing of the motion on April 17, 2001.

60 This set the stage for the motion of April 17, 2001 at which, as I have explained, the motion judge ruled that the appellants were precluded from cross-examining the receiver's representative, Mr. Morawetz, on the receiver's accounts, but nevertheless permitted Mr. Pape, as his "proxy", to question Mr. Morawetz, as an unsworn witnesses, about the accounts. In the discussion between the motion judge and counsel for all the parties concerning the propriety of Mr. Pape having made arrangements for the presence of a court reporter, it appears that every one had overlooked the motion judge's earlier endorsement that a reporter should be ordered for the passing of the accounts.

61 Although the appellants had obtained an adjournment to obtain expert reports about the receiver's fees, no report was ever provided by the appellants. They did file an affidavit of Mrs. Parravano, but did not rely on it at the hearing of the motion.

62 It appears from the motion judge's reasons for judgment and what the court was told by counsel that the practice followed in the Commercial List permits a receiver to include its request for the approval of its fees and disbursements in its report, with the result that any party opposing the amounts claimed is not able to cross-examine the receiver, or its representative, about the receiver's fees. In denying the appellants' counsel the opportunity to cross-examine Mr. Morawetz under oath, at p. 26 of his reasons, the motion judge referred to the practice that is followed in the Commercial List: "The more appropriate course of action is to proceed to interview the court officer [the receiver] with respect to the report so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravanos and their previous counsel . . . "

63 Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

64 In my view, the motion judge was wrong in equating the receiver's report with respect to its conduct of the receivership with its report as it related to its claim for remuneration. As the authorities indicate, the better practice is for the receiver and its solicitors to each support its claim for remuneration by way of an affidavit. However, the presence or absence of an affidavit should not be the crucial issue when it comes to challenging the remuneration claimed. Whether or not there is an affidavit, the interested party must have a fair opportunity to challenge the remuneration at the hearing held for that purpose. I do not think that an interested party should have to show "special" or "unusual" circumstances in order to cross-examine a receiver or its representative, on its remuneration.

65 Where the accounts have been verified by affidavit, rule 39.02(1) provides that the affiant may be cross-examined by any party of the proceedings. Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice to do so. See, *e.g.*, *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.). It would, in my view, be rare to preclude cross-examination where the accounts have been challenged. Similarly, where the accounts have not been verified by affidavit, the motion judge has discretion to permit an opposing party to cross-examine the receiver, or its representative. In my view, the

threshold for permitting questioning should be quite low. If the judge is satisfied that the questioning may assist in determining whether the remuneration is fair and reasonable, cross-examination should be permitted. In this case, I am satisfied that the submissions made by Mr. Pape at the outset of the proceedings were sufficient to cross that threshold.

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

67 In this case, I am satisfied that the appellants had a fair opportunity to challenge the remuneration of the receiver and that the questioning of Mr. Morawetz was an adequate substitute for cross-examining him. I base my conclusion on the following factors:

• The appellants had the report for over two months.

• The appellants had access to the backup documents for over two months.

• The appellant had been given two adjournments to procure evidence.

• The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.

• The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.

• The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded form any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.

• Mr. Pape was given a full opportunity to make submissions.

(3) The remuneration claimed by the receiver and its solicitor

68 Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

70 In addition, the position of the secured creditors is relevant to the correctness of the motion judge's decision. The two creditors who stood to lose the most by the passing of the accounts accepted those accounts.

71 The terms of the receiving order of Spence J. are also relevant, although not determinative. Those terms provided for the receiver's payment "at the standard rates and charges for such services rendered". Mr. Morawetz's evidence was that these were normal competitive rates. There was no evidence to the contrary, except Mr. Pape's personal opinions. It is telling that

despite the two month adjournment and repeated promises of expert evidence from the appellants, they did not produce any expert to challenge those rates.

72 However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. Mr. Morawetz really could not speak to the accuracy or, except in a limited way, to the reasonableness of those accounts. There was no representative of Goodmans for the appellants to question or cross-examine. The motion judge did not give these accounts separate consideration. In my view, he erred in failing to do so. Consequently, I would allow the appeal to that extent.

Result

73 For the foregoing reasons, I would allow the appeal to the extent of setting aside the order of the motion judge approving the accounts of the receiver's solicitors, Goodmans, and order that the accounts be resubmitted, verified by affidavit, and that they be assessed by a different judge who may, in his or her discretion, direct the trial of an issue or refer the accounts for assessment by the assessment officer. In all other respects, the appeal is dismissed. As success is divided, there will be no costs.

***Catzman J.A.*:**

I agree.

***Doherty J.A.*:**

I agree.

Appeal allowed in part.

Footnotes

1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.

2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.

TAB 6

2018 ONSC 5040
Ontario Superior Court of Justice [Commercial List]

Comfort Capital Inc. v. Yeretsian

2018 CarswellOnt 14122, 2018 ONSC 5040, 143 O.R. (3d) 314,
295 A.C.W.S. (3d) 860, 64 C.B.R. (6th) 158, 93 R.P.R. (5th) 283

COMFORT CAPITAL INC., THE BANK OF NOVA SCOTIA TRUST COMPANY, E. MANSON INVESTMENTS LTD., FENFAM HOLDINGS INC., 593651 ONTARIO LTD., 1031436 ONTARIO INC., ALRAE INVESTMENTS INC., BARRY SPIEGEL, SHARON NIGHTINGALE, DAVID SUGAR, PHYLLIS SUGAR, NATIONAL TIRE LTD., 1119778 ONTARIO LIMITED, 1415976 ONTARIO LIMITED, ALRAE INVESTMENTS INC., BAMBURGH HOLDINGS LTD., BEVERLEY GORDON, DIANE GRAFSTEIN, RICHARD GRUNEIR, B. & M. HANDELMAN INVESTMENTS LTD., RIDGEWAY OCCUPATIONAL CONSULTANTS INC., YERUSHA INVESTMENTS INC., MIHAL TYLMAN, A. ELIEZER KIRSHBLUM, 593651 ONTARIO LIMITED, THE BANK OF NOVA SCOTIA TRUST COMP ANY IN TRUST FOR BAILEY LEVENSON, THE BANK OF NOVA SCOTIA TRUST COMPANY IN TRUST FOR ROSEMONDE KELLY, ANNE HANDELMAN, YERUSHA INVESTMENTS INC., CELMAR INVESTMENTS CORP., BEVERLEY GORDON, PHILGOR INVESTMENTS LTD., BRILLIANT INVESTCORP INC., MAXOREN INVESTMENTS, 2227046 ONTARIO LIMITED, DAST PROPERTIES LIMITED, TOVA MARKOVZKI, JOSEPH SUCKONIC and B. & M. HANDELMAN INVESTMENTS LIMITED (Applicants) and ANNIE YERETSIAN, 2399029 ONTARIO INC., 2457674 ONTARIO INC., MOSS DEVELOPMENT LTD. and TERRY WILSON (Respondents)

S.F. Dunphy J.

Heard: August 16, 2018
Judgment: August 24, 2018
Docket: Toronto CV-18-592103-00CL

Counsel: Lisa S. Corne, for Applicants
Eric Golden, for Receiver, Rosen Goldenberg Inc.
Caitlin Fell, for Moving Parties, Canada Investment Corporation, Canada Capital Corporation Inc., 2399029 Ontario Inc., 2457674 Ontario Inc., Terry Wilson

Subject: Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Real property
VIII Mortgages
VIII.6 Interest
VIII.6.e Penalty or increased interest on default
Headnote
Real property --- Mortgages — Interest — Penalty or increased interest on default
Mortgagees held first mortgage security over six properties of mortgagors securing number of loans that had not been repaid when they became due — Mortgagees successfully brought application for order appointing receiver pursuant to s. 243(1) of Bankruptcy and Insolvency Act and s. 101 of Courts of Justice Act — Four properties were sold with court's approval, and proceeds were sufficient to repay all mortgage amounts — Dispute arose as to whether mortgagees were entitled to claim additional three months' interest pursuant to terms of mortgages or s. 17 of Mortgages Act — Mortgagors brought motion for

determination that mortgagees were not entitled to claim additional interest — Motion granted — There was no general right granted to secured creditors holding mortgages to claim three months' interest post-default — Section 17 of Mortgages Act was intended to provide mortgagors with beneficial option to limit their obligations in obtaining relief from forfeiture when compared to former, harsher rule of equity that required payment of six months' interest — By its terms, s. 17 applied only to "persons entitled to make payment" in respect of mortgage default — Receiver was not such person, whether creditor-appointed or court-appointed — There was no material distinction to be drawn between privately-appointed receiver and court-appointed receiver for purposes of s. 17 of Mortgages Act.

Table of Authorities

Cases considered by *S.F. Dunphy J.*:

O'Shanter Development Co. v. Gentra Canada Investments Inc. (1995), 47 R.P.R. (2d) 24, 25 O.R. (3d) 188, 84 O.A.C. 334, 1995 CarswellOnt 399 (Ont. Div. Ct.) — considered

Peat Marwick Ltd. v. Consumers' Gas Co. (1980), 29 O.R. (2d) 336, 35 C.B.R. (N.S.) 1, 1 P.P.S.A.C. 149, 11 B.L.R. 114, 113 D.L.R. (3d) 754, 1980 CarswellOnt 167 (Ont. C.A.) — considered

58 Cardill Inc. v. Rathcliffe Holdings Limited (2017), 2017 ONSC 6828, 2017 CarswellOnt 17908, 84 R.P.R. (5th) 44, 55 C.B.R. (6th) 230 (Ont. S.C.J.) — considered

58 Cardill Inc. v. Rathcliffe Holdings Limited (2018), 2018 ONCA 672, 2018 CarswellOnt 12561 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243(1) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

Mortgages Act, R.S.O. 1990, c. M.40

s. 17 — considered

Words and phrases considered:

persons entitled to make payment

Section 17 of the *Mortgages Act* [R.S.O. 1990, c. M.40] was intended as to provide mortgagors with a beneficial option to limit their obligations in obtaining relief from forfeiture when compared to the former, harsher rule of equity. By its terms, s. 17 applies only to "persons entitled to make payment" in respect of a mortgage default. A receiver - whether creditor-appointed or court-appointed - is not such a person. . . .

. . . . .

The secured creditor selling the land or his or her appointed agent is certainly not a "mortgagor or person entitled to make such payment", a court-appointed receiver is not either. The court-appointed receiver is not the agent of the appointing creditor as the applicant correctly argued. However, such a receiver is not the agent of the debtor or any subsequent mortgagee either. The receiver is not "entitled" to pay a sum of money. The receiver has no beneficial interest in the money nor did it have an interest in the land being sold.

The mortgage was not discharged, it was vested off title. The proceeds were held by the receiver pending further order and were then distributed by court order. The receiver was not a person "*entitled*" to pay the arrears, the receiver was *directed* to pay the proceeds after the owner thereof was identified. In directing the receiver to pay over proceeds of a sale, the court is making a determination of the secured creditor's entitlement to receive the funds, not a determination of the receiver's entitlement to pay.

MOTION by mortgagors for determination that mortgagees were not entitled to claim additional three months' interest pursuant to terms of mortgages or s. 17 of *Mortgages Act*.

***S.F. Dunphy J.*:**

1 The applicants seek an order for the payment of 3 months interest pursuant to s. 17 of the *Mortgages Act*, R.S.O. 1990, c. M.40 or, in the alternative, under the terms of their mortgages with the respondents. They are opposed in this by Canada Capital Corporation, 2457647 Ontario Inc., Canada Investment Corporation and Terry Wilson as holders of subsequent mortgages.

2 For the reasons that follow, I find that the applicants are not entitled to the three months interest they have claimed on either ground. There is no general right granted to secured creditors holding mortgagees to claim three months interest post-default. Section 17 of the *Mortgages Act* was intended as to provide mortgagors with a beneficial option to limit their obligations in obtaining relief from forfeiture when compared to the former, harsher rule of equity. By its terms, s. 17 applies only to "persons entitled to make payment" in respect of a mortgage default. A receiver — whether creditor-appointed or court-appointed — is not such a person. Were the claimed distinction between private receivers and court-appointed receivers to be acknowledged, potentially beneficial court supervision of receivership proceedings could be unnecessarily discouraged by reason of the potential diminution of the unsecured estate that might follow.

Background facts

3 There are no facts in dispute and the issue is a narrow legal one.

4 The applicants held first mortgage security over six properties of the respondents securing a number of loans that had not been repaid when they became due. The applicants did not elect to commence any private enforcement proceedings such as power of sale proceedings or the appointment of a private receiver. They brought this application seeking the appointment of a receiver pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 and s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The application was successful and McEwen J. appointed Rosen Goldberg as receiver in an order dated February 18, 2018.

5 On June 1, 2018, I approved the sale of four of the properties over which the Receiver had been appointed and over which the applicants held first mortgage security. My approval order included the usual language vesting title in the purchasers, discharging all charges (including mortgages) on the subject properties and providing that the proceeds of the sale would stand in place of the interests being vested out. The sales of the four properties were completed soon afterwards pursuant to the sale approval and vesting orders I granted.

6 The receivership order and the sale approval and vesting orders contain no variations from the template orders published by the Commercial List material to this motion.

7 On June 22, 2018, Hainey J. approved a distribution of funds to the applicants from the proceeds of the sale in the hands of the receiver. The amount approved was sufficient funds to repay all amounts due under the subject mortgages subject to holding back an amount in respect of the disputed claim of the applicants to receive an additional three months interest under the terms of their mortgages or s. 17 of the *Mortgages Act*. That question was raised before me on this motion.

8 Two of the applicants' mortgages covering the subject properties (High Point and Caldwell) contain no explicit provisions providing for the claimed three months interest. In those cases the applicants' claim relies solely upon s. 17 of the *Mortgages Act*. Two of the mortgages (Bridge and Loyalist) have language in the mortgage terms that substantially duplicates the language of s. 17 of the *Mortgages Act*. In those two cases, the applicants potentially have two strings to their bow being able to rely either on the statutory *or* the contractual language should one be more favourable to their cause than the other. However, during the course of argument it was conceded that there was no material difference to be drawn between the statutory and contractual language the one intentionally duplicating the effect of the other in substantially identical terms.

Issues to be decided

9 The sole issue to be decided is whether the applicants are entitled to three months interest over and above the ordinary contract interest accrued pursuant to s. 17 of the *Mortgages Act*.

Discussion and analysis

10 The issue is a narrow one. The starting point for the discussion is s. 17 of the *Mortgages Act* which provides as follows:

> **Payment of principal upon default**
>
> **17** (1) Despite any agreement to the contrary, where default has been made in the payment of any principal money secured by a mortgage of freehold or leasehold property, the mortgagor or person entitled to make such payment may at any time, upon payment of three months interest on the principal money so in arrear, pay the same, or the mortgagor or person entitled to make such payment may give the mortgagee at least three months notice, in writing, of the intention to make such payment at a time named in the notice, and in the event of making such payment on the day so named is entitled to make the same without any further payment of interest except to the date of payment.
>
> **Exception**
>
> (2) If the mortgagor or person entitled to make such payment fails to make the same at the time mentioned in the notice, the mortgagor or person is thereafter entitled to make such payment only on paying the principal money so in arrear and interest thereon to the date of payment together with three months interest in advance.

11 Some fairly straightforward observations regarding s. 17 of the *Mortgages Act* can be made without controversy:

> a. The provision is designed primarily as a *protection* for mortgagors (and subsequent encumbrances entitled to redeem) by reducing what had historically been an equitable rule requiring a mortgagor to pay six months interest to claim a right to relief to payment of only three months interest: *O'Shanter Development Co. v. Gentra Canada Investments Inc.* (1995), 25 O.R. (3d) 188 (Ont. Div. Ct.) at para. 12;
>
> b. The rule has no application where the secured creditor mortgagee seeks to realize on his or her security by way of power of sale proceedings: *O'Shanter* at para. 13.

12 There has been a simmering dispute over a number of years as to where between those two points the line is to be drawn between allowing and disallowing s. 17 claims by mortgagees.

13 In *58 Cardill Inc. v. Rathcliffe Holdings Limited*, 2017 ONSC 6828 (Ont. S.C.J.), Sanfillippo J. recently had the occasion to consider the case of a creditor who enforced its mortgage security by way of privately-appointed receiver. It was claimed that such a receiver, although appointed by the secured creditor, could be distinguished from a creditor invoking power of sale proceedings. Sanfillippo J. held that the creditor in that case was not entitled to claim three months of interest and there was distinction to be drawn between a creditor acting under power of sale or through a private receiver. This decision was recently upheld by the Court of Appeal (at 2018 ONCA 672 (Ont. C.A.)). In upholding the decision, the Court referred to the well-known "two hats" dictum of Houlden J.A. in *Peat Marwick Ltd. v. Consumers' Gas Co.*, 1980 CanLII 1850, (1980), 29 O.R. (2d) 336 (Ont. C.A.), at p. 344 holding that even if a privately-appointed receiver manager acts as the debtor's agent in operating a business in receivership, the receiver is acting as agent of the appointing creditor when realizing upon the security and selling the property free of the appointing creditor's mortgage.

14 This case addresses the one remaining question where the law has not yet been settled. Unlike a privately-appointed receiver or receiver manager, a court-appointed receiver is neither the agent of the creditor nor of the debtor. While this particular claim for s. 17 interest is advanced by the very creditor who sought the appointment of the receiver by the court, this case also illustrates the multi-faceted nature of court-appointed receiverships. Each of the debtors' properties was subject to multiple mortgages the holders of which might also have been advancing similar interest claims even if they did not append their name to the Notice of Application. Other stakeholders as well have emerged, including unsecured creditors and creditors claiming to be victims of fraud. This case has generated a large number of court appearances most of which have seen courtrooms overflowing with lawyers and interested parties. The distinction between the "two hats" agency analysis applying to private receivers and the broader, more all-encompassing multi-stakeholder analysis appropriate to a court-appointed receiver is not mere theory.

15 While the two types of receivership are quite distinct in their foundation, there is in my view no material distinction to be drawn between a privately-appointed receiver and a court-appointed receiver for the purposes of s. 17 of the *Mortgages Act*. I reach this conclusion for two reasons.

16 Firstly, the history and context of this legislative reform suggests a very limited legislative intent that does not extend to either of the two types of receiver.

17 Saunders J. in *O'Shanter* found that s. 17 of the *Mortgages Act* arose as a reform of the prior, somewhat harsher rule of equity that required a defaulting debtor who "seeks equity to do equity" by paying six months interest if seeking relief from a forfeiture. In *O'Shanter*, a subsequent mortgagee wanted to repay the first mortgage (without payment of extra interest) *after* the time to redeem under a power of sale notice had expired. It is for this reason that equitable relief was required. The principle underlying the original rule of equity and the milder statutory rule that reformed it was said to be to provide the affected secured creditor with time to seek a new investment.

18 The reason relief from forfeiture was required in the first place has to do with the nature of the title conferred by a mortgage (at least prior to more recent reforms). Originally, a mortgage was, in form, a legal conveyance of title that was subject to an equitable right to the return of title on certain conditions (timely payment of the debt). Default in the payment of the debt when due gave rise to two possible enforcement routes by the creditor: sale or foreclosure. Both of these consequences of mortgage default have long since been heavily circumscribed by statute, but the original equitable rules were designed to provide the debtor with relief from the harshness of those rules at a time where statutory reforms in the area were in their infancy. Viewed in this light, it might be considered that the payment of extra interest was intended to compensate for the loss of the accrued right to foreclose as much as it was intended to reflect the time necessary to find a new mortgage to invest in.

19 A distribution of proceeds by a receiver to entitled parties arising from a court-ordered sale of land does not involve any party seeking *relief* from anything. It falls completely outside of the range of circumstances contemplated by s. 17.

20 Secondly, the language employed by the Legislature does not compel a distinction between the two types of receivers. Section 17 confers a *right* upon a defined, limited set of persons being "the mortgagor or person *entitled* to make such payment" [emphasis added]. The right conferred is the right "at *any* time, upon payment of three months interest on the principal money so in arrear, [to] pay the same" [emphasis added].

21 The secured creditor selling the land or his or her appointed agent is certainly not a "mortgagor or person entitled to make such payment", a court-appointed receiver is not either. The court-appointed receiver is not the agent of the appointing creditor as the applicant correctly argued. However, such a receiver is not the agent of the debtor or any subsequent mortgagee either. The receiver is not "entitled" to pay a sum of money. The receiver has no beneficial interest in the money nor did it have an interest in the land being sold.

22 The mortgage was not discharged, it was vested off title. The proceeds were held by the receiver pending further order and were then distributed by court order. The receiver was not a person "*entitled*" to pay the arrears, the receiver was *directed* to pay the proceeds after the owner thereof was identified. In directing the receiver to pay over proceeds of a sale, the court is making a determination of the secured creditor's entitlement to receive the funds, not a determination of the receiver's entitlement to pay.

23 The statute does not apply to a payment of proceeds of sale to an entitled secured creditor by a court-appointed receiver on a plain reading of the text nor does a purposive reading of the statute lead to the conclusion that it was intended so to apply.

24 There are advantages to court-appointed receiverships when contrasted with private receiverships in terms of the benefits of court supervision generally and in terms of the window given to a broader group of stakeholders upon a process that may vitally impact their interests. It would be regrettable if courts should be dissuaded from allowing receivership applications for fear that an undue benefit might be conferred thereby on a single class of creditor to the detriment of others. In my view, no such advantage exists under s. 17 of the *Mortgages Act* at least.

Disposition

25 I find that the applicants are not entitled to the claimed three months interest pursuant to s. 17 of the *Mortgages Act* or pursuant to the terms of their mortgage contracts with the respondents.

26 Cost outlines were exchanged following the hearing. Canada Capital Corporation et al. have been successful on this motion and are entitled to their costs. Their outline claimed partial indemnity costs of $10,500.42, substantial indemnity costs of $13,968.92 and actual costs of $17,437.42 (in each case "all inclusive"). These figures included an estimate for the hearing that was on the high side.

27 The unsuccessful applicant provided a costs outline evidencing partial indemnity costs of $16,859.05 (with a similarly high estimate for the hearing) and full indemnity costs of $28,097.95.

28 I can see no basis to depart from the scale of partial indemnity costs in this case. The moving party bore the load of making the argument that was ultimately successful and should be compensated for their costs in doing so. The amount claimed is substantially below the costs incurred by the applicant. I would reduce the amount claimed to $16,500 to reflect the slightly high estimate for the hearing.

29 The applicants shall pay the costs of Canada Capital Corporation et al. their partial indemnity costs of this motion fixed at $16,500.

30 Order accordingly.

Motion granted.

TAB 7

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Best v. Best 2009 Joint Partner Trust | 2024 BCSC 1140, 2024 CarswellBC 1886 | (B.C. S.C., Jun 28, 2024)

2000 SCC 34, 2000 CSC 34
Supreme Court of Canada

Friedmann Equity Developments Inc. v. Final Note Ltd.

2000 CarswellOnt 2458, 2000 CarswellOnt 2459, 2000 CSC 34, 2000 SCC 34, 2000 J.E. 1445, [2000] 1 S.C.R. 842, [2000] S.C.J. No. 37, 134 O.A.C. 280, 188 D.L.R. (4th) 269, 255 N.R. 80, 34 R.P.R. (3d) 159, 48 O.R. (3d) 800 (headnote only), 48 O.R. (3d) 800, 7 B.L.R. (3d) 153, 98 A.C.W.S. (3d) 85, J.E. 2000-1445

Friedmann Equity Developments Inc., Appellant v. Dr. Almas Adatia, also known as Almas Adatia, Mohamed Rajani, Shorim Investments, in Trust, Shorim Investments Limited, in Trust, Peter Bortoluzzi, Sultan Lalani, in Trust, 808413 Ontario Inc., Crown Freight Forwarders Ltd., previously known as 808548 Ontario Inc., Respondents and Lionel C. Larry and Robins, Appleby & Taub, Respondents

Gonthier, Major, Bastarache, Binnie, Arbour JJ.

Heard: January 27, 2000
Judgment: July 20, 2000
Docket: 26971

Proceedings: affirming (1998), 112 O.A.C. 253, 20 R.P.R. (3d) 257, 41 O.R. (3d) 712 (Ont. C.A.); affirming (February 18, 1997), 94-CQ-56721A, 277/96 (Ont. Div. Ct.); reversing (March 29, 1996), 94-CQ-56721 (Ont. Gen. Div.)

Counsel: *Benjamin Zarnett*, *Carolyn Silver* and *Julie Rosenthal*, for Appellant.
Robert D. Malen, for Respondents Dr. Almas Adatia, also known as Almas Adatia, Peter Bortoluzzi, Sultan Lalani, in Trust, 808413 Ontario Inc. and Crown Freight Forwarders Ltd., previously known as 808548 Ontario Inc.
Carl Orbach, Q.C., for Respondents Mohamed Rajani, Shorim Investments, in Trust and Shorim Investments Limited, In Trust.
Valerie A. Edwards, for Respondents Lionel C. Larry and Robins, Appleby & Taub.

Subject: Property; Corporate and Commercial; Contracts
Related Abridgment Classifications
Business associations
IV Powers, rights and liabilities
  IV.9 Contracts by corporations
    IV.9.d Corporate seal
      IV.9.d.ii Miscellaneous
Commercial law
I Agency
  I.7 Relationship between principal and third person
    I.7.b Principal's liability to third person
      I.7.b.v Where principal undisclosed
Contracts
XV Contracts under seal

Headnote

Agency --- Relationship between principal and third person — Principal's liability to third person — Where principal undisclosed

Corporation mortgaged property as agent of beneficial owners — Mortgage signed by corporate officer under corporate seal — Corporation defaulted on mortgage — Plaintiff brought action against beneficial owners, who brought action against solicitors who represented them in transaction — Beneficial owners and solicitors brought motion for dismissal of plaintiff's action based on rule that undisclosed principal cannot be sued on mortgage executed by agent under seal — Motion dismissed at trial and beneficial owners appealed — Divisional Court allowed appeal and Court of Appeal affirmed judgment — Plaintiff appealed — Appeal dismissed — When contract executed under seal, undisclosed principal can neither sue nor be sued on it — Sealed contract rule is distinct from equitable rule, which may enable undisclosed principal to recover on contract when agent refuses to do so — As no direct legal relationship exists between third party and undisclosed principal, there is no corresponding right for third party to sue beneficiary on contract under seal — Plaintiff could not maintain action against owners since only parties to mortgage could be sued upon it.

Corporations --- Contracts by corporations — Corporate seal — General

Corporation mortgaged property as agent of beneficial owners — Mortgage signed by corporate officer under corporate seal — Corporation defaulted on mortgage — Plaintiff brought action against beneficial owners, who brought action against solicitors that represented them in transaction — Beneficial owners and solicitors brought motion for dismissal of plaintiff's action based on rule that undisclosed principal cannot be sued on mortgage executed by agent under seal — Motion dismissed at trial and beneficial owners appealed — Divisional Court allowed appeal and Court of Appeal affirmed judgment — Plaintiff appealed — Appeal dismissed — Sealed contract rule applies equally to individual agents and corporate agents — Corporation has all capacities and powers of natural person, especially in relation to contract law — Plaintiff could not maintain action against owners since only parties to mortgage could be sued upon it.

Contracts --- Contracts under seal — Execution — Sealing — What constitutes seal

Corporation mortgaged property as agent of beneficial owners — Mortgage signed by corporate officer under corporate seal — Corporation defaulted on mortgage — Plaintiff brought action against beneficial owners, who brought action against solicitors that represented them in transaction — Beneficial owners and solicitors brought motion for dismissal of plaintiff's action based on rule that undisclosed principal cannot be sued on mortgage executed by agent under seal — Motion dismissed at trial and beneficial owners appealed — Divisional Court allowed appeal and Court of Appeal affirmed judgment — Plaintiff appealed — Appeal dismissed — Section 13(1) of Land Registration Reform Act, 1984 rendered corporation's intention to create sealed contract irrelevant — Words "for all purposes" in section make documents transferring interest in land and charges sealed instruments for all purposes, including application of sealed contract rule — Mortgage was in form prescribed under Act and was subject to its provisions — Plaintiff could not maintain action against owners since only parties to mortgage could be sued upon it — Land Registration Reform Act, 1984, S.O. 1984, c. 32, s. 13(1).

Contracts --- Contracts under seal — Parties

Corporation mortgaged property as agent of beneficial owners — Mortgage signed by corporate officer under corporate seal — Corporation defaulted on mortgage — Plaintiff brought action against beneficial owners, who brought action against solicitors that represented them in transaction — Beneficial owners and solicitors brought motion for dismissal of plaintiff's action based on rule that undisclosed principal cannot be sued on mortgage executed by agent under seal — Motion dismissed at trial and beneficial owners appealed — Divisional Court allowed appeal and Court of Appeal affirmed judgment — Plaintiff appealed and argued that sealed contract rule should be abolished — Appeal dismissed — Plaintiff could not maintain action against owners since only parties to mortgage could be sued upon it — No change in commercial reality occurred to warrant abolition of rule — Plaintiff did not prove rule caused injustice — Abolition of rule could have unwarranted, far-reaching and complex consequences in contract law and property law — Abolition of rule would amount to fundamental reform of common law as opposed to incremental change — Prospective change in law needed to avoid uncertainty and unfairness to parties who acted in accordance with sealed contract rule — Only legislature has power to create prospective change in law.

Mandat --- Relation entre le mandant et une tierce personne — Responsabilité du mandant à l'égard de la tierce partie — Mandants secrets

Acte d'hypothèque a été conclu par une société par actions agissant à titre de mandataire des propriétaires bénéficiaires — Acte d'hypothèque a été signé par le représentant de la société par actions avec le sceau de cette dernière — Société par actions a manqué à ses obligations prévues à l'acte d'hypothèque — Demanderesse a pris action contre les propriétaires bénéficiaires, qui ont entamé des poursuites contre les avocats qui les avaient représentés dans l'opération — Propriétaires bénéficiaires et avocats ont présenté une requête en rejet de l'action de la demanderesse au motif que des mandants secrets ne pouvaient être poursuivis en vertu d'un acte hypothécaire exécuté par mandataire et avec l'existence d'un sceau — Requête en rejet de l'action a été rejetée au procès et les propriétaires bénéficiaires ont formé un pourvoi — Cour divisionnaire a accueilli le pourvoi et la Cour d'appel a confirmé le jugement — Demanderesse a formé un pourvoi à l'encontre de cette décision — Pourvoi rejeté — Lorsque le contrat est revêtu d'un sceau, le mandant secret ne peut ni poursuivre ni être poursuivi en vertu de celui-ci — Règle du contrat par acte revêtu d'un sceau est distincte de la règle de l'équité, qui pourrait permettre au mandant secret de recouvrir sur la base du contrat lorsque le mandataire refuse de le faire — Puisqu'il n'existe pas de relation légale directe entre une tierce partie et un mandant secret, il n'y a pas de droit correspondant pour une tierce partie de poursuivre un bénéficiaire sur un contrat revêtu d'un sceau — Demanderesse ne pouvait maintenir une action contre les propriétaires puisque seules les parties à l'acte hypothécaire pouvaient être poursuivies sur lui.

Sociétés par actions --- Contrats par les sociétés par actions — Sceau d'une société par actions — En général

Acte d'hypothèque a été conclu par une société par actions agissant à titre de mandataire des propriétaires bénéficiaires — Acte d'hypothèque a été signé par le représentant de la société par actions avec le sceau de cette dernière — Société par actions a manqué à ses obligations prévues à l'acte d'hypothèque — Demanderesse a pris action contre les propriétaires bénéficiaires, qui ont entamé des poursuites contre les avocats qui les avaient représentés dans l'opération — Propriétaires bénéficiaires et avocats ont présenté une requête en rejet de l'action de la demanderesse au motif que des mandants secrets ne pouvaient être poursuivis en vertu d'un acte hypothécaire exécuté par mandataire et avec l'existence d'un sceau — Requête en rejet de l'action a été rejetée au procès et les propriétaires bénéficiaires ont formé un pourvoi — Cour divisionnaire a accueilli le pourvoi et la Cour d'appel a confirmé le jugement — Demanderesse a formé un pourvoi à l'encontre de cette décision — Pourvoi rejeté — Règle du contrat par acte scellé s'applique également aux mandataires individuels et ceux constitués en sociétés par actions — Société par actions possède toutes les capacités et les pouvoirs d'une personne naturelle, spécialement en relation avec le droit des contrats — Demanderesse ne pouvait maintenir une action contre les propriétaires puisque seules les parties à l'acte hypothécaire pouvaient être poursuivies sur la base de ce dernier.

Contrats --- Contrats revêtus d'un sceau — Exécution — Revêtement du sceau — Ce qui constitue un sceau

Acte d'hypothèque a été conclu par une société par actions agissant à titre de mandataire des propriétaires bénéficiaires — Acte d'hypothèque a été signé par le représentant de la société par actions avec le sceau de cette dernière — Société par actions a manqué à ses obligations prévues à l'acte d'hypothèque — Demanderesse a pris action contre les propriétaires bénéficiaires, qui ont entamé des poursuites contre les avocats qui les avaient représentés dans l'opération — Propriétaires bénéficiaires et avocats ont présenté une requête en rejet de l'action de la demanderesse au motif que des mandants secrets ne pouvaient être poursuivis en vertu d'un acte hypothécaire exécuté par mandataire et avec l'existence d'un sceau — Requête en rejet de l'action a été rejetée au procès et les propriétaires bénéficiaires ont formé un pourvoi — Cour divisionnaire a accueilli le pourvoi et la Cour d'appel a confirmé le jugement — Demanderesse a formé un pourvoi à l'encontre de cette décision — Pourvoi rejeté — Article 13(1) de la Land Registration Reform Act, 1984 a rendu non pertinente l'intention de la société par actions de créer un contrat revêtu d'un sceau — Mots "pour tous les buts" dans l'article font des documents de transfert d'intérêt de terres et des charges, des instruments revêtus d'un sceau pour tous les buts, incluant l'application de la règle du contrat par acte revêtu d'un sceau — Acte d'hypothèque était dans la forme prévue en vertu de la Loi et était assujetti à ses dispositions — Demanderesse ne pouvait maintenir une action contre les propriétaires puisque seules les parties à l'acte hypothécaire pouvaient être poursuivies sur lui — Land Registration Reform Act, 1984, S.O. 1984, c. 32, s. 13(1).

Contrats --- Contrats revêtus d'un sceau — Parties

Acte d'hypothèque a été conclu par une société par actions agissant à titre de mandataire des propriétaires bénéficiaires — Acte d'hypothèque a été signé par le représentant de la société par actions avec le sceau de cette dernière — Société par actions a manqué à ses obligations prévues à l'acte d'hypothèque — Demanderesse a pris action contre les propriétaires bénéficiaires, qui ont entamé des poursuites contre les avocats qui les avaient représentés dans l'opération — Propriétaires bénéficiaires et avocats ont présenté une requête en rejet de l'action de la demanderesse au motif que des mandants secrets ne pouvaient être poursuivis en vertu d'un acte hypothécaire exécuté par mandataire et avec l'existence d'un sceau — Requête en rejet de l'action a été rejetée au procès et les propriétaires bénéficiaires ont formé un pourvoi — Cour divisionnaire a accueilli le pourvoi et la Cour d'appel a confirmé le jugement — Demanderesse a formé un pourvoi à l'encontre de cette décision — Pourvoi rejeté — Demanderesse ne pouvait maintenir une action contre les propriétaires puisque seules les parties à l'acte hypothécaire pouvaient être poursuivies sur la base de ce dernier — Aucun changement dans la réalité commerciale ne s'est produit pour justifier l'abolition de la règle — Demanderesse n'a pas prouvé que la règle causait de l'injustice — Abolition de la règle pourrait avoir des effets incertains, d'une grande portée et complexes en droit des biens et des contrats — Abolition de la règle amènerait une réforme fondamentale de la common law par opposition au changement graduel — Changement éventuel au droit était nécessaire afin d'éviter l'incertitude et l'injustice pour les parties qui ont agi conformément à la règle du contrat revêtu d'un sceau — Seule une législature possède le pouvoir de créer un changement au droit portant effet pour l'avenir.

A corporation held title to property and entered into a mortgage agreement with the plaintiff as an agent on behalf of undisclosed beneficial owners. None of the beneficial owners were parties to the mortgage. The mortgage was signed by an authorized officer of the corporation under its corporate seal. The corporation defaulted on the mortgage and the plaintiff brought an action on the covenant against the beneficial owners. The beneficial owners brought an action against the solicitors who represented them in the transaction.

The beneficial owners and the third party solicitors brought a motion pursuant to R. 21.01(1)(a) of the Ontario *Rules of Civil Procedure* for a determination of the question of whether they were entitled to a dismissal of the plaintiff's action based on the rule that an undisclosed principal cannot be sued by a third party on an indenture executed by an agent under seal.

The General Division dismissed the motion. The Divisional Court granted an appeal and dismissed the action based on the sealed contract rule. The Court of Appeal affirmed the Divisional Court's judgment. The plaintiff appealed and argued that the sealed contract rule should be abolished.

Held: The appeal was dismissed.

As a general rule, an undisclosed principal may sue or be sued on a simple contract entered into on his or her behalf by an agent. However, when a contract is executed under seal, the undisclosed principal can neither sue nor be sued upon it since only parties to a sealed instrument may have obligations and rights under it. The rule operates within a system of rules relating to sealed instruments, which are derived from the fact that a sealed instrument is enforceable by virtue of the form of the instrument itself. The common law sealed contract rule is distinct from the equitable rule, which may enable an undisclosed principal to recover on a contract made for his or her benefit when the agent refuses to do so. The rights enforced under the equitable principle are the rights of the agent. There is no direct legal relationship created between the third party and the undisclosed principal. As a result, there is no corresponding right for a third party to sue a beneficiary on a contract under seal.

The sealed contract rule applies equally to individual agents and corporate agents. To make an exception to the sealed contract rule for corporations that act as agents for undisclosed principals would be contrary both to other court decisions and to the law of business corporations in general. Since a corporation has all the capacities and powers of a natural person, especially in relation to the law of contract, there is no basis upon which to treat corporations acting as agents for undisclosed principals differently than individual agents.

At common law, the affixing of a corporate seal may not in all cases be evidence of an intention to create a sealed contract within the meaning of the sealed contract rule. The intention of the corporation to create a sealed instrument must be evident from the construction of the instrument and the circumstances surrounding its creation before the rule will be applied.

Section 13(1) of the *Land Registration Reform Act, 1984* renders the intention to create a sealed instrument irrelevant. The words "for all purposes" have the effect of making all documents transferring an interest in land, and charges or discharges, sealed instruments for all purposes, including the application of the sealed contract rule. The purpose of the subsection is to preserve the common law substantive consequences associated with traditional forms of conveyancing and mortgages. The mortgage at issue was in the form prescribed under the Act and was subject to its provisions.

A change in the common law must be necessary to keep the common law in step with society, to clarify a legal principle, or to resolve an inconsistency. The change should be incremental, and its consequences must be capable of assessment.

For a court to make an incremental change in the common law, there must be evidence of a change in commercial reality that makes the change necessary. There is no evidence that there has been any change in commercial reality which would warrant the abolition of the sealed contract rule. The plaintiff did not prove that the rule has caused injustice.

To make a change could have unwarranted, far-reaching and complex consequences both in the law of contract and in the law of property. To abolish one of the rules within the system of sealed instrument rules because there no longer appears to be a rationale for it would necessarily call into question the validity of the other rules. The abolition of the sealed contract rule would amount to a fundamental reform of the common law rather than an incremental change. It would create great uncertainty both in commercial relations and in the law itself.

The abolition of the sealed contract rule would have the unfair result of creating uncertainty for those who had relied on the rule in executing their contracts. To avoid uncertainty and unfairness to parties who have structured their commercial relationships in accordance with the sealed contract rule, any change to the law should operate prospectively. Only the legislature has the power to create a prospective change in the law.

The only parties to the mortgage were the plaintiff and the corporation. Since only the parties to an instrument under seal may be sued upon it, the plaintiff could not maintain an action on the covenant in the mortgage against the beneficial owners.

Une société par actions détenait un titre de propriété et a conclu un acte hypothécaire avec la demanderesse en tant que mandataire secret pour les propriétaires bénéficiaires. Aucun des propriétaires bénéficiaires n'était partie à l'acte hypothécaire. L'acte hypothécaire a été signé par un représentant dûment autorisé de la société par actions sous le sceau de cette dernière. La société par actions a manqué à ses obligations prévues à l'acte d'hypothèque et la demanderesse a entrepris des procédures contre les propriétaires bénéficiaires sur l'engagement. Les propriétaires bénéficiaires ont pris action contre les avocats qui les ont représentés lors de la transaction.

Les propriétaires bénéficiaires de même que les avocats tierces parties ont présenté une requête en vertu de la règle 21.01(1)(a) des *Règles de procédure civile* de l'Ontario pour une détermination sur la question de savoir s'ils avaient droit au rejet de l'action de la demanderesse sur la base de la règle à l'effet qu'un mandant secret ne peut être poursuivi par une tierce partie sur un acte conclu par un mandataire et revêtu d'un sceau.

La Division générale a rejeté la requête. La Cour divisionnaire a accueilli le pourvoi et a rejeté l'action en vertu de la règle du contrat revêtu d'un sceau. La Cour d'appel a confirmé le jugement de la Cour divisionnaire. La demanderesse a formé un pourvoi et a argumenté que la règle du contrat revêtu d'un sceau devait être abolie.

Arrêt: Le pourvoi a été rejeté.

Règle générale, un mandant secret peut poursuivre ou être poursuivi sur un simple contrat conclu en son nom par un mandataire. Toutefois, lorsqu'un contrat revêtu d'un sceau est exécuté, le mandant secret ne peut ni poursuivre ni être poursuivi sur la base de celui-ci puisque seules les parties à l'instrument revêtu d'un sceau peuvent y retrouver des obligations et des droits. La règle s'opère à l'intérieur d'un système de règles concernant des instruments revêtus d'un sceau qui sont dérivés du fait qu'un instrument est exécutoire en vertu de la forme même de cet instrument.

La règle de common law du contrat revêtu d'un sceau est distincte de la règle d'équité qui pourrait permettre à un mandant secret de réclamer sur un contrat fait à son avantage lorsque le mandataire refuse de le faire. Les droits imposés en vertu du principe d'équité sont les droits du mandataire. Il n'y a pas de relation légale directe créée entre la tierce partie et le mandant secret. Comme résultat, il n'y a pas de droit correspondant pour une tierce partie de poursuivre un bénéficiaire sur un contrat revêtu d'un sceau.

La règle du contrat revêtu d'un sceau s'applique également aux mandataires individuels et ceux constitués en sociétés par actions. Faire une exception à la règle du contrat revêtu d'un sceau pour les sociétés par actions qui agissent comme mandataires pour des mandants secrets serait contraire tant aux autres décisions des tribunaux qu'à la législation des affaires des sociétés par actions en général. Puisqu'une société par actions possède toutes les capacités et pouvoirs d'une personne naturelle, spécialement en relation avec le droit des contrats, il n'y a pas de raison de traiter différemment les sociétés par actions des individus agissant comme mandataires pour des mandants secrets.

En common law, le revêtement d'un sceau de la société par actions peut ne pas être dans tous les cas une preuve de l'intention de créer un contrat au sens de la règle du contrat revêtu d'un sceau. L'intention de la société par actions de créer un instrument revêtu d'un sceau doit être évidente de par la construction de l'instrument et des circonstances entourant sa création avant que la règle ne soit appliquée.

L'article 13(1) de la *Land Registration Reform Act, 1984* rend l'intention de créer un instrument revêtu d'un sceau non pertinente. Les mots "pour tous les buts" font des documents de transfert d'un intérêt dans des terres, et de charges ou de règlements, des instruments revêtus d'un sceau pour tous les buts, incluant l'application de la règle du contrat par acte scellé. Le but de la sous-section est de préserver les conséquences substantielles de la common law associées aux formes traditionnelles d'actes de cession et d'hypothèque. L'acte d'hypothèque en question était dans la forme prévue en vertu de la Loi et était sujette à ses dispositions.

Un changement de la common law doit être nécessaire pour garder la common law en ligne avec la société, pour clarifier un principe légal, ou pour résoudre une incohérence. Le changement devrait être progressif, et ses conséquences doivent être susceptible d'évaluation.

Pour qu'un tribunal procède à un changement progressif de la common law, il doit y avoir preuve d'un changement dans la réalité commerciale qui rend ce changement nécessaire. Il n'y a pas de preuve de changement dans la réalité commerciale qui justifierait l'abolition de la règle du contrat revêtu d'un sceau. La demanderesse n'a pas prouvé que la règle a causé une injustice. Procéder à un changement pourrait avoir des effets incertains, d'une grande portée et complexes au droit des biens et des contrats. L'abolition de l'une des règles au sein du système des règles des instruments revêtus d'un sceau, parce qu'il ne semble plus y avoir de raisonnement, amènerait nécessairement la question de la validité des autres règles. L'abolition de la règle du contrat revêtu d'un sceau représenterait une réforme fondamentale de la common law plutôt qu'un changement progressif. Ceci créerait une grande incertitude tant dans les relations commerciales qu'en droit.

L'abolition de la règle du contrat revêtu d'un sceau aurait le résultat injuste de créer de l'incertitude pour ceux qui s'étaient fiés sur la règle dans l'exécution de leurs contrats. Afin d'éviter l'incertitude et l'injustice aux parties qui ont structuré leurs relations commerciales conformément avec la règle du contrat revêtu d'un sceau, tout changement au droit devrait s'opérer pour l'avenir. Seule l'instance législative possède le pouvoir de créer un changement pour le futur dans le droit.

Les seules parties à l'acte d'hypothèque étaient la demanderesse et la société par actions. Puisque seules les parties à un instrument revêtu d'un sceau peuvent être poursuivies, la demanderesse ne pouvait maintenir une action hypothécaire contre les propriétaires bénéficiaires.

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POURVOI de la demanderesse à l'encontre du jugement publié à (1998), 112 O.A.C. 253, 20 R.P.R. (3d) 257, 41 O.R. (3d) 712 (C.A. Ont.), confirmant un jugement daté (18 février 1997), Doc. 94-CQ-56721A, 277/96 (Cour div. Ont.), infirmant un jugement daté (29 mars 1996), Doc. 94-CQ-56721 (Div. gén. Ont.), rejetant la requête des défendeurs en rejet de l'action de la demanderesse.

The judgment of the court was delivered by *Bastarache J.*:

I. Introduction

1 There is an established rule in our common law that an undisclosed principal cannot be sued on a contract executed by his or her agent when that contract is executed under seal ("the sealed contract rule"). The appellant, Friedmann Equity Developments Inc. ("FED"), submits that this Court should abolish that rule. The appellant has not shown that the application of the rule in this case would cause any injustice, nor has it shown that the rule is no longer consistent with commercial reality. It relies instead on the contention that the rule is a technical one which does not appear to have any present underlying rationale. The issue in this appeal, therefore, is whether this Court should abolish one rule, existing within a system of rules governing both property and contract law, without any evidence that it creates injustice or any evidence of a change in commercial reality, simply because the historical rationale for the rule is no longer of importance.

II. Factual Background

2 By Statement of Claim issued October 14, 1994, the appellant sued the respondent group of beneficial owners for a default on a mortgage registered on February 6, 1989, against property to which Final Note Limited ("Final Note") held title. The appellant alleged that Final Note executed the mortgage as the beneficial owners' bare trustee and agent. The mortgage was signed by Final Note's duly authorized officer under its corporate seal. None of the beneficial owners were parties to the mortgage. After the appellant brought the action on the covenant in the mortgage, the beneficial owners commenced proceedings against the solicitors ("third parties") who represented them in the transaction.

3 The beneficial owners and the third parties brought a motion pursuant to rule 21.01(1)(a) of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for a determination before trial of a question of law raised by the pleadings. They asked for an order dismissing the action against them on the following ground:

> If Final Note did act as agent for the remaining defendants, they are entitled to a dismissal of this action on the basis of the rule that an undisclosed principal cannot be sued by a third party on an indenture executed by an agent under seal.

Borins J. of the Ontario Court (General Division) dismissed the motion. The Divisional Court granted an appeal and dismissed the appellant's action on the basis of the sealed contract rule. Morden A.C.J.O., on behalf of the Court of Appeal, upheld the decision of the Divisional Court. That decision is the subject of the appeal before this Court.

4 When a motion is brought pursuant to rule 21.01(1)(a), the only factual materials that may be considered by the court are the pleadings and, in this case, the mortgage in question. For the purpose of addressing the question raised on this appeal, this Court is required to accept as true the allegations in the appellant's statement of claim, the relevant portions of which are as follows:

> 2. The Defendant, Final Note Limited (the "Bare Trustee") is a corporation under the laws of Ontario and is the legal title holder to property municipally known as 100 Tullamore Court, Brampton, Ontario (the "Property").
>
> 3. The Bare Trustee holds title to the Property as trustee and/or agent for the remaining defendants which are the beneficial owners thereof (the remaining defendants will hereinafter be collectively referred to as the "Owners").
>
> . . . . .

> 7. The Plaintiff states that the Bare Trustee was created for the sole purpose of holding title to the Property as Bare Trustee on behalf of the Owners.
>
> 8. The Plaintiff states that at no material time did the Bare Trustee have any independent existence either in fact or in law and that at all material times all decisions regarding the Property and the Mortgage were made by the Owners.
>
> . . . . .
>
> 10. Alternatively, the Plaintiff states that at all material times the Bare Trustee acted as agent for the Owners who are at law liable to the Plaintiff under the Mortgage.

The mortgage was executed in the form required under the *Land Registration Reform Act, 1984*, S.O. 1984, c. 32. The mortgage agreement was signed by Abdul Pirani, Vice President of Final Note. Final Note's corporate seal appeared to the right of his signature and name.

III. Judicial History

5 Borins J. noted that there was no disagreement amongst the counsel that an undisclosed principal cannot be sued by a third party on a specialty contract, executed by a trustee or an agent, under seal. There was also no disagreement that in certain circumstances a mortgage, signed by the application of a corporate seal, could constitute a specialty contract under seal. Borins J. found, however, that whether what would ordinarily be a simple contract is transformed into a contract by specialty by its execution under seal could only be determined by examining the intentions of the parties. The parties' intentions could only be determined by a trial judge, upon hearing the evidence surrounding the completion of the contract. Therefore, Borins J. found that it was not plain, obvious and beyond a doubt that FED could not succeed at trial. He dismissed the motion.

6 Steele J. granted leave to appeal to the Divisional Court from the decision of Borins J. He found that the mortgage was executed under a corporate seal and that the decision of Borins J. conflicted with the rule that an undisclosed principal cannot be sued by a third party on such a contract. Steele J. found that in some cases the intention of the parties might be relevant to determine whether a simple contract was turned into a specialty by execution under seal. However, in his view, a mortgage was a specialty in itself and the intent of the parties was irrelevant.

7 Saunders J., on behalf of Keenan and Sharpe JJ., for the Divisional Court, allowed the appeal by the beneficial owners and the third parties. Since the indenture of mortgage was executed under seal, it could only have been a specialty debt. In such a situation, there was no room for ascertaining the intent of the parties. Since all the parties agreed that an undisclosed principal could not be sued on a contract executed by an agent or trustee under seal, it was plain and obvious that the action against Final Note should be dismissed.

8 Morden A.C.J.O., for a unanimous Court of Appeal, dismissed FED's appeal. He maintained that, although the sealed contract rule had been criticized by reason of its technicality, there was no question that it continued to exist.

9 Having determined that the sealed contract rule continued to be binding, Morden A.C.J.O. proceeded to discuss its application. He rejected the appellant's argument that the rule did not apply to corporate agents. He found that pursuant to the Ontario *Business Corporations Act*, R.S.O 1990, c. B.16, s. 15, a corporation had the same capacity and powers of a natural person, and that this extended to the application of the sealed contract rule. In addition, he reviewed the cases where the rule had been applied to corporate agents and found that they could not be distinguished from the facts of the case at bar. The appellant had relied upon the decision of Bouck J. of the British Columbia Supreme Court in *Kootenay Savings Credit Union v. Toudy* (1987), 22 B.C.L.R. (2d) 201 (B.C. S.C.), as authority for the proposition that the sealed contract rule could not be applied to corporate agents. In that decision, Bouck J. had declined to apply the sealed contract rule to a corporation, citing the fact that the seal had been affixed to the contract pursuant to a statutory requirement. Morden A.C.J.O. distinguished the case on the ground that the seal affixed to the FED mortgage was not mandatory.

10 Morden A.C.J.O. proceeded to consider the appellant's claim that there was an exception to the sealed contract rule that allowed an undisclosed principal to sue on a contract under seal despite the fact that such a principal could not be sued on the same contract. To support this claim, the appellant cited the decision of the English Court of Appeal in *Harmer v. Armstrong*

(1933), [1934] 1 Ch. 65 (Eng. C.A.). The case involved a situation where the trustee had initially refused to enforce the contract under seal against the defendants. The plaintiff beneficiaries were allowed to bring an action against the agent and the third party defendants. Morden A.C.J.O., however, noted that it was an important part of the reasoning of at least two of the three members of the Court of Appeal in that case that the contract was being enforced in favour of the agent and not in favour of the plaintiff beneficiaries. The case was clearly distinguishable from the one at bar, wherein one of the contracting parties sought to enforce the contract directly against the beneficiary/principal without involving the trustee/agent.

11 Morden A.C.J.O. then turned to the issue of the intent of the parties in affixing Final Note's corporate seal to the mortgage. Section 13(1) of the *Land Registration Reform Act, 1984* states that any document which transfers an interest in land need not be executed under seal and that those documents which are not executed under seal have the same effect for all purposes as if executed under seal. In his view, the section had the effect of making the covenant to pay in the mortgage a covenant under seal for all purposes, including the application of the sealed contract rule. The provision, in his view, went beyond providing the requirements for the registration of documents under the Act and had a substantive effect. The underlying rationale of the provision was to preserve the common law substantive consequences associated with traditional forms of mortgages and conveyances. In light of this, he found that the intent with which the corporate seal was affixed was not relevant and the provision had the effect of making the sealed contract rule applicable to the covenant to pay in the mortgage.

12 Morden A.C.J.O. rejected the appellant's policy arguments for abolishing the sealed contract rule. In his opinion, while the rule had been criticized, it did form part of the law. Presumably, parties would take the rule into account in structuring their transactions and would know, by the very form of the document, who would have rights and obligations under it. To repeal the rule would have the effect of unfairly frustrating the intentions of the parties.

IV. Legislation

13 *Land Registration Reform Act, 1984*, S.O. 1984, c. 32 (now *Land Registration Reform Act*, R.S.O. 1990, c. L.4)

> **13.** — (1) Despite any statute or rule of law, a transfer or other document transferring an interest in land, a charge or discharge need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal.
>
> (2) Subsection (1) applies to a guarantee in a charge.

V. Analysis

14 The appellant, FED, has asked this Court to abolish the sealed contract rule. It contends that the rule has no present principled justification and that it has been criticized by academics and some courts. In addition, the appellant submits that the rule is unjust and unfair. With respect, I disagree with the appellant's submissions. In my view, there is no evidence that the sealed contract rule creates injustice or that it is inconsistent with commercial reality. The sealed contract rule is part of a system of property and contract rules which provide certainty in commercial relations. To change or abolish one rule within that system would inevitably create uncertainty with regard to the other rules. Courts should not interfere with such rules without clear evidence that it is necessary to change the law to be in step with commercial reality and clear evidence that a change in the rule will not have unwarranted far-reaching ramifications.

A. The Undisclosed Principal

15 When a third party contracts with an agent and the contract is not under seal, the principal has the same rights and liabilities under the contract whether he or she was disclosed to the third party and despite the fact that his or her name did not appear on the face of the contract. Therefore, undisclosed principals can sue and be sued in their own name on any simple contracts made on their behalf by their agents as long as those agents have acted within the scope of their delegated authority in so doing.

16 The rule which allows an undisclosed principal to sue or be sued on a simple contract has been criticized. Some argue that the doctrine is anomalous and that it violates some of the basic tenets of the laws of contract and of agency: see, e.g., J. B.

Ames, "Undisclosed Principal — His Rights and Liabilities" (1909), 18 *Yale L.J.* 443; M. Schiff, "The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract" (1983), 88 *Com. L. J.* 229. Critics of the rule argue that contracts are premised upon the agreement of two or more persons to be bound to each other and to the terms pursuant to which they will be so bound. It appears to be inconsistent with this fundamental principle to bind the third parties to principals with whom they did not contract.

17 While some commentators have criticized the rule relating to undisclosed principals, other commentators have argued that the rule is consistent with commercial reality. Although the undisclosed principal may not be named in the contract, he or she does exist in fact and directs the agent. The agent is simply the instrument through which the principal acts. Since the principal controls the agent and receives the benefit of the contract with the third party, there does not appear to be any injustice in making the principal directly answerable to the third party or in allowing the principal to enforce the contract against the third party. The rule simply gives effect to what exists in fact, even if that fact is not reflected in the contract: see *Keighley, Maxsted & Co. v. Durant & Co.*, [1901] A.C. 240 (U.K. H.L.), at p. 261, *per* Lindley L.J.; E. J. Weinrib, "The Undisclosed Principle of Undisclosed Principals" (1975), 21 *McGill L.J.* 298.

18 Regardless of the criticism of the rule, it is firmly established that undisclosed principals may sue or be sued on simple contracts entered into by their agents. Parties are presumed to be aware of the possibility that those with whom they are bargaining are acting on behalf of an unnamed principal. The parties to a contract can avoid the application of the rule, either by including an express term in the contract which limits liability to the parties named in the contract itself, or by executing the contract under seal.

B. The Sealed Contract Rule

19 The practice of sealing documents is one which is centuries old and which predates much of our modern legal history. Originally, it was used as a means of authenticating a document when most individuals were unable to sign their names. However, as time passed, the seal became a symbol of the solemnity of a promise and began to serve an evidentiary function. The seal rendered the terms of the underlying transaction indisputable, and thus rendered additional evidence unnecessary: see L. Fuller, "Consideration and Form" (1941), 41 *Colum. L. Rev.* 799, at p. 802. A contract under seal derived, and still derives, its validity from the form of the document itself: see, e.g., *Nalbandian v. Hanson Restaurant & Lounge, Inc.*, 338 N.E.2d 335 (U.S. Mass., 1975), at p. 337; Ontario Law Reform Commission *Report on Amendment of the Law of Contract* (1987), at p. 35; Law Reform Commission of British Columbia *Report on Deeds and Seals* (1988), at p. 8.

20 Because a contract under seal derives its validity from its form alone, there are several incidents of such a contract which differ from those of a simple contract. The fundamental difference between contracts under seal and simple contracts is in relation to the doctrine of consideration. The law will enforce a contract under seal even without consideration. Therefore, a gratuitous promise which is expressed in an instrument under seal is enforceable. There are other incidents of a contract under seal, which may be summarized as follows:

> 1. Where a debtor covenants in a deed to pay a debt antecedently based in simple contract, the right to sue in debt merges in the right to sue on the covenant and is extinguished in law.
>
> 2. In an action on a deed, a statement in the deed may operate by way of estoppel against the maker of the statement.
>
> 3. At common law, only a person named in an instrument under seal as a party to it could sue on a covenant in the instrument expressed to be for his benefit.
>
> 4. The limitation period for an action for a breach of a contract under seal may be longer than for a simple contract in some Provinces.

See A. Herschorn, "Documents Under Seal: Consequences and Complications" (1989), 10 *Advocates'Q.* 129, at p. 130; *Halsbury's Laws of England* (4th ed. 1998), vol. 9(1), at para. 617; *Limitations Act*, R.S.O. 1990, c. L.15, s. 45(1)(b); *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, s. 2; *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, s. 2(1)(c); *Statute of Limitations*, R.S.P.E.I. 1988, c. S-7, s. 13. The sealed contract rule at issue in this case, namely that only the parties to a contract under seal may sue or be sued on it, thus exists within a system of rules which apply to sealed contracts.

21 I agree with Morden A.C.J.O. that the sealed contract rule is clearly a part of the common law of Canada. The rule was first described by this Court in *Porter v. Pelton* (1903), 33 S.C.R. 449 (S.C.C.). In that case, Porter had given an option to Pelton to purchase his gold mines and to develop them. Porter was unaware that Pelton was Holden's partner and that the option was taken for the benefit of the partnership, by Holden's directions. Pelton eventually decided to purchase the property. He paid part of the purchase price and signed an agreement under seal that he would organize a company to mine the area and give Porter stock in the company for the balance of the purchase price. The company did some work on the mine but ceased operations before paying the rest of the purchase money to Porter. Porter sued both Pelton and Holden. Nesbitt J. found as follows, at p. 455:

> The cases for over a century establish the rule of law firmly that where partners contract under seal they are bound by the form of the instrument, and where parties so signing are merely acting as agents and are so described, only the parties signing can be bound. A principal or partner cannot be bound unless he has given authority for his signature under seal, and is designated as a party to the deed.

The Court thus denied recovery against Holden.

22 This Court next had the opportunity to consider the sealed contract rule in *Margolius v. Diesbourg*, [1937] S.C.R. 183 (S.C.C.). In this case, Kellner had contracted with Margolius to buy 200,000 gallons of whiskey. The contract between the two men was executed under seal. After agreeing to sell the whiskey to Kellner, Margolius learned that Kellner had been acting on behalf of his principal, Diesbourg. The contract was breached and Margolius attempted to sue both Kellner and Diesbourg. The Court found that the action was not maintainable against Diesbourg. At p. 189, Davis J. found as follows:

> It has long been settled that no person can sue or be sued in an action at law upon a contract under seal, unless the person is a party to the contract.

He cited with approval the following statement from *Pollock on Contracts* (10th ed. (1936), at pp. 97-98):

> When a deed is executed by an agent as such but purports to be the deed of the agent and not of the principal, then the principal cannot sue or be sued upon it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named or described in it as parties.

23 The most recent decision of this Court to consider the sealed contract rule is *Zamikoff v. Lundy*, [1971] S.C.R. 933 (S.C.C.). The case involved two contracts under seal governing the purchase of land in Toronto by four partners. One contract divided the land amongst the partners. The second contract detailed the consequences should a partner default on his or her obligations pursuant to the agreement. The second contract reflected the fact that, following the execution of the first contract four years earlier, one partner was replaced by his daughter and another partner was replaced by a holding company. The daughter and the holding company were included as parties in the final deed of transfer of the land and both of them executed a mortgage on the land. The holding company defaulted on its obligations under the agreement and the other partners asked the company to leave the partnership and forfeit all rights to the land. The land increased in value, and the holding company alleged that it continued to have an interest in it. Spence J. stated the sealed contract rule as follows, at pp. 941-42:

> It is, of course, well established that when an instrument is executed under seal only those who are expressed in it to be parties thereto can sue or be sued on a covenant contained in the said instrument. No further authority is required than *Porter v. Pelton & Holden* ...

The Court, however, also found that the circumstances following the execution of the original agreements showed beyond any doubt that there was a novation of the contracts, where all partners old and new agreed to the replacement of two of the partners. The holding company, therefore, was bound by the provisions of the first two contracts despite the operation of the sealed contract rule.

24 While the statement by the Court of the sealed contract rule in *Zamikoff*, *supra*, is *dictum* because of the Court's final determination that there was a novation of the contract, I agree with Morden A.C.J.O. that the statement is an authoritative statement of the law. Laskin J.A. (as he then was) had made the following statement with respect to the sealed contract rule in his separate concurring reasons in the same case at the Court of Appeal: see *Zamikoff v. Lundy* (1970), 9 D.L.R. (3d) 637 (Ont. C.A.), at p. 648:

> Failing any principle that time and rethinking may result in the desuetude, or at least justify reconsideration of a proposition that the Supreme Court has not reassessed or reaffirmed for more than half a century, I must accept the rule in *Porter v. Pelton*. But at the same time, I must say that the quoted paragraph no longer represents the English law in so far as it refers to the position of a *cestui que trust* with respect to a covenant made on his behalf by a trustee: see *Harmer v. Armstrong*, [1934] Ch. 65. Again, it probably no longer represents the English Law even in the case of an undisclosed principal who purports to sue on a sealed contract, at least where an equitable remedy is being sought; there is some warrant for *Snell on Equity*, 26th ed., p. 643, to view *Harmer v. Armstrong* as a case of agency no less than one of trust.
>
> What is left of the old common law rule in England is a shell at best; and since, admittedly, it was originally founded on a formalistic view of the contract under seal which has ceased to terrify, there is no reason of substance for prolonging its life. It has ceased to be operative in most of the States of the United States; see *I. A. Corbin on Contracts*, s. 255, p. 448.

Spence J. restated the sealed contract rule despite the invitation from Laskin J.A. to reconsider it. In this context, the statement of the rule, even in *dictum*, is strong authority for the proposition that the rule is still very much a part of the common law in Canada. The rule has been cited as part of the common law in several decisions since *Zamikoff*: see, e.g., *Canada Deposit Insurance Corp. v. Canadian Commercial Bank* (1987), 46 D.L.R. (4th) 37 (Alta. Q.B.); *Napev Construction Ltd. v. Lebedinsky* (1984), 7 C.L.R. 57 (Ont. H.C.); *Tri-S Investments Ltd. v. Vong* (December 19, 1991), Doc. 34535/89Q, 8274/91 (Ont. Gen. Div.); *Edelstein Construction Ltd. v. Fire Pit Inc.* (1996), 30 O.R. (3d) 383 (Ont. C.A.). The sealed contract rule is clearly still a part of the common law in Canada.

C. The Harmer v. Armstrong Decision

25 Despite the recognition of the sealed contract rule by this Court and other courts across the country, the appellant has asked this Court to abolish it. The appellant contends, amongst other claims, that the rule is now internally inconsistent. Following the decision of *Harmer v. Armstrong*, *supra*, the appellant claims that the rule no longer bars a principal from suing a third party on a contract entered into under seal for his or her benefit. As a result, the appellant argues, it is unjust not to allow the third party to sue the principal. To support this claim, the appellant cites the following passage from *Cheshire, Fifoot and Furmston's Law of Contract* (13th ed. 1996), at p. 495:

> The technical [sealed contract] rule, however, is subject to this limitation, that if the agent enters into a sealed contract as *trustee* for the principal, whether the trust is disclosed on the face of the contract or not, and he refuses to enforce it against the other party, then the principal, *qua* beneficiary, may himself enforce any proprietary right to which he is entitled by bringing an action against the third party and the agent. It would seem to follow that in such a case the principal is equally liable to be sued by the third party. [Emphasis in original.]

If the final sentence of the passage is correct, the sealed contract rule would no longer exist.

26 With respect, the passage cited above interprets the decision in *Harmer* beyond its original scope. The case involved a breach of trust. Armstrong was interested in purchasing some publications and approached Harmer and another potential investor to contribute a large portion of the purchase price. The investors agreed to contribute four-fifths of the price and authorized Armstrong to make an offer to purchase the papers. An agreement under seal was reached between the vendor and Armstrong to purchase the periodicals. Armstrong, however, asserted that he was the sole purchaser and, shortly after, asked to be released from his agreement to purchase. The vendor subsequently sold the papers to another purchaser. Harmer sued both Armstrong and the vendor for specific performance of the agreement. At trial, Maugham J. found that Harmer was not entitled to a judgment for specific performance because the contract was under seal and he was not a party to it.

27 All three of the judges on appeal of the decision of Maugham J. agreed with his finding that Armstrong had entered into the agreement to purchase the periodicals as a trustee for Harmer and the other investor. They also agreed that Armstrong had breached that trust in seeking to be released from the agreement. Lord Hanworth M.R. found that when a trust relationship existed, the trustee could take steps on behalf of the beneficiary to enforce the performance of a contract by the other contracting party. If the trustee, however, refused to do so, the beneficiary could sue, but was required to join the trustee as a defendant. Lord Hanworth M.R. explained that the rule was designed to eliminate procedural difficulties and circuity of action. It would have been possible for Harmer to initiate a separate proceeding to have it declared that Armstrong was his trustee. Upon receiving this declaration, he could seek leave to sue in Armstrong's name when Armstrong refused to enforce his rights. Harmer could then bring an action against the vendors for specific performance. By allowing Harmer to sue the trustee and the vendor, the court could prevent the multiple proceedings.

28 Lawrence L.J., in his reasons, emphasized that the rule which would allow Harmer to join Armstrong as a defendant was an equitable rule, distinct from the common law sealed contract rule. Both rules were equally established and authoritative in the law. He explained the equitable rule as follows, at p. 88:

> Whenever a party under a contract, at the date when he enters into it is ... a trustee for a third party that party has a right conferred upon him by way of property to sue on the contract whether the contract be under seal or not and can, according to well settled principles, enforce that right in equity, joining the trustee as a defendant to the action. *The right of a beneficiary in such a case as the present, however, is to enforce the agreement according to its tenor, that is to say in favour of the defendant Armstrong, and not in favour of the plaintiff beneficiaries*. [Emphasis added.]

Lawrence L.J. also recognized that a court could refuse to enforce a contract in this way if there was a debate as to whether a trust relationship actually existed between the party to the contract and the third party beneficiary.

29 In my view, the decision in *Harmer* does not, as the appellant contends, carve out an exception to the sealed contract rule. On the contrary, the decision specifically distinguished the equitable principle applied in the case from the sealed contract rule. The decision provides the means for beneficiaries to enforce those agreements entered into by their trustees when those trustees have refused to do so. As this Court recognized in *Margolius*, *supra*, the case was one of a *cestui que* trust seeking to enforce a contract when the trustee had committed a breach of trust in refusing to do so. The decision is based on the law of trusts and not on the law of contract.

30 The appellant has argued that the decision in *Harmer* must, on a principled basis, lead to the corollary that beneficiaries or principals should be able to be sued in their own name. With respect, I disagree with this submission. I agree with Morden A.C.J.O. that it was essential to the reasoning in the *Harmer* decision that the contract was being enforced by the beneficiary in the name of the agent. The beneficiaries could not assert any rights that they had against the third parties to the contract directly. The equitable rule did not create any legal relationship between the beneficiary and the third party. Without such a legal relationship, the third party certainly cannot sue the beneficiary.

D. Does the Sealed Contract Rule Apply Where the Agent Is a Corporation?

31 The appellant submits that there is inconsistency amongst the provinces as to when the sealed contract rule applies. Some courts, it contends, have declined to apply the rule to agreements under seal which are entered into by corporations, while other courts have found that there is no distinction, as to the application of the rule, between agents that are corporations and agents who are individuals. The appellant cites the decision of Bouck J. of the British Columbia Supreme Court in *Kootenay Savings Credit Union*, *supra*, as an example of a court's refusal to apply the rule to an agent that is a corporation and asks this Court to follow that decision.

32 The case involved a mortgage which had been granted by Kootenay Savings Credit Union to a holding company established by a group of individuals. The mortgage was executed under the seal of the holding company. The credit union had sought personal guarantees from each of the individuals, but because of the terms of the guarantees, it was only able to recover the

amount of the principal of the loan from them as guarantors. When the holding company defaulted on the mortgage, therefore, the credit union sued the individuals as the undisclosed principals of the holding company.

33 Bouck J. reviewed the authorities which had applied the sealed contract rule and found that, despite the fact that the rule appeared to be part of the law, it did not appear to be grounded in any good reason. He noted that none of the cases he had reviewed had applied the rule when a corporation had executed a document under seal on behalf of its undisclosed principals. Bouck J. noted that, at common law, a corporation could only be bound when it affixed its seal to an agreement, but that this rule had been modified by statute. Although the holding company was not required by the common law to affix its seal to the mortgage to enter into a valid contract, Bouck J. found that to register the mortgage as security for the loan in the land titles office, it had to be executed under seal pursuant to the *Property Law Act*, R.S.B.C. 1979, c. 340, s. 16(2). The seal was thus mandated by statute. After reviewing the law and finding that the seal affixed to the mortgage was required by statute, Bouck J. made the following statement, at p. 207:

> It is clear the personal defendants would be liable as undisclosed principals of LeRoi if the mortgage were simply executed by an authorized officer of LeRoi without affixing its seal. However, it is now said that because the seal of LeRoi was in fact stamped on the mortgage, that act relieved the personal defendants from liability. With respect, such a conclusion makes little sense. While this technical rule, which is peculiar to England, may also be part of Canadian law as it applies to individuals, I can see no good reason for extending its application to corporations, particularly since no higher authority compels that result.
>
> Accordingly, I hold that where a corporation enters into a mortgage under seal on behalf of undisclosed principals, those undisclosed principals can sue and be sued by the other party to the mortgage.

Bouck J. thus allowed the credit union to recover from the undisclosed principals of the holding company.

34 With respect, to the extent that the decision of Bouck J. in *Kootenay* can be read as creating the principle that the sealed contract rule does not apply to agents that are corporations, I do not agree with it. To craft an exception to the sealed contract rule for corporations that act as agents for undisclosed principals would be contrary both to the decisions of other courts in Canada and to the law of business corporations in general. Subject to those exceptions set out by statute, a corporation has the same powers and capacities as a natural person: see, e.g., *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 15(1); Ontario *Business Corporations Act*, s. 15. The powers and capacities include the power to sue and be sued, and the power to contract: see, e.g., K. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 204. I agree with Morden A.C.J.O. that since a corporation has all of the capacities and powers of a natural person, especially in relation to the law of contract, there is no principled basis upon which to treat corporations acting as agents for undisclosed principals differently than agents who are individuals.

35 Other courts across Canada have recognized the application of the sealed contract rule to corporations that act on behalf of undisclosed principals. In *Marbar Holdings v. 221,401 B.C. Ltd.* (1984), 54 B.C.L.R. 169 (B.C. S.C.), Macdonell J. applied the sealed contract rule to bar an action against the undisclosed principals of a corporation on a document executed under the company's seal. In *Edelstein Construction*, *supra*, Morden A.C.J.O. recognized the authority of the sealed contract rule in the context of an agreement executed under seal by a corporate agent, although the case was decided on different grounds. Also, in *Tri-S Investments*, *supra*, Feldman J. applied the sealed contract rule in a case of a corporate agent as one ground of her decision. In light of these authorities, the decision in *Kootenay*, in so far as it stands for the proposition that a corporate agent may be sued or sue on a contract executed under seal, appears to be anomalous. In my view, the sealed contract rule applies equally to individual agents and corporate agents. To the extent that the *Kootenay* decision can be read to find otherwise, it should not be followed.

36 While it is clear that the sealed contract rule applies to corporate agents, the attachment of a corporation's seal to an agreement may not be sufficient in all circumstances to constitute a sealed contract within the meaning of the sealed contract rule. As I stated above, historically, the act of sealing was a solemn act designed to impress upon the parties to the contract the significance of their obligations. As a result, different legal obligations flowed from sealed instruments than from simple

contracts. Today, while the creation of a sealed instrument no longer requires a waxed impression, there are still formalities which must be observed. At common law, a sealed instrument, such as a deed or a specialty, must be signed, sealed and delivered. The mere inclusion of these three words is not sufficient, and some indication of a seal is required: see, e.g., *872899 Ontario Inc. v. Iacovoni* (1998), 163 D.L.R. (4th) 263 (Ont. C.A.). To create a sealed instrument, the application of the seal must be a conscious and deliberate act. At common law, then, the relevant question is whether the party intended to create an instrument under seal.

37 Corporate seals have a different legal effect than the seal of an individual. The seal of a corporation, in many circumstances, is equivalent to the signature of a natural person: see, e.g., *Lawton, Re*, [1944] 3 D.L.R. 51 (Man. K.B.), at p. 56, aff'd [1945] 4 D.L.R. 8 (Man. C.A.); *Suburban Construction Ltd. v. Newfoundland & Labrador Housing Corp.* (1987), 38 D.L.R. (4th) 150 (Nfld. C.A.) , at p. 152; *Alton Renaissance I v. Talamanca Management Ltd.* (1996), 27 B.L.R. (2d) 307 (Ont. Div. Ct.), at p. 312. Therefore, the affixing of a corporate seal may not in all cases be evidence of an intention to create a sealed instrument, within the meaning of the sealed contract rule. I agree with the reasoning of Morgan J.A. in *Newfoundland & Labrador Housing Corp.*, *supra*, who described the effect of a corporate seal as follows, at p. 152:

> ... not every document signed by a corporation by the affixing its corporate seal would become a specialty. When the seal of a corporation is affixed to a contract made by the corporation it has the same effect as the signature of an individual. However, any contract which, if made between private persons would by law be required to be under seal, may be made on behalf of a company in writing under its common seal. Whether what would ordinarily be a simple contract is transformed into a contract by specialty by execution under seal can only be determined having regard to the intention of the parties as evidenced and the true construction of the document in question.

In my view, a corporation is certainly capable of creating a sealed instrument and availing itself of the different incidents which flow from such an agreement. However, the attachment of its corporate seal, on its own, may not be sufficient to do so. Courts must examine the instrument itself and the circumstances surrounding its creation to determine whether the corporation intended to create a sealed instrument by affixing its corporate seal.

38 While I have stated above that evidence of an intention to create a sealed instrument is necessary when a corporate seal is affixed to a contract, I emphasize that this is a principle which operates at common law. Statutory provisions may have the effect of rendering a corporation's intention to create a sealed contract irrelevant. I agree with Morden A.C.J.O. that s. 13(1) of the *Land Registration Reform Act* ("*LRRA*") renders the intention to create a sealed instrument irrelevant. The subsection reads:

> **13.** (1) Despite any statute or rule of law, a transfer or other document transferring an interest in land, a charge or discharge need not be executed under seal by any person, and such a document that is not executed under seal has the same effect for all purposes as if executed under seal.

The intention of this provision goes beyond setting the procedural requirements for the registration of conveyances and mortgages. The words "for all purposes" have the effect of making all documents transferring an interest in land, and charges or discharges, sealed instruments for all purposes, including the application of the sealed contract rule. I agree with Morden A.C.J.O. that the purpose of the subsection is to preserve the common law substantive consequences associated with traditional forms of conveyancing and mortgages. As a result, the provision has the effect of deeming all of the interests within its scope to have the same legal effects as if they were executed under seal. In circumstances where s. 13(1) of the *LRRA* governs, the intention to create a sealed instrument is thus irrelevant.

39 To summarize, as a general rule, an undisclosed principal may sue or be sued on a simple contract entered into on his or her behalf by an agent. There is a well-established exception to this rule that when such a contract is executed under seal, the undisclosed principal can neither sue nor be sued upon it. The exception stems from the rule that only parties to a sealed instrument may have obligations and rights under it. That rule operates within a system of rules relating to sealed instruments, all of which are derived from the fact that a sealed instrument is enforceable by virtue of the form of the instrument itself. The equitable principle described in *Harmer v. Armstrong*, *supra*, may enable an undisclosed principal to recover on a contract made for his or her benefit when the agent refuses to do so. The rights enforced in such a situation are the rights of the agent; there is no direct legal relationship created between the third party and the undisclosed principal. As a result, there is no corresponding

right for a third party to sue a beneficiary on a contract under seal. The sealed contract rule clearly applies to corporate agents, although the intention of the corporation to create a sealed instrument must be evident from the construction of the instrument itself and the circumstances surrounding its creation before the rule will be applied. The intention to create or not to create a sealed instrument will not be relevant if a statutory provision has the effect of deeming the instrument to have all of the effects of an instrument under seal.

VI. Should the Sealed Contract Rule Be Abolished?

40 As is evident from the foregoing analysis, the internal inconsistencies of the sealed contract rule and the inconsistencies in its application are not as glaring as the appellant has argued. However, these inconsistencies are not the only grounds upon which it has based its claim that the sealed contract rule should be abolished. The appellant also asks that this Court abolish the rule because it lacks a present principled justification because the rule is no longer applicable in some other jurisdictions, and because of the force of criticism by academics and some courts.

41 To support its claim that the rule has no present principled justification, the appellant cites the following statement of Baron Martin in *Chesterfield & Midland Silkstone Colliery Co. v. Hawkins* (1865), 3 H. & C. 678, 159 E.R. 698 (Eng. Q.B.), at p. 703:

> [The sealed contract] rule is one which is established by authority and precedent, which does not depend upon reasoning or argument, but is a fixed established rule to be acted upon and only discussed as regards its application...

The appellant also refers to Laskin J.A.'s invitation to this Court to abolish the rule in *Zamikoff v. Lundy*, *supra*. The appellant submits that some academics have criticized the rule as "anomalous" and as taking the doctrine of privity to "extreme lengths", while others see no particular reason why the rule should continue to exist: see, e.g., S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 268 (n. 40); G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 197; W. A. Seavy "The Rationale of Agency" (1920), 29 *Yale L.J.* 859, at p. 880. The appellant submits that, in response to these criticisms, the abolition of the sealed contract rule is appropriate.

42 Before examining whether the criticisms raised above merit the abolition of the sealed contract rule, it is necessary to understand the principles which govern judicial reform of the common law. In the past, this Court has considered the conditions which must be present to effect a change in the common law in several cases: see, e.g., *R. v. Vetrovec*, [1982] 1 S.C.R. 811 (S.C.C.); *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.); *R. v. Jobidon*, [1991] 2 S.C.R. 714 (S.C.C.) ; *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.); *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.); *R. v. Robinson*, [1996] 1 S.C.R. 683 (S.C.C.); *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.). From these cases, some general principles have emerged. A change in the common law must be necessary to keep the common law in step with the evolution of society (see, e.g., *Salituro*, at p. 670; *Bow Valley*, at para. 93), to clarify a legal principle (see *Vetrovec*, at p. 819), or to resolve an inconsistency (see *Jobidon*, at p. 733). In addition, the change should be incremental, and its consequences must be capable of assessment.

43 In the recent case of *Robinson*, Lamer C.J., for a majority of the Court, relied on five factors to justify the reversal of an earlier decision of the Court in *R. v. McAskill*, [1931] S.C.R. 330 (S.C.C.). These factors were the existence of previous dissenting opinions in this Court, a trend in the provincial appellate courts to depart from the principles adopted in the original decision, criticism of the case or the adoption of a contrary rule in other jurisdictions, doctrinal criticism of the case and its foundations, and inconsistency of the case with other decisions. While they are not prerequisites for a change in the common law, these factors help to identify compelling reasons for reform. On the other hand, courts will not intervene where the proposed change will have complex and far-reaching effects, setting the law on an unknown course whose ramifications cannot be accurately measured: see *Bow Valley*, *supra*, at para. 93. The rationale for judicial restraint in making changes to the common law was expressed by McLachlin J. (as she then was) in *Watkins*, *supra*, as follows, at p. 760:

> The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be

> predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make.

I will now examine whether there are compelling reasons for the abolition of the sealed contract rule.

44 As the foregoing analysis has demonstrated, there is no conflicting appellate authority as to the application of the sealed contract rule in Canada. The decision in *Kootenay* appears to be the only inconsistent application of the rule and should not be followed. A number of American states have abolished the sealed contract rule, although most appear to have done so by legislation rather than judicial reform. In England, commentators have confirmed the continued force of the rule: see *Bowstead and Reynolds on Agency* (16th ed. 1996), at p. 426; *Halsbury's Laws of England*, at para. 617. Thus it does not appear that the existence of the sealed contract rule in the common law in Canada is out of step with the developments in the common law in other jurisdictions. The rule does appear to form an exception to the general trend in agency law to make principals liable on those contracts which are entered into on their behalf. However, the rule is also consistent with the system of rules which apply to sealed instruments.

45 One might argue, however, that the practice of sealing documents, and hence the incidents thereof, are now out of step with the fabric of society. Indeed, many of the critiques of the use of the seal state that it is anachronistic. Scarcely anyone in society today would agree that the affixation of a seal is evidence of the greater solemnity and force of a promise. While the rationale for sealing a document may appear to be no longer socially relevant, it is not evident that the rules relating to sealed documents fall victim to the same critique.

46 While our common law rules must be in step with the evolution of society as a whole, when examining a proposed change to a rule of property or contract law, we must also examine whether the rule is consistent or inconsistent with commercial reality. A rule may have a rationale which appears to be anachronistic while continuing to serve a useful commercial purpose. Our common law is replete with artificial rules which, although they may appear to have no underlying rationale, promote efficiency or security in commercial transactions. Such rules, in the circumstances where they apply, must be followed to create a legally recognized and enforceable right or obligation. Parties, therefore, structure their relations with these rules in mind and the rules themselves become part of commercial reality. Commercial relations may evolve in such a way that a particular rule may become unjust and cumbersome, and may no longer serve its original purpose. When the hardship which a rule causes becomes so acute and widespread that it outweighs any purpose that it may have once served, it is certainly open to a court to make an incremental change in the law. However, there must be evidence of a change in commercial reality which makes such a change in the common law necessary.

47 The seal continues to serve a useful purpose in our law. It allows a promise to be enforced without evidence of consideration and, more importantly in the context of this case, grants parties to a contract a simple means of ensuring that they will not be liable to anyone but the parties named therein. In my view, there is no evidence that there has been any change in commercial reality which would warrant the abolition of the sealed contract rule. The rule has been an accepted part of the common law in Canada since at least 1903. Presumably, parties have been aware of the rule and have structured their transactions accordingly. The appellant has not shown the Court that the rule has caused any inconvenience in commercial transactions, nor that it has caused any great hardship. It has shown only that the rule might operate to its detriment in this particular case. In this light, the following caution from B. N. Cardozo (later Justice of the U.S. Supreme Court) in *The Paradoxes of Legal Science* (1928), at p. 68, is particularly apposite:

> Every system of law has within it artificial devices which are deemed in the main and on the average to promote convenience or security or other forms of public good. These devices take the shape of rules or standards to which the individual though he be careless or ignorant, must at his peril conform. If they were to be abandoned by the law whenever they had been disregarded by the litigant affected, there would be no sense in making them.

48 Notwithstanding my view that there has been no change in commercial reality which makes the abolition of the sealed contract rule necessary, to effect such a change could also have unwarranted, far-reaching and complex consequences both in the law of contract and in the law of property. As I have stated above, the sealed contract rule exists within a system of rules

which relate to sealed instruments. Many of these incidents of the seal stem from the historic view of sealed contracts, namely that they were enforceable by virtue of the form of the instrument. It is for this reason, for example, that today a contract under seal does not require consideration. In my view, to abolish one of the rules within this system because there no longer appears to be a rationale for it would necessarily call into question the validity of the other rules. For example, were this Court to abolish the rule that only the parties to a sealed contract can sue or be sued on such a contract, on the ground that it does not appear to have a rationale, the enforceability of a sealed contract without consideration could certainly be questioned for the same reason. The abolition of the sealed contract rule would thus amount to a fundamental reform of the common law rather than an incremental change.

49 To abolish the sealed contract rule for the reasons that the appellant has suggested would also have the effect of creating great uncertainty both in commercial relations and in the law itself. There are many rules in contract and property law which are historical, technical and which no longer appear to have any modern day rationale. However, they remain a part of the law. For example, an *inter vivos* gift is not valid until it is delivered. In my view, to abolish the sealed contract rule on the ground that it is technical and anachronistic could have the effect of creating uncertainty as to the validity of these other technical rules which do not appear to have a modern day rationale.

50 While a contract for personal property or personal obligations may be executed without a seal as long as there is valid consideration, in Ontario the conveyance of an estate in real property must be executed by deed: see, e.g., *Anger and Honsberger Law of Real Property* (2nd ed. 1985), vol. 2, at p. 1263; *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, ss. 2, 3 and 9; *Statute of Frauds*, R.S.O. 1990, c. C.19, s. 2. The formal requirement that such deeds be executed under seal has been eliminated by legislation in Ontario: see, e.g., *Land Titles Act*, R.S.O. 1990, c. L.5, s. 79(1); *LRRA*, s. 13. However, as the foregoing analysis shows, such conveyances are deemed to be specialty contracts to which the sealed contract rule would apply. The sealed contract rule, therefore, applies in the majority of property law transactions. Certainty in real property transactions is essential. Parties and solicitors must be able to rely upon the title documents and to be secure in knowing that the terms of a deed which is registered are conclusive both as to the parties and as to their rights and liabilities. To abolish the sealed contract rule would no longer allow them to do so, by making it possible for parties not appearing on the face of the deed to have rights and obligations under it.

51 The abolition of the sealed contract rule could also have far-reaching effects on existing contractual relationships. The sealed contract rule has provided a valid means for undisclosed principals to avoid personal liability and has most probably been invoked in transaction after transaction. To abolish the rule could expose such undisclosed principals to potential liability for as long as twenty years. In the United States, some of the courts that were asked to abolish the sealed contract rule refused to do so for this very reason. For example, in *Crowley v. Lewis*, 146 N.E. 374 (U.S. N.Y., 1925), the Court of Appeals of New York found that it was not at liberty to change the sealed contract rule, which was so well understood and so often enforced. Andrews J. stated as follows, at p. 374:

> Thousands of sealed instruments must have been executed in reliance upon the authority of *Briggs v. Partridge*. Many times the seal must have been used for the express purpose of relieving the undisclosed principal from personal liability. It may not be unwise to preserve the distinction for this especial purpose. But whether wise or unwise the distinction now exists.

Similar reasoning led both the District Court of Appeal of Florida in *McMullen v. McMullen*, 145 So. 2d 568 (U.S. Fla. Ct. App. 2 Dist., 1962), and the Supreme Court of Pennsylvania in *Toll v. Pioneer Sample Book Co.*, 94 A.2d 764 (U.S. Pa., 1953), to conclude that the sealed contract rule should not be abolished. I agree with the reasoning of these three decisions. The abolition of the sealed contract rule would have the unfair result of creating uncertainty for those who had relied on the rule in executing their contracts. To avoid uncertainty and any unfairness to those parties who have structured their commercial relationships in accordance with the sealed contract rule, any change to the law should operate prospectively. Only the Legislature has the power to create a prospective change in the law.

52 The foregoing analysis has focussed on the effects of the abolition of the sealed contract rule. In my view, the need to preserve certainty in commercial relations must be considered when a court is asked to make a change to the sealed contract rule. For example, a statement that the sealed contract rule does not apply to corporations would create uncertainty as to the

potential liability of all those individuals who had corporate agents insulate them from any obligations under the contract by executing it under seal. While such uncertainty may not be as widespread as that which would result from the outright abolition of the rule, such a change in the law could still have the effect of frustrating the intentions of those parties who entered into their agreements with the understanding that the rule applied. Courts should be loath to make even smaller modifications to the sealed contract rule without clear evidence that such a change is necessary to keep in step with evolving commercial reality and that it will not have unwarranted far-reaching effects.

VII. Application of the Sealed Contract Rule to the Mortgage in this Case

53 Final Note's officer affixed the corporation's seal to the mortgage at issue in this case; it was argued at trial that it is necessary to determine whether Final Note intended to create a sealed instrument in doing so. However, the mortgage is in the form prescribed under the *LRRA* and is subject to its provisions. Section 13(1) of the Act has the effect of deeming all instruments governed by its provisions to be documents under seal, for all purposes. It is not in dispute that "person" as used in s. 13(1) of the Act means both individuals and corporations. Section 13(1) of the Act, therefore, has the substantive effect of deeming the mortgage to be an instrument under seal for all purposes, including the application of the sealed contract rule. Notwithstanding Final Note's intention in affixing its corporate seal to the mortgage, the sealed contract rule applies. The only parties to the mortgage are Final Note and FED. Since only the parties to an instrument under seal may be sued upon it, the appellant cannot maintain an action on the covenant in the mortgage against the respondent group of beneficial owners.

VIII. Disposition

54 I would dismiss the appeal with costs. Appeal dismissed with costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 8

2019 ONCA 71
Ontario Court of Appeal

McDowell v. Fortress Real Capital Inc.

2019 CarswellOnt 1344, 2019 ONCA 71, 303 A.C.W.S. (3d) 748, 91 B.L.R. (5th) 181

Arlene McDowell and Saverio Aversa (Plaintiffs / Appellants) and Fortress Real Capital Inc., Fortress Real Developments Inc., Jawad Rathore, Vincenzo Petrozza, Centro Mortgage Inc., Ildina Galati, FFM Capital Inc., Rosalia Spadafora, Krish Kochhar, Tony Mazzoli, Saul Perlov, Derek Sorrenti, Sorrenti Law Professional Corporation, Olympia Trust Company and Financial Services Commission of Ontario (Defendants / Respondents)

Arlene McDowell (Plaintiff / Appellant) and Fortress Real Capital Inc., Fortress Real Developments Inc., Jawad Rathore, Vincenzo Petrozza, Empire Pace (1088 Progress) Ltd., Building & Development Mortgages Canada Inc., Ildina Galati, Derek Sorrenti, Sorrenti Law Professional Corporation, Olympia Trust Company and Michael Cane (Defendants / Respondents)

David Martino (Plaintiff / Appellant) and Fortress Real Capital Inc., Fortress Real Developments Inc., Jawad Rathore, Vincenzo Petrozza, ADI Developments (Link) Inc., ADI Developments Inc., Building & Development Mortgages Canada Inc., Ildina Galati, FFM Capital Inc., Rosalia Spadafora, Krish Kochhar, Tony Mazzoli, Saul Perlov, Derek Sorrenti, Sorrenti Law Professional Corporation, Olympia Trust Company and Her Majesty the Queen in Right of Ontario (Defendants / Respondents)

Bryan Madryga and Eileen Wallace (Plaintiffs / Appellants) and Fortress Real Capital Inc., Fortress Real Developments Inc., Fortress Kempenfelt Bay Developments Inc., Jawad Rathore, Vincenzo Petrozza, Harmony Village-Lake Simcoe Inc., City Core Developments Inc., Building & Development Mortgages Canada Inc., Ildina Galati, FMP Mortgage Investments Inc., Michael Daramola, Tonino Amendola, Graham McWaters, FDS Broker Services Inc., Glenn May-Anderson, Zafar Iqbal Khawaja, Derek Sorrenti, Sorrenti Law Professional Corporation, Olympia Trust Company, Grant Edwardh Appraisers and Consultants Ltd. and Ian G. McLean (Defendants / Respondents)

G.R. Strathy C.J.O., K. Feldman, David Brown JJ.A.

Heard: June 14, 2018
Judgment: January 31, 2019
Docket: CA C64290, C64288, C64289, C64286

Proceedings: additional reasons at *McDowell v. Fortress Real Capital Inc.* (2019), 2019 CarswellOnt 4301, 2019 ONCA 239, David Brown J.A., G.R. Strathy C.J.O., K. Feldman J.A. (Ont. C.A.); affirming *Madryga v. Fortress Real Capital Inc.* (2017), 2017 CarswellOnt 12385, 2017 ONSC 4792, Perell J. (Ont. S.C.J.); and reversing *McDowell and Aversa v. Fortress Real Capital Inc.* (2017), 2017 CarswellOnt 12387, 2017 ONSC 4791, Perell J. (Ont. S.C.J.); additional reasons at *McDowell and Aversa v. Fortress Real Capital Inc.* (2017), 2017 CarswellOnt 15181, 2017 ONSC 5759, Perell J. (Ont. S.C.J.); and reversing *Martino v. Fortress Real Capital Inc.* (2017), 2017 CarswellOnt 15196, 2017 ONSC 5755, Perell J. (Ont. S.C.J.); additional reasons to *Martino v. Fortress Real Capital Inc.* (2017), 2017 CarswellOnt 12386, 2017 ONSC 4790, Perell J. (Ont. S.C.J.); and reversing *McDowell v. Fortress Real Capital Inc.* (2017), 2017 CarswellOnt 15180, 2017 ONSC 5760, Perell J. (Ont. S.C.J.); additional reasons to *McDowell v. Fortress Real Capital Inc.* (2017), 2017 CarswellOnt 12388, 2017 ONSC 4789, Perell J. (Ont. S.C.J.)

Counsel: Kevin Sherkin, Mitchell Wine, for Appellants
Jeremy Devereux, Jennifer Teskey, for Fortress Real Capital Inc., Fortress Real Developments Inc., Jawad Rathore and Vincenzo Petrozza
Markus Kremer, Ziad Yehia, for Empire Pace (1088 Progress) Ltd.

Lisa Parliament, Lauren Ray, for Adi Developments (Link) Inc. and Adi Development Group Inc. (incorrectly named in the title of proceedings as Adi Developments Inc.)

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Property; Torts

Related Abridgment Classifications

Business associations

I Nature of business associations

I.3 Nature of corporation

I.3.b Distinct existence

I.3.b.i From owner

I.3.b.i.A General principles

Contracts

XV Contracts under seal

Headnote

Business associations --- Nature of business associations — Nature of corporation — Distinct existence — From owner — General principles

Plaintiffs were small investors induced to invest in four syndicated mortgages promoted by related defendant companies FC Inc. and FD Inc. — Two mortgages, with terms purporting to preclude investors from enforcing mortgages, were in default — Other two were removed from title through power of sale and protection proceedings such that newly-incorporated companies linked to promoter companies became owners of lands free from mortgages — Plaintiffs brought four separate, but related class actions against defendants that included principals of FC Inc. and FD Inc., lawyer who provided purportedly independent legal advice to plaintiffs, trustees who held investments in trust and mortgagors who granted syndicated mortgages — On defendants' motions, actions were dismissed against principals and two mortgagors — Plaintiffs appealed — Appeal allowed in part, with respect to actions against mortgagors — Plaintiffs' allegations did not provide any particulars of tortious conduct by principals separate from that of companies — Without specifically pleaded allegations of fraud, deceit or dishonesty by principals, it was not possible to assess whether any such alleged misconduct could lead to finding of personal liability — Unlike in otherwise factually similar precedent, there was no specific pleading of misrepresentation by principal R or of reliance by plaintiff A — There was no pleaded legal basis for personal claim against two principals.

Contracts --- Contracts under seal — Parties

Plaintiffs were small investors induced to invest in four syndicated mortgages promoted by related defendant companies FC Inc. and FD Inc. — Two mortgages, with terms purporting to preclude investors from enforcing mortgages, were in default — Other two were removed from title through power of sale and protection proceedings such that newly-incorporated companies linked to promoter companies became owners of lands free from mortgages — Plaintiffs brought four separate, but related class actions against defendants that included principals of FC Inc. and FD Inc., lawyer who provided purportedly independent legal advice to plaintiffs, trustees who held investments in trust and mortgagors who granted syndicated mortgages — On defendants' motions, actions were dismissed against principals and two mortgagors — Plaintiffs appealed — Appeal allowed in part, with respect to actions against mortgagors — Motion judge correctly found that sealed contract rule prevented plaintiffs from suing to enforce syndicated mortgages at common law — Regardless of whether plaintiffs were disclosed or undisclosed principals in light of mortgagors' knowledge that mortgages were being held for their benefit, they were not parties named in mortgage executed under seal and so did not have right to personally enforce security at common law — Motion judge erred by dismissing equitable claims for mortgage enforcement as bound to fail in law — Motion judge's conclusion depended on three findings requiring evidentiary basis, namely that standstill provision in syndicated mortgages barred plaintiffs from enforcement, and that this provision was adequately disclosed both to parties to loan agreements and to plaintiffs — Plaintiffs were entitled to lead evidence to aid in interpretation of documents and to prove what was disclosed and when, leaving question of law of whether non-disclosure would affect enforceability of standstill provisions in equity to be determined after evidentiary findings were made.

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Cases considered by *K. Feldman J.A.*:

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ADGA Systems International Ltd. v. Valcom Ltd. (2000), 2000 CarswellOnt 1160, 2000 CarswellOnt 1161, 254 N.R. 400 (note), 134 O.A.C. 400 (note), [2000] 1 S.C.R. xv (note), 51 O.R. (3d) xvii (note) (S.C.C.) — referred to

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Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

Friedmann Equity Developments Inc. v. Final Note Ltd. (2000), 2000 SCC 34, 2000 CarswellOnt 2458, 2000 CarswellOnt 2459, 48 O.R. (3d) 800 (headnote only), 188 D.L.R. (4th) 269, 34 R.P.R. (3d) 159, 255 N.R. 80, [2000] 1 S.C.R. 842, 7 B.L.R. (3d) 153, 134 O.A.C. 280, 2000 CSC 34, 48 O.R. (3d) 800 (S.C.C.) — followed

Harmer v. Armstrong (1933), [1933] All E.R. Rep. 778, [1934] 1 Ch. 65 (Eng. C.A.) — considered

Montreal Trust Co. of Canada v. ScotiaMcLeod Inc. (1995), 129 D.L.R. (4th) 711, 9 C.C.L.S. 97, 23 B.L.R. (2d) 165, 87 O.A.C. 129, (sub nom. *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.)* 26 O.R. (3d) 481, 1995 CarswellOnt 1203 (Ont. C.A.) — followed

Normart Management Ltd. v. West Hill Redevelopment Co. (1998), 155 D.L.R. (4th) 627, 37 O.R. (3d) 97, 1998 CarswellOnt 251, 17 C.P.C. (4th) 170, 113 O.A.C. 375, 41 C.C.L.T. (2d) 282 (Ont. C.A.) — followed

Piedra v. Copper Mesa Mining Corp. (2011), 2011 ONCA 191, 2011 CarswellOnt 1495, 332 D.L.R. (4th) 118, 280 O.A.C. 1 (Ont. C.A.) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Land Registration Reform Act, R.S.O. 1990, c. L.4

s. 13 — considered

Mortgage Brokerages, Lenders and Administrators Act, 2006, S.O. 2006, c. 29

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 21 — considered

R. 21.01(1)(a) — considered

R. 21.01(1)(b) — considered

APPEAL by plaintiffs from judgments reported at *Madryga v. Fortress Real Capital Inc.* (2017), 2017 ONSC 4792, 2017 CarswellOnt 12385 (Ont. S.C.J.), *Martino v. Fortress Real Capital Inc.* (2017), 2017 ONSC 4790, 2017 CarswellOnt 12386 (Ont. S.C.J.), *McDowell and Aversa v. Fortress Real Capital Inc.* (2017), 2017 ONSC 4791, 2017 CarswellOnt 12387 (Ont. S.C.J.), *McDowell v. Fortress Real Capital Inc.* (2017), 2017 ONSC 4789, 2017 CarswellOnt 12388 (Ont. S.C.J.), *Martino v. Fortress Real Capital Inc.* (2017), 2017 ONSC 5755, 2017 CarswellOnt 15196 (Ont. S.C.J.), and *McDowell v. Fortress Real Capital Inc.* (2017), 2017 ONSC 5760, 2017 CarswellOnt 15180 (Ont. S.C.J.), granting motions by some of defendants to strike pleadings or dismiss actions as against them.

***K. Feldman J.A.*:**

A. OVERVIEW

1 The appellants are small investors who were induced to invest in four syndicated mortgages promoted by Fortress Real Capital Inc. and Fortress Real Developments Inc. (the "Fortress Companies"). Two of those mortgages are in default, but certain terms of the mortgages purport to preclude the investors or their trustees from enforcing the mortgages now, and possibly forever. The other two mortgages were removed from title through power of sale proceedings and protection proceedings under

the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36. As a result of these sales, newly-incorporated companies linked to Fortress became the owners of the lands, free from the mortgages in which the appellants had invested.

2 The appellants brought class proceedings against, among others, the individuals and corporations who had promoted and formally sold the investments, two principals of Fortress Real Capital Inc. and Fortress Real Developments Inc., who were directors and officers of those companies, the lawyer who had purportedly provided independent legal advice to the appellants in respect of their investments, the trustees who held the appellants' investments in trust, and the mortgagors who granted the syndicated mortgages. The appellants seek a remedy for the effective loss of their investments.

3 The appellants' primary allegations are that the proposed defendants failed to properly disclose, or misled them about, key information regarding the development projects, particularly in relation to the risks of investing. They seek to enforce the two remaining mortgages, either directly or indirectly through the trustees, to rescind contracts relating to the investments, and to obtain damages for breach of fiduciary duty, breach of contract, misrepresentation, and negligence.

4 Eight of the defendants in the four class actions brought motions to strike the pleaded claims against them under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Four of those motions were settled, and four proceeded. The motion judge struck the pleadings against Fortress Real Capital Inc., Fortress Real Developments Inc., and Olympia Trust Company with leave to deliver Fresh as Amended Statements of Claim. Those orders are not under appeal.

5 The motion judge dismissed three of the claims and did not grant leave to amend. Those were: 1) the claims against the individual respondents Jawad Rathore and Vincenzo Petrozza, who were directors and officers of the Fortress Companies at the relevant times; 2) the claims against the respondent Empire Pace (1088 Progress) Ltd., mortgagor of one of the remaining syndicated mortgages; and 3) the claims against the respondent Adi Developments (Link) Inc. and Adi Development Group Inc. (collectively "Adi"), mortgagor and guarantor of the other remaining syndicated mortgage. The appellants appeal those orders. They also appeal the costs orders awarded in favour of Empire Pace and Adi.

6 For the reasons that follow, I agree with the motion judge that the claims disclose no reasonable cause of action against the respondents Jawad Rathore and Vincenzo Petrozza in their personal capacities. I would uphold his decision to dismiss those claims without leave to amend. However, I do not agree that the claims to enforce the mortgages against Empire Pace and Adi should be struck out on a r. 21 motion as disclosing no reasonable cause of action. As a result, I would set aside the orders striking the actions against Empire Pace and Adi together with the costs awards in their favour.

B. FACTS

7 The four proposed class actions concern investments in four land development projects. The pleaded facts are taken to be true for the purpose of determining whether the pleadings should be struck under r. 21 as disclosing no reasonable cause of action. The pleadings relied on for the purposes of these motions are four proposed draft pleadings that have been amended a number of times.

The Four Development Projects

8 In the brief descriptions of the four land development projects I provide below, I focus on the facts that are relevant to the orders under appeal.

(1) The Empire Pace Ten88 Project, Scarborough

9 Arlene McDowell is the proposed representative plaintiff in the Ten88 Project class action. Empire Pace is an Ontario corporation incorporated in 2012 to own and develop the Ten88 Project in Toronto. Mr. Rathore and Mr. Petrozza are directors and officers of the Fortress Companies and are both shareholders of Empire Pace. While the pleading states that Empire Pace is a related company to Fortress, the pleading does not describe the legal basis for that assertion.

10 On or before August 13, 2012, Empire Pace signed a loan agreement where it agreed to borrow an amount not to exceed $20 million from Fortress Developments, with part of the loan secured and part unsecured. Fortress assigned its interest in the

secured portion of the loan to Olympia Trust Company in trust and to Mr. Sorrenti in trust. Mr. Sorrenti acted as both trustee for the investors' interests in the loan as well as the lawyer who purportedly provided (personally or through his law office) independent legal advice to the investors.

11 Empire Pace entered into an agreement (the "Empire Pace Loan Agreement") with Olympia and Mr. Sorrenti, as trustees, under which a syndicated second mortgage was registered against the Ten88 property as security for their portion of the loan.

12 Under the Loan Agreement, Empire Pace agreed to pay interest at 8% per annum, payable quarterly. The loan had a three-year term, maturing on August 10, 2015, with a right to extend the maturity date by six months. Empire Pace also agreed to pay a variety of other fees and charges and to share profits. One of the terms entitled Fortress to retain 35% of all amounts raised from investors as an advance on anticipated profits and for commissions and legal fees.

13 Under the Empire Pace Loan Agreement, Mr. Sorrenti and Olympia Trust agreed to subordinate the syndicated mortgage to construction financing of up to $110M. They also agreed to grant partial discharges, postponements, and a standstill in certain circumstances.

14 Empire Pace granted the syndicated second mortgage on August 15, 2012. The syndicated mortgage is a document registered on title against the Ten88 Project lands. It contains a priority, standstill, forbearance, and postponement provision. This provision precludes investors' representatives from acting upon their security in the event of default until all other project financing has been repaid, or until the lenders of that financing approve of the action in writing. The pleadings allege that this provision was given without consideration and was inadequately disclosed to investors in the syndicated mortgage.

15 Ms. McDowell, who works in the information technology sector, decided to invest $25,000 in the syndicated mortgage after receiving information and promotional material about the Ten88 Project. She met with a mortgage agent and a notary to close her investment transaction. During the meeting, she had a phone conversation with Mr. Sorrenti, who provided her with legal advice respecting her investment. She alleges that the legal advice she was given was inadequate and not independent.

16 At the meeting Ms. McDowell received, and in some instances completed or signed, a number of documents. Where the documents are relevant to this appeal, I will address them in more detail in my analysis.

17 Construction on the Ten88 Project began in July 2013. In July 2014, Empire Pace borrowed $28M in construction financing from Meridian Credit Union. The security was a first mortgage on the property; Mr. Sorrenti and Olympia also delivered a postponement that was registered on title. Empire Pace exercised its right to extend the loan term by six months to February 10, 2016. On February 5, 2016, investors received a Memo advising that the Project was 75% sold with occupancy to begin in the spring or summer of 2017. The Memo also stated that the "Loan will now enter a period of interest accrual for the remainder of the term as also allowed by the standstill, postpone[ment] and subordinate provisions." Interest would be accrued from February 10 until the completion of the Ten88 Project, and would be paid with the principal upon completion.

18 The appellants allege that as nothing in the documentation and agreements pertaining to the syndicated mortgage allows for a period of interest accrual, the loan has been in default as of February 10, 2016. Neither Mr. Sorrenti nor Olympia has taken any steps to enforce the syndicated mortgage since that time. Ms. McDowell commenced this proposed class action on September 9, 2016. In addition to alleging that Empire Pace is in default of the Empire Pace Loan Agreement, Ms. McDowell alleges that Empire Pace cannot enforce any standstill provisions in the syndicated mortgage document against her. She also alleges that Empire Pace made misrepresentations to her that she relied on in deciding to invest in the Project.

19 In respect of Mr. Rathore and Mr. Petrozza, Ms. McDowell alleges that, as directing minds of Fortress, they should be held responsible for its wrongdoing. She further alleges that the individual respondents spoke on behalf of Fortress at investment seminars and stressed the safety and security of Fortress investments, and that they were negligent and should be held accountable for the appellants' losses because they obtained substantial monetary benefit from Fortress's activities. There is, however, no pleading that Ms. McDowell either attended a meeting or seminar where Mr. Rathore or Mr. Petrozza were present, or relied on any representation made by Mr. Rathore or Mr. Petrozza at a meeting or seminar.

(2) The Adi Sutton Project, Burlington

20 David Martino is the proposed representative plaintiff in the Sutton Project class action. Adi Developments (Link) Inc. (formerly Adi Developments Sutton Inc.) and Adi Development Group Inc. are related Ontario corporations. Adi Developments (Link) Inc. was incorporated to develop a mixed-use project in Burlington, Ontario. Both Mr. Rathore and Mr. Petrozza have an interest in Adi.

21 In August 2012, Fortress began to market investments in the Sutton Project. The Fortress defendants made presentations and the investments were marketed through brokers.

22 On or before September 4, 2012, Adi Developments (Link) Inc. signed a loan agreement where it agreed to borrow an amount not exceeding $11.6M from Fortress Developments, with part of the loan secured and part unsecured.

23 Fortress assigned its interest in the secured portion of the loan to Mr. Sorrenti in trust. Adi Developments (Link) entered into an agreement with Mr. Sorrenti (the "Adi Loan Agreement") under which a syndicated mortgage was registered against the Sutton property as security for Mr. Sorrenti's portion of the loan. Adi Development Group signed the Adi Loan Agreement as guarantor.

24 The Adi Loan Agreement contained similar terms to those in the Empire Pace Loan Agreement. Notably, under the Adi Loan Agreement, Mr. Sorrenti agreed to subordinate his security to construction financing of up to $49.5M. He also agreed to grant partial discharges, postponements, and to standstill in certain circumstances.

25 After the execution of the Adi Loan Agreement, Mr. Sorrenti agreed with Adi to a priority, standstill, forbearance, and postponement provision in the syndicated mortgage. It precludes investors' representatives from acting on their security in the event of default until all other project financing has been repaid, or until the lenders of that financing approve of the action in writing.

26 Mr. Martino is a licensed mortgage agent who was an employee of the defendant FFM Capital Inc. He decided to invest $50,000 from an RESP account he had for his children's education after receiving promotional material about the Sutton Project. His clients and family members invested a further $510,000 in the syndicated mortgage. Much of it was RRSP money.

27 Mr. Martino received, and in some instances completed or signed, a number of documents. Where those documents are relevant to this appeal, I will discuss them in more detail in my analysis. Mr. Martino was purportedly provided with independent legal advice by way of a phone call with Mr. Sorrenti or a lawyer in Mr. Sorrenti's office or under Mr. Sorrenti's direction.

28 In July 2014, Adi began to sell units in the Sutton Project; in June 2015, construction began on the Project.

29 On July 1, 2015, Adi extended the term of the loan to April 4, 2016. On October 14, 2015, Adi granted a mortgage in the amount of $16M to Aviva Insurance Company of Canada. Mr. Sorrenti subordinated the syndicated mortgage to the new mortgage from Aviva Insurance, as well as to two other mortgages granted by Adi, one to Sorrenti Law Professional Corporation and another to Cameron Stephens Financial Corporation. Those two mortgages totalled about $13.16M. Construction liens were also registered on title to the Sutton Project lands, which the appellants allege constituted default under the provisions of the Adi Loan Agreement.

30 In April 2016, the investors were advised that the Project had entered an "ongoing standstill, subordinate and postponement arrangement" with a period of "interest accrual" in accordance with the standstill, postponement, and subordinate provisions of the syndicated mortgage loan.

31 Mr. Martino alleges that Adi defaulted on the loan on April 4, 2016, when the principal and interest owing was not repaid. Nothing in any of the documentation and agreements pertaining to the syndicated mortgage provides for a period of interest accrual at any time, and Mr. Sorrenti has not taken any steps to act on Adi's default under the Adi Loan Agreement.

32 In May 2016, the investors were advised that it was necessary to increase the postponement to construction financing from $49.5M to $121M. Investors were requested to authorize the postponement. Mr. Martino refused.

33 Unbeknownst to investors, on April 5, 2016, Adi had already borrowed $75M from Meridian Credit Union to finance the construction of the Project on the security of a first mortgage of the property. Mr. Sorrenti had postponed the syndicated mortgage to Meridian's security five weeks before notifying investors.

34 Mr. Martino commenced the proposed class action on September 27, 2016. He alleges that Adi, as borrower and as guarantor, is in default under the provisions of the Adi Loan Agreement, and that Adi cannot enforce any standstill provisions contained in the syndicated mortgage document against him. He also alleges that Adi made misrepresentations to him that he relied on in deciding to invest. Mr. Martino's allegations against Mr. Rathore and Mr. Petrozza are the same as those made in the Ten88 Project class action. And similarly, there is no pleading that Mr. Martino attended a meeting or seminar where Mr. Rathore or Mr. Petrozza were present, or relied on any representations made at such a meeting or seminar.

(3) The Collier Centre Project, Barrie

35 The only facts about the Collier Centre Project that are relevant on appeal relate to the involvement of the respondents, Mr. Rathore and Mr. Petrozza. Ms. McDowell and Mr. Aversa's legal claims against Mr. Rathore and Mr. Petrozza are the same as those made in the Ten88 and Sutton Project class actions, but the Collier Centre pleadings contain different facts relating to the interactions between Mr. Rathore and Mr. Petrozza and the appellant Mr. Aversa.

36 Arlene McDowell and Saverio Aversa are the proposed representative plaintiffs in the Collier Centre Project class action. Mady-Collier Centre Ltd. was incorporated to develop a mixed-use development in Barrie, Ontario. By agreement dated July 17, 2012, Mady-Collier agreed to borrow up to about $17M from Fortress Developments. Fortress assigned its interest in the secured portion of that loan to Olympia in trust and to Mr. Sorrenti in trust. Mady-Collier entered into an agreement with Olympia and Mr. Sorrenti under which a syndicated third mortgage was registered against the Collier Centre Project lands as security for their portion of the loan.

37 Ms. McDowell decided to invest $80,000 in the syndicated mortgage after receiving information and promotional material about the Project. The material did not come from Mr. Rathore or Mr. Petrozza.

38 Mr. Aversa, who works in construction, decided to invest $15,000 from his TFSA account. His wife, Adriana, also decided to invest $15,000 from her TFSA account. Mr. Aversa was introduced to the Collier Centre Project by an employee of the defendant FFM Capital Inc., who sent him a document prepared by Fortress describing the risk profile of the syndicated mortgage investment. He was invited to attend several Fortress seminars, at some or all of which Mr. Rathore and Mr. Petrozza spoke about the "appeal of the particular Fortress investment".

39 Mr. Aversa attended at least one seminar where Mr. Rathore spoke. Mr. Rathore discussed his history in the business, the quality of the investments, and said that the investments were safe and secure. He stated that Fortress was solicited by many developers but only dealt with the best and most experienced.

40 In December 2014, construction of the Collier Centre stopped. In January 2015, Mady-Collier filed for and obtained protection under the *Companies' Creditors Arrangement Act*. In 2015, the principals of Fortress incorporated Fortress Collier Centre Ltd., which purchased the assets of the Collier Centre in a transaction approved by order of the Ontario Superior Court of Justice. The order extinguished the investors' rights in the syndicated mortgage.

41 Fortress Collier Centre has agreed that "all available cash flow after repayment of all construction and other financing required for acquisition, construction, development, leasing and sale of the [Collier Centre] . . . and after payment of all other costs to complete the [Collier Centre] not otherwise financed and appropriate reserves for future expenses and warranty claim, will be made available for repayment" to investors in the syndicated mortgage. Ms. McDowell and Mr. Aversa allege that this is an empty commitment, and that they have effectively lost their entire investment.

42 On August 8, 2016, Ms. McDowell and Mr. Aversa commenced this proposed class action.

(4) The Harmony Simcoe Project, Barrie

43 Again, the only facts about the Harmony Simcoe Project that are relevant to this appeal relate to the involvement of Mr. Rathore and Mr. Petrozza.

44 The facts surrounding the syndicated mortgage used to finance the Harmony Simcoe Project are substantially similar to those of the other three projects. The default events were most similar to those in respect of the Collier Centre Project. The syndicated mortgage went into default and, ultimately, power of sale proceedings commenced by the first mortgagee removed the syndicated mortgage from title (the syndicated mortgage being the second mortgage registered against the Project lands at that time). The power of sale proceedings again transferred title to a company controlled by Fortress, Fortress Kempenfelt Bay Developments Inc. ("FKBD").

45 Mr. Rathore was a director and officer of both Fortress Developments and FKDB at the relevant times. Mr. Petrozza was an officer of Fortress Developments, a director of Fortress Capital, and a director and officer of FKDB at the relevant times. Mr. Rathore and Mr. Petrozza both have interests in Harmony Village-Lake Simcoe Inc., the corporation that held title to the land underlying the Project until title was transferred to FKDB under power of sale proceedings. Mr. Petrozza signed the transfer of title to FKDB on behalf of FKDB.

46 There are no facts pleaded relating to any specific interactions between the proposed representative plaintiffs, Bryan Madryga and Eileen Wallace, and Mr. Rathore and Mr. Petrozza. The appellants' allegations against Mr. Rathore and Mr. Petrozza are virtually identical to those in the other three actions, except for the specific representations made by Mr. Rathore to Mr. Aversa in the Collier Centre Project. Also, the allegations relate to Mr. Rathore and Mr. Petrozza's positions both as directors and officers of Fortress and of FKBD, while the allegations in the other three actions relate to their positions as principals of Fortress alone.

C. DECISIONS BELOW

47 The motion judge delivered four separate sets of reasons, repeating much of the factual background and legal framework of the claims in each. He dismissed the claims in negligence, misrepresentation and breach of fiduciary duty against Jawad Rathore and Vincenzo Petrozza without leave to amend in all four proposed class actions. He found that the pleadings in all four actions failed to plead material facts to show that their conduct was tortious in itself or that it exhibited a separate identity of interest from that of their corporations. He found that the pleadings did not disclose a reasonable cause of action against Mr. Rathore and Mr. Petrozza in their personal capacity.

48 The motion judge also dismissed the actions against Empire Pace and Adi for enforcement of the mortgages on two bases, and refused to grant leave to amend. First, the appellants did not have standing to enforce the syndicated mortgages, as the mortgages are documents under seal to which the appellants are not parties. The sealed contract rule prevents them from enforcing the mortgages, because it prevents non-parties from suing on sealed contracts. Second, even if the appellants could step into the shoes of their trustees and sue to enforce the mortgages in equity, their rights would be no better than those of the trustees, who are barred by the standstill provisions in the mortgage documents from enforcing the mortgages without the written approval of prior-ranking secured lenders. The motion judge also found that it was unclear how a syndicated mortgage could be enforced in a class action where some of the investors in the mortgage loan might opt out.

49 The motion judge concluded that no purpose would be served by granting leave to amend the pleadings because the appellants would already have pleaded the consent of the prior-ranking lenders if it existed, and they did not.

50 Further, the motion judge concluded that it was clear from the documents incorporated into the pleadings that the standstill provisions contained in the mortgage documents had been adequately disclosed to the appellants and to the parties to the Loan

Agreements. He also made a finding that no additional consideration from Empire Pace and Adi was necessary for the inclusion of the standstill provisions.

51 On those bases, the motion judge concluded that the mortgages were not currently enforceable and dismissed the actions against Empire Pace and Adi without leave to amend.

D. ISSUES

52 The appellants raise the following issues on this appeal:

(1) Did the motion judge err in law by striking out the personal claims against the two principals, Mr. Rathore and Mr. Petrozza, as disclosing no reasonable cause of action?

(2) Did the motion judge err in law by finding that the sealed contract rule prevents the appellants from enforcing the syndicated mortgages at common law?

(3) Did the motion judge err in law by finding that the appellants cannot enforce the syndicated mortgages in equity through a class proceeding because:

(a) it is plain and obvious that the standstill provisions bar the appellants from enforcing the syndicated mortgages in equity, and

(b) it is plain and obvious that the mortgages are unenforceable through a class proceeding because some investors may opt out?

E. ANALYSIS

Standard of review

53 All parties agree that the standard of review on an appeal from a motion judge's order that strikes a claim under r. 21.01(1)(a) or (b) is the correctness standard.

(1) Did the motion judge err in law by striking out the personal claims against the two principals, Mr. Rathore and Mr. Petrozza, as disclosing no reasonable cause of action?

54 The claims against the individual respondents sought to hold them responsible, as the directing minds of the Fortress Companies, for Fortress's alleged breach of contract, breach of fiduciary duty, misrepresentation, and negligence. The motion judge followed this court's decisions in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), at pp. 102-3, and *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (Ont. C.A.), leave to appeal ref'd, (2000), [1999] S.C.C.A. No. 124 (S.C.C.), at pp. 112-13, which in turn followed *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* (1995), 26 O.R. (3d) 481 (Ont. C.A.), in holding that a director or officer of a corporation will not be personally liable for actions taken on behalf of the corporation unless some of their conduct is tortious in itself or exhibits a separate identity of interest from that of the corporation. He held that none of the four pleadings disclosed any such conduct.

55 In *ScotiaMcLeod*, at pp. 490-91, Finlayson J.A. described the requirements for finding directors or officers personally liable:

> The decided cases in which employees and officers of companies have been found personally liable for actions ostensibly carried out under a corporate name are fact-specific. In the absence of findings of fraud, deceit, dishonesty or want of authority on the part of employees or officers, they are also rare. Those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour. There is also a considerable body of case-law wherein injured parties to actions for breach of contract have attempted to extend liability to the principals of the company by pleading that the principals were privy to

> the tort of inducing breach of contract between the company and the plaintiff: see *Ontario Store Fixtures Inc. v. Mmmuffins Inc.* (1989), 70 O.R. (2d) 42 (H.C.J.), and the cases referred to therein. Additionally there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation. In every case, however, the facts giving rise to personal liability were specifically pleaded. Absent allegations which fit within the categories described above, officers or employees of limited companies are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company so as to make the act or conduct complained of their own. [Emphasis added.]

56 The appellants submit that the motion judge erred in his conclusion because the following seven types of allegations that were pleaded were sufficient in law to meet the *ScotiaMcLeod* test:

- While Fortress illegally operated as an unlicensed mortgage brokerage and assumed but failed to meet the statutory duties of a mortgage brokerage under the *Mortgage Brokerages, Lenders and Administrators Act, 2006*, S.O. 2006, c. 29, Mr. Rathore and Mr. Petrozza failed to carry out their statutory duty to ensure that Fortress met its statutory obligations;

- They breached their common law duty of care as well as their fiduciary and statutory duties that arose because Fortress took on the duties of a mortgage brokerage under the Act;

- They knew or ought to have known about Fortress's pleaded breaches of contract, duty of care, and fiduciary duty;

- Knowing that Fortress's breaches would likely cause the appellants significant harm, they took no steps to prevent that harm;

- They spoke on behalf of Fortress at investment seminars and stressed the safety and security of the Fortress investments;

- They were negligent and did not meet the standard of care expected of them in the circumstances; and,

- They acted outside the scope of their duties to Fortress.

57 I agree with the motion judge that these allegations do not provide any particulars of tortious conduct separate from that of the companies. Nor do any of the pleadings contain sufficient particularity to be able to identify any such conduct.

58 The appellants also submit that because the pleading sets out numerous claims of fraud, deceit and dishonesty by Fortress and that the two directors and officers knew or ought to have known about it, their conduct of permitting it to occur fits within the test.

59 The respondents say first, that this assertion was not made to the motion judge; and second, that there is no specific pleading of fraud, deceit or dishonesty on the part of the respondents. Again, I agree that without specifically pleaded allegations of fraud, deceit or dishonesty by the individual respondents, it is not possible to assess whether any such alleged misconduct can lead to a finding of personal liability.

60 Finally, the appellants point to the fact that in *ScotiaMcLeod*, the court allowed the action to proceed against the two most senior officers of Peoples. Finlayson J.A. described the basis for the claim against the senior officers, at p. 495:

> It is alleged against them that they were directly and personally involved in the marketing of the debentures and that they were involved in making certain representations personally which were relied on by the appellants. The appellants have also made an allegation of negligent misrepresentation against both of them personally.

61 The appellants submit that the four proposed statements of claim describe similar actions by Mr. Rathore and Mr. Petrozza and that these actions made them "directly and personally involved" in Fortress's improprieties.

62 With respect to this submission, only the Amended Amended Statement of Claim in the Collier Centre action contains a pleading alleging that the respondents made representations to one of the appellants. At paras.116-18, the appellants plead:

> 116. Thereafter, Aversa was invited to several Fortress seminars, some or all of which featured Rathore and Petrozza as the speakers extolling the appeal of the particular Fortress investment.
>
> 117. Aversa attended at least one seminar at which Rathore spoke. Rathore talked about his history in the business, the quality of the investments and that the investments were safe and secure. He also spoke about Fortress' commitment to charitable endeavors.
>
> 118. Rathore stated Fortress was solicited by many developers but only dealt with the most experienced and best ones.

63 There is, however, no pleading that Mr. Aversa relied on any representation made by Mr. Rathore. Nor is there a specific pleading of negligent or fraudulent misrepresentation by him, or that the representations were being made personally and not on behalf of Fortress.

64 As there is no pleaded legal basis for a personal claim against the two principals, I would not give effect to this ground of appeal. I also agree with the motion judge that there is no basis to grant leave to amend. The pleading has been amended a number of times, and the law on this issue is clear. If there were any relevant allegations, they would have been made already; no purpose would be served by granting leave to amend: *Piedra v. Copper Mesa Mining Corp.*, 2011 ONCA 191, 332 D.L.R. (4th) 118 (Ont. C.A.), at para. 98.

(2) Did the motion judge err in law by finding that the sealed contract rule prevents the appellants from enforcing the syndicated mortgages at common law?

65 The relief the appellants claim against the respondents Empire Pace and Adi includes judicial sale of the lands underlying the two developments, the Ten88 Project and the Sutton Project, rescission of all agreements with respect to the appellants' investments in the projects, an equitable tracing order in respect of the investment funds Empire Pace and Adi received, payment of all principal and interest owing due to Empire Pace and Adi's default under the Loan Agreements, and damages for misrepresentation.

66 Empire Pace and Adi moved for a declaration that the provisions of the syndicated mortgages prohibit the appellants from enforcing them and for an order dismissing the action against Empire Pace and Adi. The motion judge defined the issue between the parties as whether the appellants had standing to enforce the respective syndicated mortgages.

67 The mortgages were entered into between Empire Pace and Mr. Sorrenti and Olympia Trust as trustees, and between Adi and Mr. Sorrenti as trustee. The appellants are not parties to the syndicated mortgages.

68 The motion judge referred in his reasons to s. 13 of the *Land Registration Reform Act*, R.S.O. 1990, c. L.4, which provides that a mortgage that is not executed under seal has the same effect for all purposes as if it had been executed under seal. As a result, the sealed contract rule applies to the syndicated mortgages. That common law rule provides that only the signatories to a contract under seal may sue or be sued on it.

69 The appellants argue that the motion judge erred in law by finding that the sealed contract rule applies to both disclosed and undisclosed principals. They argue that the rule only applies to undisclosed principals, and that because Empire Pace and Adi knew that the trustees were acting on behalf of the appellants and the other investors, they are disclosed principals. As such, the appellants may sue on the mortgages.

70 I would not give effect to this argument. The sealed contract rule was recently affirmed by the Supreme Court of Canada in *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842 (S.C.C.). In that case, an agent and bare trustee for the undisclosed beneficial owners of property entered into a mortgage with the mortgagee, a corporate lender. When the mortgage went into default, the mortgagee sued the beneficial owners personally on the covenant given by the agent in the mortgage.

71 In *Friedmann*, as in this case, the operation of s. 13 of the *Land Registration Reform Act* had the effect of making the mortgage a document under seal. The mortgagee asked the court to set aside the sealed contract rule and allow its action against the undisclosed principals to proceed. The court declined to do so. Instead it affirmed the rule.

72 While the court discussed the rule in terms of its application to undisclosed principals, it is clear from the context of the court's discussion that the rule also applies to disclosed principals. The court began its explanation and analysis at para. 15 by stating the general rule in agency law as follows:

> When a third party contracts with an agent and the contract is not under seal, the principal has the same rights and liabilities under the contract whether he or she was disclosed to the third party . . . Therefore undisclosed principals can sue and be sued in their own name on any simple contracts made on their behalf by their agents as long as those agents have acted within the scope of their delegated authority in so doing. [Emphasis added.]

73 The general rule has been criticized because it allows people to sue one another on a contract even where one person is not named as a party to that contract. The court in *Friedmann* noted, however, that one could avoid the general rule's consequence either by expressly limiting liability to the named parties or by executing the contract under seal: at para. 18. One of the effects of executing a contract under seal, at common law, is that only a named party can sue on a covenant in the contract: at para. 20.

74 The appellants' position is that while they were not named as parties to the syndicated mortgages, their specific identities and the fact that the syndicated mortgages were being held for their benefit was disclosed to Empire Pace and Adi because Empire Pace and Adi knew that the trustees were acting on behalf of investors and because they signed documents that identified each of the investors as a holder of a beneficial interest in the Loan Agreements. Whether that makes the appellants disclosed principals who were not made parties or undisclosed principals, the result must be the same. Had the contract not been executed under seal, as principals, they could have sued or been sued on it. The effect of the sealed contract rule is to both protect them from suit and preclude them from having the right to personally enforce the security at common law.

75 The motion judge correctly found that the sealed contract rule prevents the appellants from suing to enforce the syndicated mortgages at common law.

(3) Did the motion judge err in law by finding that the appellants cannot enforce the syndicated mortgages in equity through a class proceeding?

76 The motion judge acknowledged that in circumstances where a trustee who is a party to a sealed contract takes no steps to enforce the contractual obligations of the other party, the beneficiaries of the trust may enforce the rights of the trustee in equity by bringing the action and including the trustee as a party to the action.

77 This right was recognized by the Supreme Court in *Friedmann*, where the court discussed the decision of the English Court of Appeal in *Harmer v. Armstrong* (1933), [1934] 1 Ch. 65 (Eng. C.A.). Bastarache J. stated that the *Harmer* decision merely provides a procedural method for the beneficiaries of a trust to effectively force the trustee to enforce its rights under agreements under seal for their benefit: at para. 29. The equitable right is based on the law of trusts, not the law of contract, and therefore it does not constitute an exception to the sealed contract rule. Bastarache J. also explained that the equitable rule does not have the effect of creating a legal relationship between the beneficiary and the contracting third party. Therefore, the third party may not use the rule to sue the beneficiary, and, importantly for this case, when the beneficiary sues to enforce the contract, it is to enforce the agreement "*according to its tenor*" (emphasis added), meaning the beneficiary is asserting the trustee's rights and not his or her own: at paras. 28, 30.

78 Based on his reading of the syndicated mortgages, the motion judge found that the trustees, having granted the specific standstill provisions in the respective syndicated mortgages, would not themselves be able to enforce those mortgages without the written consent of the prior-ranking mortgagees in accordance with the terms of the standstill provisions. The standstill provisions read:

> 13. Priority, Standstill, Forbearance and Postponement
>
> The Chargee acknowledges that the Chargor will be arranging for additional financing to facilitate the development of the project on the Lands which shall include but not be limited to soft and hard cost financing, marketing financing, additional equity and surety bonding/financing to be secured by real estate charge(s) and personalty [and any and all renewals and replacements thereof] [1] (the "Senior Security"). The current amount of the loans to be evidenced by the Senior Security are $100,000,000 [2] (the "Total Senior Security") which Total Senior Security shall increase from time to time as may be necessary to reflect any necessary adjustments to the project as to scope of the project or anticipated costs (the "Total Adjusted Senior Security"). The Chargee agrees with the Chargor as follows: [. . .]
>
> C. STANDSTILL/FORBEARANCE
>
> 1. The Chargee hereby covenants and agrees that from and after the date hereof, to and until the date of repayment of the outstanding indebtedness secured under the Total Adjusted Senior Security and the complete discharge thereof (which period of time is hereinafter referred to as the "Standstill Period"), the Chargee shall not take, direct, initiate, pursue or otherwise participate in (either directly or indirectly) any collection, realization or enforcement proceedings or remedies against (or otherwise affecting) the Chargor (nor against any party or parties who may be entitled to claim contribution or indemnity against the Chargor), nor against the Lands (or any portion thereof), nor against any chattels, fixtures, rents, leases and/or other personal property situate upon, within, or affixed to, or otherwise relating to the Lands or the Condominium complex (or any portion thereof), as a result of any breach, default or non-compliance with any covenants, conditions, representations, warranties, terms and/or provisions of this Chargee (or any portion thereof) save and except any enforcement proceedings or remedies first approved of in writing by all of the holders of the Total Adjusted Senior Security, which approval may be unreasonably withheld.

79 The motion judge rejected the appellants' submission that in an equitable enforcement action, the appellants could challenge the interpretation and enforceability of the standstill provision. He further found that, in any event, there would be no merit to any such challenge: the standstill provision's meaning is plain, and it requires the prior consent of the senior security holders to any proceeding enforcing the lenders' security. Finally, he found that based on the pleadings and the documents incorporated by reference into the pleadings, the standstill provision was adequately disclosed to the parties to the Loan Agreements as well as to the appellants themselves.

(3) (a) Is it plain and obvious that the standstill provisions bar the appellants from enforcing the syndicated mortgages in equity?

80 As Brown J.A. recently explained in *Brozmanova v. Tarshis*, 2018 ONCA 523 (Ont. C.A.), at paras. 10-13, there are two types of procedures available under the *Rules of Civil Procedure* to dispose of a contested claim. One involves leading evidence to prove or disprove the claim as pleaded; the other is to dismiss all or part of the claim on the basis that, regardless of the evidence, the claim cannot succeed as a matter of law.

81 In my view, the motion judge erred by proceeding to decide the equitable claims for mortgage enforcement using r. 21 (among the latter type of law-based procedures), and by dismissing them as bound to fail in law.

82 In drawing his conclusion that the claims for equitable enforcement of the mortgages against Empire Pace and Adi disclose no reasonable cause of action, the motion judge made three findings which required an evidentiary basis: 1) that properly interpreted, the standstill provision in the syndicated mortgages barred the appellants from enforcement; 2) that the standstill provision in the syndicated mortgages was adequately disclosed to the parties to the Loan Agreements; and 3) that the standstill provision in the syndicated mortgages was adequately disclosed to the appellants.

83 Regarding the first finding, the Supreme Court of Canada held in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at para. 50, that the interpretation of a contract is a question of mixed fact and law. Therefore, a party is entitled to lead relevant evidence regarding the surrounding circumstances of the contract's formation or

its context to aid in its interpretation. Interpreting the standstill provision in this case is no exception: to determine its effect on the appellants' ability to enforce the syndicated mortgages in equity in the particular circumstances of this case, relevant evidence may be available.

84 The second two findings are clearly factual. The motion judge relied on the documentary record before him in making those findings, but again, the appellants are entitled to lead evidence both to aid in the interpretation of those documents and to prove what was disclosed and when.

85 Even without further evidence, with respect, the motion judge's finding that the standstill provisions were adequately disclosed does not bear scrutiny. A review of the relevant documents shows that while a standstill provision is referred to in most of the key documents, the various references to a standstill provision are worded in different ways: for example, the Adi Loan Agreement contains a provision in which the trustee, Mr. Sorrenti, agreed "to enter into such standstill agreements as shall be *reasonable in the circumstances*" (emphasis added).

86 Since the effect of the standstill provisions, on their face, is to make the appellants' security essentially unenforceable and ensure that they will never recover their investment in the event of default, one could argue that the standstill provision that was ultimately granted in the syndicated mortgages was not reasonable in the circumstances or that its actual effect was not disclosed to the investors. Whether any non-disclosure would affect the enforceability of the standstill provision in equity by or on behalf of the trustees will be an issue of law to be determined once the evidentiary findings are made.

(3) (b) Is it plain and obvious that the mortgages are unenforceable through a class proceeding because some investors may opt out?

87 The motion judge did not find that it was plain and obvious that the claim could not succeed because the appellants have a very small interest in the loans to Empire Pace and Adi and because some investors could opt out of the proposed class action. He only raised the issue. In my view, the determination of this issue is premature and not a reason to strike the claim on a r. 21 motion.

Other grounds

88 The appellants have pleaded relief other than enforcement of the syndicated mortgages against the Empire Pace and Adi respondents. The other relief they seek includes: payment of all principal and interest owing under the Loan Agreements (which are not under seal themselves, but any enforcement of which may be affected by the existence of the sealed syndicated mortgages); rescission of all agreements respecting their investments in the syndicated mortgages; equitable tracing of all of their investment funds; and damages for Empire Pace and Adi's misrepresentation of certain information respecting the investments, including the value of the mortgaged properties. The motion judge dismissed the actions against Empire Pace and Adi without addressing the viability of any of these claims. The only one he referred to was the rescission claim, which he assumed the appellants would elect to abandon if they ultimately chose to enforce the syndicated mortgages. As these claims were not struck out by the motion judge, they will remain in the Empire Pace and Adi actions together with the equitable mortgage enforcement claims.

F. CONCLUSION

89 For the reasons outlined above, I would uphold the motion judge's decision to strike the claims against Mr. Rathore and Mr. Petrozza without leave to amend. However, I would allow the appeal with respect to the balance of the orders.

G. COSTS OF THE MOTIONS

90 The appellants also sought to appeal the costs orders made in favour of the Empire Pace and Adi respondents. As I would allow the appeal in respect of those claims, I would also set aside the costs awards.

H. COSTS OF THE APPEAL

91 It was agreed at the hearing that the parties would attempt to agree on the costs of the appeal following release of these reasons.

92 If the parties are unable to agree on the costs of the motion or the appeal, they may make brief (maximum three pages) written submissions to the court. The appellants' submissions shall be made within three weeks following release of these reasons and the respondents' within two weeks thereafter.

***G.R. Strathy C.J.O.*:**

I agree.

***David Brown J.A.*:**

I agree.

Appeal allowed in part.

Footnotes

1 The language in the square brackets is only included in the Adi mortgage document, registered against the Sutton Project lands.

2 This amount is from the Empire Pace mortgage document, registered against the Ten88 Project lands. The amount included in the equivalent provision in the Adi mortgage document, registered against the Sutton Project lands, is $45,000,000.

TAB 9

Re Holmes
Re Sinclair

(1976), 9 O.R. (2d) 240

ONTARIO
SUPREME COURT OF ONTARIO
IN BANKRUPTCY
HENRY, J.
22ND MAY 1975

Bankruptcy -- Acts of bankruptcy -- Ceasing to meet liabilities generally -- Whether proof of single unpaid debt sufficient -- Bankruptcy Act (Can.), s. 24(1)(j).

In order to establish as an act of bankruptcy under s. 24(1)(j) of the Bankruptcy Act, R.S.C. 1970, c. B-3, that a debtor "ceases to meet his liabilities generally as they become due", it is not sufficient for a petitioning creditor to prove that an unpaid debt is owed to him alone. Some evidence is required that the debtor has ceased to meet his liabilities to others.

[Re Dixie Market (Nurseries) Ltd. (1971), 14 C.B.R. (N.S.) 281; Re Polyco Distributors Ltd. (1971), 14 C.B.R. (N.S.) 285; Re King Petroleum Ltd. (1973), 2 O.R. (2d) 192, 42 D.L.R. (3d) 322, 19 C.B.R. (N.S.) 16, distd; Re Elkind (1966), 9 C.B.R. (N.S.) 274, refd to]

PETITIONS for receiving orders in bankruptcy.

Gerald S. Gringorten, for petitioner.

M. Siegel, for respondents.

HENRY, J.:-- These two petitions in bankruptcy were tried together as the debt alleged to be owing to the petitioning creditor, the Huron and Erie Mortgage Corporation, is the joint debt of Mr. Holmes and Miss Sinclair. The evidence shows that these persons operated a chequing account in the St. Clair West branch of the petitioning creditor in Toronto. Apparently the account was used primarily for real estate investments and related transactions. This account became overdrawn for the main reason that several cheques were deposited in the account and were subsequently returned N.S.F. After the account had been in an overdraft position for some time, the two debtors on November 5, 1974, jointly acknowledged their indebtedness in respect of the overdraft in writing, and at the same time they gave a joint demand note to the petitioning creditor for the amount outstanding, which was $46,418.97. They also agreed to a programme of periodic payments to repay the debt. The first payment of $1,000 was made. In spite of demands made by the company upon the debtors, nothing further has been paid on the debt.

I am satisfied that the petitioning creditor has proved the following allegations in the petitions against each of the debtors -- that the debt exceeds $1,000; that the amount is as stated in the petitions, less the $1,000 paid on account; that the debtors reside within the jurisdiction of this Court; that they have defaulted on this obligation within the six-month period prescribed; and that the proposed trustee is qualified and available. I am, however, not satisfied that the essential act of bankruptcy alleged has been proved.

Paragraph 3 of each petition alleges that the debtor has ceased to meet his liabilities generally as they became due. This is the only act of bankruptcy alleged. Under the jurisprudence, the Bankruptcy Act, R.S.C. 1970, c. B-3, being a quasi-criminal statute, the act of bankruptcy and every allegation in the petition must be strictly proved: Re Elkind (1966), 9 C.B.R. (N.S.) 274. This requires that evidence be placed before the Court to prove all the allegations of fact made in the petition, whether or not they are put in issue by the debtor in his notice of dispute, including what might be regarded as merely formal facts. All the elements necessary to found a receiving order must be pleaded in the petition and all allegations made therein must be strictly proved by the petitioning creditor.

In the case of each of these petitions, the petitioning creditor has proved the debt owing to it beyond question, but it stops there. Only two witnesses were called -- both employees of the petitioning creditor. No evidence that I could regard as admissible was led to disclose the existence or identity of any other creditor of these debtors. Clearly the witnesses believed there were other creditors, but no attempt was made to bring proper evidence of the situation before the Court. Instead, counsel submitted that the receiving order should be made on the ground that the present state of the law allows me to grant a receiving order where there is proof of default to only one creditor. In making this submission Mr. Gringorten referred me to the judicial decisions in Re Raitblat (1925), 28 O.W.N. 237 [1925] 2 D.L.R. 1219, 5 C.B.R. 714; affirmed 28 O.W.N. 292, [1925] 3 D.L.R. 446, 5 C.B.R. 765; Le Comite de L'Industrie de la Construction de la Region de Montreal v. Colonello Construction Inc. (1967), 10 C.B.R. (N.S.) 19; Kaneb v. Canadian Int'l Paper Co. (1968), 12 C.B.R. (N.S.) 41; Re Dixie Market (Nurseries) Ltd. (1971), 14 C.B.R. (N.S.) 281; Re Polyco Distributors Ltd. (1971), 14 C.B.R. (N.S.) 285; and Re King Petroleum Ltd. (1973), 2 O.R. (2d) 192, 42 D.L.R. (3d) 322, 19 C.B.R. (N.S.) 16.

I have carefully considered these decisions and it is clear that the Courts, in Ontario at least, have granted a receiving order on the basis of a default to one creditor in special circumstances. These circumstances are:

(a) the creditor is the only creditor of the debtor, and the debtor has failed to meet repeated demands of the creditor; in these circumstances he should not be denied the benefits of the Bankruptcy Act by reason only of his unique character; or

(b) the creditor is a significant creditor and there are special circumstances such as fraud on the part of the debtor which make it imperative that the processes of the Bankruptcy Act be set in motion immediately for the protection of the whole class of creditors; or

(c) the debtor admits he is unable to pay his creditors generally, although they and the obligations are not identified.

I find on the evidence that these circumstances do not exist here.

Because this Court has in some of the recent decisions referred to, such as Dixie Market, Polyco and King Petroleum, made a receiving order on proof of failure to meet a liability to a single creditor, it is not to be taken to have established a new principle that a petitioning creditor need only prove default with respect to the debt owing to him. Those decisions in my judgment do not lay down such a principle; they are as I see it, merely the application to particular facts of the general rule (exemplified by the decision in Re Elkind, supra, that when relying on an act of bankruptcy described in s. 24(1)(j) the petitioning creditor must strictly establish that, in the words of the statute, the debtor "ceases to meet his liabilities generally as they become due"; in all of them the Court was influenced either by the existence of other creditors, or of one of the special circumstances I have set out above. In the non-exceptional case, as in the case at bar, that situation cannot be ordinarily proved by having regard to the experience of one creditor only, even though he may be a major creditor. Resort to the statutory machinery of the Bankruptcy Act, rather than to the remedies to enforce a debt or claim in the ordinary Courts, is intended by Parliament to be for the benefit of the creditors of a debtor as a class, and the act of bankruptcy described in s. 24(1)(j) is in my judgment, an act that singles out the conduct of the debtor in relation to the class, rather than to the individual (as is the case under s. 24(1)(e)). It is for this reason that the Court must be satisfied that there is sufficient evidence from which an inference of fact can fairly be drawn that creditors generally are not being paid. This requires as a minimum some evidence that liabilities other than those incurred towards the petitioning creditor, have ceased to be met. The Court ought not to be asked to draw inferences with respect to the class on the basis of one creditor's experience where evidence of the debtor's conduct towards other members of the class could, with reasonable diligence, be discovered and produced. The Court's intuition is no substitute for the diligence of the petitioning creditor.

In the case before me, the petitioning creditor has not established conduct of the debtors towards other creditors. I am, in effect, asked to infer that there is a group of creditors who have not been paid. It is not possible to say, on the evidence, whether they exist at all, or are few or numerous, or whether their claims individually or in total are significant or, most important, to say whether the debtors have ceased to meet their liabilities generally.

The petitions will therefore be dismissed. I am bound to point out, however, that on the evidence the debtors have behaved in a most irresponsible manner towards the petitioning creditor, although on the evidence I do not find it was fraudulent. They have undertaken to discharge their indebtedness by a programme of payments which they have virtually ignored without explanation. They have put up security that is heavily encumbered. They have opposed the petitions in part by suggesting that if time were allowed, assets could be liquidated to discharge their debt, when, as appears from the evidence, this is patently not so. They have not seen fit to attend personally in Court to support by their testimony the position they have taken in the notice of dispute. They succeed here, not by reason of any merit in their position, but by reason of the failure of the petitioning creditor to discharge the onus upon it.

In these circumstances there will be no order for costs and the dismissal of the petitions is without prejudice to this or another creditor presenting a new petition.

Petitions dismissed.

TAB 10

2005 CarswellOnt 1998
Ontario Superior Court of Justice

Lai, Re

2005 CarswellOnt 1998, [2005] O.J. No. 2032, 12 C.B.R. (5th) 245, 139 A.C.W.S. (3d) 222, 75 O.R. (3d) 451

IN THE MATTER OF THE BANKRUPTCY OF EDWARD LAI

Ground J.

Heard: May 2, 2005
Judgment: May 17, 2005
Docket: 31-OR-207209-T

Counsel: D. Howell for Applicant, 1606276 Ontario Limited
Marek Z. Tufman for Edward Lai

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.1 Grounds for application
Bankruptcy and insolvency
III Applications for bankruptcy orders
III.3 Hearing of application
III.3.b Defences
Headnote
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy — Ceasing to meet liabilities generally
Creditor became so by taking assignment of debt of L in amount of $22,000 — Creditor was corporation formed by principal for purchasing debt of L, whom principal blamed for business loss unrelated to proceedings at bar — Creditor brought application for bankruptcy order against L — Application dismissed — L was able to meet liabilities as they became due — No creditor was actively pressing L for payment of debts — Some claims were being negotiated or were in settlement process — Application brought for improper purpose of punishing L for creditor's principal's earlier loss.
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Improper purpose of creditor
Creditor became so by taking assignment of debt of L in amount of $22,000 — Creditor was corporation formed by principal for purchasing debt of L, whom principal blamed for business loss unrelated to proceedings at bar — Creditor brought application for bankruptcy order against L — Application dismissed — L was able to meet liabilities as they became due — No creditor was actively pressing L for payment of debts — Some claims were being negotiated or were in settlement process — Application brought for improper purpose of punishing L for creditor's principal's earlier loss.
Table of Authorities
Cases considered by *Ground J.*:

Arnco Business Services Ltd., Re (1983), 49 C.B.R. (N.S.) 188, 38 C.P.C. 226, 1983 CarswellOnt 241 (Ont. Bktcy.) — referred to

De La Hooke, Re (1934), 15 C.B.R. 485, 1934 CarswellOnt 95 (Ont. S.C.) — considered

Four Twenty-Seven Investments Ltd., Re (1985), 55 C.B.R. (N.S.) 183, 1985 CarswellOnt 171 (Ont. S.C.) — referred to

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 1979 CarswellOnt 185 (Ont. Bktcy.) — referred to

Pooley, Re (1882), [1882] 20 Ch. D. 685 (Eng. Ch. Div.) — considered
Steintron International Electronics Ltd., Re (1986), 7 B.C.L.R. (2d) 267, 62 C.B.R. (N.S.) 78, 1986 CarswellBC 477 (B.C. S.C.) — distinguished
Vipond v. Ewing (1941), 22 C.B.R. 268, 70 Que. K.B. 41, 1941 CarswellQue 4 (Que. K.B.) — distinguished
Westlake, Re (1984), 53 C.B.R. (N.S.) 207, 1984 CarswellOnt 183 (Ont. S.C.) — followed

APPLICATION by creditor for bankruptcy order against debtor.

***Ground J.*:**

1 This is an application for a Bankruptcy Order against Edward Lai ("Lai). The only applicant creditor is 1606276 Ontario Limited ("160"), a company owned by Mr. Mark Risdon ("Risdon"), which was incorporated for the purpose of purchasing debts owed by Lai to various creditors.

2 On April 2, 2004, 160 took an assignment of a judgment obtained by Goodman & Goodman, now Goodmans LLP, ("Goodmans") on September 2, 1992 in the amount of $3,576.19 in respect of an account for legal services to Lai and a company controlled by him. It would appear that Goodmans had taken no active steps to enforce this judgment prior to the assignment of the judgment to 160.

3 Neither Risdon nor 160 had previously been a creditor of Lai. Risdon had, however, invested in the late 1990s in shares of IBI Corporation Ltd., ("IBI"), a company at that time managed and controlled by Lai, and had suffered a substantial loss on that investment which Risdon appears to attribute to some misrepresentation or malfeasance on the part of Lai. It is significant that Risdon is still a shareholder of IBI and has never brought any proceedings against Lai based upon such alleged misrepresentation or malfeasance nor commenced any oppression or derivative proceedings as a shareholder of IBI.

4 After service of a demand letter dated September 27, 2004 from counsel to 160 to Lai, this application was issued on October 7, 2004 and served on Lai by way of substitutional service on October 18, 2004.

5 The act of bankruptcy alleged in the application is that Lai had ceased to meet his liabilities generally as they became due. In support of this allegation 160 relies on the fact that, as of the date of the application, there were outstanding judgments against Lai and executions filed against him in the following approximate amounts:

CT Tower Investments Inc. -	$245,000
Banca Commerciale Italiana -	$350,000
Amex Bank of Canada -	$ 22,000
Goodman & Goodman -	$ 4,200

6 All such judgments and executions date back to the early or mid 1990s. The evidence is clear that none of the judgment creditors had been pressing Lai for payment of these judgments. In the case of Banca Commerciale Italiana ("BCI"), the evidence of Lai was that the judgment against him arose out of advances by BCI to National Executive Centres Inc. ("NEC"), a company controlled by him, and presumably as a result of his personal guarantee of the obligations of NEC to BCI. Lai's testimony was that the claim against him had been settled several years ago on the basis of a payment by him to BCI in the amount of $20,000 although Lai had no documentary evidence to substantiate this settlement.

7 With respect to Amex Bank of Canada ("Amex"), Lai's evidence was that the $22,000 claimed by Amex was made up of an approximately $6,000 credit card purchase and accrued interest on that amount for a number of years and that he had disputed the $6,000 charge as the purchase had been made by an employee on his credit card and was not authorized by him. Lai's testimony was that the matter had been settled with Amex following a call from Mr. Howell to Amex advising it of the bankruptcy proceedings and a subsequent threat by Amex to cancel Lai's Holt Renfrew/Amex credit card. This account was settled as between Lai and Amex on March 23, 2005 on the basis of payments to Amex in the total amount of $6,149.75.

8 With respect to CT Tower Investments Inc. ("CT Tower"), Lai's evidence was that this judgment resulted from arrears of rent owed by NEC to CT Tower for space leased in BCE Place and presumably, the judgment against him was based upon a personal guarantee by Lai of the rental payments. It was clear from the evidence that CT Tower had not been pressing Lai for payment of its judgment in that, after the institution of these bankruptcy proceedings, Lai had approached CT Tower to negotiate a settlement of its claim against him. This claim was settled between Lai and CT Tower on February 22, 2005 on the basis of a payment of $50,000 to CT Tower, $30,000 having been paid on March 28, 2005 and two of the four payments of $5,000 each also having been paid when due, the other two payments being not yet due.

9 With respect to Goodmans, there was evidence before this court of cheques from Lai and one of his companies to Goodman & Goodman in 1992 on which Lai had stopped payment and one cheque which was returned NSF. Lai's testimony was that he had been advised by a legal colleague that he was not personally liable for the Goodmans' account. There was also some evidence, although not particularly convincing, that there had been confusion between amounts owing by NEC to Goodman & Goodman and Goodman & Carr. As stated above, the evidence was clear that Goodmans had not been pressing for payment of their claim and had taken no active steps to collect payment prior to the assignment of their judgment to 160 on April 2, 2004.

10 There was no evidence that there had been any requests for payment by any of the execution creditors which had not been met by Lai. There was ample evidence, including an Equifax credit report, of credit cards and a line of credit held by Lai being in good standing. In addition, Lai provided reasonable explanations as to why BCI, CT Tower and Amex had not pursued collection of their judgments against him and had agreed to settlements on terms beneficial to Lai and, although the details of the settlement negotiations were ruled inadmissible, there was evidence that Lai had attempted to settle the claim of Goodmans.

11 On the basis of the above evidence, I am unable to conclude that Lai was not meeting his liabilities generally as they became due and, accordingly, the application is dismissed as the Applicant has failed to establish the alleged act of bankruptcy that Lai has ceased to meet his liabilities generally as they became due.

12 This application does, however, raise another disturbing issue. Risdon's evidence was that he incorporated 160 for the sole purpose of purchasing debts owed by Lai to third parties, that 160 would have purchased all the debts that were available for purchase, that he believed Lai was a "swindler" who had swindled a lot of people who had invested in IBI, that he believed that Lai should be made to pay his financial obligations and that this court should ensure that Lai lives up to his financial obligations. Risdon also conceded that this is a personal crusade and that he is seeking vengeance against Lai. Risdon's motives are purely vengeful and vindictive. The bankruptcy of Lai is sought solely to punish Lai for what Risdon believes was Lai's responsibility for Risdon's investment loss in the shares of IBI. He appears to fancy himself as some sort of vigilante seeking justice for investors in IBI "swindled" by Lai.

13 Counsel for the Applicant submitted, however, that the motive of Risdon in bringing this application through 160 is irrelevant and should not be a factor to be considered by this court in its disposition of the application.

14 Counsel for the Applicant relies for this proposition upon statement by St. Jacques, J. in *Vipond v. Ewing* (1941), 22 C.B.R. 268 (Que. K.B.) at page 272 (translation)

> The motives of vengeance that the Superior Court identified in the evidence cannot be an obstacle to the application of a bankruptcy, if, in addition, it is well founded in law

and upon the judgment of Cumming J. in *Steintron International Electronics Ltd., Re* (1986), 62 C.B.R. (N.S.) 78 (B.C. S.C.) at page 52 as follows:

> I do not see how the mere fact that, as part of its motive in bringing this application, NEC is seeking to establish its qualification to recover under the Japanese export credit insurance scheme condemns these proceedings to failure on the ground, as it is alleged, they are being used to obtain a collateral advantage. The motive of NEC is not a factor: see *Re De La Hooke* (1934), 15 C.B.R. 485 at 499-89 (Ont. S.C.), citing with approval *King v. Henderson*, [1898] A.C. 720 at 731, 67 L.J.P.C. 134 (P.C.), where Lord Watson says:

> Their Lordships do not dispute the soundness of the proposition that a plaintiff or petitioner who institutes and insists in a process before the Bankruptcy or any other Court, in circumstances which make it an abuse of the remedy sought or a fraud upon the Court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or as fraud upon the Court. In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shewn that, in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable.

15 With great respect, the above decisions do not, in my view, reflect the law of Ontario today. Although there is authority for the proposition that it is not an improper purpose or an abuse of process to petition a creditor into bankruptcy in order to gain priority over other creditors, to collect the debt or to take advantage of remedies not available outside of bankruptcy including an investigation of the bankrupt's affairs. *See Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.); *Arnco Business Services Ltd., Re*, [1983] O.J. No. 974 (Ont. Bktcy.) at paragraphs 20 and 21; and *Four Twenty-Seven Investments Ltd., Re*, [1985] O.J. No. 1733 (Ont. S.C.) at paragraph 18, the law in Ontario is clear that, if the petition is brought for some collateral purpose, it will be dismissed and, in particular, if the object of acquiring a debt of the debtor was for the purpose of bringing a petition in bankruptcy, this will be found to be an improper purpose or an abuse of the process of the bankruptcy court. In *De La Hooke, Re* (1934), 15 C.B.R. 485 (Ont. S.C.), the court quoted from the decision of the Chancery Division in *Pooley, Re*, [1882] 20 Ch. D. 685 (Eng. Ch. Div.) at 692 as follows:

> I must take it, therefore, that Mr. Harper knew that the object of buying up this debt was, not the recovery of the debt, but to make Mr. Holt a bankrupt, and (as I consider to be the fair inference) with the view of removing him from being trustee. But, even if it goes no further than the first proposition, it is a gross abuse of the bankruptcy laws. And we must recollect that all this occurred after the well known judgment, a judgment which made a great noise in the profession, in Ex parte Griffin, 12 Ch.D 480, which was delivered in July, 1879, and in which Lord Justice Cotton said, 12 Ch. Div. 483: "The Proceedings In Bankruptcy were not taken to obtain payment of the debt, but the debt was purchased to order to take the proceedings in bankruptcy;" and Lord Justice James added that he entirely agreed with that, and that after what Lord Justice Cotton had said "people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings." Now a solicitor, who after that chooses to be concerned In buying up a debt with a view of taking bankruptcy proceedings, cannot complain if his conduct Is viewed with disapprobation by a Court of Justice.

16 In *De La Hooke, Re*, *supra*, the court found that the petition was filed for the purpose of removing a business competitor who was using a similar trade name and that the filing was accordingly for collateral purpose and the petition was dismissed. In Houlden & Morawetz in commenting on that case at page 2-45, the author states:

> When the effect of an agreement between the petitioning creditor and some non-creditors was to embroil the petitioning creditor in an improper objective of the purchasers of a business who as non-creditors had no status in the bankruptcy proceedings and were intermeddling in it, and the objective was to bring about the bankruptcy of the debtors, held — the whole proceeding was tainted and the Petition must be dismissed: Re Pappy's Good Eats Ltd. (1985), 56 CBR (NS) 334 (Ont. SC).

17 I adopt the statements of Potts, J. in *Westlake, Re*, [1984] O.J. No. 2341 (Ont. S.C.) at paragraphs 9 and 10:

> It is clear on the evidence that this petition was vindictive as part of a vendetta over these years. The petitioning creditor, when asked in cross-examination what benefit she would receive if the petition were granted, made some vague response that justice would be satisfied. Justice in her mind equates with vindictiveness. It reminds me of Shakespeare and the Merchant of Venice, the pound of flesh; with no other creditors involved she thought she would get her satisfaction by putting this lady into bankruptcy, knowing full well from this nulla bona returns that there was little possibility that she would recover on these costs.

18 This court, in my view, is required to consider whether a proceeding in bankruptcy is being brought for an improper purpose or is an abuse of the process of this court and whether the relief sought in the proceeding is consistent with the purpose and intent of bankruptcy legislation which is to provide for the orderly distribution of the assets of the bankrupt among the bankrupt's creditors for the general benefit of such creditors and to provide an opportunity for the granting of a fresh start and rehabilitation for the bankrupt. In the case at bar, the motives of Risdon in bringing this application through 160 clearly establish that the proceeding is brought for an improper purpose and is an abuse of the process of this court and bears no relation to the purpose and intent of bankruptcy legislation. I would dismiss the application on this basis even if I had concluded that an act of bankruptcy had been established.

19 The application is dismissed.

20 Counsel may make brief written submissions to me as to the costs of this application on or before June 17, 2005.

Application dismissed.

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Intercap Equity Inc. v. Bellman | 2022 ONCA 61, 2022 CarswellOnt 855, 343 A.C.W.S. (3d) 207, 25 B.L.R. (6th) 309, 160 O.R. (3d) 536 | (Ont. C.A., Jan 26, 2022)

2018 ONSC 7116
Ontario Superior Court of Justice (Divisional Court)

Dhawan v. Shails et. al.

2018 CarswellOnt 19811, 2018 ONSC 7116, 299 A.C.W.S. (3d) 378, 85 B.L.R. (5th) 294

Rajender Singh Dhawan (Plaintiff / Respondent) and Shails Communication Inc., Santosh Shail, Swapna Shail, TD Canada Trust and Scotiabank (Defendants / Appellants)

Sally Gomery J.

Heard: November 19, 2018
Judgment: November 27, 2018
Docket: 17-2269-DV

Proceedings: reversing *Dhawan v. Shails Communication Inc.* (2016), 2016 ONSC 7743, 2016 CarswellOnt 20546, Champagne Master (Ont. S.C.J.)

Counsel: David Debenham, for Plaintiff / Respondent
Colin Johnston, for Defendants / Appellants

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Guarantee and indemnity

II Guarantee

II.2 Continuing guarantee

II.2.c Miscellaneous

Headnote

Guarantee and indemnity --- Guarantee — Continuing guarantee — Miscellaneous

Individual defendants were directors of defendant company, and plaintiff invested money in company — Parties consented to judgment of $244,059.96 in favour of plaintiff against company, but company did not have funds to pay judgment — Plaintiff claimed that individual defendants signed number of personal guarantees for debts of company for which they were personally liable — Plaintiff also alleged oppression under s. 248 of Business Corporations Act — Plaintiff's motion for partial summary judgment against individual defendants for order finding them personally liable for consent judgment was granted — Trial judge found evidence allowed for findings of fact to be made, and dispute could fairly be resolved — Trial judge found undisputed evidence was that plaintiff advanced $750,000 to company for various projects, and he was repaid $516,233, plus plaintiff had seized $122,912.20 from company's bank accounts — Trial judge found while there was dispute as to whether amounts plaintiff advanced to company were loans for investment or whether plaintiff was shareholder, there was no dispute that company owed plaintiff $244,059.96 — Trial judge found there was no dispute that individual defendants both signed personal guarantee for indebtedness of company in 2010 — Trial judge found there was dispute over signing of 2013 promissory notes and personal guarantees, but on face of them, notes and guarantees met criteria in Bills of Exchange Act — Trial judge found given that individual defendants made allegations of misrepresentation that could impact their validity, 2013 notes and guarantees were not relied on in coming to decision — Trial judge found 2010 Guarantee was continuing guarantee where individual defendants intended to guarantee present and future debts of company, and they were personally liable for consent judgment — Defendants appealed — Appeal allowed — Given inconsistent terms in 2010 Guarantee, parties' intent could only be ascertained by examining circumstances surrounding its execution, including overall deal on same day as reflected in contract and 2010 note — Trial judge did not refer to terms of contract or note, which amounted to error of law — There were not two reasonable interpretations of 2010 Guarantee, once all of its terms and its context are taken into consideration, and only reasonable interpretation was that guarantee related to 2010 note and was not continuing all accounts guarantee — Obligations under 2010 Guarantee were extinguished — Matter of 2013 Guarantee was not appropriate for summary judgment.

Table of Authorities

Cases considered by *Sally Gomery J.*:

Canadian National Railway v. Canadian Pacific Ltd. (1978), [1979] 1 W.W.R. 358, 95 D.L.R. (3d) 242, 1978 CarswellBC 525 (B.C. C.A.) — referred to

Canadian National Railway v. Canadian Pacific Ltd. (1979), [1979] 2 S.C.R. 668, [1979] 6 W.W.R. 96, 105 D.L.R. (3d) 170, 1979 CarswellBC 712, 1979 CarswellBC 761 (S.C.C.) — referred to

Clayton's Case, Re (1816), 35 E.R. 781, 1 Mer. 572, [1814-23] All E.R. Rep. 1 (Eng. Ch. Div.) — referred to

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

Mehdi-Pour v. Minto Developments Inc. (2010), 2010 ONSC 5414, 2010 CarswellOnt 8709 (Ont. S.C.J.) — referred to

Mehdi-Pour v. Minto Developments Inc. (2011), 2011 ONSC 3571, 2011 CarswellOnt 5478, 3 C.L.R. (4th) 191, 282 O.A.C. 299 (Ont. Div. Ct.) — referred to

Royal Bank of Canada v. Samson Management & Solutions Ltd. (2013), 2013 ONCA 313, 2013 CarswellOnt 5709, 115 O.R. (3d) 380, 306 O.A.C. 190, 362 D.L.R. (4th) 633, 15 B.L.R. (5th) 1 (Ont. C.A.) — considered

1079268 Ontario Inc. v. GoodLife Fitness Centres Inc. (2017), 2017 ONCA 12, 2017 CarswellOnt 71, 411 D.L.R. (4th) 558, 80 R.P.R. (5th) 57 (Ont. C.A.) — considered

1465778 Ontario Inc. v. 1122077 Ontario Ltd. (2006), 2006 CarswellOnt 6582, 216 O.A.C. 339, 82 O.R. (3d) 757, 275 D.L.R. (4th) 321, 38 C.P.C. (6th) 1 (Ont. C.A.) — referred to

Statutes considered:

Arbitration Act, 1991, S.O. 1991, c. 17

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20.04(2.1) [en. O. Reg. 438/08] — considered

APPEAL by defendant from judgment reported at *Dhawan v. Shails Communication Inc.* (2016), 2016 ONSC 7743, 2016 CarswellOnt 20546 (Ont. S.C.J.), allowing summary judgment on guarantee of debt.

***Sally Gomery J.*:**

1 This appeal centres on the interpretation of a personal guarantee.

2 On July 7, 2010, Santosh Shail and Swapna Shail executed a guarantee in favour of Rajender Singh Dhawan (the "2010 Guarantee"). On December 8, 2016, a Master held that, by virtue of the 2010 Guarantee, the Shails were liable for all of the debt owed to Dhawan by their company, Shails Communication Inc. ("SCI"). She granted Dhawan partial summary judgment against the Shails for $244,059.96 plus $17,000 in costs, the amounts in a consent judgment already granted in SCI's favour.

3 In this appeal, the Shails contend that the Master erred in her interpretation of the 2010 Guarantee. They ask this court to set aside her decision and find that any debt owed under the Guarantee has been discharged. Dhawan says that the Master made no reviewable error. In the alternative, Dhawan says that I should find the Shails liable for the company's debt based on further guarantees they signed in 2013 (the "2013 Guarantees").

4 For the reasons that follow, I am granting the appeal and dismissing the claim against the Shails based on the 2010 Guarantee. I am not making any determination on the enforceability of the 2013 Guarantees because, as found by the Master, this is not an issue appropriate for summary judgment.

Background

5 Most of the facts relevant to this appeal are not in dispute, either because they have been admitted or appear on the face of the agreements between the parties.

6 In July 2010, Dhawan entered into an agreement with SCI to provide funding for a proposed project with the Government of Ethiopia (the "Contract"). Under the terms of the Contract, Dhawan would advance $50,000 to SCI immediately so that it could bid on the project. If SCI's bid was rejected by the Ethiopian Government, it would return this money to Dhawan without interest. If SCI's bid was accepted, Dhawan would advance a further $250,000 to SCI to fund its work on the project. Once the project was completed, Dhawan would be repaid his money and 25% of the profits of the project. [1]

7 Further to paragraph 3 of the Contract, SCI's obligation to repay Dhawan would be secured by a promissory note and a personal guarantee from the Shails. If Dhawan advanced a further loan of $250,000 to proceed with the execution of the project, paragraph 9 provided that SCI would "execute a further promissory note and guarantee for these monies".

8 The Contract, the 2010 Guarantee, and a demand promissory note (the "2010 Note") were all drafted by Dhawan and signed on July 7, 2010. The Preamble and first two sections of the 2010 Guarantee read as follows:

> **WHEREAS:**
>
> > A. *Shails Communications Inc.* . . . (herein referred to as the "Borrower") has issued in favour of the Lender [Dhawan] a Demand Promissory Note of July 7, 2010 (such note as it may hereafter be amended, modified, supplemented, renewed, substituted or replaced from time to time is herein referred to as the "note") pursuant to which the Borrower has agreed to repay its indebtedness to the Lender.
> >
> > B. The Guarantors [the Shails] wishes the Borrowers, which is equally and wholly owned by the Guarantors, to repay the indebtedness in accordance with the terms set out in the Note in favour of the Lender and, therefore, is willing to execute and deliver this Guarantee to the Lender.
>
> NOW THEREFORE in consideration of the Lender accepting repayment of the indebtedness in accordance with the note, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Guarantors, the Guarantors agrees as follows:
>
> > 1. **Interpretation**. All terms defined in the note and not otherwise defined herein and used in this Guarantee shall have the meanings ascribed thereto in the note.
> >
> > 2. **Guarantee.** The Guarantors, severally and jointly, hereby unconditionally and irrevocably guarantees, as a continuing obligation, payment to the Lender forth-with after demand therefor of all present and future indebtedness, obligations and liabilities of any kind whatsoever which the Bor-rower has incurred or may incur or be under to the Lender arising under or in connection with the note (herein collectively referred to as the "obligations"). All amounts payable by the Guarantors hereunder shallbe paid to the Lender at his address as aforesaid or as otherwise directed by the Lender. For greater certainty, this shall be a continuing guarantee and shall cover all of the obligations now or hereafter existing and shall apply to and secure any ultimate balance due or remaining due to the Lender. [2]

9 Following execution of the Contract, the 2010 Note and the 2010 Guarantee, Dhawan advanced $50,000 to SCI. He advanced a further $250,000 to SCI and the Shails between July and October 2010. SCI won the bid for the Ethiopian project, and in December 2010 a contract was signed between the company and the Ethiopian Government. SCI and the Shails did not sign any further guarantee and promissory note for the additional money lent by Dhawan, as contemplated in paragraph 9 of the Contract.

10 Although by October 2010 Dhawan had advanced all of the money contemplated in the Contract, he subsequently provided SCI and the Shails with additional loans of $450,000 to fund the Ethiopian project and other investments. The Shails did not provide any further personal security until March 2013, when Dhawan alleges that they signed the two 2013 Guarantees. The Shails deny that these guarantees are enforceable for various reasons.

11 The parties agree that Dhawan provided SCI with $750,000 in total. They also agree that he is entitled to 25% of the profits from the Ethiopian project. Taking into account repayments by SCI of approximately $640,000, and about $123,000 seized by Dhawan from SCI's bank account, Dhawan is owed $244,059.96. Of this amount, $110,154.80 represents the unpaid balance of loans and $133,905.16 the unpaid profit share.

12 In April 2016, Justice Ray issued an order, on consent, that required SCI to repay Dhawan $244,059.96 plus $17,000 in costs.

The Master's Judgment

13 On September 8, 2016, Dhawan moved for partial summary judgment against the Shails. In her decision on the motion, Master Champagne (as she then was) concluded that, by signing the 2010 Guarantee, the Shails agreed to repay all of SCI's current and future debts to Dhawan.

14 In reaching her decision, the Master rejected the Shails' argument that the phrase "arising under or in connection with the note" in section 2 of the 2010 Guarantee limited the scope of their indebtedness to the amount that Dhawan would recover from SCI pursuant to the 2010. She wrote:

> I agree that the indebtedness includes the note but the passage as a whole says the guarantee covers "obligations and liabilities of any kind whatsoever which the Bor-rower [sic] has incurred **or** may incur **or** be under to the Lender arising under or in connection with the note (herein collectively referred to as the "obligations")" [Emphasis added]. This suggests to me that the $50,000 note was meant to be included along with other contemplated indebtedness. The last sentence of paragraph 2 of the guarantee that "[f]or greater certainty, *this shall be a continuing guarantee and shall cover all of the obligations now or hereafter existing* and shall apply to and secure any ultimate balance due or remaining due to the Lender" [Emphasis added] makes that clear.

15 The Master rejected the Shails' affidavit evidence that the 2010 Guarantee was not meant to secure further advances made by Dhawan to SCI. In her view, these were bald and unsupported assertions. They were furthermore, in her view, contradicted by "documented and substantiated evidence that clearly shows that the plaintiff made a series of long term loans and advances to SCI and that SCI repaid him various sums over the period of three years", a course of action which the Master found was consistent with the interpretation of the Guarantee as a continuing guarantee.

16 In interpreting the 2010 Guarantee, the Master relied on the Court of Appeal's decision in *Royal Bank of Canada v. Samson Management & Solutions Ltd.* [3] In that case, the Court held that a guarantee given by an individual to secure a line of credit by a bank was a "continuing all accounts guarantee". The Master concluded that:

> The wording of the [2010] guarantee contemplates future loans by the plaintiff and future indebtedness by SCI which in fact occurred. In the circumstances, I find that the Shails are personally liable for the debts of SCI.

17 The Master accordingly granted Dhawan partial summary judgment for $244,059.96 plus $17,000 in costs, the amounts SCI had been ordered to pay to Dhawan in April 2016.

18 In his partial summary judgment motion, Dhawan also relied on the 2013 Guarantees. The Shails claimed, among other things, that they executed these Guarantees based on misrepresentations by Dhawan and that they overstated SCI's debt to him. The Master declined to make any finding on the parties' competing allegations on the 2013 Guarantees and did not rely on them in reaching her decision.

19 The Master also dealt with arguments based on the *Arbitration Act, 1991* and oppression. Her decisions on these issues have not been challenged in this appeal.

The parties' positions and the questions on appeal

20 The Shails contend that the Master erred in law in interpreting the 2010 Guarantee. They ask this court to set aside her decision and find that the 2010 Guarantee was only intended to secure Dhawan's initial $50,000 advance, that this advance was repaid by SCI prior to the April 2016 consent order, and that the Shails' obligations under the 2010 Guarantee have accordingly been extinguished.

21 In their factum, the Shails claimed that the Master exceeded her jurisdiction by using powers reserved to a judge in rule 20.04(2.1). They raised other issues in their notice of appeal. This argument and these issues were however not pursued at the hearing.

22 Dhawan says that the Master made no legal errors and that, as a result, I may only set her decision aside if she made a palpable and overriding error in interpreting the 2010 Guarantee. He argues that she made no such errors as her interpretation of the Guarantee was reasonable. In the alternative, Dhawan argues that I should find the Shails liable for the amount of the consent judgment against SCI based on the 2013 Guarantees.

23 The questions arising in this appeal are:

(1) What is the applicable standard of review of the Master's decision?

(2) Did the Master err in law or make an overriding and palpable error of fact and law in interpreting the 2010 Guarantee?

(3) If so, has the Shails' debt under the 2010 Guarantee been extinguished?

(4) If the Shails are not liable under the 2010 Guarantee, are they liable under the 2013 Guarantees?

Standard of review

24 On review of a Master's decision on a motion for summary judgment, I may only interfere if the Master made an error of law, exercised her discretion on wrong principles, or made a palpable and overriding error of fact or mixed fact and law. [4]

25 In *Creston Moly Corp. v. Sattva Capital Corp.*, the Supreme Court of Canada held that the interpretation of a contract is generally a question of mixed fact and law. [5] A master or judge's interpretation should therefore not be overturned on appeal in the absence of a palpable and overriding error. Exceptionally, a lower court may make an error of law in interpreting a contract. In that case, the standard of review is correctness.

26 In *1079268 Ontario Inc. v. GoodLife Fitness Centres Inc.*, the Ontario Court of Appeal considered when a faulty interpretation of a contract would amount to an error of law. [6] The central issue in that case was whether GoodLife's lease include the basement of the building it was renting. The judge who heard the application concluded that it did not. The Court of Appeal allowed the appeal.

27 The Court of Appeal clarified how a judge or master could make a legal error in interpreting a contract:

> *Sattva* makes clear that the standard of review is palpable and overriding error, unless it is possible to identify an extricable question of law, in which case correctness review applies. *Sattva* emphasizes that questions of law are relatively rare; courts must be cautious in identifying extricable questions of law, lest contractual interpretation collapse into correctness review. Nevertheless, the Supreme Court identified three examples of legal errors that may be made in the course of contractual interpretation: "the application of incorrect principles, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" . . . . [7]

28 In *GoodLife*, the Court of Appeal found that the application judge considered some, but not all, of the relevant circumstances when the lease was signed. [8] The circumstances surrounding the formation of the lease were particularly important given the inconsistent and contradictory provisions in the lease. [9] The Court concluded that the application judge's failure to interpret the lease having regard to the circumstances as a whole amounted to an error of law. According to the Court:

> The problem in this case is not that the application judge simply failed to refer to all the material evidence in the reasons for her decision; indeed, she was not required to do so. The problem is that the application judge failed to consider all the material evidence before reaching her decision. The result is an interpretation of the lease that was inconsistent with the intention of the parties. [10]

29 Having considered all of the evidence with respect to the negotiation of the lease, the Court concluded that the parties clearly intended to include the basement in the leased premises, even if there were some provisions in the final agreement that suggested otherwise.

Did the Master make a reviewable error in interpreting the Guarantee?

30 In my view, the Master erred in law in interpreting the 2010 Guarantee by failing to consider the circumstances in which it was signed and by not applying applicable interpretive principles.

31 In *Sattva*, the Supreme Court said that the court must "read the contract as a whole, giving the words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract". [11]

32 Like the lease in *GoodLife*, and as the Master herself recognized, the language in the 2010 Guarantee is inconsistent. According to its preamble, the consideration for the Guarantee was Dhawan's acceptance of repayment of the indebtedness "in accordance with" the 2010 Note. Section 1 of the 2010 Guarantee says that any term not otherwise defined had the same meaning given to as in the 2010 Note. Section 2 states that the Shails guarantee indebtedness "arising under or in connection with" the 2010 Note. All of this language ties the Shails' indebtedness to the terms of the 2010 Note.

33 On the other hand, section 2 of the Guarantee says that it is a "continuing" guarantee. A continuing guarantee "covers a series of transactions, and the surety will be liable in respect of any of those transactions (subject to any overall limit in the amount of the guarantee)". [12] The qualification of the guarantee as a continuing guarantee could imply that the Shails' indebtedness secured by the 2010 Guarantee was not limited to the indebtedness secured by the 2010 Note.

34 Section 9 of the 2010 Guarantee provides another example of the inconsistency of its terms. The first sentence of the section states that "All monies, advances, renewals and credits in fact borrowed or obtained by the Borrower from the Lender under or in connection with the note shall be deemed to form part of the obligations" notwithstanding any lack of capacity on the part of the parties signing on behalf of SCI or any irregularity in the underlying transaction. Although this is broadly drafted, it is again tied to the terms of the 2010 Note. But later on in the same section, the phrase "monies, advances renewals or credits in fact borrowed or obtained from the Lender" is not similarly qualified.

35 Given the inconsistent terms in the 2010 Guarantee, the parties' intent can only be ascertained by examining all of the circumstances surrounding its execution. This would include, notably, the overall deal struck between them that same day as reflected in the Contract and the 2010 Note. The Master did not however refer to the terms either the Contract or the 2010 Note. In my view, this amounted to an error in law.

36 The Contract contains separate and distinct provisions with respect to the first $50,000 that Dhawan undertook to advance to SCI immediately, and with respect to the further $250,000 that he might provide, if SCI's bid was accepted. Further to paragraph 3 of the Contract:

> Dhawan has agreed to deliver Fifty Thousand ($50,000) Dollars to [SCI] upon signing of this agreement, and [SCI] has agreed to execute a Promissory Note for indebtedness and personal guarantee of its Directors, Santosh Shail and Swapna Shail, in return thereof. This money is to enable [SCI] to bid for the contract with the Ethiopian Government.

37 Paragraphs 4 to 8 of the Contract set out what the parties agreed to do, depending on what happened with SCI's bid. Paragraph 4 says that, if SCI's bid was rejected, it would repay Dhawan the $50,000 he had advanced without interest, "as soon as the decision of the Ethiopian government is made public in any manner". Paragraphs 5 6, 7 and 8 set out what would happen if SCI's bid is accepted. Paragraph 9 says:

> Dhawan will further deliver Two Hundred and Fifty Thousand ($250,000) Dollars to [SCI] to complete their formalities with the Ethiopian Government, Export Development Canada (EDC) and any other federal or provincial government or department, to proceed with the execution of the project. [SCI] agrees to execute a further promissory note and guarantee for these monies.

38 Paragraph 3 requires SCI and the Shails to provide security as consideration for Dhawan's advance of the first $50,000. Paragraph 9 anticipates further security if and when he advances a further $250,000 later on.

39 Dhawan argues that paragraph 9 of the Contract does not preclude the possibility that the 2010 Guarantee is a continuing guarantee that secures all of SCI's debt to Dhawan. If the Guarantee's terms clearly indicate that the Shails intended to cover all loans that he might extend in future to SCI, it would not matter that the parties contemplated something different in the Contract they signed the same day.

40 As already noted, however, the terms of the 2010 Guarantee are ambiguous. This makes the terms of the Contract highly relevant to ascertaining the parties' intentions in signing the 2010 Guarantee. The Contract, which sets out what parties undertake to do, states that separate security will be provided for the two advances due from Dhawan. This supports the argument that they intended that the 2010 Guarantee would be limited to the amounts due under the 2010 Note.

41 So too does the language of the 2010 Note. In the Note, SCI acknowledges its debt to Dhawan under the Contract and promises to repay him $50,000. If SCI fails to repay the money by the due date or at the demand of Dhawan, or if it becomes bankrupt or insolvent, interest of 18% annually will run on the principal amount as of July 6, 2010. SCI also agrees to indemnify Dhawan "against any claims or costs arising out of non-payment" of the loan, and to pay all costs of collection including legal fees.

42 There is no evidence that Dhawan and the Shails ever amended, modified, supplemented or replaced the 2010 Note. In light of this, Dhawan's recovery against SCI based on the Note was limited to $50,000 plus interest plus any costs associated with enforcement of the security. There is nothing in the 2010 Note that suggests that it secured further advances by Dhawan. In fact the opposite is true. It specifically contemplates the execution of "further agreement(s) and documents" if SCI wins a contract from the Ethiopian government. This logically refers to SCI's undertaking at paragraph 9 of the Contract to provide a further promissory note and guarantee if it received a further $250,000 advance from Dhawan.

43 The terms of the 2010 Note would again not prevent Dhawan from preparing, and the Shails from signing, a continuing guarantee on July 7, 2010 that secured all future advances by Dhawan. I cannot however infer that the parties intended to depart from the deal concluded the very same day in the absence of unambiguous language to this effect in the 2010 Guarantee.

44 To the extent that there is any further doubt about the meaning to be given to the 2010 Guarantee, it can be resolved based on the *contra proferentem* rule. The scope and rationale of the *contra proferentem* rule is that:

> provisions in agreements and other written documents that suffer from ambiguity are to be construed against the interest of the person who draft or proferred the ambiguous provision. . . . The apparent rationale for the rule is that the author of the agreement, having had an opportunity to protect his or her interest, ought to be able to take advantage of such protections as have been inserted only to the extent that they are clearly communicated in the language of the agreement to the other

> party. The doctrine works against unfair surprise of the non-drafting party. A further underlying concern may be to preclude any incentive that might otherwise exist for the author to strategically draft provisions that are deliberately obscure, with the intention of preserving the opportunity of asserting a more generous interpretation at a later date. [13]

45 Applying the general rule and rationale to guarantees:

> [I]n the context of guarantees that, in the usual case, are drafted by someone other than the guarantor, provisions imposing burdens on the guarantor will be construed against the interests of the person who drafted the guarantee. [14]

46 Dhawan drafted the 2010 Guarantee. Its terms are ambiguous insofar as the reference to a "continuing" guarantee in section 2 is at odds with other language in the document that limits the Shails' liability to SCI's indebtedness under the 2010 Note. There is no evidence that Dhawan told the Shails that he construed the 2010 Guarantee as a continuing guarantee. In these circumstances, the *contra proferentem* rule dictates that any ambiguity in the terms of the 2010 Guarantee must be resolved in the Shails' favour and against Dhawan's interests.

47 The terms of 2010 Guarantee are different than those in the guarantee in *Royal Bank of Canada v. Samson Management & Solutions Ltd.*, the case relied upon by the Master in her decision. Dhawan points out that the last sentence of section 2 of the 2010 Guarantee strongly resembles a term in the guarantee in *Royal Bank of Canada v. Samson Management & Solutions Ltd.*, which read as follows:

> This guarantee shall be a continuing guarantee and shall cover all the liabilities, and shall apply to and secure any ultimate balance due and remaining unpaid to the Bank. [15]

48 The last sentence of section 2 of the 2010 Guarantee reads:

> For greater certainty, this shall be a continuing guarantee and shall cover all of the obligations now and heareafter existing and shall apply to and secure any ultimate balance due and remaining unpaid to the Bank

49 There is however a critical distinction between the language used in the two guarantees. Earlier in the same section in the 2010 Guarantee, "obligations" are restricted to "indebtedness, obligations and liabilities "under or in connection with" the 2010 Note. Nothing in the guarantee at issue in *Royal Bank of Canada v. Samson Management & Solutions Ltd.* tied the guarantor's indebtedness to a particular debt instrument. On the contrary, the guarantee required Mrs. Samson to pay the bank "all debts and liabilities, present or future, direct or indirect, absolute or contingent, mature or not, at any time owing" by Mr. Samson "or remaining unpaid by the customer to the Bank, heretofore or hereafter incurred or arising and . . . incurred by or arising from agreement or dealings between the Bank and the customer".

50 The broad and unfettered language in the guarantee in *Royal Bank of Canada v. Samson Management & Solutions Ltd.* distinguishes from the 2010 Guarantee. The Master accordingly erred in relying on this case in her interpretation of the Guarantee.

51 The Master also relied on the parties' conduct after signing the 2010 Guarantee which, in her view, was consistent with the existence of continuing guarantee. Post-contractual conduct may be used as an interpretive aid in some circumstances:

> [I]f after considering the words used in the agreement itself (i.e., as used in their immediate context), and after taking into account the context of the agreement as a whole, there remain two reasonable alternative interpretations, then subsequent conduct may be used as additional evidence to determine which of the two reasonable alternative interpretations is the correct one. [16]

52 As I have already concluded, however, there are not two reasonable interpretations of the 2010 Guarantee, once all of its terms and its context are taken into consideration. The only reasonable interpretation is that the Shails were specifically guaranteeing SCI's indebtedness pursuant to the 2010 Note, as opposed to providing a continuing, all accounts guarantee. The parties' post-agreement conduct is accordingly irrelevant.

53 I conclude that the parties could not have and did not intend that the Shails would provide Dhawan, through the 2010 Guarantee, with security for all amounts he might advance to SCI in the future. The statement in section 2 of the 2010 Guarantee that it is a continuing guarantee cannot, by itself, transform a specific guarantee to a much broader, indeed unlimited, security. Since the 2010 Note was never amended, supplemented or replaced, the total amount of indebtedness pursuant to the 2010 Guarantee was $50,000 plus interest plus any costs of execution.

Is the Shails' debt under the 2010 Guarantee extinguished?

54 If I find that the 2010 Guarantee only guarantees SCI's indebtedness under the 2010 Note, the Shails say I should further find that their liability under the Guarantee has been extinguished based on the rule in Clayton's case. The Master did not deal with this argument because she found that the 2010 Guarantee secured all of SCI's debt to the Shails.

55 The rule in Clayton's case is sometimes referred to as the "first-in, first-out" rule. Under this rule, where a debtor borrows successive amounts of money, each repayment will apply against the oldest outstanding debt, unless the debtor specifies otherwise. [17]

56 The parties agree that SCI had repaid $639,845.30 against debt obligations of $750,000 by the date of the summary judgment motion. The Master stated that the timing of the payments was unclear from the evidence. In a schedule to his factum, however, Dhawan sets out the dates of each advance he allegedly made to SCI and amounts he received in repayment, based on evidence on the motion. The Shails do not take issue with the accuracy of the information in the schedule. I accordingly have no reason not to rely on it.

57 The schedule shows that the Shails repaid Dhawan $150,000 in August 2011. There is no evidence that the Shails specified that this repayment would apply against any particular advance made by Dhawan. Assuming that interest of 18% ran on this amount from July 2010, the total amount due in August 2011 pursuant to the 2010 Note was $59,750. [18]

58 Based on the rule in Clayton's case, the Shails' repayment of $150,000 applied against Dhawan's first loan. The amount exceeded any liability that SCI had in connection with that loan. Since the 2010 Guarantee secured only this indebtedness, its repayment discharged the Shails' obligations under the Guarantee.

59 As a result, I conclude that the Shails' obligations under the 2010 Guarantee have been extinguished.

Are the Shails liable for SCI's debt as a result of the 2013 Guarantees?

60 The Master concluded that she could not grant summary judgment on Dhawan's claim with respect to the 2013 Guarantee. She wrote:

> Given that the Shails' allegations of misrepresentation could impact their validity, I am not relying on the March 2013 notes and guarantees in coming to my decision and I make no finding as to the alleged misrepresentation.

61 In order to reject the Shails' misrepresentation defence, the Master would have had to determine what information they had when they signed the 2013 Guarantee. The Master found that the evidence on this point, an exchange of emails between the parties in January 2013, was not helpful because of unexplained discrepancies on the time-stamps on the messages.

62 On the appeal, Dhawan argues that the Master should have inferred that the discrepancies in the time-stamps were due to the time difference between Canada and Brazil and that, as a result, the Shails' allegation of misrepresentation was not credible.

63 By virtue of rule 20.04(2.1), a judge considering a motion for summary judgment has the power to make findings of fact that a Master does not. The Master was accordingly correct in declining to draw the inference proposed by Dhawan with respect to the emails. Had she done otherwise, the Shails could have argued that she exceeded her jurisdiction on the motion.

64 But even if the Master did not have the power to make the necessary findings of fact to deal with the misrepresentation defence, Dhawan argues that I should exercise this power as a judge on this appeal. He contends that it would be in the interests of justice for me to do so, since a favourable ruling for the plaintiff on this point would dispose of the entire action.

65 I am not convinced that a party may properly seek determinations on an appeal that would have exceeded the jurisdiction of the court of first instance. In any event, in my view it would be inappropriate for me to make the proposed findings in this case. Dhawan chose to seek summary judgment before a Master, and the Shails assembled their record and argument on this basis. I cannot fairly dispose of an issue that the Shails could not have anticipated would be before the court.

66 I will therefore not intervene in the Master's determination that Dhawan's claim with respect to the 2013 Guarantee is an issue requiring a trial.

Conclusion and costs

67 The appeal is granted. The Master's decision granting Dhawan judgment in the amount of $244,059.96 plus $17,000 in costs is set aside. Dhawan's claim pursuant to the 2010 Guarantee is dismissed. As found by the Master, Dhawan's claim pursuant to the 2013 Guarantee, and his other claims against the Shails, are not appropriate issues for summary judgment.

68 The Shails seek costs on the appeal. Their counsel's bill of costs includes fees, on a partial indemnity basis, of $16,961.30 (HST included) and $6395.62 in disbursements.

69 The Shails' counsel has advised that he is acting in a pro bono capacity pursuant to Pro Bono Law Ontario's Appeals Assistance Program. This does not automatically mean that the Shails cannot recover costs. The Ontario Court of Appeal has ruled that costs may be awarded in favour of parties represented by pro bono counsel in appropriate cases. [19] This promotes access to justice by encouraging more lawyers to take on deserving cases even if the client cannot afford to pay counsel. The criteria for awarding costs are generally the same that apply in other cases, with one additional consideration. If costs are sought on an interlocutory proceeding, an award to a pro bono party could create an uneven playing field, because the other party might not be able to recover costs that the impecunious party might eventually be ordered to pay. This concern can be addressed by adjusting the amount of the interlocutory costs award or suspending the obligation to pay it until the action is fully resolved. [20]

70 Having reviewed the Shails' bill of costs, I conclude that the fees claimed are fair and reasonable. Their counsel's experience, rate and time expended are appropriate given the complexity of the issues and their importance to the Shails. The fees claimed are slightly lower than those in the bill of costs submitted by Dhawan's counsel. This implies that the amount claimed by the Shails is within the range of what he would expect to pay.

71 The Shails' list of disbursements includes $2420.48 for "Transportation/Hotel/Meals re December 6, 2018 hearing date adjourned". I suspect that the date in this entry is wrong, but no explanation is provided for the disbursement and no supporting documents are provided. This item is accordingly disallowed. The other disbursements claimed are reasonable.

72 I am therefore awarding total costs to the Shails of $20,000 inclusive of fees, disbursements and HST. Of this amount, $5000 is payable within 30 days of this decision and the balance of $15,000 is payable when final judgment is entered in the action.

Appeal allowed.

Footnotes

1 Paragraph 7 of the Contract also states that "Dhawan will also become a shareholder of the Corporation for a twenty-five (25%) percent share in the Corporation". The parties do not agree on what this means. It is not however material for the purpose of this appeal.

2 The text of the agreements contain typographical and grammatical errors which are reproduced here. For ease of reading, I have not inserted [sic] next to every error.

3 2013 ONCA 313 (Ont. C.A.) ("*RBC v. Samson*").

4 *Mehdi-Pour v. Minto Developments Inc.*, 2011 ONSC 3571 (Ont. Div. Ct.) (CanLII), affirming 2010 ONSC 5414 (Ont. S.C.J.) (CanLII) ("*Medhdi-Pour*"), at para. 4.

5 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.) ("*Sattva*").

6 2017 ONCA 12 (Ont. C.A.) ("*GoodLife*").

7 *GoodLife*, at para. 24, citing *Sattva*, at para. 53.

8 *GoodLife*, at para. 5.

9 *GoodLife*, at para. 28.

10 *GoodLife*, at para. 40.

11 *Sattva*, at para. 47.

12 K. McGuiness, *The Law of Guarantee*, 3d ed (Toronto: LexisNexis Canada, 2013), at para. 7.5., p. 324.

13 John McCamus, The Law of Contracts (Toronto: Irwin Law, 2005), at pp. 722 and 723.

14 McCamus, at p. 723.

15 *Royal Bank of Canada v. Samson Management & Solutions Ltd.*, at para. 24.

16 K. McGuinness, The Law of Guarantee, 3d ed. (Toronto: LexisNexis Canada, 2013), at para. 6.70, citing *Canadian National Railway v. Canadian Pacific Ltd.*, [1978] B.C.J. No. 1298, 95 D.L.R. (3d) 242 (B.C. C.A.) at 262, aff'd [1979] 2 S.C.R. 668 (S.C.C.).

17 *Clayton's Case, Re* (1816), 1 Mer. 572, 35 E.R. 781 (Eng. Ch. Div.), at 798.

18 It is not clear if in fact the total amount claimed by Dhawan includes any interest on this advance.

19 *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* [2006 CarswellOnt 6582 (Ont. C.A.)], 2006 CanLII 35819.

20 *1465778 Ontario Inc. v. 1122077 Ontario Ltd.*, at paras 37 to 44.

End of Document

TAB 12

2013 ONCA 767
Ontario Court of Appeal

Leajon Graphics Ltd. v. Hayter

2013 CarswellOnt 17580, 2013 ONCA 767, 235 A.C.W.S. (3d) 958

Leajon Graphics Ltd., Ken Raspin and Larry Jeffrey, Plaintiffs (Respondents) and Allan Hayter, Jake Bulk, Huron Tract Holdings Inc., and Susan Lehnen, Renee Lehnen, and Christa Lehnen in their capacities as Estate Trustees of the Estate of Richard Lehnen also known as Dick Lehnen, deceased, Defendants (Appellants)

Doherty J.A., Sharpe J.A., Watt J.A.

Heard: December 16, 2013
Judgment: December 18, 2013
Docket: CA C56863-C56869

Proceedings: affirming *Leajon Graphics Ltd. v. Hayter* (2013), 2013 CarswellOnt 2640, 2013 ONSC 1149 (Ont. S.C.J.)

Counsel: M. Paul Downs, for Defendant / Appellant, Allan Hayter
Peter Sengbusch, for Defendant / Appellant, Jake Bulk
Maurice J. Neirinck, Michael McQuade, for Plaintiffs / Respondents

Subject: Corporate and Commercial; Contracts; Insolvency
Related Abridgment Classifications
Guarantee and indemnity
II Guarantee
  II.1 Contract of guarantee
    II.1.h Interpretation
      II.1.h.ii Intention of parties
        II.1.h.ii.A General principles
Headnote
Guarantee and indemnity --- Guarantee — Contract of guarantee — Interpretation — Intention of parties — General principles
Corporate debtor borrowed significant funds from plaintiffs that remained unpaid — Corporate debtor went into receivership and there was no prospect plaintiffs would recover anything more from it — Plaintiffs brought action against individual defendants for recovery of outstanding amount — Action was allowed — Trial judge concluded that defendants were liable as guarantors; and on basis that agreement in issue was not was guarantee but rather promise to purchase certain promissory notes — Defendants appealed — Appeal dismissed — Agreement in issue was not drawn by lawyer and was open to different interpretations — Trial judge properly viewed language of agreement in context of relationship of parties and their intention as determined by reference to circumstances when agreement was made — Trial judge did not err in analysis.

APPEAL by defendants from judgment reported at *Leajon Graphics Ltd. v. Hayter* (2013), 2013 CarswellOnt 2640, 2013 ONSC 1149 (Ont. S.C.J.), allowing plaintiffs' action for recovery of outstanding amount of debt.

Per curiam:

1 The trial judge determined liability on two alternative vases. The appellants challenge both. We agree with the trial judge's reasons in respect of both bases.

The First Basis

2 The trial judge concluded that the appellants were liable as guarantors. The agreement in issue was not drawn by a lawyer. The language viewed in isolation arguably admits of different interpretations. However, the trial judge properly viewed the language in the context of the relationship of the parties and the intention of the parties as determined by reference to the circumstances at the time the agreement was made. We agree with his interpretation.

The Second Basis

3 The trial judge also addressed the appellants' liability on the basis that, as claimed by the appellants, the agreement in issue was not a guarantee but rather a promise to purchase certain promissory notes. The trial judge found the appellants liable even on that basis. We agree with his analysis (see reasons at paras. 103-108).

4 The appeal is dismissed.

5 The trial judge gave detailed reasons for the costs order. We see no basis for interfering with the trial judge's exercise of his discretion. Leave to appeal is granted but the appeal is refused.

6 Costs of the appeal fixed at $18,000, inclusive of taxes and disbursements.

Appeal dismissed.

TAB 13

2013 ONSC 1449
Ontario Superior Court of Justice

Leajon Graphics Ltd. v. Hayter

2013 CarswellOnt 2640, 2013 ONSC 1449, 226 A.C.W.S. (3d) 423

Leajon Graphics Ltd., Ken Raspin, Nick Minichillo and Larry Jeffrey, Plaintiffs and Allan Hayter, Jake Bulk, Huron Tract Holdings Inc., and Susan Lehnen, Renee Lehnen, and Christa Lehnen in their capacities as Estate Trustees of the Estate of Richard Lehnen also known as Dick Lehnen, deceased, Defendants

A.D. Grace J.

Heard: March 26, 2012; March 27, 2012; March 28, 2012; November 30, 2012
Judgment: March 8, 2013
Docket: CV-08-00368098

Counsel: Maurice J. Neirinck, Michael G. McQuade, for Plaintiffs
M. Paul Downs, Paula Downs, for Allan Hayter
Peter Sengbusch, for Jake Bulk
No one for Susan Lehnen, Renee Lehnen, Christa Lehnen Estate Trustees of the estate of Richard Lehnen, deceased

Subject: Corporate and Commercial; Contracts; Insolvency

Headnote

Guarantee and indemnity --- Guarantee — Contract of guarantee — Interpretation — Intention of parties — General principles

Corporate debtor borrowed funds from plaintiffs that remained unpaid — There was no prospect plaintiffs would recover anything more from corporate debtor — Creditors brought action for recovery of outstanding amount — Action allowed — Corporate debtor was in receivership and issue was whether individual defendants were liable to pay pursuant to hand-written agreement — Agreement recorded sale of shares and resignations — Defendants argued agreement contemplated completion of sale by plaintiffs of promissory notes issued by corporate debtor to individual defendants — Defendants claim that plaintiffs failed to present and assign promissory notes on closing and relieved defendants of obligation to pay was not made out — Intention of parties to agreement was that individual defendants guaranteed that corporate debtor would pay plaintiffs amount owing plus interest — Individual defendants had immediate obligation to answer for default.

Table of Authorities

Cases considered by *A.D. Grace J.*:

Can-Euro Investments Ltd. v. Industrial Alliance Insurance & Financial Services Inc. (2009), 79 R.P.R. (4th) 59, 2009 CarswellNS 34, 2009 NSSC 20, 273 N.S.R. (2d) 325, 872 A.P.R. 325 (N.S. S.C.) — referred to

Dumbrell v. Regional Group of Cos. (2007), 55 C.C.E.L. (3d) 155, 220 O.A.C. 64, 85 O.R. (3d) 616, 2007 CarswellOnt 407, 25 B.L.R. (4th) 171, 279 D.L.R. (4th) 201, 2007 ONCA 59 (Ont. C.A.) — considered

Excelsior Properties Ltd. v. Cosentino Developments Inc. (2011), 2011 CarswellAlta 1907, 2011 ABQB 666, 528 A.R. 29 (Alta. Q.B.) — referred to

Gyulay v. Kenderry Corp. (1998), 24 R.P.R. (3d) 84, 72 O.T.C. 362, 1998 CarswellOnt 4894 (Ont. Gen. Div.) — referred to

Kentucky Fried Chicken Canada v. Scott's Food Services Inc. (1998), 1998 CarswellOnt 4170, 41 B.L.R. (2d) 42, 114 O.A.C. 357 (Ont. C.A.) — considered

Mitsui Construction Co. v. Attorney General of Hong Kong (1986), 71 N.R. 285, 33 Build. L.R. 1 (Hong Kong P.C.) — followed

Onex Corp. v. American Home Assurance Co. (2013), 2013 ONCA 117, 2013 CarswellOnt 1969 (Ont. C.A.) — considered

Pompeani v. Bonik Inc. (1997), 35 O.R. (3d) 417, 1997 CarswellOnt 3744, 13 R.P.R. (3d) 1, 104 O.A.C. 149 (Ont. C.A.) — referred to

Puri v. Sharynton Homes Ltd. (1994), 1994 CarswellOnt 1200, 48 R.P.R. (2d) 8 (Ont. Gen. Div.) — referred to

Roma Construction Ltd. v. Excel Venture Management Inc. (2007), 2007 CarswellAlta 820, 2007 ABQB 396, 81 Alta. L.R. (4th) 77 (Alta. Q.B.) — referred to

Stewart v. Ambrosino (1977), 1977 CarswellOnt 1053, 78 D.L.R. (3d) 125, 16 O.R. (2d) 221 (Ont. C.A.) — considered

Terasen Gas Inc. v. Anglo Swiss Resources Inc. (2010), 2010 CarswellBC 3369, 2010 BCSC 1732 (B.C. S.C.) — referred to

Statutes considered:

Bills of Exchange Act, R.S.C. 1985, c. B-4

Generally — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 128 — referred to

s. 128(1) — referred to

s. 129(1) — considered

***A.D. Grace J.*:**

A. Introduction

1 Huron Tract Holdings Inc. ("Huron Tract") borrowed significant sums from former National Hockey League player Larry Jeffrey and two Toronto businessmen — Ken Raspin and Nick Minichillo (the latter through Leajon Graphics Ltd.), that remain unpaid.

2 The principal amounts owing by Huron Tract are not in issue. Huron Tract owes Leajon Graphics Ltd./Minichillo (collectively "Leajon") $475,000, Mr. Raspin $362,000 and Mr. Jeffrey $206,000.

3 There is no prospect the plaintiffs will recover anything more from Huron Tract. It was placed into receivership in 2009.

4 The issue is whether the individual defendants are liable to pay anything to them pursuant to the home drawn, inelegant document entitled "Agreement to Purchase" they executed on January 26, 2006 (the "Agreement").

5 The parties agree it is a critical document and that the result in this action depends on the court's interpretation of its terms.

6 Determining the meaning of a contract requires more than an analysis of the words it contains. In *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* (1998), 114 O.A.C. 357 (Ont. C.A.) at paras. 25 — 27, Goudge J.A. wrote:

> [25] While the task of interpretation must begin with the words of the document and their ordinary meaning, the general context that gave birth to the document or its "factual matrix" will also provide the court with useful assistance...
>
> [26] The scope of the surrounding circumstances...generally will encompass those factors which assist the court "...to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract." *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 901.
>
> [27] Where...the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other...

7 The phrase "factual matrix" includes "the genesis of the agreement, its purpose, and the commercial context in which the agreement was made": *Dumbrell v. Regional Group of Cos.* (2007), 85 O.R. (3d) 616 (Ont. C.A.) at para. 55. [1]

8 I turn to the evidence.

B. Background

9 The parties negotiated and filed (as trial exhibit 1) a partial agreed statement of fact. It details most of the early history.

10 Huron Tract was incorporated under another name in 2000 by Messrs. Hayter and Bulk for the purpose of purchasing and developing commercial properties. Mr. Hayter's friend, Richard Lehnen, joined them as an officer, director and shareholder of the company soon after Huron Tract acquired its first property: the site of the former Dearborn Steel operation in Goderich, Ontario.

11 After retiring from professional hockey, Mr. Jeffrey took up farming near that Town. He was introduced to Mr. Lehnen who encouraged Mr. Jeffrey to invest in Huron Tract.

12 According to Mr. Jeffrey, Huron Tract's plan was to convert the Dearborn Steel property to a use that is close to his heart — an arena. [2] Mr. Jeffrey accepted Mr. Lehnen's invitation and made investments in 2001 and 2002. [3]

13 Mr. Minichillo met Mr. Lehnen a year later. By then, Huron Tract's original plan had run into obstacles. Mr. Minichillo was told that Huron Tract planned to develop a multi-use project in Goderich. Mr. Minichillo was also asked to invest and promised a position on the board of directors if he did so.

14 Mr. Raspin joined the parade after being introduced to the original group by Mr. Minichillo.

15 By the end of the summer of 2004, Leajon had advanced a total of $480,000 and Mr. Raspin over $372,000. Some of the advances made by them were evidenced by promissory notes. Others were not. [4]

16 Messrs. Raspin, Minichillo and Jeffrey testified at trial. Mr. Lehnen could not. He is deceased. Mr. Hayter and Mr. Bulk did not.

17 Despite having joined the original trio on the board of directors and attending regular meetings, the plaintiffs did not always feel fully or accurately informed. [5]

18 Huron Tract owned parcels of land but didn't develop a thing. The company seems to have either owned or to have invested in other businesses.

19 For example, Huron Tract acquired an insolvent plastics manufacturer. However, it had no experience in the industry and was unable to turn the business around. In 2004, Huron Tract sold the venture to Jokey Plastics North America Inc. ("Jokey") for $1 million but on generous payment terms as evidenced by a Participating Term Debenture dated October 19, 2004 (the "Jokey Debenture").

20 It is impossible to comment accurately on Huron Tract's financial performance because statements were not prepared despite repeated requests by Mr. Minichillo. However, the evidence suggests the company was a financial disappointment.

21 Huron Tract wheezed into 2005. Mr. Minichillo was the first to act on his growing disillusionment. He asked for the return of Leajon's investment.

22 Huron Tract agreed. A June 11, 2005 letter signed by Mr. Lehnen as Chair of Huron Tract said, in part:

> I have been asked by the Board assembled Friday for a special meeting to write you and convey their response to your request for early redemtion (sic) of promissory notes and common shares all issued by Huron Tract...
>
> First:

> The Board want me to extend their sincere thank you for the time, effort, and investment that you put at the disposal of Huron Tract...
>
> Second:
>
> The Board have asked me to convey that they are prepared to make arrangements for the redemption back into the Treasury: of the notes or portions thereof, the due interest accrued thereon, together with the common shares issued to you or related parties, at cost of issue. Their direction is to do this in 90 days or less...

23 Mr. Lehnen seems to have had a questionable grasp of the technical aspects of the proposal but the intention is clear: Leajon's financial stake in Huron Tract would be repaid within 90 days and all strings between the two parties would be severed.

24 They weren't. The 90 day period quietly passed.

25 Mr. Minichillo tried to bring matters to a head at a November 10, 2005 board meeting. He voiced his displeasure and sought a solution.

26 Huron Tract's corporate solicitor, Max Prince, was present. The draft minutes he circulated evidence dysfunction and significant concern with Mr. Lehnen's leadership and management and Huron Tract's financial health.

27 Some of Mr. Minichillo's concerns resonated with others. After a lengthy meeting, the board unanimously resolved that the hierarchy would change: Mr. Raspin would replace Mr. Lehnen as Huron Tract's senior officer. However, Mr. Minichillo's request for a concrete plan for fulfilment of the promises made to him in June was deferred to a meeting scheduled for the following month.

28 Mr. Raspin's tenure was short-lived. [6] Mr. Raspin testified that in early December, 2005 he received a call. He was told the original investors wished to buy out his interest in Huron Tract and that of Leajon.

29 A December 13, 2005 document entitled "A Special Resolution" read in part:

> The Directors of Huron Tract...have deemed it in their interest to deal with a request from Nick Minichillo and Mr. Ken Raspin for redemption of their interests in Huron Tract...both by way of investment notes secured by an Income Debenture of the company and Common Shares issued by Huron Tract Holdings Inc.
>
> Now therefore the Directors by this Resolution do hereby instruct the Officers of the Corporation to do all things required to give effect to the transfer of the Jokey Income (sic) Debenture...to a corporation designated by Mr. Minichillo and Mr. Raspin for a full and final release of the company from any and all debts owing to either of Mr. Raspin or Mr. Minichillo.
>
> -And-
>
> For services rendered and redemption of any and all common shares issued by Huron Tract...to Mr. Raspin and or Mr. Minichillo...a payment will be made from the Treasury in the amount of $50,000 to each...
>
> To provide for the postponement of a meeting of the Board...to...December 21, 2005, at which time the matters referred to herein will be concluded...

30 All of the individuals I have mentioned so far signed the document except Mr. Minichillo. He was unwilling to accept the Jokey Debenture for two reasons: first, it was expressly stated to be non-assignable by Huron Tract [7] and second, Jokey wasn't obligated to make any payments before 2019 unless it earned "positive taxable income" in any fiscal year. [8]

31 Another solution was needed. Discussions between Mr. Lehnen and Mr. Raspin occurred. Soon Mr. Raspin was speaking for Messrs. Minichillo and Jeffrey.

32 Negotiations culminated in an agreement to meet at the offices of Huron Tract's solicitors on January 26, 2006.

33 While Mr. Prince later reported on aspects of the transactions completed that day, minutes were not taken. I accept the version of events provided at trial by Messrs. Jeffrey and Raspin.

34 All of Huron Tract's investors except Mr. Minichillo attended. The meeting had three purposes: first, to document and complete the transfer of common shares issued to three shareholders (Messrs. Minichillo, Jeffrey and Raspin) for an aggregate purchase price of $125,000; second, to obtain the resignations of the departing shareholders as officers and directors of Huron Tract and third, to document the basis on which their loans to Huron Tract would be repaid.

35 Mr. Prince opened the meeting, made some introductory comments and left. Documents were circulated to those in attendance. For the first time, Messrs. Jeffrey and Raspin saw the home drawn contracts they were asked to sign. They included a document entitled Share Purchase Agreement and the Agreement.

36 They retired to a signing room. After speaking with Mr. Minichillo about the proposed terms, they agreed to sign the contracts in the form presented. Those agreements were executed along with additional corporate documents necessary to transfer the shares and record the resignations of the former shareholders. An articling student was dispatched to obtain Mr. Minichillo's signature at an out-of-town location.

37 While I do not know who paid the purchase price for the shares, Mr. Minichillo, Mr. Raspin and Mr. Jeffrey acknowledged it was paid on closing and that they received their portion.

38 That takes me to the Agreement. As noted, it was not drafted by a lawyer. I say that for two reasons: first, in a March 30, 2006 reporting letter, Mr. Prince advised that his office "did not prepare the Agreement to Purchase nor did we provide any legal advice on the transaction" and second, it is rudimentary.

39 Six parties were named in and executed the Agreement. The first three - Messrs. Minichillo (not Leajon), Raspin and Jeffrey - are described as "Note Holders".

40 Based on the chronology told to date, that seems curious since, as noted earlier, promissory notes signed by Huron Tract either existed for only a portion of the monies advanced ($300,000 of Leajon's $480,000 and $100,000 of Mr. Raspin's $372,000) or not at all (in the case of Mr. Jeffrey).

41 However, exhibit 2 contains a batch of identically worded promissory notes each dated January 6, 2005 and signed by Mr. Lehnen and Mr. Bulk on behalf of Huron Tract. I will return to them later in these reasons.

42 The other signatories are Messrs. Hayter, Bulk and Lehnen who are referred to as "Guarantors". Inexplicably given its terms, Huron Tract, the borrower of the money, was not a party.

43 The Agreement to Purchase recorded the sale of shares and resignations I have described. To the extent relevant, it continued;

> **Now therefore the parties hereto agree as follows:**
>
> 1/ The notes held by the Note Holders or corporations for which they act as trustees...will be left as a continuing investment in Huron Tract...and be secured by an Income Debenture which Debenture is postponed to any and all charges created by Huron Tract...in the normal course of business.
>
> . . .
>
> 4/ During the tenure of this agreement the Guarantors will make payments of interest on the notes at a rate of 5% per annum in adjusted quarterly installments (sic) should Huron Tract...fail to make payments of income equal to or greater than the due interest (sic) set out herein.

> 5/ Partial payments of principal on the notes may be made at any time without notice or bonus by the Guarantors or Huron Tract...
>
> . . . . .
>
> 6/ The principal amounts outstanding on the notes issued are as follows:
>
> > Larry Jeffrey - $211,000.00
> >
> > Ken Raspin - $367,000.00
> >
> > Nick Minichillo - $480,000.00
>
> . . . . .
>
> 8/ This agreement forms a specific guaranty by the Guarantors to purchase the entirety of outstanding notes issued by Huron Tract...and held by the note holders on or before January 25, 2008.

44 Almost two years passed. While sporadic, Huron Tract made some payments on account of interest. Nothing was paid on account of principal.

45 The plaintiffs retained Cassels Brock LLP.

46 On January 14, 2008, Sheldon Plener of that firm wrote to Huron Tract and each of the "Guarantors". He referenced the Agreement and added:

> ...The closing is contemplated to occur on January 25, 2008. I am writing in advance...to coordinate closing matters. In that regard, please let me know the name and contact information of your legal counsel. We would also expect that all arrears of interest also be brought up-to-date at the closing.

47 A response was requested by January 18, 2008. Messrs. Bulk and Lehnen wrote directly to the "Note Holders" that day. The first two paragraphs provide the flavour for what follows:

> This letter will recognize that as a result of certain negotiations Huron Tract...shares issued to the above note holders were transferred to Mr. Jake Bulk, and Mr. Richard E. Lehnen as trustees to hold pending settlement of the note obligation to Mr. Minichillo, Mr. Raspin, and Mr. Jeffrey.
>
> In an effort to settle this obligation and plan for the orderly growth of Huron Tract...the remaining Board entered into an investment program with Green Breeze Energy Systems Inc. the net result of which created a capital pool inclusive of Composotech Structures equal to $1,800,000.00. These funds deployed on a timely basis allowed for our repatriation of the subject notes. That plan was never finished and Green Breeze has defaulted on the investment...

48 While befuddling language was used, the message was clear: Huron Tract was unable to pay. Assets Huron Tract was allegedly trying to sell were listed. The letter closed with a rather vague sentence. It read:

> We want to work with you...to resolve and redeem the obligation to you as quickly as possible.

49 The letter was thin on detail. It attached no supporting documentation. No time frame was specified.

50 In a follow up letter dated January 24, 2008, Mr. Plener advised that an extension of time would not be provided. He added:

> Accordingly, my clients are expecting that their notes be purchased on January 25, 2008 and that all outstanding interest be brought up-to-date. My client (sic) remains ready, willing and able to complete this transaction on the scheduled date and we would appreciate hearing from you, or preferably your lawyer, so that we can settle documents and agree upon an appropriate time and place to accomplish this.

51 Huron Tract responded to Mr. Plener that same day. It promised to issue cheques to extinguish interest arrears "on or about" January 26, 2008. It added:

> A payback on an orderly sale of the properties does not meet the time frame of your clients. We have commenced discussions to release sufficient security to satisfy the obligation...
>
> In the interim for a possible alternative solution, would your clients consider a prearranged schedule of payments?

52 Mr. Plener promised to obtain instructions in his January 29, 2008 letter but indicated:

> ...in the meantime my client (sic) considers Messrs. Lehnen, Bulk and Hayter to be in breach of their obligations to repurchase the notes as per our earlier correspondence.

53 Little fazed, Huron Tract summarized efforts it alleged were being made to find a solution "for repatriating the notes issued to your clients" and asked for "a thirty day postponement while the issues we are working on clarify".

54 If there was a response I have not seen it. However, Messrs. Minichillo, Raspin and Jeffrey acknowledged receiving a "good faith" principal payment of $5,000 each in February, 2008. Only Mr. Raspin received payment of all of the interest due in the first two years. Leajon and Mr. Jeffrey did not. [9]

55 No other payments were made to the plaintiffs. I do not know what became of any of the assets the initial letter from Messrs. Lehnen and Bulk listed.

C. The Position of the Parties

56 Mr. Raspin, Mr. Jeffrey and Leajon claim that Messrs. Hayter, Bulk and the estate of Mr. Lehnen owe them the principal balance Huron Tract did not pay [10] together with interest at the rate set forth in the Agreement (5 percent per year) or alternatively, pursuant to the *Courts of Justice Act*. [11] They maintain that is what was intended when the parties entered into the Agreement. In their statement of claim, the plaintiffs maintain:

> The effect of the Agreement was that the Guarantors agreed to unconditionally guarantee repayment of the principal and interest owing under the Loans... [12]

57 Counsel for Messrs. Bulk and Hayter disagree. They submit that the Agreement contemplated completion of a transaction: the sale by the plaintiffs of promissory notes issued by Huron Tract to the individual defendants. They maintain that the plaintiffs were obligated to present and assign the promissory notes on closing, failed to do so and therefore relieved Messrs. Bulk and Hayter of their obligation to buy.

58 Counsel for Mr. Bulk argues that result also flows from the fact the plaintiffs failed to comply with various provisions of the *Bills of Exchange Act*, R.S.C. 1985, c. B-4 which are applicable to promissory notes.

D. Analysis and Decision

59 The intention of the parties to the Agreement to Purchase is, in my view, this: Messrs. Lehnen, Hayter and Bulk guaranteed that Huron Tract would pay to the plaintiffs the principal amount owing plus interest for two years at the annual rate of 5%.

60 The conclusion with respect to interest is drawn from the wording of paragraph 4 of the Purchase Agreement. As mentioned earlier, that paragraph provided:

> During the tenure of this agreement, the Guarantors will make payments of interest on the notes at a rate of 5% per annum in adjusted quarterly installments (sic) should Huron Tract...fail to make payments of income equal to or greater than the due interest (sic) set out herein.

61 Stopping there, the Agreement is clear. Interest was to accrue on the plaintiffs' outstanding loans at an annual rate of 5%. For two years Huron Tract was to make quarterly payments of interest. If it didn't, the individual defendants would. Mr. Raspin received the interest that was due to him. However, Huron Tract underpaid interest due to Leajon and Mr. Jeffrey for that period. They are still owed $12,000 and $10,550 respectively.

62 The individual defendants had an immediate obligation to answer for that default. It must be remembered that the plaintiffs ceased to have any involvement in the affairs of Huron Tract on January 26, 2006 as the individual defendants requested. The guarantee of payment offered by Messrs. Lehnen, Hayter and Bulk induced the plaintiffs to enter into that bargain.

63 What about principal? I acknowledge the superficial attractiveness of the defendants' position given the fact the document is entitled "Agreement to Purchase" and reflected the agreement of Messrs. Lehnen, Hayter and Bulk to:

> ...guaranty...to purchase the entirety of outstanding notes issued by Huron Tract...and held by the note holders on or before January 25, 2008.

64 However, a review of the entire Agreement, the genesis of the contract, its purpose and the commercial context in which it was made, lead to the conclusion that the individual defendants agreed, in substance, to answer for the default of another, Huron Tract. Let me explain.

65 First, although Huron Tract is not a party, the Agreement gave the company time to pay and room to manoeuvre. That is why the Agreement noted that the "notes held by the Note Holders...will be left as a continuing investment in Huron Tract..."

66 For an instant, it appeared from the Agreement that the plaintiffs had comfort that payment would eventually be made: the Purchase Agreement stated that their debts would "be secured by an Income Debenture".

67 In fact, the plaintiffs could take no solace from that wording. Under the Agreement, they promised to "take no action" under the Income Debenture. In fact, they agreed that the "rights granted to enforce are hereby assigned to the Guarantors." [13] As an aside, I do not know whether the security existed at all. [14]

68 Paragraph 5 of the Agreement provided that:

> Partial payments of principal on the notes may be made at any time without notice or bonus by the Guarantors or Huron Tract...provided only that these payments are pro rated (sic) as to the balance of notes held by each of the note holders.

69 If, as the defendants maintain, the purpose of the Purchase Agreement was to allow them to buy promissory notes on January 25, 2008, why were partial payments permitted? Why were such payments on account of "principal" and not a purchase price? Why were Messrs. Hayter, Bulk and Lehnen described as "Guarantors" if, in fact, they were "purchasers"?

70 My comments so far ignore the fact that the Agreement did not contain any listing of the promissory notes said to be "held" by Leajon, Mr. Raspin or Mr. Jeffrey.

71 As noted previously, some of the advances made by Mr. Raspin ($100,000) and Leajon ($300,000) were evidenced by promissory notes dated between March 19 and September 11, 2003 (the "2003 notes"). They were issued by Huron Tract contemporaneously or nearly contemporaneously with the advance of funds. [15] Promissory notes were not created in this time frame in favour of Mr. Jeffrey.

72 Each 2003 note contained Huron Tract's promise to pay $50,000 on the tenth anniversary. In the interim, interest was to accrue at the annual rate of 5% and be paid quarterly. The Agreement contained the same interest rate.

73 However, by their terms, the 2003 notes could only be assigned by the holder with Huron Tract's consent. The Agreement does not mention that fact.

74 Furthermore, the 2003 notes referred to items that were "lodged with *The Bank of Nova Scotia Trust* as Trustee for the benefit of the Noteholders of record" including a debenture and trust indenture. I have not seen either document and do not know whether the statements to which I have referred are fact or fiction. [16]

75 The unwillingness of that institution to continue to hold documents was alleged to have caused Huron Tract to issue new promissory notes dated January 6, 2005 (the "2005 notes"). However, once again, the story seems incomplete. They evidence only a portion of the advances made by Mr. Jeffrey ($150,000 of more than $200,000) and Leajon ($350,000 of $480,000). Strangely, those in favour of Mr. Raspin, in trust exceeded that loaned to Huron Tract ($400,000 when only about $372,000 had been advanced).

76 In them, Huron Tract did "hereby guaranty and agree to deliver to" the named person [17] the principal sum of $50,000 on April 1, 2010.

77 The 2005 notes didn't require the payment of interest. Instead, an incomprehensible paragraph appeared. It read:

> On or between March 31 st and April 30 th of each and every year an amount equal to 20% of the consolidated pre tax (sic) profits of the Corporation divided by the total number of notes issued under an "Income Debenture" held in trust by the Treasurer of the Corporation for the benefit of all note holders of record from time to time.

78 The partial sentence was not completed.

79 That wording was not brought to the attention of the plaintiffs. They testified that they did not even know of the existence of the 2005 promissory notes until provided by Mr. Bulk's lawyer years after the commencement of this action. Their evidence was unchallenged.

80 In short, the story of the "notes" is unclear at best.

81 However, while initially inadequately documented, the principal amount owing by Huron Tract to the plaintiffs was not in doubt. The Agreement confirmed that on January 25, 2006, Mr. Jeffrey was owed $211,000; Mr. Raspin $367,000 and Leajon $480,000 on account of principal.

82 It is clear to me that the purpose of the Agreement was to outline the basis on which Huron Tract would retire the indebtedness it owed to the plaintiffs by January 25, 2008 and to address the consequences if it did not.

83 The conclusions I have reached are based on the evidence I have mentioned at some length.

84 To summarize, Mr. Minichillo was initially the only one who wanted to sever his ties with Huron Tract. Messrs. Raspin and Jeffrey were content to remain. Those individuals participated fully in the decision to replace Mr. Lehnen at Huron Tract's helm. In fact, Mr. Raspin was to assume that position.

85 Implementation of the board's unanimous decision soon unravelled. Messrs. Lehnen, Hayter and Bulk presented a united front. They wanted to return to the days when they had sole control of Huron Tract. By the close of business on January 26, 2006, they had attained that goal. They acquired the plaintiffs' shares and accepted their resignation as officers and directors.

86 The plaintiffs were owed money but had lost the benefit of any security they held. They would receive interest only payments for two years. There was no obligation to make any principal payment during that period.

87 As noted, some payments of interest due under the Agreement were made: presumably by Huron Tract.

88 As the January 25, 2008 deadline for the "purchase of the entirety of the outstanding notes issued by Huron Tract" approached, were the "Guarantors" preparing to buy? No.

89 The plaintiffs' lawyer initiated contact. As mentioned, Mr. Plener said that the purpose of his January 14, 2008 letter was "to coordinate closing matters" and he asked for the name and contact information of the lawyer acting on the other side.

90 The letter sent by Messrs. Bulk and Lehnen to the plaintiffs directly didn't address closing matters or even provide the name of a lawyer. It explained why Huron Tract couldn't pay, what it was doing to raise money and stated their intention "to work with you...to resolve and redeem the obligation to you as quickly as possible."

91 Not once did the defendants mention a transaction of purchase and sale. The plaintiffs' lawyer did. As mentioned, in his January 24, 2008 letter Mr. Plener said in part:

> My client (sic) remains ready, willing and able to complete this transaction on the scheduled date and we would appreciate hearing from you, or preferably your lawyer, so that we can settle documents and agree upon an appropriate time and place to accomplish this.

92 The letter was addressed to each of the individual defendants and Huron Tract.

93 The only response came from Huron Tract. It didn't mention a "transaction", a lawyer, documents or time and place. It simply said that "[w]e have commenced discussions to release sufficient security to satisfy the obligation..." and asked whether the plaintiffs would agree to a repayment schedule. The sole focus was on Huron Tract's ability to pay.

94 Subsequent to the "closing" date, Huron Tract paid some of the outstanding interest. Each of the plaintiffs also received a $5,000 principal payment from Huron Tract.

95 In an undated letter bearing the names of Mr. Lehnen and Mr. Bulk, Huron Tract advised Mr. Plener that "I have had an opportunity to discuss a few alternative solutions for repatriating the notes issued to your clients." The company asked for a "thirty day postponement", promised it would "notify Mr. Raspin on a daily or weekly basis of any change in status" and declared "[o]ur interest is in solving the repatriation."

96 The notion that the parties had negotiated a transaction that required the plaintiffs to have in their possession promissory notes ready for transfer in exchange for a purchase price is nothing short of fanciful. It is an argument founded on desperation, nothing more. It is without merit.

97 The simple fact is that a rift developed in Huron Tract because of concerns about its management and financial condition. The plaintiffs were asked to leave Huron Tract in the hands of the individual defendants. In return, the plaintiffs received their promise to repay the principal that was outstanding two years later if Huron Tract failed to do so.

98 In isolation the language of the Agreement would be bewildering. However, when read in its factual context, the intention of the parties and the meaning of the words of the Agreement are readily discernible.

99 In *The Law of Guarantee*, [18] Kevin McGuinness summarized the formal requirements of a contract of guarantee. He wrote:

> In determining whether a particular undertaking amounts to a guarantee, a court will look to the substance of a transaction, rather than to the form of the agreement or to the terms in which it is described by the parties. The determining consideration in deciding upon the true nature of an agreement is the substantive intention exhibited by the parties when fashioning their agreement. No special wording is required to create a guarantee. An agreement may be held to constitute a guarantee, even though that word was not employed by the parties. In an appropriate case, the court will disregard the whole form of an agreement in order to give effect to the substantive intention between the parties. Thus, although the terms employed by the parties in drafting the agreement may be evidence as to their intent, the terminology used is not conclusive.
>
> [Citations omitted]

100 Using context as an interpretive aid is particularly important in a case such as this one where the drafting was undertaken by a non-lawyer who used unclear (to be charitable) or obfuscatory (to be more accurate) language.

101 In *Mitsui Construction Co. v. Attorney General of Hong Kong*, Lord Bridge addressed the court's task when faced with a poorly written contract. I agree with this passage:

> [It] affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention... [19]

102 What if I am wrong and the plaintiffs were obligated to assign promissory notes made by Huron Tract in their favour to the individual defendants? In my view, the result would be the same.

103 As noted, Mr. Plener wrote to the defendants before January 25, 2008 in an effort to determine what was required to complete whatever transaction the Agreement contemplated. That portion of his letter was ignored.

104 There is no mystery underlying the defendants' failure to communicate their expectations on "closing". They didn't have any. It was immediately clear that Huron Tract was without funds. Messrs. Lehnen and Bulk communicated on behalf of Huron Tract but were wordless in their personal capacity. Mr. Hayter didn't surface at all. The individual defendants didn't mention the existence of the Agreement, let alone what they expected to receive in return for the payment it required.

105 Those facts alone demonstrate the weakness of the submission that the plaintiffs were bound to tender on January 25, 2008. [20] Add to the mix the fact that the plaintiffs didn't have copies of the 2005 notes and that the 2003 notes either didn't evidence their advances at all (in the case of Mr. Jeffrey) or only to a limited extent (in the case of Mr. Raspin and Leajon) and the submission borders on the absurd. [21]

106 As MacKinnon J.A. wrote in *Stewart v. Ambrosino*:

> The law does not require a nugatory and meaningless ritual to be carried out. [22]

107 On January 26, 2006, the plaintiffs were asked to sign a host of documents in return for the share purchase price. They did so that day. I have no hesitation in concluding the plaintiffs would have assigned their debt and — to the extent they held them — promissory notes evidencing same, the moment Messrs. Lehnen, Bulk and Hayter made the payments the Agreement required. They were not asked to because those defendants had no intention of fulfilling their promise.

108 Messrs. Lehnen, Bulk and Hayter did not acknowledge the existence of any potential personal obligation, let alone evidence any intention of completing a transaction involving the purchase of promissory notes. If the Agreement, in substance, contemplated such a transaction, any obligation on the part of the plaintiffs to tender evaporated given the fact the defendants were "demonstrably unable" and unwilling to complete it. [23]

E. Conclusion

109 For the reasons given, I conclude that the individual defendants guaranteed payment of amounts owing to the plaintiffs by Huron Tract. [24] Interest only payments were to be made for two years. The individual defendants are liable to the extent those payments were not made.

110 The principal amount was to be repaid on or before January 25, 2008. It wasn't. With the exception of a $5,000 instalment paid by Huron Tract to each of the plaintiffs in early February, 2008, the entire balance is outstanding.

111 The plaintiffs shall have judgment against Jake Bulk, Allan Hayter and the Estate of Richard Lehnen for the following principal amounts:

a. In the case of Leajon Graphics Ltd., $475,000;

b. In the case of Ken Raspin, $362,000;

c. In the case of Larry Jeffrey, $206,000.

112 Leajon Graphics Ltd. and Larry Jeffrey are also entitled to judgment for interest accrued to January 26, 2008, in the respective amounts of $12,000 and $10,550.

113 All of the plaintiffs are entitled to pre-judgment interest on the amounts set forth in paragraph 111 of these reasons from January 27, 2008 onward at the rate of 3.3 % per year pursuant to s. 128 (1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Postjudgment interest shall accrue in accordance with s. 129 (1) of that statute.

114 The plaintiffs are presumptively entitled to their costs. Failing agreement on the issue, written cost submissions not exceeding five pages (exclusive of any offer(s) to settle) may be provided according to the following schedule:

a. Those of the plaintiffs shall be served and filed on or before April 9, 2013;

b. Those of the defendants shall be served and filed on or before April 23, 2013;

c. A short reply not exceeding two pages may be served and filed by the plaintiffs on or before April 30, 2013.

115 Counsel are asked to provide their cost submissions to me through Judges' Administration in London, Ontario.

Footnotes

1 The principle was recently applied in *Onex Corp. v. American Home Assurance Co.*, 2013 ONCA 117 (Ont. C.A.).

2 According to Mr. Jeffrey, the project was also to include a swimming pool.

3 According to exhibit 1, $218,038 was the amount of the original investment.

4 The parties filed a two volume joint document brief as exhibit 2. It contained six promissory notes from that period in favour of Leajon, one in favour of Mr. Raspin and one in favour of his company 2006312 Ontario Inc. In each of them Huron Tract promised to pay $50,000 with interest only payments required quarterly in arrears until the note matured on its tenth anniversary.

5 A review of the minutes of a November 10, 2005 meeting of the board of directors evidences Mr. Minichillo's frustration. He said that current financial statements and tax returns had not been produced despite requests over a period of two and a half years. He went so far as to suggest that there had been some "creative accounting".

6 A change notice was prepared by Mr. Prince and filed with the Ministry of Consumer and Business Services on November 15, 2005. In addition, Mr. Prince advised Huron Tract's lender, Heartland Community Credit Union Limited, of the change by letter on that same day.

7 Mr. Minichillo is correct. Paragraph 18 contained that prohibition.

8 If it did earn such income, Huron Tract was to receive 10% of it.

9 According to exhibit 3, Leajon received $36,000 of the $48,000 that was due and Mr. Jeffrey received $10,550 of the $21,110 that was due.

10 As noted earlier the amounts are respectively $362,000 (Raspin), $206,000 (Jeffrey) and $475,000 (Leajon).

11 R.S.O 1990, c. C.43, s. 128.

12 The excerpt is taken from paragraph 16 of the Amended Amended Statement of Claim.

13 That was set forth in paragraph 3 of the Agreement.

14 The Joint Document Brief included a partial copy of a Participating Term Debenture signed by Huron Tract in favour of note holders who were to be described in schedule "A". No such schedule was attached. None of the witnesses referred to it.

15 Each of the promissory notes was identically worded and signed by Mr. Bulk as secretary. Interest was to accrue at an annual rate of five per cent and be paid quarterly. Huron Tract promised to pay the named person $50,000 on the tenth anniversary date which ranged from March 19 to September 11, 2013.

16 Paragraph 27 of the parties' partial Agreed Statement of Fact stated:

The promissory notes were to be secured by the Bank of Nova Scotia. In late 2004, the Bank of Nova Scotia determined that it could not continue to hold the notes.

I was shown an August 9, 2004 "Direction" addressed to The Bank of Nova Scotia Trust Company and signed by, among others, Messrs. Raspin and Minichillo. Interestingly, I did not see a single document generated by the institution.

17 The 2005 notes named either Mr. Jeffrey, Mr. Raspin, in trust or Mr. Minichillo, in trust as payee.

18 2d ed. (Toronto: Carswell 1996) at §3.18.

19 (1986), 33 Build. L.R. 1 (Hong Kong P.C.). See, too, *Excelsior Properties Ltd. v. Cosentino Developments Inc.*, 2011 ABQB 666 (Alta. Q.B.); *Terasen Gas Inc. v. Anglo Swiss Resources Inc.*, 2010 CarswellBC 3369 (B.C. S.C.); *Roma Construction Ltd. v. Excel Venture Management Inc.*, 2007 ABQB 396 (Alta. Q.B.).

20 *Pompeani v. Bonik Inc.* (1997), 35 O.R. (3d) 417 (Ont. C.A.).

21 See, for example, *Gyulay v. Kenderry Corp.* (1998), 72 O.T.C. 362 (Ont. Gen. Div.); *Puri v. Sharynton Homes Ltd.* (1994), 48 R.P.R. (2d) 8 (Ont. Gen. Div.); *Can-Euro Investments Ltd. v. Industrial Alliance Insurance & Financial Services Inc.*, 2009 NSSC 20 (N.S. S.C.).

22 (1977), 16 O.R. (2d) 221 (Ont. C.A.).

23 The quoted phrase is drawn from *Gyulay*, *supra* note 22 at para. 36.

24 As noted in the body of my decision, this was pleaded in paragraph 16 of the Amended Amended Statement of Claim.

End of Document

TAB 14

Most Negative Treatment: Distinguished
Most Recent Distinguished: Steed v. 1848756 Ontario Inc. | 2024 ONSC 3197, 2024 CarswellOnt 8370 | (Ont. S.C.J., Jun 5, 2024)

1996 CarswellOnt 3941
Supreme Court of Canada

Manulife Bank of Canada v. Conlin

1996 CarswellOnt 3941, 1996 CarswellOnt 3942, [1996] 3 S.C.R. 415, [1996] S.C.J. No. 101, 139 D.L.R. (4th) 426, 203 N.R. 81, 30 B.L.R. (2d) 1, 30 O.R. (3d) 577 (note), 66 A.C.W.S. (3d) 555, 6 R.P.R. (3d) 1, 94 O.A.C. 161, J.E. 96-2122

Manulife Bank of Canada (appellant) v. John Joseph Conlin (respondent)

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

Heard: May 30, 1996
Judgment: October 31, 1996
Docket: 24499

Counsel: *H. Stephen Lee*, for appellant.
Raymond F. Leach and *Barbara F. Fischer*, for respondent.

Subject: Property; Corporate and Commercial
Related Abridgment Classifications
Guarantee and indemnity
II Guarantee
II.2 Continuing guarantee
II.2.a What constituting
Judges and courts
XVI Jurisdiction
XVI.3 Superior courts
XVI.3.h Appellate court
XVI.3.h.iv Miscellaneous
Real property
VIII Mortgages
VIII.11 Action on the covenant
VIII.11.a Liability on the covenant
VIII.11.a.iii Guarantor
Headnote
Guarantee and indemnity --- Guarantee — Continuing guarantee — What constituting
Mortgages --- Action on the covenant — Liability on the covenant — Guarantee
Judges and courts --- Jurisdiction — Jurisdiction of superior courts — Jurisdiction of appellate court
Mortgages — Action on the covenant — Liability on the covenant — Guarantee — Liability of guarantor — Guarantor not waiving equitable right to be released from liability on material variation of terms — Document construed contra proferentem against bank.
Guarantee and indemnity — Guarantee — Continuing guarantee — What constituting — Guarantee permitting variation of terms — Guarantor not having waived equitable or common law rights to be released from guarantee when mortgage renewed — Renewal agreement not constituting extension of original loan agreement.

Judges and courts — Jurisdiction — Jurisdiction of superior courts — Jurisdiction of appellate court — Mortgagor defaulting on mortgage and bank obtaining summary judgment against mortgagor and guarantors — Court of Appeal having jurisdiction to set aside judgment and dismiss action against guarantor — Court of Appeal having jurisdiction to make any order or decision that ought to have been made by court or tribunal appealed from.

The appellant bank made a loan to the respondent guarantor's spouse which was secured by a first mortgage on an apartment building. The guarantor (along with another), guaranteed the mortgage, which was for a three-year term with an interest rate of 11.5 per cent per annum. The guarantor signed the original mortgage documents. The guarantors covenanted to be bound by all conditions of the mortgage, and to remain so bound notwithstanding an extension of time for payment of the loan or an increase in the interest rate charged for the loan. The covenant provided that the guarantor would assume all obligations as the principal debtor.

Prior to the mortgage maturing, the bank agreed to extend the time for repayment of the loan for another three years at an interest rate of 13 per cent per annum. At that time, the guarantor had separated from his spouse, and had no notice or knowledge of the renewal. Only the spouse executed the renewal agreement as mortgagor, although the document provided for the signature of the guarantor as well.

The mortgage went into default, and the bank commenced proceedings to recover the mortgage debt. It obtained summary judgment against both the mortgagor and the guarantors for the principal owing under the mortgage, with interest at 13 per cent. The guarantor successfully appealed. The Ontario Court of Appeal set aside the judgment, and dismissed the action against the respondent guarantor. The bank appealed. At issue was whether the Court of Appeal had exceeded its jurisdiction in allowing the appeal, and dismissing the action, and whether the guarantor was released from his promise to pay under the terms of the mortgage agreement.

Held:

The appeal was dismissed.

Per Cory J. (La Forest, Sopinka and Major JJ. concurring) The principle that a guarantor will be released from liability on a guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor has been established for a long time. The basis for the rule is that any material change in the principal contract will result in an alteration of the surety's risk. While a surety can contract out of the protection provided by the common law or equity to the guarantor, such contracting out must be clear. Whether a surety remains liable is to be determined by an interpretation of the contract between the parties, the intention of the parties, and all of the circumstances surrounding the transaction. If there is any ambiguity in the guarantee, the document should be construed in accordance with the contra proferentem rule. As a favoured creditor, a surety's obligation should be strictly enforced. The guarantor in this case was not a compensated surety, and fell within the class of "accommodation sureties." Any doubt or ambiguity was to be strictly interpreted, and resolved in favour of the guarantor.

The guarantee covenant was to be interpreted and considered within the context of the entire transaction. The renewal or extension of time clause were not ambiguous. The clause clearly indicated that the guarantor was not bound by the renewal agreement. If the guarantor was to be treated as a principal debtor and not as a guarantor, the bank's failure to notify him of the renewal agreement and the new terms served to release him from his obligations, since he was not a party to the renewal agreement. In any event, the equitable or common law rules relieving a surety from liability are applicable where a contract has been materially altered by the creditor and the principal debtor without notice to the surety, in the absence of an express agreement to the contrary.

The renewal agreement was to be considered an integral part of the transaction. Two aspects of the renewal agreement led to the conclusion that the guarantor was not bound. The renewal agreement was a standard form contract prepared by the bank, and it required the signature of the guarantor. The guarantor was expected to execute the document to confirm notice to him and his acceptance of it, but he did not sign it. Furthermore, the renewal agreement provided that it constituted a new, rather than an extension of the former, agreement. The original document specifically distinguished between extensions and renewals. The absence of a reference to a renewal agreement suggested that it had no application for a renewal. The language in the covenant bound the guarantor to variations if the mortgage was extended; it did not bind the guarantor to a renewal without his consent. The guarantor was to be relieved from liability under these circumstances.

Per Iacobucci J. (dissenting) (Gonthier J. concurring): The Ontario Court of Appeal had jurisdiction to dismiss the action as against the respondent guarantor. The order originally appealed from was granted on a motion for summary judgment brought by the bank. Pursuant to r. 20.04(2) and 20.04(4) of the Ontario *Rules of Civil Procedure*, the motions court judge (and, by extension, the Court of Appeal) had jurisdiction to dismiss the action against the guarantor. The bank was not deprived of its right to have its case fully heard, and to test all of the guarantor's evidence. The bank chose not to exercise its rights under r. 39.02(1) to cross-examine on the affidavits supporting the guarantor's position.

The guarantee clause constituted a waiver of the guarantor's equitable right to be discharged because of the material variation of the mortgage contract. Being essentially a contract, the guarantee was to be interpreted in accordance with the ordinary rules of contractual construction. The primary rule was that effect was to be given to the intentions of the parties as expressed in the written document. In this case, the guarantor plainly agreed to remain bound by the guarantee agreement, notwithstanding the material variations of the principal debt. Even though the guarantee covenant did not refer specifically to a renewal agreement, the language amounted to a clear waiver of the guarantor's right to be discharged in the event of a change in the interest rate or time for repayment. The mechanism of the renewal agreement basically served to extend the time, and increase the interest rate as expressly contemplated in the guarantee covenant. The covenant also did not require the bank to notify the guarantors of any such alteration in the mortgage.

The guarantors were not expected, as "principal debtors," to be signatories to the renewal agreement. The intention of the parties in using such language was to preserve the liability of the surety even in circumstances where the principal obligations were no longer enforceable. The space for the guarantors' signature on the renewal agreement was not helpful in interpreting the guarantee contract. The extent of the guarantor's liability was limited to repayment of the principal, secured by the mortgage at 11.5 per cent per annum.

Per L'Heureux-Dubé J. (dissenting): The "modern contextual approach" constitutes the standard normative approach to judicial interpretation, although, in appropriate circumstances, resort may be had to the old "plain meaning" rules of construction. The "modern contextual approach" for statutory interpretation is equally applicable, with appropriate adaptations, to contractual interpretation. In this case, the appropriate methodology to interpret the language of the guarantee was not the application of the "plain meaning" approach, but an application of the "modern contextual approach," because the terms in the documents constituted "legal terms of art."

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s. 134(1)*considered*

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r. 1.04(1)*referred to*

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r. 39.02(1)*referred to*

APPEAL from judgment reported at (1994), 41 R.P.R. (2d) 283, 17 B.L.R. (2d) 143, 20 O.R. (4d) 499, 120 D.L.R. (4th) 234, 75 O.A.C. 117, allowing appeal from decision granting motion for summary judgment for recovery of mortgage debt under mortgage and guarantee.

***Cory J.* (*La Forest, Sopinka* and *Major JJ.* concurring):**

1 I have read with great interest the clear and concise reasons of Justice Iacobucci. I am in agreement with his finding that the Court of Appeal had jurisdiction to make the order dismissing the action against the respondent. However, I must differ with his conclusion that by the terms of the guarantee, the respondent waived the equitable right of a guarantor to be released upon renewal of the mortgage loan with a different term and interest rates to which the guarantor did not consent.

The Position of a Guarantor as Defined by Equity and the Common Law

2 It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. The principle was enunciated by Cotton L.J. in *Holme v. Brunskill*, [1877] 3 Q.B.D. 495 (C.A.) at pp. 505-6 in this way:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without

> inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court
>
> . . . . .
>
> will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

This rule has been adopted in a number of Canadian cases. See for example *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562.

3 The basis for the rule is that any material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk. The rationale was set out in *The Law of Guarantee* (2nd ed. 1996) by Professor K. P. McGuinness in this way, at p. 534:

> The foundation of the rule in equity is certainly consistent with traditional thinking, but it is a fair question whether it is necessary to invoke the aid of equity at all in order to conclude that in a case where the principal contract is varied materially without the surety's consent, the surety is not liable for any subsequent default. Essentially, a specific or discrete guarantee (as opposed to an all accounts guarantee) is an undertaking by the surety against the risks arising from a particular contract with the principal. If that contract is varied so as to change the nature or extent of the risks arising under it, then the effect of the variation is not so much to cancel the liability of the surety as to remove the creditor from the scope of the protection that the guarantee affords. When so viewed, the foundation of the surety's defence appears in law rather than equity: it is not that the surety is no longer liable for the original contract as it is that the original contract for which the surety assumed liability has ceased to apply. In varying the principal contract without the consent of the surety, the creditor embarks upon a frolic of his own, and if misfortune occurs it occurs at the sole risk of the creditor. A law based approach to the defence is in certain respects attractive, because it moves the surety's right of defence in the case of material variation from the discretionary and therefore relatively unsettled realm of equity into the more absolute and certain realm of law. In any event, it is clear quite certainly in equity and quite probably in law as well, that the material variation of the principal contract without the surety's consent (unless subsequently ratified by the surety) will result in the discharge of the surety from liability under the guarantee.

And further at p. 541, he wrote:

> Where the risk to which the surety is exposed is changed, the rationale for the complete release of the surety is easily explained. To change the principal contract is to change the basis upon which the surety agreed to become liable. A surety's liability extends only to the contract which he has agreed to guarantee. If the terms of that contract (and consequently the terms of the surety's risk) are varied then the creditor should no longer be entitled to hold the surety to his obligation under the guarantee. To require a surety to maintain a guarantee in such a situation would be to allow the creditor and the principal to impose a guarantee upon the surety in respect of a new transaction. Such a power in the hands of the principal and creditor would amount to a radical departure from the principles of consensus and voluntary assumption of duty that form the basis of the law of contract.

The Right of a Guarantor to Contract Out of the Protection Provided by the Common Law

4 Generally, it is open to parties to make their own arrangements. It follows that a surety can contract out of the protection provided to a guarantor by the common law or equity. See for example *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107. The Ontario Court of Appeal, correctly in my view, added that any contracting out of the equitable principle must be clear. See *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), at p. 796.

5 The principle was explained by Professor McGuinness in *The Law of Guarantee, supra*, at p. 546 in these words:

> There are certain types of amendment that may be made to the terms of a principal contract (or departures from the terms of the principal contract) that will not have the effect of discharging the surety under that contract, even though those

> changes may be of a material nature. For instance, where the changes that have been made to the principal contract were specifically authorized by the surety or were otherwise within the contemplation of the contract, the surety will not be discharged. Similarly, changes which are authorized within the guarantee will not relieve the surety from liability.
>
> It is a question of interpretation whether such changes are authorized or contemplated.

The author added at p. 547 the following sage advice to lending institutions:

> *Since the courts have tended to give a narrow construction to provisions in standard form guarantees which authorize such changes, it would be most unwise for a creditor to agree to changes without first obtaining the consent of the surety, except where there is clear authorization* for him to act solely upon his own initiative. Where the creditor seeks to show that the guarantee agreement provides a blanket authorization to make material alterations to the principal contract, *the wording must be very clear* that such a right was intended. [Emphasis added.]

6 The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and the events and circumstances surrounding the transaction as a whole.

Principles of Interpretation

7 In many if not most cases of guarantees a contract of adhesion is involved. That is to say the document is drawn by the lending institution on a standard form. The borrower and the guarantor have little or no part in the negotiation of the agreement. They have no choice but to comply with its terms if the loan is to be granted. Often the guarantors are family members with limited commercial experience. As a matter of accommodation for a family member or friend they sign the guarantee. Many guarantors are unsophisticated and vulnerable. Yet the guarantee extended as a favour may result in a financial tragedy for the guarantor. If the submissions of the bank are accepted, it will mean in effect that a guarantor, without the benefit of notice or any further consideration, will be bound indefinitely to further mortgages signed by the mortgagor at varying rates of interest and terms. The guarantor is without any control over the situation. The position adopted by the bank, if it is correct, could in the long run have serious consequences. Guarantors, once they become aware of the extent of their liability, will inevitably drop out of the picture with the result that many simple and straightforward loans will not proceed since they could not be secured by guarantors.

8 In my view, it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. This is a sensible and satisfactory way of approaching the situation since the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity. The principle is supported by academic writers.

9 G. H. L. Fridman, in his text *The Law of Contract in Canada* (3rd ed. 1994), at pp. 470-71, puts the position in this way:

> The *contra proferentem* rule is of great importance, especially where the clause being construed creates an exemption, exclusion or limitation of liability.
>
> . . . . .
>
> Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails.

Professor McGuinness, in his work *The Law of Guarantee, supra*, at pp. 612-13 explains the application of the rule as follows:

> . . . . .
>
> the *contra proferentum* rule of construction (under which the provisions of an agreement that were inserted by a party for his own protection are subjected to a strict interpretation) provides one method through which the courts can restrict the scope of extremely broad provisions which purport to eliminate the rights of the surety. The justification for giving such provisions a narrow construction is clear: it is one thing to say that a party may, if he so chooses, agree to assume

> an excessive burden, and to waive the rights which the law generally recognizes as existing for his protection. It is quite another thing to assume that parties necessarily intend to enter into such obligations. The more natural assumption is the exact opposite. Where the guarantee was drafted by the creditor, and there is any ambiguity or imprecision in the terms of a provision which purports to limit the rights of a surety, it is only fair that the ambiguity be resolved against the party who prepared the document. If the creditor wishes to take away a right belonging to the surety, he should use clear language in the document.

McGuinness further explains the principle and its justification in these words at p. 244:

> Where it is the creditor who drafted the terms of the contract, consistence of principle would call for the guarantee to be construed narrowly and thus in effect against the creditor. It is submitted that the correct rule is that where there is only one reasonable interpretation that the words used in a guarantee can bear, the guarantee should be given that interpretation. In such a case, the *contra proferentum* rule would not come into play. Where, however, the agreement is ambiguous in the sense that there are two or more interpretations that might reasonably be given to its terms, the guarantee should be construed against the party who prepared it or proposed its adoption, whether that be the creditor or the surety.

10 As well, this Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. This appears from the reasons of Davis J. in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165, at p. 172:

> A surety has always been a favoured creditor in the eyes of the law. His obligation is strictly examined and strictly enforced.

He goes on to say:

> "It must always be recollected," said Lord Westbury in *Blest v. Brown* (1862), 4 De G.F. & J. 367, at 376,

> in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement be altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."

> Apart from any express stipulation to the contrary, where the change is in respect of a matter that cannot "plainly be seen without inquiry to be unsubstantial or necessarily beneficial to the surety,"
>
> . . . . .
>
> the surety, if he has not consented to remain liable notwithstanding the alteration, will be discharged whether he is in fact prejudiced or not.

Those comments are as true today as they were at the time they were written.

11 The appellant contends that this principle of interpretation has been abandoned and for that proposition relies upon the reasons of this Court in *Bauer, supra*. I cannot agree with this submission. The issue in that case was whether a particular clause within the guarantee was an exemption clause and thus subject to the special rules of construction applying to those clauses. It was held that the clause in question was not, in fact, an exemption clause. The general question as to whether the scope of surety obligations should be construed strictly was not explicitly addressed by the Court. It is also significant that the Alberta Court of Appeal in *Alberta Opportunity Co. v. Schinnour*, [1991] 2 W.W.R. 624, found that the clause they were considering was analogous to that in issue in *Bauer*. Nonetheless they determined, correctly in my view, that it should be interpreted in accordance with the general rules of construction. Those rules should, in my view, include the *contra proferentem* rule and thus will be generally applicable to guarantee or surety clauses.

12 The position set out in *Holland-Canada Mortgage Co.*, *supra*, was confirmed in *Johns-Manville Canada Inc. v. John Carlo Ltd.*, [1983] 1 S.C.R. 513. At p. 521 of that case, it was said that "accommodation sureties" are those who entered into the guarantee "in the expectation of little or no remuneration and for the purpose of accommodating others or of assisting others in the accomplishment of their plans." The protection offered to this class of guarantors was explained also at p. 521:

> In respect of them, the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety.

13 These sureties were contrasted with "compensated sureties" whose business consists of guaranteeing performance and payment in return for a premium. With respect to this latter class of sureties it was held at p. 524:

> in the case of the compensated surety it cannot be every variation in the guaranteed contract, however minor, or every failure of a claimant to meet the conditions imposed by the bond, however trivial, which will enable the surety to escape liability.

Although the primary issue in the case was the distinction between accommodation sureties and those who receive compensation, these words nonetheless represent the considered opinion of the Court. In my view, they are correct.

14 I would note in passing that the guarantor in this case comes within the class of accommodation sureties.

15 It follows that if there is a doubt or ambiguity as to the construction or meaning of the clauses binding the guarantor in this case, they must be strictly interpreted and resolved in favour of the guarantor. Further, as a result of the favoured position of guarantors, the clauses binding them must be strictly construed.

16 Finally, when the guarantee clause is interpreted, it must be considered in the context of the entire transaction. This flows logically from the bank's position that the renewal agreement was an integral part of the original contract of guarantee. This position I believe is correct. It follows that fairness demands that the entire transaction be considered and this must include the terms and arrangements for the renewal agreement.

Application of the Principles of Interpretation to the Guarantee and Renewal Agreement Presented in this Case

17 It may be helpful to set out once again clauses 34 and 7 of the original guarantee agreement and recall that the renewal agreement called for the signature of the guarantor.

Clause 34: Guarantee and Indemnity

> IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertaining to this mortgage well and truly do, observe, fulfil and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in full of the principal sum and all other moneys hereby secured.

Clause 7: Renewal or Extension of Time

> PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

18 Counsel for the appellant contended that there was no ambiguity in these clauses and that they made it clear that the respondent's obligations as guarantor continued in spite of the renewal agreement. Counsel for the respondent came to exactly the opposite conclusion. He submitted that on the plain meaning of the clauses, the guarantor was not bound. A somewhat cynical observer might conclude that it should not be unexpected that counsel for the opposing parties would take these positions. However, the same conclusion cannot possibly be reached with regard to the judges who have considered these clauses. The trial judge and the minority in the Court of Appeal came to the same conclusion as the appellant. The majority in the Court of Appeal came to the opposite conclusion. That skilled and experienced judges could come to opposite conclusions with regard to the clauses might well lead one to suspect that the meaning of the clauses is unclear; in a word, they are ambiguous. Of course, if that be the case, the *contra proferentem* rule should be applied. However, for the reasons set out above, my view is that the clauses unambiguously indicate that the respondent was not bound by the renewal agreement. If I am in error and if the *contra proferentem* rule were applied it would strengthen and support my conclusion as to the interpretation of the clauses.

The Effect of the "Principal Debtor Obligation" Set Out in Clause 34

19 In *Canadian Imperial Bank of Commerce v. Patel* (1990), 72 O.R. (2d) 109 (H.C.), at p. 119, it was held that a principal debtor clause converts a guarantor into a full-fledged principal debtor. I agree with this conclusion. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. This conclusion does not require recourse to equitable rules regarding material variation of contracts of surety. It is simply apparent from the contract that a principal debtor must have notice of material changes and consent to them. Of course, a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights. However, in the absence of a clear waiver of these rights, such a guarantor must be given notice of the material changes and, if he is to be bound, consent to them.

20 The appellant contended that the words in clause 34 which provide "the said guarantors

. . . . .

covenant, promise and agree as principal debtors and not as sureties". indicate that the respondent is bound as a principal debtor yet without any of the usual rights and benefits of a principal debtor such as notice with regard to renewal, and the opportunity to negotiate and consent to its terms. To take this position seems to me to be unfair and unreasonable.

21 The mortgagor as a principal debtor must be given notice of the renewal agreement. This is evident from the requirement that the mortgagor sign the renewal agreement. The principal debtor clause converts the guarantor into a full-fledged principal debtor with all the duties and obligations which that term implies. If the guarantor is to be responsible to the lending institution as a "full-fledged principal debtor" then he or she is entitled to the same notice of a renewal agreement as the principal debtor mortgagor. That is undoubtedly the reason the standard form of the renewal agreement provides a place for the guarantor to sign. Not just fairness and equity but the designation of the guarantor as a principal debtor leads to the conclusion that the guarantor must have notice of and agree to the renewal before he is bound by its terms. A guarantor reading clause 34 would be led to believe that as a principal debtor he would have the same notice of a renewal agreement as would the principal debtor mortgagor.

If a lending institution wishes to have the guarantor obligated as a principal debtor, then the guarantor must be entitled to the same rights as the principal debtor which would include both notice and agreement as a party to a renewal.

22 Even if it were thought that the principal debtor clause does not convert the guarantor into a principal debtor, the equitable or common law rules relieving the surety from liability where the contract has been materially altered by the creditor and the principal debtor without notice to the surety would apply, in the absence of an express agreement to the contrary. The question is whether in this case, either as principal debtor or as surety, the guarantor has expressly contracted out of the normal protections accorded to him. This question must be determined as a matter of interpretation of the clauses of the agreement, through consideration of the transaction as a whole, and the application of the appropriate rules of construction.

Effect of the Renewal Agreement

23 In my view, the renewal agreement must be considered an integral part of the transaction. There are two aspects of the renewal agreement itself which lead to the conclusion that the guarantor is not to be bound. First, the renewal agreement is once again a standard form prepared and used by the bank and it calls for the signature of the guarantor. It must be assumed that all these standard form agreements prepared by the bank as a lending institution were meant to mesh with and complement each other. The requirement by the standard form of a signature by the guarantor then supports the respondent's position that he was not, by the terms of the original loan agreement, deprived of the equitable and common law protection ordinarily extended to guarantors. Rather, he was expected to sign the renewal agreement. His signature would confirm his notice of the agreement and his consent to it.

24 The appellant submitted that the renewal agreement is simply an extension of the original mortgage which was contemplated by the terms of that mortgage. This submission should not be accepted. The original mortgage was for a period of three years, a term not uncommon in today's mortgage market. The renewal agreement provides for an agreement as to the term of a new mortgage and the new rate of interest. The document itself appears to indicate that the renewal agreement constitutes a new mortgage arrangement. This can be gathered from the provision which reads:

> All the covenants, conditions, powers and matters in the said mortgage shall apply to and *form part of this agreement, except those amended herein*. [Emphasis added.]

25 The standard form indicates that many variations in the original mortgage are to be agreed upon. For example, the mortgagor can select the length of the term of the loan; the rate of interest is to be agreed upon between the mortgagor and the lending institution. If the renewal agreement is no more than the extension of the original mortgage, the mischief that that position creates becomes obvious. What if the renewal provided for an extension of the term to 25 years at a substantially increased rate of interest? What if the situation with regard to the security had changed remarkably as a result of new zoning regulations or a new building code or there had been a marked change of use in the surrounding lands? To say that despite the changed circumstances the guarantor is, beyond the strict terms of the agreement, bound without any notice to an indefinite guarantee of a mortgage containing substantial changes in the term of the loan and the interest rate is worrisome indeed.

26 Further, it is significant that the renewal agreement states that the terms of the old mortgage will form part of the agreement. By doing so it indicates that this is a new agreement rather than merely an extension of an old agreement. This serves to strengthen my view that the respondent was no longer bound by the terms of the original guarantee upon the execution without notice to him of the renewal agreement.

Significance of Clause 7 of the Original Agreement

27 The reasons of Finlayson and Carthy JJ.A. forming the majority of this case in the Court of Appeal are in my view correct. Finlayson J.A. wrote ((1994), 20 O.R. (3d) 499, at p. 513):

> The reference in cl. 7 to the renewal agreement taking priority over subsequent encumbrancers indicates to me that the mortgagee was not directing its corporate mind to the guarantors when negotiating this document
>
> . . . . .

> Certainly, there is no express reference to the renewal agreement in cl. 34. On balance, and keeping in mind that these documents were all drawn and presented by the mortgagee, I conclude that the renewal agreement was a material change to the original mortgage debt not contemplated by the language of the guarantee and has the effect of releasing the guarantors from their obligations as sureties.

28 Carthy J.A.'s interpretation of the contract supports that of Finlayson J.A. but emphasises different aspects. First, he stresses that clause 34 makes no reference to renewals. In his view, this is significant because it is a term commonly used with respect to mortgages and it is explicitly used in other clauses such as clause 7. Moreover, he found that clause 34 is perfectly capable of coherently referring to changes in the terms within the period of the original mortgage itself.

29 It is, I think, noteworthy and telling that clause 7 specifically distinguishes between extensions and renewals both in its heading and its text. This leads me to conclude that these terms do *not* refer to the same eventuality. Since clause 7 so carefully distinguishes between extensions and renewals, they must be referring to different situations. Both *Black's* legal dictionary and *The Oxford Dictionary* give separate and distinct definitions of the terms extension and renewal. *Black's Law Dictionary* (5th ed. 1979) at p. 1165 defines "renewal" as "[t]he act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established" while it defines "extension" at p. 523 as "[a]n increase in length of time (*e.g.* of expiration date of lease, or due date of note). The word 'extension' ordinarily implies the existence of something to be extended." This clearly indicates that an "extension" refers to extending an agreement which already exists, while a renewal refers to the revival of an agreement which has expired. This distinction is confirmed by *The Concise Oxford Dictionary of Current English* (9th ed. 1995) at p. 476, which defines "extend" as "lengthen or make larger in space or time" while "renew" is defined as "revive; regenerate; make new again, restore to the original state." It follows that the failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. If the lending institutions wished to have clause 34 apply to renewals, it would be a simple matter to use the specific term which is well known in the commercial world of mortgages.

30 Finally, the renewal agreement refers to incorporating the mortgage terms into the agreement. Clause 3 of the renewal agreement provides that:

> All the covenants, conditions, powers and matters in the said mortgage shall apply to and *form part of this agreement, except those amended herein*. [Emphasis added.]

This, too, suggests that the renewal agreement is a new agreement and not an extension, since the original mortgage terms are only incorporated to the extent that they are not altered by the renewal. Although clause 34 contemplates a change in the interest rate, an extension would not ordinarily involve an alteration of the original terms, but rather a continuation of the same terms over a longer time period.

31 The appellant sought comfort from *Co-operative Trust Co. of Canada v. Kirkby*, [1986] 6 W.W.R. 90 (Sask. Q.B.). In that case, Armstrong J. noted that in some cases, a mortgage extension or renewal agreement could have exactly the same effect as a new mortgage. However, he concluded, correctly I believe, that on the facts of that case, there was no evidence to support the contention that the mortgage extension agreement was in fact a new mortgage. In my view, such a determination will involve a review of the particular guarantee clause and the whole transaction between the parties. The appellant also referred to the decisions in *Royal Trust Corp. of Canada v. Reid* (1985), 40 R.P.R. 287 (P.E.I. C.A.), and *Veteran Appliance Service Co. v. 109272 Developments Ltd.* (1986), 67 A.R. 117 (Q.B.). In both those decisions, the terms renewal and extension agreement were used interchangeably. Yet I think that it becomes clear in reading both these decisions that this was not a central or major issue in the case. To repeat, it will be a question of fact to be determined on the particular transaction, agreement and circumstances presented in each case whether a renewal agreement is a new contract or simply an extension of the existing agreement.

32 It follows I find that the words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. The renewal agreement which was entered into without notice to, or the agreement of, the guarantor materially altered the provisions of the original loan agreement. The guarantor was thereby relieved of his obligation.

33 If the wording of the two clauses should be found to be ambiguous, the *contra proferentem* rule must be applied against the bank. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability.

Disposition

34 I would dismiss the appeal with costs.

L'Heureux-Dubé J. **(dissenting):**

35 I substantially agree with my colleague Justice Iacobucci's reasons and the result he reaches. I have only one comment which relates to the judicial interpretation methodology relied upon by my colleague.

36 The "modern contextual approach" is, in my view, the standard, normative approach to judicial interpretation, and one may exceptionally resort to the old "plain meaning" rule in appropriate circumstances. One example of the latter is statutory interpretation in the area of taxation, where the words and expressions used in legislative provisions quite often have a well-defined "plain meaning" within the business community.

37 In the case at bar, our court is called upon to determine the appropriate definition of the phrase "the giving of time for payment

. . . . .

or the varying of the terms of payment", in the context and factual situation of the instant case.

38 My colleague decides the issue by going through a contractual interpretation exercise as follows. Firstly, the impugned contractual provisions are reviewed in the context of the whole contract. Secondly, the issue of the *contra proferentem* rule is addressed. Thirdly, the issue of the difference between "accommodating" and "compensated" sureties is examined. Fourthly, an authoritative academic text is relied upon: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996).

39 Thus, after reviewing the provisions in their immediate context, the contract as a whole, the consequences of proposed interpretations, the applicable presumptions and rules of interpretation, and admissible external aids, my colleague comes to a contextual interpretation of the impugned phrase. I fully agree with both the process used and the conclusions he arrived at. However, with respect, that process is not an application of the "plain meaning" approach: in fact, the "modern contextual approach" to judicial interpretation is the one that is actually used in the instant case.

40 I agree with my colleague that "[t]he rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally". But *the rules which govern the interpretation of deeds and contracts generally* are essentially the same as *the rules for statutory interpretation*. As Lord Blackburn stated in *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743 (H.L.), at pp. 763-65:

. . . . .

> I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. *In all cases* the object is to see what is the intention expressed by the words used.
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> . . . . .
>
> In construing written instruments I think the same principle applies. In the case of wills the testator is speaking of and concerning all his affairs;
>
> In the case of a contract, the two parties are speaking of certain things only.
>
> . . . . .

> [In both cases] the Court
>
> . . . . .
>
> declares what the intention, indicated by the words used under such circumstances, really is.
>
> And this, as applied to the construction of statutes, is no new doctrine.
>
> . . . . .
>
> My Lords, *mutatis mutandis, I think this is applicable to the construction of statutes as much as of wills*. And I think it is correct. [Emphasis added.]

41 Therefore, the "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. In the instant case, the methodological reference provided by R. Sullivan in *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131, applies equally to contractual interpretation:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially interpreted] in its *total context*, having regard to [its] purpose
>
> . . . . .
>
> , the *consequences of proposed interpretations*, the *presumptions and special rules of interpretation*, as well as *admissible external aids*. In other words, the *courts must consider and take into account all relevant and admissible indicators of [*
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> . . . . .
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> *]meaning. After taking these into account, the court must them adopt an interpretation that is appropriate*. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the [
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> . . . . .
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>]text; (b) its efficacy, that is, its promotion of the [
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> . . . . .
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>]purpose; and (c) its acceptability, that is the outcome is reasonable and just. [Emphasis added.]

42 This methodology was indeed the one followed by my colleague. In the case at bar, however, the resulting interpretation did not really come from the "plain meaning" of the words, but from their "meaning in law", because they are "legal terms of art". As Lord Diplock explained in *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302 (C.A.), at pp. 313-14:

> Documents which are intended to give rise to legally enforceable rights and duties contemplate enforcement by due process of law which involves their being interpreted by courts composed of judges, each one of whom has his personal idiosyncrasies of sentiment and upbringing, not to speak of age. Such documents would fail in their object if the rights and duties which could be enforced depended on the personal idiosyncrasies of the individual judge or judges upon whom the task of construing them chanced to fall. It is to avoid this that lawyers, whose profession is to draft and to construe such documents, have been compelled to evolve an English language, of which the constituent words and phrases are more precise in their meaning than they are in the language of Shakespeare or of any of the passengers on the Clapham omnibus this morning. *These words and phrases to which a more precise meaning is so ascribed are called by lawyers "terms of art" but are in popular parlance known as "legal jargon*." [Emphasis added.]

43 After having specified the nature of "legal terms of art", Lord Diplock stated the basic rule of judicial interpretation, as well as the methodology, that are applicable in that context (at p. 314):

> The words and phrases
>
> . . . . .
>
> which are "terms of art" must therefore be given the meaning which attaches to them as terms of art:
>
> . . . . .
>
> The lexicon of terms of art is to be found in decided cases and in textbooks consulted by legal practitioners.

44 It is quite obvious that where courts expound judicial interpretations of "legal terms of art" using such external aids as legal textbooks, the resulting outcome cannot appropriately be labelled a "plain meaning" definition.

45 Where an instrument uses a legal term of art, there is a presumption that the term of art is used in its correct legal sense: *Inland Revenue Commissioners v. Williams*, [1969] 1 W.L.R. 1197 (Ch.; Megarry J.).

46 This is the presumption that is resorted to by my colleague Iacobucci J. when he makes use of admissible external aids — i.e.: McGuinness, *supra*, — in determining the correct meaning of the phrase "to give time". As McGuinness reviews extensive case-law authority that establishes the generally accepted "meaning in law" of these "legal terms of art", it is an admissible external aid to judicial interpretation: see *Driedger, supra*, at pp. 428, 468 and 474; see also P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 449-53 and 457-58.

47 Subject to the above considerations, I concur with my colleague's disposition of the appeal.

Iacobucci J. **(dissenting) (*Gonthier J.* concurring):**

48 This appeal raises questions regarding the proper method for interpreting guarantees. Specifically, we are asked to determine whether the wording of the contract in issue was clear enough to waive the guarantors' equitable right to be released when the principal loan was renewed.

I. Background

49 On February 20, 1987, the appellant Manulife Bank of Canada (at the time known as The Regional Trust Company) made a loan of $275,000 to Dina Conlin. The loan was for a term of three years and bore interest at the rate of 11.5 percent per annum. Dina Conlin provided security for the loan in the form of a first mortgage against lands located in Welland, Ontario.

50 The terms of the loan required the signature of two guarantors: the respondent John Joseph Conlin, who was the mortgagor's husband; and Conlin Engineering and Planning Limited, an Ontario corporation. In clause 34 of the mortgage agreement, the two promised, "as principal debtors and not as sureties", to pay the money secured by the mortgage. They further agreed to all of the particular conditions and stipulations of the mortgage which were binding upon the mortgagor.

51 The guarantee was to remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". The liability of the guarantors was stated to be continuous, subsisting "until payment in full of the principal sum and all other moneys hereby secured".

52 In 1989, the respondent and Dina Conlin separated.

53 In 1990, shortly before the mortgage was to mature, Dina Conlin and the appellant executed an agreement which renewed the mortgage for a further three- year term at a yearly interest rate of 13 percent. The renewal forms provided spaces for the signature of the "registered owner" and the "guarantor", but the agreement was signed only by Dina Conlin. The respondent had no notice or knowledge of the renewal.

54 In March of 1992, Dina Conlin defaulted on the mortgage.

55 After fruitless efforts to sell the Welland lands, the bank initiated proceedings for summary judgment against Dina Conlin and the guarantors. The bank claimed the principal owing under the mortgage with interest at the rate of 13 percent per annum. Judgment was obtained on the motion. However, a majority of the Court of Appeal set aside the judgment and dismissed the action against the respondent: (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143.

II. Relevant Contractual Provisions

56

(7) Renewal or Extension of Time

PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

(34) Guarantee and Indemnity

IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertaining to this mortgage well and truly do, observe, fulfill and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us, notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment thereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in full of the principal sum and all other moneys hereby secured.

III. Judgments Appealed From

A. Ontario Court (General Division)

57 In a very succinct judgment, Killeen J. granted the bank's motion for summary judgment against both Dina Conlin and the respondent. He found that, according to the "clear and unequivocal language" of clauses 7 and 34, the respondent was liable under his guarantee despite the renewal of the mortgage and despite the increase in the rate of interest: "In my view, there is no escape for the guarantor".

B. Ontario Court of Appeal (1994), 20 O.R. (3d) 499

(a) Finlayson J.A.

58 Finlayson J.A. first considered the following language in clause 34: "the said guarantors

. . . . .

covenant, promise and agree *as principal debtors and not as sureties*

. . . . .

" (emphasis added). He found an apparent inconsistency between this last phrase and the fact that, on the face of the contract, the respondent appeared to be signing as a surety and not as a principal debtor. Having briefly discussed the difference between contracts of indemnity and contracts of guarantee, Finlayson J.A. concluded that it was unnecessary to resolve the exact nature of the guarantor's status, stating: "the reference to the guarantor as principal debtor can be disregarded for the purposes of this appeal" (p. 511).

59 Finlayson J.A. then turned to the main issue of whether the renewal agreement extinguished the respondent's liability under his guarantee. He noted that, in equity, either an increase of the interest rate or an extension of the mortgage's term constitutes a material change of the original contract which will extinguish a guarantor's liability.

60 Therefore, it was necessary to determine whether clause 34 constituted a waiver, on the part of the sureties, of these equitable rights. After reviewing several cases where the language of a particular guarantee was held to embrace a renewal agreement, Finlayson J.A. stated that "each of these cases must be confined to its own wording" (pp. 511-12). Furthermore, the language of the Manulife guarantee clause did not, in the opinion of Finlayson J.A., clearly contemplate the renewal agreement. Accordingly, the material change to the loan, effected through the renewal agreement, released the guarantors from their respective obligations.

(b) Carthy J.A. (concurring with Finlayson J.A. in the result)

61 Carthy J.A. began by stating that the law has always treated sureties as "favoured" creditors. While a surety can contract out of his legal rights, the language used to do so must be clear.

62 Applying a "strict" interpretation to the loan agreement, Carthy J.A. concluded that the guarantee agreement was not "explicit enough to embrace a renewal" (p. 515). Furthermore, he found that the wording of clause 7 did not stipulate clearly that the loan could be renewed by an agreement which was not signed by the guarantors. The guarantors had not waived their equitable rights and, accordingly, the renewal agreement extinguished their liability.

(c) Robins J.A. (dissenting)

63 Robins J.A. first reviewed the rule in *Holme v. Brunskill*, [1877] 3 Q.B.D. 495 (C.A.) which states that any material variation of the principal contract without the surety's consent will discharge the surety. He went on to note that a guarantor can contract out of this equitable protection.

64 Robins J.A. then looked at the terms of clause 34 which stated that the guarantee would remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". He concluded that these words clearly contemplated both the extension of the mortgage's term and the increase in the interest rate, as implemented by the renewal agreement. In other words, by clause 34, the guarantors waived their equitable rights to be released from their obligations in the event of these particular changes to the loan contract.

65 Having decided that the respondent was liable as a guarantor, Robins J.A. did not find it necessary to consider whether the guarantors were, in fact, "principal debtors".

66 However, while he found the respondent to be liable under the guarantee, Robins J.A. would have varied the order of the motions court judge such that Conlin would only be liable for the principal amount secured under the mortgage and interest thereon calculated at 11.5 percent per annum. He based this variation on the finding that the guarantors agreed to be liable for the moneys secured *under the original mortgage*. In his view, although they agreed to be liable notwithstanding any change in the interest rate, they did not agree to be liable for that higher rate of interest.

IV. Issues

67 Before our Court, the appellant raised a threshold issue of jurisdiction. It claimed that the Court of Appeal had erred in dismissing the action when that order was not requested by either party at the motion for summary judgment or on appeal and when neither counsel nor the courts ever discussed this form of relief. Accordingly, there are two major issues before us:

1. Did the majority of the Ontario Court of Appeal exceed its jurisdiction in allowing the appeal and dismissing the action, rather than sending the matter back to trial?

2. Under the terms of the loan agreement, was the respondent John Joseph Conlin released from his promise to pay the principal sum and other moneys secured by the mortgage, when the term of the mortgage was extended and the rate of interest increased, without notice to the respondent?

V. Analysis

A. Did the Court of Appeal have jurisdiction to dismiss the action as against the respondent?

68 Section 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, states as follows:

> *134.* — (1) Unless otherwise provided, a court to which an appeal is taken may,
>
> (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
>
> (b) order a new trial;
>
> (c) make any other order or decision that is considered just.

69 The order originally appealed from was granted on a motion for summary judgment brought by the bank. The respondent Conlin had brought no cross-motion for summary judgment dismissing the action. There had been no examination for discovery and no trial. Given that an appeal court may not make an order which the trial judge would not have had the jurisdiction to make, *Rotenberg v. York (Borough) (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), at p. 110, the appellant argued before us that the Court of Appeal had jurisdiction only to set aside the order for summary judgment and send the matter back for trial. The question to be answered, therefore, is whether the motions court judge had the jurisdiction to dismiss the action against the respondent.

70 The original motion for summary judgment was brought pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 20.04(2) states:

> Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

Rule 20.04(4) states:

> Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly,
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> . . . . .

The interpretive guide to the *Rules* is set out in Rule 1.04(1):

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

71 Considered in light of Rule 1.04(1), in my opinion, Rules 20.04(2) and (4) gave Killeen J. the jurisdiction to dismiss the action against the respondent. The motions court judge could either have found that there was no genuine issue for trial or he could have found that the only genuine issue was an issue of law. In either case, it would have been within his jurisdiction and, by extension, within the jurisdiction of the Court of Appeal, to dispose of the matter by dismissing Manulife's claim.

72 However, the appellant further argues that Finlayson and Carthy JJ.A. erred in basing their decisions on the unproven assertion that Conlin had never consented to the 1990 renewal agreement. The appellant claims that it had no opportunity to fully test Conlin's affidavit evidence with regard to consent and that, therefore, it was denied the right to have its case fully heard.

73 I do not agree with this assertion. The appellant did, in fact, have the opportunity to test Conlin's evidence. Rule 39.02(1) of the *Rules of Civil Procedure* says that a party to a motion may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion. However, the bank chose not to exercise this right and left Conlin's evidence unchallenged. Therefore, in my opinion, the appellant was not deprived of its right to have its case fully heard and to test all of the respondent's evidence.

74 This case is far from the circumstances that arose in *Keltic Leasing Corp. v. Curtis* (1993), 133 N.B.R. (2d) 73 (C.A.). In that case, the trial judge erred in making a finding of fact on a question which had not been addressed at all by the parties. The Court of Appeal found that this deprived the plaintiff of its right to adduce evidence in support of its position. However, in the case before us, the question of Conlin's consent, or lack thereof, to the renewal agreement was addressed before Killeen J. and, as discussed above, the appellant had full opportunity to counter this with evidence to the contrary.

75 For these reasons, it is my view that there is no reason to interfere with the Court of Appeal's procedural handling of this case.

B. Under the terms of the loan agreement, was the respondent released from his promise to pay the principal sum and other moneys secured by the mortgage when the term of the mortgage was extended and the rate of interest increased without the respondent's consent?

76 It is well accepted that any material variation of the terms of a contract between debtor and creditor, which is prejudicial to the guarantor and which is made without the guarantor's consent, will discharge the guarantor: *Holme v. Brunskill*, *supra*, at pp. 505-6; *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562. An increase in the rate of interest and an extension of the time for payment are both material changes to the loan agreement sufficient to discharge a surety: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996), at ¶¶10.23 and 10.51.

77 However, this right to be discharged as a result of a material variation of the principal contract can be waived by the surety. As McIntyre J. said in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107, "it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule". The question to be resolved, therefore, is whether clause 34 amounts to a waiver of the respondent's equitable rights. Before dealing with this question, I believe it would be helpful to discuss briefly some of the interpretive principles relating to guarantees.

a) Interpretive principles relating to guarantees

78 In my opinion, there is no special rule of construction for guarantees. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. As McGuinness states, *supra*, at p. 238, "The rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally."

79 The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. As Estey J. said in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 899, quoting Meredith J.A. in *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131 (Ont. C.A.), at p. 137: "[In all contracts], effect must be given to the intention of the parties, to be gathered from the words they have used." The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is "plainly repugnant to the intention of the parties": McGuinness, *supra*, at p. 239; and see the reasons of Estey J. in *Consolidated Bathurst*, *supra*, at p. 901.

80 When interpreting guarantees, like other contracts, the court may apply the *contra proferentem* rule where the wording of the guarantee supports more than one meaning. According to this rule, the ambiguity will be resolved in favour of the party who did *not* draft the contract. This is an interpretive rule of last resort, to be used only when all other means of ascertaining the intentions of the parties, as expressed by their written contract, have failed. See the words of Cartwright J. in *Reliance*

Petroleum Ltd. v. Stevenson, [1956] S.C.R. 936, at p. 953. As Lindley L.J. said in *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453 (C.A.), at p. 456:

. . . . .

> this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

81 There is some suggestion in the case law that guarantee agreements entered into by an "uncompensated" or "accommodating" surety will be interpreted more strictly than those entered into by a compensated surety. In this respect, most notable is the decision of the Court in *Johns-Manville Canada Inc. v. John Carlo Ltd.*, [1983] 1 S.C.R. 513.

82 In that case, the respondent, Johns-Manville, had entered into a contract with a supplier. That supplier had entered into a payment bond which named the appellant, Citadel, as guarantor of the supply contract. A condition of the bond was that no suit could be commenced under the bond without proper notice being given to the appellant surety and to the supplier. The supplier defaulted and the respondent commenced an action against the guarantor, Citadel. The respondent gave proper notice to the guarantor. However, while notice was given to the supplier, it did not strictly comply with the requirements of the bonding agreement. The guarantor denied liability under the bond on the basis that the notice provisions of the bond had not been complied with.

83 The Court rejected this argument and held that the guarantor was liable under the bonding agreement despite the respondent's failure to comply strictly with the terms of the contract. The basis for the decision was that guarantee agreements entered into for valuable consideration should be interpreted according to the ordinary rules of contractual construction. In *obiter*, McIntyre J., at pp. 521-22, went on to suggest that a different, stricter rule would apply to guarantors who had not received compensation:

> In respect of them [i.e. uncompensated sureties], the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety. Any material variation in the terms of the guaranteed indebtedness and any extension of time or postponement of the debtor's obligation, or any discharge or relinquishment of any security for the debt without the consent of the surety will discharge him. In other words, courts have adopted the *strictissimi juris* construction of the surety contract
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> . . . . .
>
> surety contracts should be more liberally construed in favour of claimants in the case of compensated sureties than in the case of accommodation sureties.

84 In my opinion, the above statement should be understood in the context in which it was made. In *Citadel General Assurance*, the issue was not one of contractual interpretation. Rather, it was a question of what consequences were to flow from a clear breach of the contract. For these reasons, it is my view that the comments in *Citadel General Assurance* are not a sufficient basis for holding generally that guarantee contracts should be subject to special, stricter rules of interpretation if the guarantor has not received compensation.

(b) Application of the rules of interpretation to the contract between Conlin and Manulife

85 In applying the above principles to this case, a number of sub-questions arise from the arguments of the parties which I now will address.

(i) Does clause 34 amount to a waiver of the respondent's equitable rights?

86 By clause 34, the guarantors agree to remain bound by the guarantee contract notwithstanding the giving of time for payment of the mortgage or the varying of the rate of interest.

87 The respondent argued that clause 34 does not include a waiver of the guarantors' right to be discharged in the event of a renewal of the mortgage. According to this argument, since the renewal agreement constituted a material change, it discharged the guarantors.

88 It is true, as the respondents contend, that clause 34 does not refer to "renewal" agreements by name. However, the clause does contain a clear waiver of the guarantors' right to be discharged in the event of an extension of time or an increase in the rate of interest:

. . . . .

> this covenant shall bind us, and each of us, notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon

. . . . .

89 The respondent maintained that a renewal was not the same thing as the giving of time for payment. He pointed out that clause 7 uses the term "renewal" while clause 34 does not. According to this line of argument, if the parties had intended the guarantee agreement to include a waiver of the right of discharge in the event of a renewal of the mortgage, they would have said so explicitly in clause 34.

90 However, I do not find this argument persuasive. The plain ordinary meaning of the words, "the giving of time for payment

. . . . .

or the varying of the terms of payment" encompasses the renewal agreement. Through this agreement, the appellant bank extended the term of the loan by three years and increased the rate of interest charged on the debt. I can see no support for the respondent's contention that the "giving of time for payment", as detailed in clause 34, does not include the giving of time for payment as effected by the renewal agreement.

91 In his book *The Law of Guarantee*, *supra*, at p. 556, McGuinness discusses the effect of agreements "to give time" to the principal debtor and says that the "giving of time" includes those agreements "which provide specifically for an extension of time for performance.

. . . . .

[for] further time in which to pay

. . . . .

the guaranteed debt". This is precisely what the renewal agreement accomplished and, thus, this is what was contemplated by the language of the guarantee agreement.

92 In other words, what we must consider is the substantive effect of the renewal agreement, rather than the form of the instrument by which it was executed. The parties did use a renewal agreement, but, at bottom, that renewal agreement extended the time for payment and increased the interest rate, events that are expressly covered in clause 34.

93 With respect, I do not agree with Carthy J.A. when he says that the words "notwithstanding the giving of time for payment" should be interpreted to refer only to forbearance by the bank to pursue remedies during the original term of the mortgage. This is a case where we should heed the warning of Lindley L.J. in *Cornish v. Accident Insurance Co.*, *supra*, and not use the *contra proferentem* doctrine in any guise to create a doubt, or to magnify an ambiguity. Like Killeen J., I am of the view that the plain wording of the agreement in question raises no real difficulty.

(ii) Under clause 34, did the appellant have to notify the guarantors of the renewal agreement?

94 One of the last phrases of clause 34 reads as follows: "we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities *without notice to us*" (emphasis added). By contrast, the preceding phrase which waives the guarantors' rights to be discharged in the event of certain material changes to the principal contract does not contain this phrase, "without notice to us". The respondent contends that this omission means that, if the bank failed to notify the guarantors of the relevant material changes, the guarantors would be discharged from their obligations. Because the respondent received no notice of the renewal agreement, he was released from his liability.

95 Again, I am unable to agree with this line of argument. As already stated, the language of clause 34 is clear: the guarantor unconditionally promises to remain bound notwithstanding the extending of time or the changing of the rate of interest charged. It is rather odd to infer a condition of notice when the undertaking is so clear and unambiguous. Of course, the parties could have included a requirement of notice, but, as the language of the waiver in clause 34 is so clear, they would have had to do so explicitly. It may be that the insertion of the words "without notice to us", in connection with the waiver of breaches and the accepting of other covenants, sureties or securities, was simply made out of an abundance of caution, but, regardless, this cannot affect the clear waiver relating to extending time and changing the interest rate.

(iii) What is the effect of the respondent promising "as a principal debtor and not as a surety"?

96 Clause 34 provides that the respondent and Conlin Engineering enter the agreement "as principal debtors and not as sureties". In his concurring judgment, Carthy J.A. reasoned that, as "principal debtors", the guarantors would be "expected" to be signatories to the renewal agreement. With respect, I do not agree.

97 I agree with Robins J.A.'s conclusion that the evident intention of the parties, in using this kind of language, was to preserve the liability of the surety even in circumstances where the principal obligation was no longer enforceable, although I express no opinion on whether the language is sufficient to accomplish such an objective. In any event, it is unnecessary to consider whether this clause was sufficient to turn clause 34 into an indemnity agreement, because I am of the opinion that the respondent is liable as a guarantor.

(iv) What is the significance of the fact that the renewal form provides a space for the guarantor's signature?

98 The respondent points to the fact that the renewal agreement had a space for the signature of the guarantor as proof that the reasonable expectations of the parties were that, in the absence of the guarantors' consent to a renewal agreement, any such agreement would discharge the guarantors. With respect, I do not agree.

99 Our primary task is to determine the meaning of the guarantee contained in clause 34. This agreement was entered into in 1987. The wording or form of another subsequent contract, entered into three years later, cannot change the meaning of the original agreement. In my opinion, the space for the guarantors' signature on the renewal agreement is not helpful in trying to interpret the guarantee contract.

(v) What exactly is the extent of the respondent's obligation?

100 The respondent promised to guarantee the payment of the money secured by the 1987 mortgage. In my view, the terms of that mortgage determine the extent of the respondent's liability. Clause 34 does include a waiver of the guarantors' rights to be discharged in the case of material variation of the terms of the loan agreement. However, the fact that the renewal agreement does not discharge the respondent does not mean that the respondent is liable for the money secured by that renewal agreement — a contract to which he never consented. In clause 34, the guarantors promise to pay "the principal sum and all other moneys *hereby secured*" (emphasis added), i.e. secured by the original mortgage agreement. In other words, the respondent is not liable for interest at the increased rate of 13 percent. Rather, his responsibility, as specified in the 1987 agreement, and as found by Robins J.A. in the Court of Appeal, is to repay the balance owing on the principal sum with interest charged at the rate of 11.5 percent.

VI. Disposition

101 For the foregoing reasons, I would allow the appeal, with costs here and below, set aside the judgment of the Court of Appeal, and substitute therefor an order to the effect that the respondent is liable under his guarantee to pay the balance owing on the principal amount with interest at 11.5 percent per annum.

Appeal dismissed.

TAB 15

2009 CarswellOnt 4063
Ontario Superior Court of Justice

Royal Bank v. Jones

2009 CarswellOnt 4063, [2009] O.J. No. 2932, 178 A.C.W.S. (3d) 1014

ROYAL BANK OF CANADA (Plaintiff) and SIMON JONES, NICK AGOSTINO, BERARDINO LOMBARDI aka BEN LOMBARDI and LUIS TRUJILLO (Defendants)

Matheson J.

Heard: May 28, 2009
Judgment: July 10, 2009
Docket: 7466/07

Counsel: J. Ross Macfarlane for Plaintiff
Christopher J. Jaglowitz for Defendant, Simon Jones
Craig R. Colraine for Defendant , Nick Agostino
Patrick Summers for Defendant, Luis Trujillo
No one for Defendant Berardino Lombardi

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Guarantee and indemnity
II Guarantee
II.1 Contract of guarantee
II.1.h Interpretation
II.1.h.ii Intention of parties
II.1.h.ii.B Contra proferentem rule
Guarantee and indemnity
IV Practice and procedure
IV.1 Guarantee
IV.1.i Miscellaneous
Headnote
Guarantee and indemnity --- Guarantee — Contract of guarantee — Interpretation — Intention of parties — Contra proferentem rule
Guarantee and indemnity --- Practice and procedure — Guarantee — General principles
Table of Authorities
Cases considered by *Matheson J.*:

Bauer v. Bank of Montreal (1980), 1980 CarswellOnt 141, 33 C.B.R. (N.S.) 291, 1980 CarswellOnt 638, [1980] 2 S.C.R. 102, 32 N.R. 191, 10 B.L.R. 209, 110 D.L.R. (3d) 424 (S.C.C.) — considered

Esses v. Friedberg & Co. (2008), 2008 CarswellOnt 5526, 2008 ONCA 646, 241 O.A.C. 134 (Ont. C.A.) — considered

Manulife Bank of Canada v. Conlin (1996), 1996 CarswellOnt 3941, 1996 CarswellOnt 3942, 6 R.P.R. (3d) 1, 94 O.A.C. 161, 203 N.R. 81, [1996] 3 S.C.R. 415, 139 D.L.R. (4th) 426, 30 O.R. (3d) 577 (note), 30 B.L.R. (2d) 1 (S.C.C.) — considered

Pizza Pizza Ltd. v. Gillespie (1990), 1990 CarswellOnt 408, 75 O.R. (2d) 225, 33 C.P.R. (3d) 515, 45 C.P.C. (2d) 168 (Ont. S.C.J.) — considered

Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — referred to

R. 20.01(1) — pursuant to

R. 20.04(1) — referred to

R. 20.04(2)(a) — referred to

***Matheson J.*:**

1 This is a motion for summary judgment brought by the plaintiff Royal Bank of Canada (RBC).

2 The facts that I am relying on are from the affidavits of Nigel Seales, dated November 13, 2008; Colin Cochrane, dated February 10, 2009 and February 26, 2009; Luis Trujillo (Trujillo) dated January 10, 2009; and Nick Agostino (Agostino) dated January 16, 2009.

3 RBC and a company by the name of Autoworx Performance Specialties Inc. (Autoworx) entered into the following contracts:

Financial Services Agreement dated March 9, 2005; Confirmation of Credit Facilities Letter dated May 4, 2005; General Security Agreement dated May 5, 2005; Canada Small Business Financing Act Loan Agreement dated May 3, 2005; Visa Business Cards dated October 6, 2005

4 Lombardi, Agostino, Simon Jones (Jones) and Trujillo entered into Guarantee and Postponement of Claim, and Joint and Several Guarantee, both dated May 5, 2005. All the defendants stated that they did not read the documents that they signed, nor did they ask for independent legal advice.

5 Autoworx was a company that was formed by Lombardi to deal with upscale automobiles. He and the three other defendants had worked at a company by the name of John Reid and Son's Distribution Inc. Lombardi created Autoworx and was the major shareholder; the other three became minority shareholders.

6 The company experienced a declining business in 2006. That decline continued and on May 28, 2007 demand was made by RBC. Autoworx owed RBC on that date $107,092.95 on the Confirmation of Credit Facilities and Visa Agreement, and on the Canada Small Business Financing Act Loan the amount of $149,970.95.

7 RBC on May 2nd and 28th had its solicitors send demand letters by registered mail to the four defendants.

8 Judgment was obtained against Lombardi for $110,640.22 and $51,923.29, plus costs and interest.

9 RBC was able to recover $32,333.90 from the sale of the Lombardi residence.

10 The defendants state that Autoworx had assets of about between $172,235 and $250,000 about 2006-2007. See affidavit of Trujillo dated January 16, 2009 and Simon Jones dated January 15, 2009.

11 RBC hired BDO Dunwoody Limited and in its report filed in Further Supplementary Motion Record of the plaintiff stated that it was not advisable for the bank to pursue its security against the assets of Autoworx. (See letter of November 2007).

12 The position of RBC is that it has a right to pursue its claim as against the remaining three defendants on the guarantee. It states that the defendants have not raised any genuine issue for trial and there are no reasonable defences advanced.

13 The defendants state that they have a number of valid defences to this claim. They are:

1. The two guarantees are indistinguishable and that only one, at best, could apply. It is suggested that the bank representative said that their liability was limited to $50,000.

2. RBC made a material change of the debt obligation without advising the defendants. The position of the defendants is that this extinguished the guarantees.

3. RBC failed to take action against Autoworx sooner and by its inaction let the assets of Autoworx be dissipated. The loans of Autoworx were transferred to "special loans" division of the bank. This was in October of 2006. RBC stated that the assets of Autoworx was some $324,000 (See tab 8 of the Supplementary Motion Record of the Defendants).

4. RBC tries to protect its financial situation with a related company of Lombardi, Benlom Holdings Inc. By doing this they put the three defendants at further risk.

The Law with Respect to Summary Judgment

14 The plaintiff, after the defendants have filed a statement of defence, may move with supporting material or other evidence for summary judgment. (See Rule 20.01(1))

15 The defendants are then obliged by Rule 20.04 (1) and (2), which reads as follows:

(1) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest on the mere allegations or denials of the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence; ...

16 The defendants may not rest on allegations or denials in their pleadings. They must set out in affidavit material or other evidence specific facts that show that there is a genuine issue for trial. (See Rule 20.04(1))

17 Justice Watt, in writing for the Court of Appeal in the *Esses v. Friedberg & Co.*, 2008 ONCA 646 (Ont. C.A.), stated the standard to be applied on motions for summary judgment at paras. 40-45.

[40] Rule 20.04(2) authorizes a court to grant summary judgment where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence. In this case, to grant summary judgment to Esses, the motion judge had to be satisfied that BMO had not raised in defence to Esses' claim any genuine issue for trial.

[41] The term "genuine issue" cannot be reduced to any precise formula for ease of application. Nonetheless, *Irving Ungerman Ltd. v.Galanis* (1991), 4 O.R. (3d) 545 (C.A.) provides some assistance about the meaning of "genuine" in the phrase "genuine issue for trial". At paragraph 22, Morden A.C.J.O. concluded:

¶22 It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. (See 6 Moore's Federal Practice, 2nd ed. (1987 release), p. 56-391; Wright, Miller and Kane, supra, at vol. 10A, pp. 574-75.)

[42] The *Ungerman* court found two other requirements implicit in r. 20.04(2). In paragraph 16, Morden A.C.J.O. described these implicit requirements:

¶16 Our rule does not contain, after "genuine issue", the additional words "as to any material fact". Such a requirement is implicit. If a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a "genuine issue for trial". (See Wright, Miller and Kane, Federal Practice and Procedure, 2 nd ed. (1983), vol. 10A, pp. 93-95.) Similar reasoning applies to the absence from our rule of the words "and the moving party is entitled to a judgment as a matter of law". This is implicit.

[43] *Ungerman* reminds us of two other points of importance in connection with motions for summary judgment. The first distinguishes between identification of issues of fact on the one hand, and resolution of issues of fact, on the other. The function of a judge on a motion for summary judgment is to determine whether a genuine issue exists about any material fact. Once having determined that such an issue exists, it is not for the motion judge to resolve that issue, for that is the task of the trier of fact at trial. The second point of importance that emerges from *Ungerman* is that, at least as a sensible general proposition, if there is an issue of credibility, a trial is required, and summary judgment should not be granted. *Ungerman* at para. 24. The issue of credibility must, of course, be genuine, not contrived.

[44] On a motion for summary judgment, the motion judge must bear in mind the placement and substance of the onus on the parties to the motion. The moving party, here Esses, bears the legal or persuasive burden to satisfy the court that there is no genuine issue for trial before summary judgment can be granted. *Hi-Tech Group Inc. v.Sears Canada Inc.*, [2001] O.J. No. 33 (C.A.) at para. 30. The responding party assumes an evidentiary burden, or something similar, to respond with evidence setting out specific facts showing that there is a genuine issue for trial. But, failure of the responding party to tender evidence does not automatically result in summary judgment. *Hi-Tech* at para. 30.

[45] The nature of the "evidential burden" imposed on a responding party to a summary judgment motion warrants brief mention. The "evidential burden" involves the presentation of evidence, whether affidavit or other material, capable of supporting the position advanced by the responding party. The responding party may not rest his or her defence on unsupported defence allegations or denials, but may nonetheless urge that the moving party's claim as supported by affidavit, is so obviously deficient that it raises a triable issue about the moving party's right to succeed. *Hi-Tech* at para. 30.

18 Justice Henry, in *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225 (Ont. S.C.J.), stated what he believed to be the seminal decisions of the Court of Appeal on Rule 20. This is found at pages 20 and 21, which read as follows:

Rule 20 contemplates a radically new attitude to motions for judgment; the objective is to screen out claims that in the opinion of the court, based on evidence furnished as directed by the rule, ought not to proceed to trial because they cannot survive the "good hard look".

There is no arbitrary or fixed criterion that the motions judge must apply. It is a case by case decision to be made on the law and on the facts that he is able to find on the evidence submitted to him in support of the claim or defence, whether the plaintiff has laid a proper foundation in its affidavit and other evidence to sustain the claims made.

It is not sufficient for the responding party to say that more and better evidence will (or may) be available at trial. The occasion is now. The respondent must set out specific facts and coherent evidence organized to show that there is a genuine issue for trial.

Apparent factual conflict in evidence does not end the inquiry.

The court may, on a common sense basis, draw inferences from the evidence.

The court may look at the overall credibility of the plaintiff's action,e., does the plaintiff's case have the ring of truth about it such that it would justify consideration by the trier of fact?

Matters of credibility requiring resolution in a case of conflicting evidence ought to go to trial; however, that depends upon the circumstances of the case; the court in taking the "hard look" at the merits must decide if any conflict is more apparent than real, i.e., whether there is really an issue of credibility that must be resolved in order to adjudicate on the merits.

> Motions under Rule 20 must be made sparingly and judiciously; the court will control abuse of this process if necessary by its order for costs.

19 The party opposing the motion for summary judgment must put its best foot forward so that the motions judge may "take a hard look at the merits of the action at this preliminary stage".

The Law with Respect to Guarantees

20 Geoff R. Hall in *Canadian Contractual Interpretation Law*, (1 st ed.) at page 168 gave a general outline as follows:

> Although the interpretation of a guarantee is for the most part an application of the normal rules of contractual interpretation, the majority decision in *Manulife Bank of Canada v. Conlin*, the leading Canadian case on the interpretation of guarantees, reveals four ways in which the interpretation of a guarantee differs from the interpretation of some other type of contract. First, the *contra proferentem* rule is more apt to apply. Second, interpretation of a guarantee takes into account the fact that guarantors have a favoured position in the eyes of the law. As a result of each of these two factors, provisions binding a guarantor are strictly interpreted, with any doubt or ambiguity resolved in the guarantor's favour. Third, while parties to a guarantee may contract out of the protections which are afforded to a guarantor at common law or in equity, such contracting out can only be accomplished by clear language. Fourth, a guarantee must be interpreted in the context of the entire transaction, including the circumstances of the underlying obligation and any dealings with respect to it.
>
> Guarantees are an interesting and special case in contract interpretation. The usual rules of contract interpretation (which focus on accurately ascribing meaning to what the contracting parties intended) apply, but they are modified. The modifications are driven not by interpretive concerns about giving effect to the parties' intentions but rather by the concern of furthering certain substantive legal protections afforded to guarantors. As such, the interpretation of guarantees is a relatively rare instance, along with employment contracts, franchise contracts and a few other instances, in which the courts use contractual interpretation to advance certain social and policy goals beyond the usual policy goal of interpretive accuracy.

21 One of the leading cases in interpretation of a guarantee is *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 (S.C.C.). In this case, Bauer signed a guarantee with the Bank. There was certain security that the Bank took from Mr. Bauer's company. It was misfiled and when his company went bankrupt, after he sold the company, he was still liable on the guarantee.

22 The Supreme Court of Canada in its judgment stated that the parties to a guarantee could contract out, as long as the language was clear and unambiguous.

23 One of the leading cases in this area of the law is *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415 (S.C.C.). Justice Cory of the Supreme Court of Canada gave the majority decision. He stated the following:

>> 2 It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. ...
>>
>> . . . . .
>>
>> 7 In many if not most cases of guarantees a contract of adhesion is involved. That is to say the document is drawn by the lending institution on a standard form. The borrower and the guarantor have little or no part in the negotiation of the agreement. They have no choice but to comply with its terms if the loan is to be granted. Often the guarantors are family members with limited commercial experience. As a matter of accommodation for a family member or friend they sign the guarantee. Many guarantors are unsophisticated and vulnerable. Yet the guarantee extended as a favour may result in a financial tragedy for the guarantor. If the submissions of the bank are accepted, it will mean in effect that a guarantor, without the benefit of notice or any further consideration, will be bound indefinitely to

further mortgages signed by the mortgagor at varying rates of interest and terms. The guarantor is without any control over the situation. The position adopted by the bank, if it is correct, could in the long run have serious consequences. Guarantors, once they become aware of the extent of their liability, will inevitably drop out of the picture with the result that many simple and straightforward loans will not proceed since they could not be secured by guarantors.

8 In my view, it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. This is a sensible and satisfactory way of approaching the situation since the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity. The principle is supported by academic writers.

9 G. H. L. Fridman, in his text *The Law of Contract in Canada* (3rd ed. 1994), at pp. 470-71, puts the position in this way:

> The *contra proferentem* rule is of great importance, especially where the clause being construed creates an exemption, exclusion or limitation of liability.
>
> . . . . .
>
> Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails.

Professor McGuinness, in his work *The Law of Guarantee*, *supra*, at pp. 612-13, explains the application of the rule as follows:

. . . . .

> the *contra proferentum* rule of construction (under which the provisions of an agreement that were inserted by a party for his own protection are subjected to a strict interpretation) provides one method through which the courts can restrict the scope of extremely broad provisions which purport to eliminate the rights of the surety. The justification for giving such provisions a narrow construction is clear: it is one thing to say that a party may, if he so chooses, agree to assume an excessive burden, and to waive the rights which the law generally recognizes as existing for his protection. It is quite another thing to assume that parties necessarily intend to enter into such obligations. The more natural assumption is the exact opposite. Where the guarantee was drafted by the creditor, and there is any ambiguity or imprecision in the terms of a provision which purports to limit the rights of a surety, it is only fair that the ambiguity be resolved against the party who prepared the document. If the creditor wishes to take away a right belonging to the surety, he should use clear language in the document.

McGuinness further explains the principle and its justification in these words, at p. 244:

> Where it is the creditor who drafted the terms of the contract, consistence of principle would call for the guarantee to be construed narrowly and thus in effect against the creditor. It is submitted that the correct rule is that where there is only one reasonable interpretation that the words used in a guarantee can bear, the guarantee should be given that interpretation. In such a case, the *contra proferentum* rule would not come into play. Where, however, the agreement is ambiguous in the sense that there are two or more interpretations that might reasonably be given to its terms, the guarantee should be construed against the party who prepared it or proposed its adoption, whether that be the creditor or the surety.

24 I understand the decision to mean that the courts will look strictly at the wording of the guarantee which is usually prepared in advance of the parties signing.

25 As stated by Geoff R. Hall there are four steps that a court should look at when reviewing a guarantee. They are:

1. The *contra proferentem* rule is more likely to apply. This places an onus on the lending institution to show that the language is precise and clear.

2. The guarantors have a favoured position in the eyes of the law.

3. Parties to a guarantee may contract out of the protections, which are afforded by the common law or equity.

4. The guarantee must be interpreted in the context of the entire transaction.

Analysis

26 A reading of the two Guarantees and Postponement of Claim makes it clear that the wording is clear and unambiguous. Paragraph 13 clearly states that this guarantee speaks for itself and that any other representation or promise does not bind any party to the agreement.

27 The two Guarantees both contain at clause 9 the wording: "This guarantee is in addition to and not in substitution for any other guarantee, ..." Thus, they were aware that there were two guarantees. The one limited to $50,000 was in line with the Canada Small Business Financing Act Loan Agreement.

28 The interest rate change dated January 17, 2007 was, in my opinion, not a material change. In today's fluctuating financial situation these changes could be expected.

29 There was no evidence brought by the Defendants on the motion that would indicate that RBC's dealing with Benlom Holdings adversely affected their financial position.

30 The argument that the bank was delinquent in not going after Autoworx sooner is met with paragraph 3 of the Guarantee, which states:

> The Bank shall not be bound to exhaust its recourse against the customer or others or any securities it may at any time hold before being entitled to payment from the undersigned of the liabilities. The undersigned renounce(s) to all benefits of discussion and division.

31 Therefore, I find that the Royal Bank of Canada has met the onus on it and there will be judgment on the two Guarantees in the amounts of $85,491.82 and $50,000 against the three Defendants Simon Jones, Nick Agostino and Luis Trujillo, jointly and severally. There will be interest until date of judgment.

32 I may be spoken to if the parties are not able to agree on costs.

End of Document

TAB 16

Most Negative Treatment: Considered
Most Recent Considered: Singh v. Chand | 2020 BCSC 1268, 2020 CarswellBC 2120, 62 C.P.C. (8th) 171, 323 A.C.W.S. (3d) 177 | (B.C. S.C., Aug 27, 2020)

2001 BCCA 667
British Columbia Court of Appeal

Times Square Holdings Ltd. v. Shimizu

2001 CarswellBC 2563, 2001 BCCA 667, [2001] B.C.J. No. 2419, [2002] B.C.W.L.D. 66, 109 A.C.W.S. (3d) 565, 159 B.C.A.C. 124, 259 W.A.C. 124, 95 B.C.L.R. (3d) 234

TIMES SQUARE HOLDINGS LTD. (formerly known as 785 DENMAN ST. DEVELOPMENTS LTD.) (PLAINTIFF / RESPONDENT) AND J. TOSHIO SHIMIZU, also known as J.T. SHIMIZU and SHIMIZU STORES LTD. (DEFENDANTS / APPELLANTS)

Donald, Mackenzie, Low JJ.A.

Heard: April 6, 2001
Judgment: November 20, 2001
Docket: Vancouver CA026336

Proceedings: additional reasons to (2001), 91 B.C.L.R. (3d) 208 (B.C. C.A.); reversing 1999 CarswellBC 1912 (B.C. S.C.)

Counsel: *Steven R. Stark*, for Appellant
Scott A. Dawson, for Respondent

Subject: Property; Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.a Multiple parties
XXIV.5.a.iii Success divided among defendants
XXIV.5.a.iii.B Sanderson order
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III.1 Consensus ad idem
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Guarantee and indemnity
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II.1.c Parties to contract
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V.10 Rent
V.10.b Obligation to pay
V.10.b.ix Guarantee of rental obligation

Headnote

Practice --- Costs — Persons entitled to or liable for costs — Multiple parties — Success divided among defendants — Sanderson order

Individual defendant was officer and director and operated defendant company, S Ltd. — S Ltd. was dissolved — Landlord brought action to recover losses from S Ltd.'s breach of lease — Parties stated special case as to whether or not individual defendant was liable for lease obligations that S Ltd. owed landlord — In special case, trial judge held that individual defendant was liable as guarantor of obligations of S Ltd. — Individual defendant's appeal was allowed — Issue arose regarding costs and landlord sought Sanderson order — Sanderson order denied — Individual defendant was entitled to recover costs of appeal against landlord — Effect of Sanderson order would be to direct that individual defendant could only recover costs of appeal from S Ltd., not from landlord — That S Ltd. was dissolved meant that Sanderson order would have deprived individual defendant of costs — As S Ltd. was not co-defendant in special case, typical elements of Sanderson order did not exist — Landlord's claim against individual defendant failed because landlord neglected to put guarantee into lease agreement, not because of default by individual defendant.

Table of Authorities

Cases considered by *Donald J.A.*:

Imperial Salmon House Ltd. v. Krdzalic (1983), 37 C.P.C. 152, 48 B.C.L.R. 256 (B.C. S.C.) — considered

Robertson v. Wing (1980), (sub nom. *Robertson v. North Island College Technical & Vocation Institute)* 26 B.C.L.R. 225, 119 D.L.R. (3d) 17 (B.C. C.A.) — considered

Times Square Holdings Ltd. v. Shimizu, [2001] B.C.J. No. 1396, 2001 BCCA 448, 2001 CarswellBC 1399, 91 B.C.L.R. (3d) 208 (B.C. C.A.) — referred to

Statutes considered:

Court of Appeal Act, R.S.B.C. 1996, c. 77

s. 23 — referred to

s. 30 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

Generally — referred to

R. 33 — referred to

R. 57(18) — considered

ADDITIONAL REASONS to judgment reported at [2001] B.C.J. No. 1396, 2001 BCCA 448, 2001 CarswellBC 1399, 91 B.C.L.R. (3d) 208, 155 B.C.A.C. 89, 254 W.A.C. 89 (B.C. C.A.) regarding costs.

The judgment of the court was delivered by *Donald J.A.*:

1 This judgment considers the distribution of costs arising from litigation between the plaintiff, Times Square Holdings Ltd. ("Times Square"), and the co-defendants, J. Toshio Shimizu ("Mr. Shimizu") and Shimizu Stores Ltd. ("Shimizu Stores"). Times Square commenced an action against Mr. Shimizu and Shimizu Stores to recover losses resulting from Shimizu Stores' breach of its lease with Times Square.

2 Mr. Shimizu, along with his son who operated the company, was an officer and a director of Shimizu Stores. Shimizu Stores was dissolved by the Registrar of Companies on 25 June 1999 for failure to file annual reports.

3 As part of this action, the parties stated a Special Case pursuant to Rule 33 of the *Supreme Court Rules*. The question to be answered was whether or not Mr. Shimizu was liable for any lease obligations Shimizu Stores may have owed Times Square. Mr. Justice Paris held that Mr. Shimizu was liable to Times Square as a guarantor of the obligations of Shimizu Stores.

4 Mr. Shimizu appealed and by a majority, Mr. Justice Low dissenting, this Court reversed that decision on the basis that there was no actual guarantee in the contract documents, and that the evidence went no further than to show that Mr. Shimizu was willing to give a guarantee: [2001] B.C.J. No. 1396, 91 B.C.L.R. (3d) 208 (B.C. C.A.). At para. 26 I said:

> [26] The plaintiff landlord prepared the document. It failed to include language which spelled out the obligation to be assumed by the guarantor. I cannot accept that in the absence of any such language it should be implied that the obligation consists of guaranteeing all the obligations of the tenant. In the final analysis, although Mr. Shimizu, senior, indicated a readiness to assist in the leasehold arrangements by acting as a guarantor, the landlord did not actuate that intention by settling the applicable terms.

5 Mr. Shimizu is entitled to his costs of the appeal. Ordinarily the obligation to pay them would fall on Times Square as the unsuccessful party on appeal. Section 23 of the *Court of Appeal Act* says:

> **Costs**
>
> **23** Unless the court or a justice otherwise orders, the party who is successful on an appeal is entitled to costs of the appeal including the costs of all applications made in the appeal.

6 However, in this case, the plaintiff, Times Square, invokes our discretion to make a Sanderson order. This is one of the alternatives (the other is a Bullock order) provided in Rule 57, sub-rule (18) of the *Supreme Court Rules*:

> **Costs of one defendant payable by another**
>
> (18) Where the costs of one defendant against a plaintiff ought to be paid by another defendant, the court may order payment to be made by one defendant to the other directly, or may order the plaintiff to pay the costs of the successful defendant and allow the plaintiff to include those costs as a disbursement in the costs payable to the plaintiff by the unsuccessful defendant.

7 No such provision appears in the rules of this Court but s. 30 of the *Court of Appeal Act* allows us to bring into consideration any analogous rule in the *Supreme Court Rules* in order to dispose of a question. Section 3***o*** provides as follows:

> **If no provision in this Act or the rules**
>
> **30** If no special provision is contained in this Act or the rules, the procedure and practice of the court is to be regulated by analogy to this Act and the rules or, if there is no appropriate analogy, by analogy to the *Supreme Court Act* and the Supreme Court Rules.

8 The effect of a Sanderson order would be to direct that Mr. Shimizu can only recover the costs of his appeal from his co-defendant, Shimizu Stores, and not from the plaintiff, Times Square.

9 The leading authority in this area of costs is *Robertson v. Wing* (1980), 26 B.C.L.R. 225 (B.C. C.A.). There, Mr. Justice Lambert, in the judgment most often quoted in later cases, decided that the only general rule applying to Sanderson and Bullock orders is that for either of them to be considered, a threshold test must first be met: it must have been reasonable for the plaintiff to have joined the successful defendant in the action. If the plaintiff can meet this threshold, it is left to the judge to exercise his or her discretion in deciding what distribution of costs would be just. This discretion may be exercised without being trammelled by a set of legal principles or burdened by precedent: see pp. 227-8.

10 This decision was followed in a case bearing some similarity to the present matter: *Imperial Salmon House Ltd. v. Krdzalic* (1983), 48 B.C.L.R. 256 (B.C. S.C.). The similarity is that in both cases the unsuccessful defendant was unable to pay costs and so a Sanderson order would deprive the successful defendant of any recovery. In her reasons for judgment Madam Justice McLachlin (now C.J.C.), guided by the principles in *Robertson*, *supra*, refused a Sanderson order holding at 258-9 that:

> The question, then, is how the court's discretion should be exercised. The question, at base, is one of policy; with which of the plaintiff and the successful defendant should rest the risk that the defendant Krdzalic would be unable to pay the defendant A. E. LePage's costs? In determining this question, it must be borne in mind that the effect of a Sanderson order is that the court nominates the unsuccessful defendant as the only person to whom the successful defendant is entitled to look for payment of its costs, thus depriving the successful defendant of its right against the unsuccessful (as against him) plaintiff, upon whose ability to pay the successful defendant might have been quite content to rely: *Munshaw Colour Service Ltd. v. Vancouver* (1960), 31 W.W.R. 273 at 278 (B.C.S.C.). In the absence of special circumstances, such as where the unsuccessful defendant is legally related to the successful defendant (see *Kemp v. Lee*, B.C.S.C., Toy J., Dawson Creek No. 84/1982, 9th May 1983 (not yet reported)), I would decline to make such an order. The plaintiff, as the party which initiated proceedings, must bear the primary risk of meeting the costs of parties against whom it is eventually unsuccessful. The fact that the conduct of the defendants was related is in itself insufficient; that exists in most cases where more than one defendant is properly joined by a plaintiff. [Emphasis added]

11 Though in my opinion Times Square has met the threshold for this Court to consider a Sanderson order, the fact that Shimizu Stores has been dissolved means that the order sought would effectively deprive Mr. Shimizu of his costs. As well, with regard to the Special Case, Mr. Shimizu was the only defendant. Shimizu Stores was not a co-defendant and therefore, the typical elements of a Sanderson order (which require a plaintiff, a successful defendant and an unsuccessful co-defendant), do not exist.

12 The plaintiff submits that it is entitled to a favourable exercise of the court's discretion on costs because Mr. Shimizu, as one of the principals of the defendant company, was partly responsible for the company's breach of its obligation in the agreement to lease to conclude a formal lease document. The document tendered by the plaintiff did contain an express guarantee clause. Since, it is argued, Mr. Shimizu bears some responsibility for the breach it is right and proper that he look only to the other defendant for his costs.

13 I do not accept this argument. The plaintiff's claim against Mr. Shimizu failed because the plaintiff neglected to put a guarantee in the agreement to lease, not because of any default on Mr. Shimizu's part. The agreement to lease did not commit him to any particular form of guarantee and consequently he could have rejected the clause in the formal lease document and the plaintiff would have been no further ahead.

14 Since I have not been persuaded that Mr. Shimizu should look only to a dissolved company for his costs, I would refuse a Sanderson order. He may recover his costs from the plaintiff.

Order accordingly.

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IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

KINGSETT MORTGAGE CORPORATION	**and**	**MAPLEVIEW DEVELOPMENTS LTD., PACE MAPLEVIEW LTD. and 2552741 ONTARIO INC.**
Applicant		Respondents

Court File No.: CV-24-00716511-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF MAPLEVIEW AND PACE MAPLEVIEW

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