Estate / Court File No.: 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY* ACT, R.S.C. 1985, c. B-3, AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

BOOK OF AUTHORITIES OF THE RESPONDENT
(Returnable June 23, 2021)

June 22, 2021

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TAB 1

CITATION: House v. Baird, 2019 ONSC 1712
COURT FILE NO.: C-1092-09
DATE: 2019-03-15

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
TYLER HOUSE BY HIS LITIGATION GUARDIAN GAIL HOUSE, THE ESTATE OF TITUS HOUSE, GAIL HOUSE and TITUS HOUSE JR.	Allan Rouben & Richard Campbell, Counsel for Tyler House, Plaintiff
- and –	
DONALD BAIRD, ROBERT SCOTT MURRAY and THE CORPORATION OF THE TOWNSHIP OF WILMOT	Jeramie Gallichan & Daniel Veinot, Counsel for Donald Baird, Defendant (Plaintiff in Court File No. C-141-11)
	Greg Robson, Counsel for the Non-Party, Nordique Insurance
	Gary Flaxbard, Counsel for Dawn Samms & Darryl Samms (Plaintiffs in Court File No. C-570-10)
	HEARD: August 17 & December 10, 2018

The Honourable Justice Catrina D. Braid

REASONS ON MOTION

I. OVERVIEW

[1] Tyler House was driving a car with the consent of the owner, Donald Baird. House lost control, and the vehicle was hit by another car. As a result of the accident, Adam Samms lost his life. House and Baird were seriously injured. At the time of the accident, Baird and House each had insurance with policy limits of $1 million.

[2] Baird and the Samms family brought actions against House, Scott Murray (the driver of the other car) and the Township of Wilmot. The Samms family settled their claim for $200,000, and Baird settled his claim for $500,000.

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[3] House sued Baird, Murray, and the Township, and the action proceeded to trial. House obtained judgment against Baird in the amount of $1.4 million.

[4] House has brought a motion seeking directions regarding the distribution of insurance funds and regarding his right to garnish Baird's settlement.

[5] In these reasons, I shall address the following issues:

A. The legal framework for distribution of insurance funds
B. Whether the equitable remedy of marshalling is available
C. Enforceability and ambiguities in the Baird settlement
D. Whether House can garnish the Baird settlement funds

[6] For the reasons set out below, I find that the doctrine of marshalling is not applicable. State Farm must pay out the funds on a *pro rata* basis, and Nordique must pay the remaining amounts to Baird and the Samms family. House shall be entitled to garnish 20% of the Baird settlement.

II. FACTS

[7] A tragic accident occurred on February 25, 2009, involving four young men who were close friends. House was driving Baird's vehicle when the vehicle went out of control and was struck by a vehicle driven by Murray. As a result of the accident, Adam Samms lost his life. Baird was seriously injured. House was catastrophically injured, with his most severe injury being a diffuse axonal closed head injury.

[8] The Baird vehicle was insured by State Farm with third-party liability limits of $1 million. In these reasons, I shall refer to this insurance policy as "the State Farm policy."

[9] House was insured by Nordique Insurance with third-party liability limits of $1 million. In these reasons, I shall refer to this insurance policy as "the Nordique policy."

[10] Baird and the Samms family brought actions against House, Murray, and the Township. The Samms family settled their claim for $200,000, and Baird settled

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his claim for $500,000. In those settlements, the plaintiffs agreed that, in the event that there is a shortfall in the available insurance limits, the amount of the settlements would be pro-rated with the plaintiffs in the other actions. The parties also agreed that the defendants would be bound by the liability findings as determined at the trial of the action brought by House.

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[11] House sued Baird, Murray, and the Township, and the action proceeded to trial. The claim against Murray was settled in advance of trial. On February 26, 2015, Justice Kent released his judgment and dismissed the claim against the Township of Wilmot. It is notable that, had the House claim against the Township been even partially successful, there would not have been any issue relating to insurance policy limits.

[12] Justice Kent approved the settlement of the claim made by House against the defendant Murray and ordered Murray to pay $675,000 in damages to House.

[13] Justice Kent found that Baird's vehicle had overinflated and bald tires, which created a risk that control of the vehicle could not be maintained. The court found that House made no adjustment to his speed to suit conditions, and he was driving while distracted. Because liability was apportioned equally between House and Baird, the court ordered that House is entitled to recover 50% of his assessed damages from Baird.

[14] House obtained a judgment against Baird in the amount of $1,405,439.10, after the 50% apportionment and a reduction for a settlement with Murray.

[15] The parties have failed to reach an agreement on the distribution of the insurance proceeds. House has brought a motion seeking the following:

i. Advice and direction from the court regarding the interpretation and application of ss. 258 and 277 of the *Insurance Act*, R.S.O. 1990 c. I.8 in determining priorities and entitlement to insurance monies available to the parties.
ii. A declaration, in accordance with the equitable doctrine of marshalling, that the House claim rank in priority to the Baird and Samms claims.

iii. A declaration that the Baird settlement monies received are not exempt from attachment or execution and confirming House's right to garnish those funds directly from the insurance companies.

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III. ANALYSIS

A. The Legal Framework for Distribution of Insurance Funds

[16] The limits on Baird's State Farm policy are $1 million. The insurers take the position that the State Farm policy is required to respond to the three claims on a *pro rata* basis. A portion of the $1 million would be paid out to each of House, Baird, and the Samms family. In this scenario, the Samms family and Baird would recover the shortfall from House's Nordique policy and would be fully indemnified; House would be left with a shortfall of almost $668,000 as he is not entitled to recover from his own policy. House argues that this distribution of the funds is incorrect.

[17] A person who has a claim against an insured may recover payment of the judgment against the insured's motor vehicle policy: see *Insurance Act*, s. 258(1).

[18] Under s. 277(1) of the *Insurance Act*, the owner's policy responds first to claims arising from an accident. An owner's insurance policy is first loss insurance in respect of liability arising from the use or operation of an automobile owned by the insured. Insurance under any other motor vehicle liability policy is excess insurance only. A motor vehicle liability policy insures the owner or the driver of an automobile: see *Insurance Act*, ss.1, and 277(1).

[19] House was an insured person under the State Farm policy because his liability arises solely out of the use or operation of the Baird vehicle. This makes the State Farm policy first loss insurance. The Nordique policy is insurance attaching under any other valid motor vehicle policy and is, therefore, excess insurance in relation to the State Farm policy.

[20] The limits on the State Farm insurance policy are $1 million. Given the fact that the aggregate amount owing to all the plaintiffs exceeds the State Farm policy

third-party liability limits, State Farm must pay its policy limits on a *pro rata* basis (without ranking any of the claims above the other) as follows:

i. Damages owed by Baird to the Samms family;
ii. Damages owed by Baird to House;
iii. Damages owed by House to the Samms family; and
iv. Damages owed by House to Baird.

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[21] The State Farm policy has insufficient limits to satisfy all claims, and House will still owe money to the Samms family and Baird. House has recourse to the insurance policy issued to him by Nordique Insurance to satisfy the remaining claims. Pursuant to s. 277(1), the Nordique policy is excess insurance to the State Farm policy and will be called upon to pay amounts that House owes to others, in excess of what is paid to them by the State Farm policy.

[22] First loss insurance means that House must first look to Baird's insurance policy coverage since he was driving Baird's vehicle at the time of the accident. He may only look to his own policy for additional coverage if his policy limits exceed those of Baird's policy. Since the limits are the same, House cannot obtain the shortfall from his own policy.

[23] House argues that the State Farm policy should not be called upon to make payment to Baird for his own independent claim for damages against House. In support of that argument, he relies on *Enterprise Rent-a-Car Canada Ltd. v. Meloche Monnex Financial Service Inc.*, 2010 ONCA 277, 102 O.R. (3d) 87.

[24] I do not accept this argument. The *Enterprise Rent-a-Car* case deals with the meaning of "insurance available" in the context of a leased vehicle and it is, therefore, distinguishable. This argument also ignores the first loss insurance provisions as set out in s. 277(1) of the *Insurance Act*.

[25] House also relies on the decision in *Benson v. Walt*, 2018 ONCA 172, to support the proposition that the Baird and House policies should be required to

make payment of the independent claims of the other. However, the decision does not stand for that proposition.

[26] In that case, Walt was driving with the consent of the owner of the car. Pursuant to s. 277(1), the first policy to respond is the policy insuring the owner of the vehicle involved in the accident. If the driver is not the owner of the car involved in the accident, the driver's own automobile insurance policy will not apply until the insurance under the owner's policy has been exhausted: see *Benson v. Walt*; and *Avis Rent A Car Systems Inc. v. Certas Direct Insurance Co.,* (2005) 197 O.A.C. 214.

[27] Finally, House argues that s. 277 of the *Insurance Act* does not apply, and the damages should not be pro-rated because he did not consent to the Minutes of Settlement in the other actions. However, his consent is not required. The proper application of s. 277 requires that the damages be pro-rated as between House, Baird and the Samms family.

[28] The OAP 1 Standard Insurance Policy does not differentiate between the obligation of the State Farm policy to indemnify Baird and House. They are both considered insured for purposes of the liability provisions of the State Farm policy. The OAP 1 states that the insurer will make payment on behalf of all of the insured persons, up to the limits of the policy for any one incident. House is an insured under the State Farm policy and, therefore, State Farm is obliged to indemnify House for damages payable to Baird.

[29] In *Scale Estate v. The Cooperators Insurance*, 2018 ONSC 363, the court held that the *pro rata* approach should generally prevail in the case of automobile insurance, and the rule should not be departed from except in special circumstances. I am not satisfied that any special circumstances exist that would justify departing from the *pro rata* principle for first loss automobile insurance.

[30] The Baird and Samms settlements reflected the fact that State Farm, as first loss insurer, considered the need to pro-rate claims between multiple parties.

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The facts of this case are similar to the facts in *Insurance Corp. of British Columbia v. Kushneriuk*, 2004 BCCA 440, in which there were multiple claimants, with the most seriously injured claimant only able to receive funds from the first loss insurer. In that case, the British Columbia Court of Appeal found that no special circumstances existed to depart from the usual *pro rata* principle.

[31] In his factum, House submitted that, in the event there is a shortfall, he should be entitled to recover the balance of his judgment under the provisions of the OPCF 44R Endorsement of his own insurance policy. This argument was abandoned by counsel during submissions in court, which was an appropriate concession.

[32] An underinsurer's obligation to pay does not arise until the total amount of insurance held by the tortfeasor at the time of the accident is less than the family protection coverage liability limit. This is true regardless of the number of eligible claimants injured or killed. Access to the underinsurance coverage is not available even if the injuring party's insurance might be apportioned among several plaintiffs, thereby creating a potential payment of less than $1 million for each plaintiff: see *Van Bastelaar v. Bentley*, 2011 ONCA 660.

[33] In this case, the Nordique policy coverage cannot be called upon to pay the unsatisfied portion of House's judgment against Baird as the liability limit of coverage under the OPCF 44R ($1 million) does not exceed the total amount of the Baird insurance.

B. Whether the Equitable Remedy of Marshalling is Available

[34] House argues that the court should order that the proceeds of the State Farm policy be marshalled so that House receives the full amount of the State Farm policy limits. Baird and Samms would then be in a position to access the Nordique policy. House argues that the equities of the situation support the application of the remedy of marshalling so that House not be deprived of his recovery.

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[35] Marshalling is a principle that permits equity to be done between two or more creditors, each of whom are owed debts by the same debtor, but one of whom can only enforce his claim against one security or fund, while the other can resort to more than one. This will prevent a creditor who can resort to two funds, from defeating another creditor who can resort to only one of them.

[36] Historically, the doctrine arose in cases involving real property mortgages, but has expanded to personal property security and bankruptcy. Counsel were unable to provide any caselaw in which the doctrine of marshalling was invoked in the context of s. 277 of the *Insurance Act.*

[37] The limits of the doctrine of marshalling are not well defined, as equity gives it flexibility, adaptability, and utility. Equity also gives it its uncertainty and lack of clear boundaries: see Bruce MacDougall, “Marshalling and the Personal Property Security Acts: Doing Unto Others…” (1994) 28 U. Brit. Colum. L. Rev. 91 at 91.

[38] There are three primary reasons why marshalling cannot be invoked in this case. I shall address each reason under a separate heading below:

i. There is Not a Common Debtor and Two Creditors

[39] A number of common law rules have developed in the application of marshalling, although its equitable nature enables courts to craft relief appropriate to each case. There are five preconditions for marshalling:

(a) two creditors;

(b) one common debtor;

(c) two funds of the debtor with the superior creditor having access to both and the inferior creditor to but one;

(d) no interference with the choice of remedy of the superior creditor; and

(e) no prejudice to third parties.

See *Green v. Bank of Montreal* (1999), 128 O.A.C. 324

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[40] House has not specified who he considers the debtors to be, for purposes of the marshalling argument. In the case at bar, the debts arise from either the judgment or settlements flowing from the negligence of different defendants. If the defendants are the debtors, State Farm is obligated to indemnify the defendants to the extent of $1 million, but it cannot be said that State Farm is a debtor of the plaintiffs under the third-party liability insurance of the defendants.

[41] If the debtor is either Baird or House, it cannot be said that there are two funds at the “debtor's disposal” as the funds available under the insurance policies of House and Baird are not under their control. Rather, these are potential funds, which are only available to certain plaintiffs if they are not able to obtain full recovery of the balances owing to them through the State Farm policy. Even if the debtor is House (who arguably may be indemnified by two insurance policies), the doctrine of marshalling is invoked for the benefit of a creditor and not a debtor.

ii. Marshalling Cannot Defeat Clear Statute

[42] The equitable doctrine of marshalling cannot be applied to overcome the unambiguous wording of the *Insurance Act.* The *Act* does not preclude marshalling, but the doctrine, on its own, cannot overcome well-established legal principles.

[43] Equity is based on judicial discretion. Where applied, equitable remedies are flexible; their award is based on what is just in all the circumstances of the case. They are malleable principles intended to serve the ends of fairness and justice: see *Soulas v. Korkontzilas*, [1997] 2 S.C.R. 217; and *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534.

[44] The maxim ‘equity follows the law’ applies in this situation. The maxim seeks to avoid inconsistent approaches from the application of equity rules and common law principles. Where there is a conflict, common law principles prevail. The maxim most clearly applies to principles of law derived from statutes: see *Canadian Imperial Bank of Commerce v. Saskatchewan Lawyer’s Insurance Association Inc.* (1990), 140 Sask. R. 114 (Q.B.).

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[45] Accordingly, in the face of clear statutory provisions, equitable remedies cannot apply. Equitable remedies may co-exist alongside statutory provisions where statutory language permits. However, I am not satisfied that equitable remedies should be applied in this case in light of clear legal principles, and in light of the fact that the doctrine of marshalling is in clear conflict with the provisions of the *Insurance Act*, related legislation, and caselaw.

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iii. A Claimant's Access to Other Insurance Funds is Irrelevant

[46] In the case of *Insurance Corp. of British Columbia v. Kushneriuk*, 2004 BCCA 440, the British Columbia Court of Appeal held that the existence of additional insurance available to satisfy the claims of some of the plaintiffs is an irrelevant consideration.

[47] In *Kushneriuk,* the moving party made an argument similar to the marshalling argument advanced by House. In that case, the motions judge decided that the most seriously injured of the three claimants should take 100% of the available first loss insurance proceeds rather than share with other claimants on a *pro rata* basis (which was effectively a form of marshalling). The Court of Appeal found that it was an error for the motions judge to consider other insurance coverage available to some claimants and to direct that the claimant who did not have access to the other insurance coverage should be paid out in full in priority to the other claimants. The most seriously injured plaintiff was only entitled to her *pro rata* share of the first loss insurance funds.

[48] While the factual circumstances may be compelling, the equitable principle House seeks is unavailable to him. I find that the doctrine of marshalling does not apply. The funds must be paid to the claimants on a *pro rata* basis. The Court does not have discretion to order that the funds be paid on a different basis.

C. Enforceability and Ambiguities in the Baird Settlement

[49] House submits that the Baird settlement has not been approved by the court and is, therefore, unenforceable. House was a person under disability at the

time of the settlement and was represented by a litigation guardian. Court approval of the settlement is required pursuant to Rule 7.08 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194. For reasons that are unclear, no one has sought court approval of the Baird settlement.

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[50] For purposes of this motion, I shall treat the Baird settlement as enforceable, for the following reasons:

a) The Baird settlement tracks the language of the Samms settlement, including the *pro rata* distribution between the plaintiffs. The Samms settlement was approved by the court.
b) All parties were represented by counsel at the settlement meetings, including defence counsel for House.
c) Although House's plaintiff counsel was not present at the settlement meetings, he was advised of the Baird settlement. He did not raise any objections and stated that the quantum of the settlement was reasonable.
d) House has not moved to set aside the Baird settlement, which was reached almost five years ago.
e) The paragraphs of the Baird settlement stating that the plaintiffs in all actions would be paid on a *pro rata* basis is consistent with the *Insurance Act*. These paragraphs were designed to avoid the outcome in the *Scale Estate* decision.

[51] The Baird settlement is silent with respect to apportionment of damages. After hearing initial submissions from the parties, the court provided the parties with an opportunity to provide evidence establishing a breakdown of the heads of damages included in the Baird settlement.

[52] Baird's counsel, Bernard Verbanac, filed a supplementary affidavit. In addition, Nordique's counsel, Brian Smith, filed an affidavit. House primarily objects to the affidavit of Mr. Smith and argues that it breaches the parol evidence rule. The court permitted the affidavit to be filed, with its weight to be determined at a later point.

[53] The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing. The rule precludes, among other things, evidence of the subjective intentions of the parties. The rule developed from the desire to have the nullity and certainty in contractual obligations. One of the exceptions to the parol evidence rule is that, where there is ambiguity in the written contract itself, extrinsic evidence may be admitted to clarify the meaning of the ambiguous terms: see *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633; and *C.J.A. Local 579 v. Bradco. Construction Ltd.,* [1993] 2 S.C.R. 316.

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[54] The Baird settlement contains terms that are arguably ambiguous terms. This falls into the exception to the parol evidence rule, and extrinsic evidence is admissible to clarify the meaning of the written settlement.

[55] The affidavits addressed two areas of potential ambiguity in the Baird settlement:

i. Whether Nordique Agreed to Pay any Shortfall to all of the Plaintiffs

[56] In response to a question from the court, counsel for House argued, for the first time, that paragraph 6 of the Baird settlement should be interpreted to mean that Nordique agreed to pay any shortfall in the insurance proceeds to all of the plaintiffs, including House, after State Farm had paid out its policy limits.

[57] The affidavit of Mr. Smith speaks to his understanding, as Nordique's counsel, of the meaning of the word "plaintiffs" in paragraph 6 of the Baird settlement. Counsel states that this paragraph was never intended to include House. I give this portion of the affidavit little weight. Counsel's own intentions do not really assist me in interpreting the ambiguous language of the agreement.

[58] However, other extrinsic evidence and additional considerations lead me to conclude that the word "plaintiffs" in paragraph 6 includes only the Baird plaintiffs, and cannot be interpreted as a promise by Nordique to pay any shortfall in damages to all of the plaintiffs. I have considered the following:

a) House made submissions on this motion that the House plaintiffs were not parties to the Baird negotiations and settlement, and he did not have counsel at the settlement meeting. He stated that he does not agree with the Baird settlement, and Nordique breached its duty of care toward him when it entered into that settlement. House has always taken the position that the Baird settlement is detrimental to his position as plaintiff in this litigation.

b) Because of s. 277 of the *Insurance Act,* Nordique has no obligation in law to pay any shortfall in damages to House. There would be no reason for Nordique to give such an unlimited, gratuitous promise to pay damages to House once the State Farm policy limits were exhausted. In addition, Nordique received no contractual consideration from House for such an agreement.

c) None of the parties interpreted paragraph 6 to include House as one of the plaintiffs. House appealed the trial ruling dismissing his claim against the Township (seeking indemnification from the Township). He argued the doctrine of marshalling before me and stated that House would have a substantial shortfall if I did not direct that State Farm pay House in priority to the other plaintiffs. It would make no sense for House to take these steps if he believed that paragraph 6 meant that he would be fully paid by Nordique.

[59] Although the word "plaintiffs" in paragraph 6 of the Baird settlement is arguably ambiguous, I have considered the wording of the entire agreement and the surrounding circumstances. All of the parties conducted themselves according to the interpretation that paragraph 6 did not include a promise by Nordique to pay any shortfall in damages to all of the plaintiffs. I interpret paragraph 6 to reference the Baird plaintiffs only.

ii. Heads of Damages Included in the Settlement

[60] The affidavit of Mr. Verbanac addresses the heads of damages in the Baird settlement. The affidavit provides some context to the settlement discussions,

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which assists me in exercising my discretion in apportioning the damages for the purpose of the garnishment hearing. I shall address this further below.

D. Whether House Can Garnish the Baird Settlement Funds

[61] Even though there is a shortfall in the insurance proceeds available to House, he still has the right to collect the remaining damages from Baird personally. House has issued two Notices of Garnishment, seeking to garnish insurance proceeds payable to Baird. One Notice has been issued with State Farm as the Garnishee and the other with Nordique as the Garnishee. House seeks a declaration that any insurance funds that Baird is set to receive from the settlement are not exempt from attachment or execution. On the other hand, Baird submits that the settlement funds are not subject to garnishment.

[62] Pursuant to Rule 60.08(16) of the *Rules of Civil Procedure*, the court has the discretion to determine rights, liabilities or any matter in relation to the garnishment. The Baird settlement set damages at $500,000. It does not define the heads of damages breakdown. Baird acknowledges that it is his onus to show that the settlement is exempt from garnishment.

[63] Since Rule 60.08(16) grants the court discretion to determine any matter, I shall exercise my discretion to determine the distribution of settlement funds in order to determine what portion, if any, can be garnished. There is no settled approach to how the categories of damages should be allocated to out of court settlements. Where settlements are not broken into constituent components, the court may allocate the settlement into the heads of damages as best it can. This entails examining any evidence of the settlement negotiations.

[64] I have reviewed the affidavit of Baird's counsel. Baird's Pre-Trial Memorandum suggested that Baird was entitled to approximately $2.9 million, which was divided as follows: 7% for general damages; 49% for future care costs; 41% for past and future income loss (Baird was not receiving income replacement benefits at the time); and 3% for the *Family Law Act* claim.

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[65] Baird's counsel acknowledges that the parties treated the $500,000 settlement as an all-inclusive figure. He has no knowledge of how the defendants arrived at the figure and/or what (if any) specific heads of damages were considered in arriving at the sum of $500,000. He states that he advised his clients to accept the $500,000 offer as he believed it to be an appropriate amount, taking into account Baird's injuries, future care costs, potential future income loss, loss of competitive advantage, and the potential risks associated with trial.

[66] The absence of any apportionment of the heads of damages in the settlement (in particular, the quantum of future income and/or future care costs) benefited Baird. This allowed Baird to maximize his claim for income replacement benefits through his statutory accident benefit entitlements.

[67] Baird's accident benefits matter was settled on August 2, 2017, for a total of $500,000. The accident benefits settlement was structured with 50% as income replacement benefits and 50% for medical and rehabilitation benefits.

[68] Baird's accident benefits claim settled four months before the notices of garnishment were served on State Farm, and Baird has received a lump sum accident benefit payout. The garnishment hearing before me relates to a request to garnish funds that Baird stands to receive from his settlement of the court action.

[69] At the time of settlement, Baird's counsel clearly considered income loss to be a substantial portion of any court settlement. This position is reflected in the apportionment of damages as set out in the Pre-Trial Memorandum. It is also reflected in the fact that counsel considered it to be beneficial to Baird that the settlement be an all-inclusive figure.

[70] In all the circumstances, I find that it is appropriate to designate 50% of the Baird settlement for general damages, future care costs, and the *Family Law Act* claim. I find that this portion of the settlement should be exempt from garnishment, for the following reasons:

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a) Garnishment is an equitable remedy. As such, the court has jurisdiction to exempt personal injury damages for pain and suffering from garnishment under Rule 60.08(16). The parties agree that damages for pain and suffering are not subject to garnishment: see *Mullin v. R-M & E Pharmacy* (2005), 74 O.R. (3d) 378 (S.C.).

b) Damages that are personal in nature (such as damages for pain and suffering, future care, and housekeeping) are not ordinarily subject to seizure by creditors: see *Conforti (Re),* 2015 ONCA 268.

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[71] I designate the remaining 50% of the settlement as income loss. The question of what portion of income loss can be garnished requires further analysis.

[72] Baird agrees that, if a portion of the settlement is found to be lost income or loss of competitive advantage, it can be garnished. However, he argues two possible ways in which the court should limit the garnishment of the lost income.

[73] First, Baird attempts to draw an analogy to caselaw dealing with future income loss awards in the bankruptcy context. He submits that the court should apportion funds for lost income from the date of settlement to the date of his notional bankruptcy discharge, relative to Baird's estimated remaining work life. He argues that the court should consider how much of a bankrupt's income would be available to creditors when determining what portion of the settlement should be garnished.

[74] In the bankruptcy context, future income funds can be pro-rated from the discharge rate over the estimate of debtor's working life. Lost future earning capacity has also been considered to be a replacement for earned income, and thus, falls under s. 68 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. As such, it does not accrue fully to the trustee: see *Conforti (Re)*.

[75] I do not accept the submission that the lost wages portion of the settlement should be pro-rated in this fashion. The bankruptcy cases are distinguishable from the case before the court. There are different policy

considerations that apply in the context of a bankruptcy. Courts have applied the *Bankruptcy Act* in a manner that is consistent with the “fresh start” principle. The *Act* is not intended to require payments by the bankrupt to the estate after the bankrupt's discharge. To require payment of any of the amount of future loss of wages to the estate would bring about this result. Accordingly, while the future loss amount may be property, it is not property that may be acquired by or devolved on the bankrupt before his discharge: see *Re Anderson*, 2004 ABQB 349, 358 A.R. 183 .

[76] The *Creditors’ Relief Act, 2010*, S.O. 2010, c. 16, Sched. 4, does not contain the same provisions as the *Bankruptcy and Insolvency Act*. The purpose of the *Creditors’ Relief Act* is to allow creditors to collect overdue debt without resorting to legal action. It allows all creditors to gain from the benefit of a proceeding, effectively extinguishing the priority of the execution creditor who first seized property: see *I.J.T. Holdings Ltd. v. Saskatchewan (Sheriff of the Judicial Centre of Moose Jaw)* (1998), 171 Sask. R. 273 (Q.B.).

[77] As a secondary argument, Baird submits that the *Wages Act*, R.S.O. 1991, c. W.1, applies to damages for lost income and that at least 80% of the portion that is considered wages should be exempt from garnishment. The *Wages Act* states that payments from insurance that is intended to replace income lost because of disability shall be deemed to be wages. 80% of a person’s wages are exempt from seizure or garnishment. A judge may order that the exemption be increased or decreased if satisfied that it is just to do so, having regard to the nature of the debt owed to the creditor, the person’s financial circumstances, and any other matter the judge considers relevant: see s. 7.

[78] The parties were unable to find caselaw to assist with the issue of whether insurance settlements are considered to be “wages” under the *Wages Act*. However, there are principles found in the caselaw that provide some assistance:

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i. Income replacement benefits under the SABS are wages within the meaning of the *Wages Act*: see *Lease Truck Inc. v. Serbinek,* [2008] O.J. No. 4700 (S.C.).

ii. Periodic payments to a doctor under OHIP are not wages. The court can consider the debtor's monthly expenses and designate a portion of OHIP payments as exempt from garnishment, pursuant to Rule 60.08(16): see *Hongkong Bank of Canada v. Slesers* (1992), 7 O.R. (3d) 117 (S.C.).

iii. Damages for wrongful dismissal are wages within the meaning of the *Wages Act*: see *Landry (Re)* (2000), 135 O.A.C. 381 (C.A.).

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[79] Although not dealing with the *Wages Act*, the analysis in the decision of *Re Conforti* provides some analogous direction. In discussing the operative legal framework under the *Bankruptcy Act*, the court held examples of payments that are encompassed by the s. 68(2)(a) definition of total income include lost wages and disability payments.

[80] When considering the garnishment of income, the court should strike a balance between the interests of the creditors in obtaining an expeditious payment in full of the amounts owed to them and the ability of debtors to continue to earn money that will be used to discharge their debts and support themselves and their dependents: see *Dhaliwal v. Ontario (Ministry of Health and Long Term Care)*, [2002] O.J. No. 4717 (S.C.).

[81] It is not a requirement of the *Wages Act* or the caselaw that wages can only be received in the form of periodic payments or only from an employer. I find that the *Wages Act* applies to the lost income portion of the Baird settlement. Even if I am wrong about the application of the *Wages Act*, I would apply a similar analysis under Rule 60.08(16) and deem a portion of the funds to be exempt from garnishment.

[82] In this case, no one disputes that Baird was seriously injured in the accident, which may limit his ability to earn an income in the future. The lost income portion of the settlement will allow Baird to support himself and his dependents (if

any). However, Baird has not provided his own affidavit setting out to what extent he is unable to work in the future or whether he has other assets or income available to him. It is notable that Baird has already been paid lump sum income replacement benefits from his insurer that cannot be garnished from the insurer.

[83] Both the *Wages Act* and Rule 60.08(16) give the court discretion to decrease the exemption from garnishment. I find that it is appropriate that 60% of the lost income portion of the Baird settlement should be exempt from garnishment. Since half of the settlement is entirely exempt, the net result is that 80% of the entire settlement is immune from attachment and execution. House may garnish 20% of the Baird settlement from State Farm and Nordique.

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IV. ORDERS

[84] For all of these reasons, the court makes the following orders and directions:

1. The State Farm policy limits of $1 million is first loss insurance and shall be apportioned on a *pro rata* basis to satisfy settlements and judgments against House (as a defendant in the Baird and Samms actions) and against Baird (as a defendant in the House and Samms actions). The judgment of House in this action shall be pro-rated with the judgment in the Samms action C-570-10 and with the settlement in the Baird action C-570-10.
2. After the State Farm policy has paid out its policy limits on a *pro rata* basis, the Nordique policy shall then pay the remaining additional damages to Baird and to the Samms family, up to the policy limits of $1 million.
3. House shall be entitled to garnish 20% of the settlement funds payable by State Farm and Nordique to Baird.
4. The parties shall mutually agree on the quantum of payments within 30 days or such other time period as agreed to by all interested parties.
5. In the event that the parties cannot agree on the pro-rated figures within 30 days, the parties shall submit written submissions within 60 days of this ruling and I will determine the pro-rated amounts. If further direction is required from the court on any other issue, the parties may provide me with written submissions within the same time frame. The court may direct a further attendance, if required, to address the issues in dispute.

V. COSTS

[85] Nordique and Baird have been more successful than House on this motion. The Samms family took no position, but attended to ensure that their interests were protected.

[86] In the event that the parties cannot agree as to costs, they are directed to provide written submissions. The submissions shall be no longer than two typed

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pages, double-spaced, in addition to any relevant Bill of Costs and Offers to Settle. Nordique, Baird, and the Samms family shall provide costs submissions first and House shall respond two weeks later. In light of the fact that further submissions may be required, the parties shall agree on a timetable for costs submissions and file that timetable with the court.

Braid, J.

Released: March 15, 2019

2019 ONSC 1712 (CanLII)

CITATION: House v. Baird, 2019 ONSC 1712
COURT FILE NO.: C-1092-09
DATE: 2019-03-15

2019 ONSC 1712 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

TYLER HOUSE BY HIS LITIGATION GUARDIAN GAIL HOUSE, THE ESTATE OF TITUS HOUSE, GAIL HOUSE and TITUS HOUSE JR.

- and –

DONALD BAIRD, ROBERT SCOTT MURRAY and THE CORPORATION OF THE TOWNSHIP OF WILMOT

REASONS ON MOTION

CDB

Released: March 15, 2019

TAB 2

CITATION: In the matter of the Proposal of Innovative Coating Systems Inc., 2017 ONSC 3070
COURT FILE NO.: 35/2185695
DATE: 20170519

ONTARIO SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY and INSOLVENCY

In the matter of the Proposal of Innovative Coating Systems Inc., a company duly incorporated under the laws of the Province of Ontario, having its head office in the town of Tecumseh, County of Essex and Province of Ontario, (Bankrupt/Moving Party)	Benjamin Blay, for Innovative Coating Systems Inc. Thomas Robson, for Business Development Bank Sean Zeitz, for Eli Mogil, lawyer for Uni-Select Eastern Inc. John Leslie, for Proposal Trustee, S. Funtig & Associates Inc. Timothy Hogan, for Royal Bank of Canada **HEARD:** May 12, 2017

GARSON J.

Introduction

[1] Innovative Coating Systems Inc. ("the debtor") brings an application for approval of its proposal, dated December 5, 2016 accepted by creditors at a meeting of January 18, 2017, pursuant to s. 58 of the *Bankruptcy and Insolvency Act* ("BIA"). The debtor also seeks directions from this court regarding next steps.

[2] Uni-Select Eastern Inc. ("Uni-Select") and the Business Development Bank of Canada ("BDC"), secured creditors of the debtor, oppose the proposal because it contains a release of the guarantors.

[3] Wayne Brady ("Brady"), the principal of the debtor, executed personal guarantees in favour of both Uni-Select and BDC.

[4] For the reasons that follow and in accordance with s. 59(2) of the BIA, I am of the opinion that the terms of the proposal are not calculated to benefit the general body of creditors and accordingly refuse to approve the proposal.

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2017 ONSC 3070 (CanLII)

Preliminary Matters

[5] Royal Bank of Canada, a secured creditor and senior lender of the debtor and the holder of a personal guarantee by Brady, takes no position on the motion on the basis that they are not affected by the proposal and their security, including the guarantee of Brady, is unaffected by its terms.

[6] Pursuant to s. 187(a) of the BIA and unopposed by the parties, BDC is granted leave to amend its Proof of Claim to extend to both Loan No. 060562-02 and No. 60562-04.

Background and Facts

[7] Innovative, an industrial coatings and chemical company in Tecumseh, Ontario, filed a Notice of Intention to File a Proposal under the BIA.

[8] S. Funtig and Associates Inc., in its capacity as trustee ("the Trustee"), prepared a proposal, including a clause in the proposal that released guarantors from liability from future actions.

[9] Uni-Select, a secured creditor that supplied auto parts and services to the debtor, also holds a guarantee from Brady and his numbered corporation ("2067195").

[10] Upon counsel for Uni-Select realizing how this clause would compromise their ability to pursue Brady, they reached out to the Trustee to request that the first creditor's meeting scheduled for December 28, 2016 be adjourned. It was rescheduled for January 18, 2017 at 10:00 a.m.

[11] Due to an administrative error, no one from counsel for Uni-Select attended at this meeting. The Trustee delayed the start of the meeting for 20 minutes to allow time for counsel for Uni-Select to attend by phone. No one appeared either in person or by phone.

[12] BDC executed a proxy in favour of the proposal.

[13] Having determined sufficient voting letters and proxies were received from both secured and unsecured creditors to form a quorum, the meeting was held and the proposal was passed by 100 percent of creditors of both classes that voted at the meeting. The Trustee, Brady and counsel for the debtor were the only persons in attendance at the meeting. The Trustee exercised proxies or relied on voting letters to form a quorum.

[14] Counsel for Uni-Select emailed the Trustee the day after the meeting inquiring about whether the proposal had been updated. She was then advised of the outcome of the meeting and the fact the Trustee called the Official Receiver's Office which confirmed the process they followed was correct.

[15] Both Uni-Select and BDC now appear before this court and oppose the proposal.

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Positions of the Parties

[16] The Trustee seeks approval of the proposal and argues he acted honestly and in good faith and in accordance with the requirements of the BIA. He submits the proposal is reasonable in the circumstances and that his release of Brady as guarantor is as a *quid pro quo* for the assistance Brady will offer in liquidating the assets of the debtor which will ultimately benefit the general body of creditors.

[17] BDC candidly admits that it erred by misconstruing the meaning of the proposal and not initially understanding that it contained a release of the guarantee BDC personally holds against Brady. BDC argues that it is entitled to change its position before this court and now opposes the proposal because it will not benefit them as a secured creditor.

[18] Uni-Select goes further and argues that the proposal is drafted in a way that is misleading and violates the principles of the BIA and of commercial morality required in the drafting of such documents. Uni-Select suggests that the proposal does not benefit them as the largest secured creditor but rather enures to the benefit of Brady. They oppose the proposal and submit their earlier omission in failing to attend the creditor's meeting does not affect their ability to oppose approval of the proposal by this court.

Discussion

[19] Section 59(1) of the BIA provides that the court shall, before approving the proposal, hear from the debtor.

[20] In *Re Eagle Mining Ltd*., 1999 CarswellOnt 1291, (Gen. Div.) the court made clear that there is no impediment to a creditor taking different positions at a creditor's meeting and before the court. Ultimately, it is the court that must determine whether the proposal benefits the general body of creditors.

[21] Accordingly, the fact that BDC earlier voted to support the proposal is of no consequence given the position they now take.

[22] Section 59(2) of the BIA provides that if the terms of the proposal are not reasonable nor calculated to benefit the general body of creditors, the court shall refuse to approve the proposal.

[23] In *Re Kitchener Frame Ltd.*, 2012 ONSC 234 (SCJ), Morawetz J. at para. 19 confirms the three-pronged test under s. 59(2) that the proposal:

(i) is reasonable;

(ii) is calculated to benefit the general body of creditors; and

(iii) is made in good faith.

[24] This test includes consideration of whether the terms of the proposal meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system: *Re Kitchener* at para. 22. I will address each part of the test separately.

(i) <u>Reasonableness</u>

[25] None of the parties contest the reasonableness of the terms of the proposal, save and accept the release of Brady as guarantor.

(ii) <u>Calculated to Benefit the General Body of Creditors</u>

[26] Uni-Select and BDC combine to represent 100 percent of the secured creditors under the proposal. Uni-Select has a claim for $254,765.82 and BDC has a claim for $130,636.40. They constitute more than two-thirds of the admitted claims.

[27] There is little doubt that if approved, this proposal would potentially harm and prejudice both Uni-Select and BDC to the extent that their personal guarantees would be compromised. After all, one of the primary purposes of a personal guarantee is to permit the creditor to look to the guarantor when the principal debtor defaults – precisely the situation before this court.

[28] The Trustee suggests the release of Brady as guarantor is both permissible and reasonable in the circumstances. I disagree.

[29] In *ATB Financial v. Metcalf and Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, the Ontario Court of Appeal outlined the requirements that must be satisfied to justify a third-party release (in the context of a plan under the CCAA). In *Re Kitchener*, Morawetz J. applied these criteria in the context of approving a proposal under the BIA. They include:

(a) the parties to be released are necessary and essential to the restructuring of the debtor;

(b) the claims to be released are rationally related to the purpose of the proposal and necessary for it;

(c) the proposal cannot succeed without the releases;

(d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the proposal; and

(e) the proposal will benefit not only the debtor companies but creditors generally.

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[30] I have difficulty accepting that the criteria have been met. There is little to satisfy me that the release is necessary or essential to the liquidation of the debtor's assets. Although the affidavit of Brady suggests he would be unwilling to assist with the liquidation in the absence of being released from his guarantees, this assertion rings hollow. Common sense dictates that it is in the best interests of Brady to maximize every dollar of potential earnings from the proposal. After all, each dollar achieved is one less dollar of potential personal liability. In the end, he would be ill-advised to let such potential returns slip away due to his unwillingness to assist with the liquidation.

[31] I am also not satisfied that the release of Brady's personal guarantees are neither rationally related to the purpose of the proposal or necessary for it.

[32] As referenced above, the proposal can succeed without his release, given the inherent self-interest he has in maximizing the liquidation of the assets.

[33] As both Uni-Select and BDC point out, this proposal benefits neither of them and compromises their guarantees.

[34] I place little weight on the fact that Uni-Select failed to attend the rescheduled creditors meeting and BDC wishes to retract its vote. Section 59(2) provides each creditor with a fresh opportunity to make submissions on the proposal. Their administrative error, inadvertence or oversight speaks to the reason this matter is before the court but not to whether they meet the test under s. 59(2).

[35] There is no need for a *quid pro quo* for Brady in these circumstances.

(iii) <u>Good Faith</u>

[36] I agree with the submissions of Uni-Select that the terms of the proposal are drafted in a way that does not clearly disclose that the personal guarantees of Brady and 2067195 are being compromised. These releases should have been front and centre. In Article 2.2, the proposal states that it affects

> …all claims existing against Innovative.

[37] There is no mention of Brady's personal guarantees nor of the *quid pro quo* analysis.

[38] The accompanying letter to the proposal at Tab 1(d) of the Responding Motion Record is also silent as to Brady's personal guarantees.

[39] Although I do not accept the characterization of the proposal as intentionally misleading, I agree that the breadth of the release was tucked away in Article 3.4 in a manner that caused BDC to initially misread the proposal and misunderstand the implications with respect to the guarantees. Simply put, the proposal was not drafted in a manner that properly reflects the interest of creditors and the requirements of commercial morality and integrity. Rather, it is a carefully tailored proposal that appears to better serve the interests of Brady, but is not calculated to benefit the general body of creditors: *Re*

Lofchik, 1998 CarswellOnt 194 (Gen. Div.) and *Re Sumner Co. (1984) Ltd.*, 1987 CarswellNB 26 (NBQB).

[40] At the end of the day, a court must be satisfied that the creditors are getting more advantage from the terms and the proposal than would arise from a bankruptcy. I am not so satisfied on the record before me.

[41] The Trustee should have expressly and clearly stated both within the terms of the proposal and the covering letter that the proposal benefits Brady and 2067195 and he should have done an analysis of the extent of such benefits.

[42] I am aware of a very limited power under the BIA to make alterations or amendments to a proposal. However, none of the parties has sought this remedy and it is not appropriate to grant same in these circumstances.

Conclusion

[43] For the above reasons the proposal shall not be approved. In light of the provisions of s. 61(2)(a) of the BIA and with the consent of the parties, leave is granted to the debtor to file an amended proposal if it so chooses with the deemed release removed therefrom with costs payable by the debtor, Brady, 2067195 and the Trustee on a joint and several basis. In accordance with the requirements of the BIA, the amended proposal shall be filed within ten days.

Costs

[44] Uni-Select seeks costs on a partial-indemnity scale of $14,336.59, inclusive of HST and disbursements. Uni-Select suggests Brady ought to be jointly and severally liable for such costs because this type of conduct stood to personally benefit Brady and the Trustee's conduct in not disclosing same in a more prominent manner ought to be sanctioned with costs.

[45] BDC seeks costs of $7,203.55 on a partial indemnity scale, inclusive of HST and disbursements.

[46] Innovative seeks costs of $5,030.31 on a partial indemnity scale, inclusive of HST and disbursements.

[47] I agree with Innovative that this motion would not have been necessary if Uni-Select had not missed the meeting that was rescheduled at its request. Similarly, had BDC not misread the proposal, they would have cast their vote in a manner that would have obviated the need for this motion.

[48] Further, BDC served no factum or cases in advance and showed up on the day of the motion with a single case in hand.

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[49] Although the Trustee also bears some responsibility for this motion, but for the actions or inactions of Uni-Select and BDC, this court appearance would not have taken place. In all of the circumstances, this is one of those rare occasions where the court will exercise its discretion to award no costs.

"Justice M. A. Garson"

Justice M. A. Garson

Released: May 19, 2017

2017 ONSC 3070 (CanLII)

CITATION: In the matter of the Proposal of Innovative Coating Systems Inc., 2017 ONSC 3070
COURT FILE NO.: 35/2185695
DATE: 20170519

2017 ONSC 3070 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE IN BANKRUPTCY and INSOLVENCY

BETWEEN:

In the matter of the Proposal of Innovative Coating Systems Inc., A company duly incorporated under the laws of the Province of Ontario, having its head office in the town of Tecumseh, County of Essex and Province of Ontario, (Bankrupt/Moving Party)

REASONS FOR JUDGMENT

Justice M. A. Garson

Released: May 19, 2017

TAB 3

Alberta Court of Queen's Bench
Canadian Airlines Corp. (Re)
Date: 2000-05-04

G. Morawetz, A.J. McConnell and R.N. Billington, for Bank of Nova Scotia Trust Co. of New York and Montreal Trust Co. of Canada.

A.L. Friend, Q.C., and H.M. Kay, Q.C., for Canadian Airlines.

S. Dunphy, for Air Canada and 853350 Alberta Ltd.

R. Anderson, Q.C., for Loyalty Group.

H. Gorman, for ABN AMRO Bank N.V.

P. McCarthy, for Monitor - Price Waterhouse Cooper.

D. Haigh, Q.C., and D. Nishimura, for Unsecured noteholders - Resurgence Asset Management.

C.J. Shaw, for Airline Pilots Association International.

G. Wells, for NavCanada.

D. Hardy, for Royal Bank of Canada.

(Calgary 0001-05071, 0001-05044)

May 4, 2000.

2000 CanLII 28202 (AB QB)

[1] PAPERNY J. [orally]: — Montreal Trust Company of Canada, Collateral Agent for the holders of the Senior Secured Notes, and the Bank of Nova Scotia Trust Company of New York, Trustee for the holders of the Senior Secured Notes, apply for the following relief:

> 1. In the CCAA proceeding (Action No. 0001-05071) an order lifting the stay of proceedings against them contained in the orders of this court dated March 24, 2000 and April 19, 2000 to allow for the court-ordered appointment of Ernst & Young Inc. as receiver and manager over the assets and property charged in favour of the Senior Secured Noteholders; and
>
> 2. In Action No. 0001-05044, an order appointing Ernst & Young Inc. as a court officer with the exclusive right to negotiate the sale of the assets or shares of Canadian Regional Airlines (1998) Ltd.

[2] Canadian Airlines Corporation ("CAC") is a Canadian based holding company which, through its majority owned subsidiary Canadian Airlines International Ltd. ("CAIL") provides domestic, U.S.-Canada transborder and international jet air transportation services. CAC also provides regional transportation through its subsidiary Canadian Regional Airlines (1998) Ltd. ("Canadian Regional"). Canadian Regional is not an applicant under the CCAA proceedings.

[3] The Senior Secured Notes were issued under an Indenture dated April 24, 1998 between CAC and the Trustee. The principal face amount is $175 million U.S. As well, there is interest outstanding. The Senior Secured Notes are directly and indirectly secured

by a diverse package of assets and property of the CCAA applicants, including spare engines, rotables, repairables, hangar leases and ground equipment. The security comprises the key operational assets of CAC and CAIL. The security also includes the outstanding shares of Canadian Regional and the $56 million intercompany indebtedness owed by Canadian Regional to CAIL.

2000 CanLII 28202 (AB QB)

[4] Under the terms of the Indenture, CAC is required to make an offer to purchase the Senior Secured Notes where there is a "change of control" of CAC. It is submitted by the Senior Secured Noteholders that Air Canada indirectly acquired control of CAC on January 4, 2000 resulting in a change of control. Under the Indenture, CAC is then required to purchase the notes at 101 percent of the outstanding principal, interest and costs. CAC did not do so. According to the Trustee, an Event of Default occurred, and on March 6, 2000 the Trustee delivered Notices of Intention to Enforce Security under the Bankruptcy and Insolvency Act.

[5] On March 24, 2000, the Senior Secured Noteholders commenced Action No. 0001-05044 and brought an application for the appointment of a receiver over their collateral. On the same day, CAC and CAIL were granted CCAA protection and the Senior Secured Noteholders adjourned their application for a receiver. However, the Senior Secured Noteholders made further application that day for orders that Ernst & Young be appointed monitor over their security and for weekly payments from CAC and CAIL of $500,000 U.S. These applications were dismissed.

[6] The CCAA Plan filed on April 25, 2000, proposes that the Senior Secured Noteholders constitute a separate class and offers them two alternatives:

1. To accept repayment of less than the outstanding amount; or
2. To be unaffected by the CCAA Plan and realize on their security.

[7] On April 26th, 2000, the Senior Secured Noteholders met and unanimously rejected the first option. They passed a resolution to take steps to realize on the security.

[8] The Senior Secured Noteholders argue that the time has come to permit them to realize on their security. They have already rejected the Plan and see no utility in waiting to vote in this regard on May 26th, 2000, the date set by this court.

[9] The Senior Secured Noteholders submit that since the CCAA proceedings began five weeks ago, the following has occurred:

-interest has continued to accrue at approximately $2 million U.S. per month;

-the security has decreased in value by approximately $6 million Canadian;

-the Collateral Agent and the Trustee have incurred substantial costs;

-no amounts have been paid for the continued use of the collateral, which is key to the operations of CAIL;

-no outstanding accrued interest has been paid; and- they are the only secured creditor not getting paid.

[10] The Senior Secured Noteholders emphasize that one of the end results of the Plan is a transfer of CAIL's assets to Air Canada. The Senior Secured Noteholders assert that the Plan is sponsored by this very solvent proponent, who is in a position to pay them in full. They are argue that Air Canada has made an economic decision not to do so and instead is using the CCAA to achieve its own objectives at their expense, an inappropriate use of the Act.

[11] The Senior Secured Noteholders suggest that the Plan will not be impacted if they are permitted to realize on their security now instead of after a formal rejection of the Plan at the court-scheduled vote on May 26, 2000. The Senior Secured Noteholders argue that for all of the preceding reasons lifting the stay would be in accordance with the spirit and intent of the CCAA.

[12] The CCAA is remedial legislation which should be given a large and liberal interpretation: See, for example, *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3d) 165 (Ont. Gen. Div.). It is intended to permit the court to make orders which will effectively maintain the status quo for a period while the struggling company attempts to develop a plan to compromise its debts and ultimately continue operations for the benefit of both the company and its creditors: See for example, *Meridian Development Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.), and *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.).

[13] This aim is facilitated by the power to stay proceedings provided by Section 11 of the Act. The stay power is the key element of the CCAA process.

[14] The granting of a stay under Section 11 is discretionary. On the debtor's initial application, the court may order a stay at its discretion for a period not to exceed 30 days. The burden of proof to obtain a stay extension under Section 11 (4) is on the debtor. The debtor must satisfy the court that circumstances exist that make the request for a stay extension appropriate and that the debtor has acted, and is acting, in good faith and with due diligence. CAC and CAIL discharged this burden on April 19, 2000. However, unlike under the Bankruptcy and Insolvency Act, there is no statutory test under the CCAA to guide the court in lifting a stay against a certain creditor.

2000 CanLII 28202 (AB QB)

[15] In determining whether a stay should be lifted, the court must always have regard to the particular facts. However, in every order in a CCAA proceeding the court is required to balance a number of interests. McFarlane J.A. states in his closing remarks of his reasons in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and problems.

[16] Also see Blair J.'s decision in *Campeau v. Olympia & York Developments Ltd.* (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.), for another example of the balancing approach.

[17] As noted above, the stay power is to be used to preserve the status quo among the creditors of the insolvent company. Huddart J., as she then was, commented on the status quo in *Re Alberta-Pacific Terminals Ltd.* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). She stated:

> The status quo is not always easy to find… Nor is it always easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered.

[18] Further commentary on the status quo is contained in *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 80 C.B.R. (N.S.) 98 (B.C. S.C.). Thackray J. comments that the maintenance of the status quo does not mean that every detail of the status quo must survive. Rather, it means that the debtor will be able to stay in business and will have breathing space to develop a proposal to remain viable.

[19] Finally, in making orders under the CCAA, the court must never lose sight of the objectives of the legislation. These were concisely summarized by the chambers judge and adopted by the British Columbia Court *of* Appeal in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]):

> (1) The purpose of the CCAA is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and court.

2000 CanLII 28202 (AB QB)

(2) The CCAA is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and employees.

(3) During the stay period, the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.

(4) The function of the court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

(5) The status quo does not mean preservation of the relative pre-stay debt status of each creditor. Since the companies under CCAA orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, the preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

(6) The court has a broad discretion to apply these principles to the facts of th particular case.

[20] At pages 342 and 343 of this text, Canadian Commercial Reorganization: Preventing Bankruptcy (Aurora: Canada Law Book, looseleaf). R.H. McLaren describes situations in which the court will lift a stay:

1. When the plan is likely to fail;

2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor);

3. The applicant shows necessity for payment (where the creditors financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence);

4. The applicant would be severely prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors;

5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passage of time;

6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.

[21] I now turn to the particular circumstances of the applications before me.

[22] I would firstly address the matter of the Senior Secured Noteholders' current rejection of the compromise put forward under the Plan. Although they are in a separate class under CAC's Plan and can control the vote as it affects their interest, they are not in a position to vote down the Plan in its entirety. However, the Senior Secured Noteholders submit that where a plan offers two options to a class of creditors and the class has selected which option it wants, there is no purpose to be served in delaying that class from proceeding with its chosen course of action. They rely on the *Nova Metal Products Inc. v.*

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Comiskey (*Trustee of*) (1990), 1 C.B.R. (3d) 101 (Ont. C.A.) at 115, as just one of several cases supporting this proposition. *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.) at pp. 27-28, leave to appeal to S.C.C. refused (1992), 15 C.B.R. (3d) 57 (note) (S.C.C.), would suggest that the burden is on the Senior Secured Noteholders to establish that the Plan is "doomed to fail". To the extent that Nova Metal and Philip's Manufacturing articulate different tests to meet in this context, the application of either would not favour the Senior Secured Noteholders.

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[23] The evidence before me suggests that progress may still be made in the negotiations with the representatives of the Senior Secured Noteholders and that it would be premature to conclude that any further discussions would be unsuccessful. The parties are continuing to explore revisions and alternative proposals which would satisfy the Senior Secured Noteholders.

[24] Mr. Carty's affidavit sworn May 1, 2000, in response to these applications states his belief that these efforts are being made in good faith and that, if allowed to continue, there is a real prospect for an acceptable proposal to be made at or before the creditors' meeting on May 26, 2000. Ms. Allen's affidavit does not contain any assertion that negotiations will cease. Despite the emphatic suggestion of the Senior Secured Noteholders' counsel that negotiations would be "one way", realistically I do not believe that there is no hope of the Senior Secured Noteholders coming to an acceptable compromise.

[25] Further, there is no evidence before me that would indicate the Plan is "doomed to fail". The evidence does disclose that CAC and CAIL have already achieved significant compromises with creditors and continue to work swiftly and diligently to achieve further progress in this regard. This is reflected in the affidavits of Mr. Carty and the reports from the Monitor.

[26] In any case, there is a fundamental problem in the application of the Senior Secured Noteholders to have a receiver appointed in respect of their security which the certainty of a "no" vote at this time does not vitiate: It disregards the interests of the other stakeholders involved in the process. These include other secured creditors, unsecured creditors, employees, shareholders and the flying public. It is not insignificant that the debtor companies serve an important national need in the operation of a national and international airline which employs tens of thousands of employees. As previously noted, these are all constituents the court must consider in making orders under the CCAA proceeding.

[27] Paragraph 11 of Mr. Carty's May 1, 2000 affidavit states as follows:

> In my opinion, the continuation of the stay of proceedings to allow the restructuring process to continue will be of benefit to all stakeholders including the holders of the Senior Secured Notes. A termination of the stay proceedings as regards the security of the holders of the Senior Secured Notes would immediately deprive CA1L of assets which are critical to its operational integrity and would result in grave disruption of CAIL's operations and could lead to the cessation of operations. This would result in the destruction of value for all stakeholders, including the holders of the Senior Secured Notes. Furthermore, if CAIL ceased to operate, it is doubtful that Canadian Regional Airlines (1998) Ltd. ("'CRAL98"), whose shares form a significant part of the security package of the holders of the Senior Secured Notes, would be in a position to continue operating and there would be a very real possibility that the equity of CAIL and CRAL, valued at approximately $115 million for the purposes of the issuance of the Senior Secured Notes in 1998, would be largely lost. Further, if such seizure caused CAIL to cease operations, the market for the assets and equipment which are subject to the security of the holders of the Senior Secured Notes could well be adversely affected, in that it could either lengthen the time necessary to realize on these assets or reduce realization values.

[28] The alternative to this Plan proceeding is addressed in the Monitor's reports to the court. For example, in Paragraph 8 of the Monitor's third report to the court states:

> The Monitor believes the if the Plan is not approved and implemented, CAIL will not be able to continue as a going concern. In that case, the only foreseeable alternative would be a liquidation of CAIL's assets by a receiver and manager and/or by a trustee. Under the Plan, CAIL's obligations to parties it considers to be essential in order to continue operations, including employees, customers, travel agents, fuel, maintenance, catering and equipment suppliers, and airport authorities, are in most cases to be treated as unaffected and paid in full. In the event of a liquidation, those parties would not, in most cases, be paid in full and, except for specific lien rights, statutory priorities or other legal protection, would rank as ordinary unsecured creditors. The Monitor estimates that the additional unsecured claims which would arise if CAIL were to cease operation as a going concern and be forced into liquidation would be in excess of $1.1 billion.

[29] This evidence is uncontradicted and flies in the face of the Senior Secured Noteholders' assertion that realizing on their collateral at this point in time will not affect the Plan. Although, as the Senior Secured Noteholders heavily emphasized the Plan does contemplate a "no" vote by the Senior Secured Noteholders, the removal of their security will follow that vote. 9.8(c) of the Plan states that:

> If the Required Majority of Affected Secured Noteholders fails to approve the Plan, arrangements in form and substance satisfactory to the Applicants will have been made with the Affected Secured Noteholders or with a receiver appointed over the assets comprising the Senior Notes Security, which arrangements provide for the transitional use by [CAIL], and subsequent sale, of the assets comprising the Senior Notes Security.

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[30] On the other side of the scale, the evidence of the Senior Secured Noteholders is that the value of their security is well in excess of what they are owed. Paragraph 15(a) of the Monitor's third report to the court values the collateral at $445 million. The evidence suggests that they are not the only secured creditor going unpaid. CAIL is asking that they be permitted to continue the restructuring process and their good faith efforts to attempt to reach an acceptable proposal with the Senior Secured Noteholders until the date of the creditors meeting, which is in three weeks. The Senior Secured Noteholders have not established that they will suffer any material prejudice in the intervening period.

[31] The appointment of a receiver at this time would negate the effect of the order staying proceedings and thwart the purposes of the CCAA.

[32] Accordingly, I am dismissing the application, with leave to reapply in the event that the Senior Secured Noteholders vote to reject the Plan on May 26, 2000.

[33] An alternative to receivership raised by the Senior Secured Noteholders was interim payment for use of the security. The Monitor's third report makes it clear that the debtor's cash flow forecasts would not permit such payments.

[34] The Senior Secured Noteholders suggested Air Canada could make the payments and, indeed, that Air Canada should pay out the debt owed to them by CAC. It is my view that, in the absence of abuse of the CCAA process, simply having a solvent entity financially supporting a plan with a view to ultimately obtaining an economic benefit for itself does not dictate that that entity should be required to pay creditors in full as requested. In my view, the evidence before me at this time does not suggest that the CCAA process is being improperly used. Rather, the evidence demonstrates these proceedings to be in furtherance of the objectives of the CCAA.

[35] With respect to the application to sell shares or assets of Canadian Regional, this application raises a distinct issue in that Canadian Regional is not one of the debtor companies. In my view, Paragraph 5(a) of Chief Justice Moore's March 24, 2000 order encompasses marketing the shares or assets of Canadian Regional. That paragraph stays, inter alia:

> …any and all proceedings … against or in respect of… any of the Petitioners' property … whether held by the Petitioners directly or indirectly, as principal or nominee, beneficially or otherwise…

[36] As noted above, Canadian Regional is CAC's subsidiary, and its shares and assets are the "property" of CAC and marketing of these would constitute a "proceeding …

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in respect of … the Petitioners' property" within the meaning of Paragraph 5(a) and Section 11 of the CCAA.

[37] If I am incorrect in my interpretation of Paragraph 5(a), I rely on the inherent jurisdiction of the court in these proceedings.

[38] As noted above, the CCAA is to be afforded a large and liberal interpretation. Two of the landmark decisions in this regard hail from Alberta: *Meridian Development Inc. v. Toronto Dominion Bank,* supra, and *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 20 (Alta. Q.B.). At least one court has also recognized an inherent jurisdiction in relation to the CCAA in order to grant stays in relation to proceedings against third parties: *Re Woodward's Ltd.* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.). Tysoe J. urged that although this power should be used cautiously, a prerequisite to its use should not be an inability to otherwise complete the reorganization. Rather, what must be shown is that the exercise of the inherent jurisdiction is important to the reorganization process. The test described by Tysoe J. is consistent with the critical balancing that must occur in CCAA proceedings. He states:

> In deciding whether to exercise its inherent jurisdiction, the court should weigh the interests of the insolvent company against the interests of parties who will be affected by the exercise of the inherent jurisdiction. If. in relative terms, the prejudice to the affected party is greater than the benefit that will be achieved by the insolvent company, the court should decline to its inherent jurisdiction. The threshold of prejudice will be much lower than the threshold required to persuade the court that it should not exercise its discretion under Section 11 of the CCAA to grant or continue a stay that is prejudicial to a creditor of the insolvent company (or other party affected by the stay).

[39] The balancing that I have described above in the context of the receivership application equally applies to this application. While the threshold of prejudice is lower, the Senior Secured Noteholders still fail to meet it. I cannot see that it is important to the CCAA proceedings that the Senior Secured Noteholders get started on marketing Canadian Regional. Instead, it would be disruptive and endanger the CCAA proceedings which, on the evidence before me, have progressed swiftly and in good faith.

[40] The application in Action No. 0001-05044 is dismissed, also with leave to reapply after the vote on May 26, 2000.

[41] I appreciate that the Senior Secured Noteholders will be disappointed and likely frustrated with the outcome of these applications. I would emphasize that on the evidence before me their rights are being postponed and not eradicated. Any hardship they

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experience at this time must yield to the greater hardship that the debtor companies and the other constituents would suffer were the stay to be lifted at this time.

Application dismissed.

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TAB 4

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Blackburn Developments Ltd. (Re),* 2011 BCSC 1671

Date: 20111207
Docket: S111150
Registry: Vancouver

2011 BCSC 1671 (CanLII)

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57

And

In the Matter of Blackburn Developments Ltd.

Petitioner

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for PricewaterhouseCoopers Inc.:	K. Jackson D. Toigo
Counsel for Home Equity Development Inc. and Landus Development Group Inc.:	J. Sandrelli
Counsel for Pinnacle International Lands Inc.:	W. Milman
Counsel for Streetwise Capital Partners Inc.:	D. Gruber T. Louman-Gardiner
Counsel for Christina Friesen and Martin Biggerstaff:	B. Friesen
Counsel for R. Wellsby and R. Wilson:	D. Fitzpatrick
Place and Date of Trial/Hearing:	Vancouver, B.C. November 24 and 25, 2011
Place and Date of Judgment:	Vancouver, B.C. December 7, 2011

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[1] The petitioner, Blackburn Developments Ltd. ("Blackburn"), is a real estate development company that undertook a very large residential real estate development project near Chilliwack, British Columbia. The development went on for many years. Blackburn sold some lots. In order to meet its financial obligations over the years it granted a large number of mortgages over its development lands and a golf course that was an important part of the development.

[2] By 2010 and probably before, Blackburn was insolvent. It had incurred many millions of dollars of losses and owed its creditors, both secured and unsecured, in excess of $80,000,000. While many creditors had mortgage security over the Blackburn real estate portfolio, the value of the properties charged was not sufficient to satisfy the amounts secured by the mortgages and most mortgage creditors were in fact unsecured or faced large deficiencies. Despite Blackburn's difficulties, its management was still hopeful of restructuring its affairs. It was recognized that it had potentially valuable losses that could be monetized through a corporate reorganization. However, it was far behind in preparing its financial statements and filing its required income tax returns, and it was therefore impossible to value its tax attributes.

[3] In February 2011 Blackburn sought protection pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*]. On February 23, 2011 it obtained an order (the "Initial Order") granting a stay of proceedings against it to permit it to prepare a plan of arrangement (the "Plan") to present to its creditors.

[4] From the outset of these proceedings it was apparent that Blackburn had two potential sources of funds to finance the Plan. The first was the development potential of its real estate holdings. The second was its tax attributes. It was also apparent that Blackburn faced formidable obstacles to completing a Plan. These included the chaotic state of its financial records, its lack of liquidity, the complicated state of the title to its real estate holdings, and the scepticism of some of its secured creditors about its ability to bring forward an acceptable plan.

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[5] These obstacles were addressed in part by the adoption of what has come to be known as a two track process in the *CCAA* proceedings by which Blackburn pursued a restructuring plan and the Monitor, PricewaterhouseCoopers, marketed its assets. This provided Blackburn with a chance to restructure and gave some comfort to its secured creditors that realization on their security would not be unduly delayed.

[6] Initially the focus of the Monitor's marketing efforts was on the company's real estate and related assets. The potential of marketing the real estate and tax attributes through a reorganization was recognized but was not the primary focus of the early applications before me.

[7] The applications addressed in these reasons arise partially out of the collision of the two processes. There are three applications, all by the Monitor. They are:

a. to disallow the votes of Streetwise Capital Partners Inc. ("Streetwise") cast at the creditors' meeting held to consider the Plan;

b. to sanction the Plan;

c. to extend the stay of proceedings to January 15, 2012.

[8] The history of this proceeding is well known to the parties and need not be repeated in detail. By July 2011, the financial, tax and accounting records of Blackburn had been brought up to date, giving a clearer picture of the value of its tax attributes. The Monitor was in a position to begin the process of negotiating and finalizing an asset sale agreement. On July 22, 2011 I made an order (the "Claims Procedure Order") approving a claims procedure that authorized the Monitor to undertake a claims process. Paragraphs 22 and 23 of the Claims Procedure Order provided for assignment of claims and expressly stated that the assignee of a claim was entitled to vote that claim, provided it complied with the provisions of paragraph 23.

[9] After July 22, management of Blackburn continued to pursue a restructuring as contemplated in the Initial Order.

[10] With the benefit of hindsight it can now be seen that the two track process had a fundamental flaw. It was based on the erroneous assumption that an asset sale and a restructuring could be separately negotiated. In fact the Monitor was unable to negotiate any asset sale that was not effected through a restructuring.

[11] It was able to enter into a Restructuring Term Sheet (the “Pinnacle RTS”) with Pinnacle International Lands Inc. (“Pinnacle”) in September 2011. As the name discloses, a restructuring was an essential part of the Pinnacle RTS. In the Pinnacle RTS, Pinnacle agreed to provide sufficient funds to Blackburn to pay senior secured debt and, through a corporate arrangement, ultimately become the sole shareholder of Blackburn. It would thereby acquire Blackburn’s attributes. An essential step in the process therefore was approval by Blackburn’s creditors of a plan of arrangement implementing the Pinnacle RTS.

[12] In the period up to August 30, 2011 management of Blackburn pursued a restructuring, as contemplated in the Initial Order. The only entity that showed a serious interest in pursuing a restructuring with Blackburn was Streetwise, a company that specialized in realizing value from financially distressed enterprises. Streetwise is a self-described “vulture fund”. By August 30, 2011, discussions between management of Blackburn and Streetwise had advanced to the point that the directors of Blackburn had concluded that Streetwise’s restructuring proposal offered the best recovery for creditors.

[13] On August 30, Mr. Rick Wellsby, one of the two directors of Blackburn, sent an email to most of the unsecured creditors of Blackburn soliciting their support for the Streetwise proposal. The email was criticized in the Monitor’s submissions to me. I will return to those criticisms later in these reasons. The email attached a letter of intent that bound any creditor signing it to assign its claim against Blackburn to Streetwise for 2 cents on the dollar plus certain additional consideration.

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[14] Many creditors executed letters of intent. The letters of intent contained conditions precedent in favour of Streetwise that gave Streetwise until October 15, 2011 to satisfy itself that it had sufficient support for its proposed restructuring to proceed with it. For all practical purposes, the executed letters of intent were options in favour of Streetwise. By September 30, Streetwise had received sufficient signed letters of intent to ensure that, if it acted upon them, it could defeat any plan proposed pursuant to the *CCAA*.

[15] On September 16, 2011, Streetwise proposed a transaction to the Monitor pursuant to which Streetwise would become the sole shareholder of Blackburn and acquire its tax attributes through a restructuring that required a plan of arrangement. Streetwise proposed a capital contribution, payment of a portion of the restructuring costs and payment of $1,250,000 as a fund to make a distribution to unsecured creditors. The principal difference between the Pinnacle and Streetwise proposals was that the Pinnacle proposal called for Blackburn to retain its real estate holdings and provided sufficient capital to satisfy senior secured claims while the Streetwise proposal called for a disposition of those real estate assets, except for the golf course.

[16] The Monitor did not pursue Streetwise's proposal for the reasons set out in paragraph 3.10 of the Monitor's 11th Report. Among those reasons was the fact that the Landus Group ("Landus") did not support the proposed transaction and in the Monitor's view no restructuring proposal could succeed without the support of Landus because Landus held sufficient unsecured claims to defeat any plan. On September 23, the Monitor informed Streetwise that it was moving forward with a preferred bidder.

[17] On September 30, I approved The Pinnacle RTS on the recommendation of the Monitor. As part of that order I directed Blackburn to execute the Pinnacle RTS. I did so despite the fact that Streetwise sought to have the Monitor or the Court consider a revised offer from it. While I have already given my reasons for approving the Pinnacle RTS I repeat that I was concerned that the *CCAA*

proceedings had already become prolonged, that restructuring costs were mounting alarmingly and that the Streetwise proposal did not have the support of Landus, without whose support no Plan could be approved.

[18] However, Blackburn was unable to execute the Pinnacle RTS because both its directors, Messrs. Wellsby and Wilson, resigned. On October 5, I made a further order authorizing the Monitor to execute the Pinnacle RTS on behalf of Blackburn and to take the steps necessary to bring the a plan of arrangement implementing the Pinnacle RTS (the "Pinnacle Plan") to a meeting of creditors for approval. At the same time I ordered that Blackburn and its principals, including its former directors, cease restructuring activities.

[19] In my brief oral reasons I tried to make it clear that I was in no way restricting any creditor from exercising its rights to oppose the Pinnacle Plan or to persuade other creditors to vote against it.

[20] Streetwise did not appeal the September 30 order. However it did proceed to acquire the claims of those creditors who had signed letters of intent prior to September 30 and to purchase other claims. As a result Streetwise had by the end of October acquired claims in the amount of approximately $38,000,000, including approximately $7,500,000 in related party claims. The related party claims are subject to a challenge. However, even excluding those claims, Streetwise was the assignee of $30,500,000 in claims, more than sufficient to defeat the implementing of the Pinnacle Plan.

[21] At the meeting of creditors held on November 21 Streetwise voted all its claims against approval of the Pinnacle Plan and it was defeated. However, the Monitor, supported by Landus and Pinnacle, seeks an order disallowing Streetwise's votes. If those votes are disallowed the result will be that the Pinnacle Plan will be approved by a sufficient number of creditors to be approved in accordance with s. 6 of the *CCAA*.

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[22] The Monitor submits that I have the discretionary jurisdiction to disallow Streetwise's votes, but not its right to receive a dividend, on its claims. It submits that I should exercise that jurisdiction to disallow the votes if I conclude that Streetwise has not acted in good faith and has voted its claims for a collateral and improper purpose. The Monitor concedes that there is no express provision in the *CCAA* permitting the court to disallow votes of a person who is a creditor. However, it submits that the broad discretion granted by s. 11 of the *CCAA* extents to controlling any conduct done in bad faith, particularly if that conduct has the effect of frustrating the due process of the administration of a *CCAA* plan. The Monitor says that that control extends to a power to disallow votes.

[23] The Monitor relies on three authorities, two from the United States and one from Nova Scotia, to support the proposition that a court exercising supervisory jurisdiction over an insolvency matter has the jurisdiction to disallow votes of creditors if those votes are cast for an improper purpose. Counsel for all parties agreed that this question has not previously been considered in Canada in *CCAA* proceedings.

[24] The Monitor submits that Streetwise did not act in good faith when it voted against the Pinnacle Plan. The Monitor says that Streetwise acquired sufficient claims to block approval of the Plan as part of a scheme to defeat the Pinnacle Plan for the purpose of getting a second chance to acquire Blackburn's tax attributes for itself. The Monitor submits that it was improper for Streetwise to buy up claims and vote those claims in order to allow it to force the other interested parties to reconsider its offer for the tax attributes.

[25] Streetwise submits that I have no jurisdiction to disallow votes by a creditor who has obtained its status in accordance with the Claims Procedure Order because in so doing I would be depriving that creditor of an express statutory right given by the *CCAA.* It also submits that the facts of this case do not call for making such an order even if I have jurisdiction to do so. Streetwise's position is that it has participated in good faith in the very process contemplated by the Initial Order and

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that it has acted throughout in the *bona fide* belief that there is more value to unsecured creditors than is provided by the Pinnacle RTS.

[26] The three cases relied on by the Monitor are *In re Allegheny International Inc.*, 118 B.R. 282 (Bankr. W.D. Pa. 1990) [*Allegheny*], *In re DBSB North America Inc.*, 421 B.R. 133 (Bankr. S.D.N.Y., 2009) [*DBSB*], and *Re Laserworks Computer Services Inc.* (1997), 6 C.B.R. (4th) 69, [1998] N.S.J. No. 60 (CA) [*Laserworks*].

[27] In this case Streetwise undoubtedly became involved in the Blackburn *CCAA* proceedings because it wished to acquire the tax attributes of Blackburn for itself. This is obvious from the terms of its September 16th offer to the Monitor. However the critical question is not why Streetwise first became interested in Blackburn but whether it voted against the Plan for an improper purpose. In deciding this matter I must proceed on the basis that Streetwise is a creditor pursuant to legally valid assignments. It is of course implicit in the position taken by the Monitor that Streetwise is entitled to share in the distribution to creditors that this is so.

[28] I do not find it necessary to decide whether a judge supervising a *CCAA* proceeding has the jurisdiction to disallow the votes of a creditor while at the same time recognizing that the creditor has a valid claim for purposes of distribution. As is often the case in *CCAA* matters, the parties urgently require a decision. I will therefore proceed on the assumption that I have that jurisdiction. In so doing, I will attempt to adopt the analysis and apply the principles set out in *Laserworks*.

[29] *Laserworks* was a case decided in the context of a proposal under the *Bankruptcy and Insolvency Act* [*BIA*]. In that case *Laserworks* made a proposal to its creditors. A competitor purchased sufficient claims to allow it to defeat the proposal. Under the *BIA* this had the effect of putting *Laserworks* into bankruptcy, thereby eliminating it as a competitor, the very purpose for which the competitor had purchased the claims. The remaining creditors favoured approval of the proposal. The Nova Scotia Court of Appeal found that the creditor had voted its claims for an improper purpose and that the Registrar had the discretion to disallow the votes of that creditor.

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[30] In *Laserworks,* the court set out the basis on which it thought it appropriate to intervene to disallow votes at paras. 50-56 as follows:

> 50 Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the BIA. These are established in several sections, including s. 109(1), persons who had not duly proved and lodged a claim; s. 54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s. 110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s. 111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s. 112, a creditor holding security (subject to conditions); and s. 113(2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.
>
> 51 (It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)
>
> 52 However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a crteditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the guise of tortious behavior, to which motive is relevant. In the s. 108(3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in *Dimples Diapers*.
>
> 53 Tortious or tort-like behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice, particularly for persons at a point so vulnerable they must resort to insolvency protection. (See *Shepard*.) In my view that is why Parliament chose the language it did in s. 187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards required for establishing such torts as abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.
>
> (ii) The Authorities
>
> 54 The four cases cited by the Registrar establish that the threshold is crossed when the BIA is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament.
>
> 55 Farley J. held in *Dimples Diapers* that:
>
> > . . . the *Bankruptcy Act*, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a pari passu basis". (L.W.Houlden and C.H.Morawetz, Bankruptcy Law of Canada, 3rd ed. (looseleaf) (Toronto: Carswell, 1989) at p. 1-3 [A&4]....

> 56 In the cases cited the improper purpose takes the form of abuse of process or tortious behavior closely analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s. 43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes.

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[31] The court elaborated on the concept of substantial injustice at paras. 72-74, in a portion of the judgment dealing with class voting, as follows:

> 72 Hardie Boys J. cited the same passage quoted above by Justice Stewart from Vicount Haldane's judgment. It concludes that there is a restriction on powers conferred on a majority of a special class in order to enable that majority to bind a minority:
>
> > ...They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.
>
> 73 Hardie Boys J. considered *Re Farmers' Co-operative*, which was also cited by Justice Stewart, in which votes of several creditors who were competitors of the debtor were disallowed.
>
> > ...In a later development of the same matter, but not now involving the Court's sanction under s. 205, Gallen J. accepted that the Court has an overriding control, not limited to the approval stage under s. 205, and may restrict a right to vote where the equities of a particular situation require it: see [1992] 1 NZLR 348. It is unnecessary for present purposes to decide whether these cases were correctly decided, for even if they were, the principle is not of unlimited application, and does not apply to the exercise of voting rights generally. This is clear from what Viscount Haldane said in the *British America Nickel* case. Immediately after the passage already quoted, his Lordship said
> >
> > > Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.
> >
> > Thus in *Pender v. Lushington* (1877) 6 Ch. D.
> > Jessel MR said there is:
> >
> > > . . . no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.

> While the voting rights conferred by Part XV of the *Insolvency Act* are not akin to a "right of property attaching to a share", they are rights conferred without reservation. There is no requirement for class voting; there is instead a general right conferred equally on all creditors. The rationale of the principle does not apply. It is well settled that the motive (short of fraud) of a petitioning creditor, no matter how reprehensible, is irrelevant to his right to obtain an order of adjudication: *King v. Henderson* [1898] AC 720, *Re King, ex parte Commercial Bank of Australia Ltd. (No. 2)*, [1920] VLR 490. The motive of a creditor voting on a proposal, really the other side of the coin to a petition for adjudication, can be no different. That is not to say that there may be no remedy in an extreme case, such as fraud or mistake. But certainly where, as here, there are perfectly legitimate reasons for opposing the proposal, a creditor is not to be denied that right because he may have some other motive as well...

74 If the exception made for fraud is broadened to "substantial injustice" I would take Hardie Boys J.'s conclusions to be a fair statement of the law in Canada as well, as applied by Canadian courts in the cases cited by the Registrar. The New Zealand court included mistake as well as fraud as an exception. A creditor is not to be deprived of the right to vote for wrongful motives alone; motive must be coupled with a tortious act to support a finding of improper purpose.

[32] The reference to "substantial injustice" in paragraph 74 of *Laserworks* finds its origin in s. 187(9) of the *BIA*. No such express provision is found in the *CCAA*. However, assuming without deciding that the same jurisdiction can be found in s. 11 of the *CCAA*, the test promulgated in *Laserworks* is difficult to meet. As I understand that test I must be satisfied that there has been conduct amounting to an abuse of process or other tortious or near tortious character and that that conduct has resulted in a substantial injustice before I can exercise my discretion to disallow a vote of a creditor.

[33] In its submissions to me the Monitor placed particular emphasis on the fact that Streetwise was actively seeking to acquire the tax attributes of Blackburn. It points out that after I had approved the Pinnacle RTS, Streetwise continued to acquire claims. It submits that the inescapable inference to be drawn from these facts is that Streetwise acquired the claims and voted to block approval of the Pinnacle Plan not for the purpose of achieving the purposes of the *CCAA,* but for the improper purpose of forcing a situation in which it would acquire the tax attributes for itself.

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[34] All parties supporting the application to disallow Streetwise's votes emphasized that Streetwise was not a creditor of Blackburn at the outset of these proceedings, that it continued to purchase claims after it was aware that the Pinnacle RTS had been approved to be presented to creditors and that it was obvious that Streetwise wished to obtain the tax attributes of Blackburn. They submit that these circumstances are strong indicators that Streetwise was not acting in good faith.

[35] The Monitor has asked that I infer that Streetwise exercised its votes for an improper purpose analogous to the improper purpose found in the authorities referred to above. Against that inference I have the evidence of Mr. Sethi, contained in two affidavits. The gist of that evidence is that Streetwise entered into restructuring discussions with management of Blackburn prior to August 30, 2011 and that by that date Streetwise believed that it had a viable restructuring plan. Mr. Sethi deposes that in accordance with its expectation it began to acquire the right to have debt assigned to it in order to facilitate approval of its proposed restructuring. Mr. Sethi says, and the documentary evidence supports, that he attempted to initiate discussions with the Monitor in mid-September 2011, but that the Monitor declined to negotiate with him.

[36] Mr. Sethi deposes that when he became aware of the Pinnacle RTS, he attempted to put forward an alternative plan but was unsuccessful in persuading me to give more time to consider Streetwise's offer. Critically, he has deposed that he does not consider that the Pinnacle Plan fairly allocates the value of the tax attributes between the secured and unsecured creditors. In his affidavit #2 he states that he was of the view that there was more value in the unsecured claims than was being offered under the Pinnacle Plan and that accordingly Streetwise decided to acquire the unsecured claims that it effectively had under option. It also acquired additional claims in the same belief.

[37] I think the substance of Mr. Sethi's evidence was that he was confident that Streetwise could recover more than the cost of acquiring the claims, either through

an enhanced offer from Pinnacle or through some other plan that would be presented, if the Pinnacle Plan was defeated.

[38] I accept Mr. Sethi's evidence as reliable. He was not cross-examined on his affidavit. The uncontradicted evidence before me is that Streetwise was acting as a *bona fide* party seeking to participate in a restructuring of Blackburn up to September 30, 2011. There is no dispute that management of Blackburn had the right to pursue a restructuring up to that date. Streetwise became involved in the proceeding at a time when it was known that Blackburn's assets were being offered for sale. I think I can infer that by the summer of 2011 it was obvious to everyone that any restructuring would result in a third party gaining control of Blackburn. I find that by September 30, 2011 Streetwise had committed considerable time and resources in pursuing what I will describe as the Blackburn opportunity.

[39] I also accept as genuine Mr. Sethi's evidence that Streetwise proceeded to acquire creditor claims because it believed that it would ultimately recover more than it paid for those claims. I do not think that Streetwise can be said to be acting in bad faith by acquiring those claims even if it was motivated in part to do so to acquire a blocking position. It is obvious that a party with a blocking position is in a strong position in the negotiations over the terms of a plan of arrangement. That reality was demonstrated in this case by the Monitor's recognition that no plan of arrangement was possible without the support of Landus.

[40] It seems to me that this case raises squarely the appropriateness of permitting "vulture funds" to participate in insolvency restructurings. In my view there is no compelling argument that the activities of vulture funds are undesirable. Even if there were, I think it is the role of Parliament and not the courts to address what limits, if any, should be placed on the activities of such funds. I also note that in this case the terms of the Pinnacle RTS were significantly improved after it became apparent that Streetwise had a substantial position in the claims. There is no doubt that the Pinnacle Plan put to the creditors on November 21 was significantly superior to that recommended by the Monitor on September 30. The

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inference that I draw from that is that the enhancements to the offer were motivated by a desire to enlist creditor support in the face of the Streetwise opposition to the Plan.

[41] I think that the cases cited to me by the Monitor in which bad faith was found are distinguishable from this case. Firstly, the courts in those cases found that the creditor who acquired claims had no *bona fide* intention of profiting from realizing on those claims. In the American cases the courts relied on the fact that the claims were acquired at par or close to par as evidence that the acquiring party did not regard the investment in the claims as a legitimate profit making venture. In all three cases the acquiring creditor did not put forward any plausibly credible evidence that it acquired the claims to make a profit on them or that there was any reasonable prospect of a greater recovery for creditors if the plan or proposal was defeated. In addition, as far as I am able to discern, none of the cases involved an assignee that had become involved in the process with the support of management of the insolvent company. Finally I can see no indication that the plans or proposals under consideration in those cases were in effect liquidation proposals, as is the case in this proceeding.

[42] In *DBSD* the Court found that the acquiring creditor had no *bona fide* interest in profiting from an investment in the debt as the debt was purchased at par. In *Allegheny* the Court also found as a fact that the acquiring creditor, Japonica, had no *bona fide* intention to profit from its investment in the debt. In addition it acquired *de facto* blocking positions in two separate classes whose interests were in direct conflict. These actions were in the Court's view inconsistent with Japonica's actions being carried out for economic reasons.

[43] I also question whether the US decisions are consistent with the law in Canada. Firstly, the US decisions concern the exercise of an express statutory power to disallow votes. It appears from the cases cited that US courts have been prepared to exercise that power in situations in which they conclude that the votes have been exercised in aid of a plan to acquire control of the debtor company. I

must frankly say that I find the distinction made in those cases between pursuing economic interests as a creditor and as a potential owner difficult to grasp. In both cases the creditor is pursuing its economic interests. Both American decisions acknowledge that acquiring debt with a view to making a profit is not bad faith behaviour. Thus the activities of a vulture fund are permissible under US law.

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[44] As I have already stated, I think that the policy approach taken in *Laserworks* is preferable to that of the US authorities. As the above quoted passages make clear, the Court in *Laserworks* recognized that creditors are entitled to vote their claims in what they as creditors perceived to be their own economic interests as long as their actions are not unlawful or do not result in a substantial injustice.

[45] I think this approach is preferable because it recognizes that the effect of such an order is to deprive the assignee of a statutory right and to subject it to having its contractual rights compromised against its will. In my view such a result would only be appropriate in the clearest of cases.

[46] The Monitor and other parties were critical of the conduct of the directors of Blackburn and in particular with the contents of the August 30 email from Mr. Wellsby to Blackburn's creditors. The Monitor submits that this email contained misleading and inaccurate information that may well have misled creditors into signing the Letters of Intent that empowered Streetwise to obtain assignments of their claims. In the Monitor's submission I should take the allegedly misleading statements into account in deciding whether I should disallow Streetwise's votes.

[47] It is quite clear that the email does contain inaccurate information, particularly with respect to the potential recovery creditors could expect if the proposed Streetwise restructuring plan was approved. I am also concerned that the email did not adequately explain that the Letters of Intent purported to give Streetwise the unilateral right to take an assignment of claims whether or not its proposed restructuring plan proceeded.

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[48] I have decided that I should not take the contents of the email into account in deciding these applications. The point made by the Monitor is that the assignments of claims acted upon by Streetwise may have been obtained as a result of misrepresentations contained in the email. However, even if that were so, in law the assignments would only be voidable at the instance of any affected creditor. While some assigning creditors have expressed regret to the Monitor about executing the Letters of Intent and assignments, none has applied to me to have the assignments set aside or for any other remedy against Streetwise. In addition the Monitor has registered Streetwise as a creditor in accordance with the Claims Procedure Order. While that registration is not conclusive with respect to Streetwise's right to vote on the Pinnacle Plan, it does relieve me of the task of examining the circumstances of the assignments to determine their validity in the absence of an express challenge thereto.

[49] I am also of the view that Mr. Wellsby did not intend to deceive the creditors when he sent the email. I accept his evidence that he genuinely believed that the Streetwise proposal offered the best recovery to creditors and that he continued to hold that belief after I approved the Pinnacle RTS.

[50] After hearing the submissions of all parties and considering the extensive evidence before me I have concluded that in this case there was a genuine difference of opinion about the best course to follow to maximize recovery for the unsecured creditors of Blackburn. The Monitor was clearly of the view that it was futile to proceed with a restructuring without the support of Landus, which effectively had a blocking position given the extent of unsecured debt that it held. I accept that Streetwise and the directors of Blackburn held the genuine belief that the Pinnacle Plan unfairly favoured Landus and did not provide a fair dividend to unsecured creditors.

[51] In this case I cannot find that the predominate purpose of Streetwise's negative vote was to acquire control of Blackburn and hence its tax attributes. Mr. Sethi has denied that that was the predominate purpose and the surrounding

circumstances do not lead to that conclusion. In addition, the liquidation analysis prepared by the Monitor does not lead to the conclusion that creditors will be worse off under liquidation.

[52] Accordingly, the application to disallow Streetwise's votes is dismissed. With that dismissal there is no approved Plan to be sanctioned and it follows that that application is also dismissed.

[53] At the hearing I extended the stay in this matter until December 15, 2011. As is probably apparent from these reasons it is my view that it is possible for the parties to reach an agreement that would permit a Plan to be approved. The difference of opinion over the appropriate allocation of the value of the tax attributes has unfortunately led to the defeat of the restructuring plan favoured by the Monitor. Despite this setback it is my view that the synergies between the values of the real estate assets and the tax attributes remain and I urge the parties to renew their efforts to reach an agreement on how to share those values.

[54] To assist in that regard I am therefore prepared to hear an application to extend the stay beyond December 15 if the parties see any utility in so doing.

"Sewell J."

The Honourable Mr. Justice Sewell

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TAB 5

1997 **B19853**

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY

IN THE MATTER OF the Proposal of Laserworks Computer Services Inc.

- and -

IN THE MATTER OF Section 194(2) of *Bankruptcy and Insolvency Act,* R.S.C. 1985, c.B-3

- and -

IN THE MATTER OF an appeal by 3004876 Nova Scotia Limited

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DECISION

HEARD: at Halifax, Nova Scotia, before the Honourable Justice Margaret J. Stewart on June 24, 1997

DECISION: August 13, 1997

COUNSEL: Michael S. Ryan, Q.C.
Counsel for the Appellant, 3004876 Nova Scotia Limited

Roy F. Redgrave
Counsel for the Laserworks Computer Services Limited

D. Bruce Clarke
Counsel for McCuaig & Company Inc., Trustee under Proposal

<u>Stewart, J.:</u>

The Appellant, 3004876 Nova Scotia Limited, (the Appellant numbered company) appeals from the decision of Registrar Hill dated April 14, 1997 and resulting order dated May 5, 1997, whereby the Registrar declared invalid the votes that 18 unsecured creditors of the insolvent, Laserworks Computer Services Inc. (Laserworks) cast, by proxy, against Laserworks' amended proposal.

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1. On December 4, 1996, Laserworks gave notice of its intention to file a proposal under s. 50 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c.B-3 as amended (the **Act**).

2. On January 3, 1997, the proposal was filed.

3. On January 24, 1997, the first meeting of the classes of creditors was adjourned.

4. On February 12, 1997, Laserworks filed an amended proposal.

5. On March 3, 1997, the amended proposal was considered by the meeting of the classes of creditors. Victor Goldberg, a solicitor for the Appellant numbered company, between himself and an associate, held and presented 18 proxies of unsecured creditors. These 18 claims were objected to by the principals of Laserworks. Upon the vote being taken, the proposal was defeated, subject to the Registrar's resolution of the objections. As noted by the Registrar in his decision, it was common ground the sustaining of the objection against the votes of the 18 creditors for whom Victor Goldberg held the proxies would result in the proposal being approved.

6. On March 24, 1997, Victor Goldberg by consent was examined by counsel for Laserworks pursuant to s. 163(2) of the **Act**. Victor Goldberg's testimony and/or written summary which detailed the offers to the 18 creditors revealed to the Registrar:

> a) Victor Goldberg sought to purchase the claims of some of the creditors of Laserwork on behalf of the Appellant numbered company, being a "shelf' company, and his client was, in fact, Datarite Inc. ("Datarite"), a division of which was a business competitor of Laserworks;
>
> b) Generally, the Appellant numbered company, offered a higher percentage of the claims to creditors with smaller claims;
>
> c) Eighteen creditors delivered their proxy and a vast majority also delivered an assignment agreement; but, the agreement was not executed by the Appellant numbered company. This, the Registrar concluded, was an attempt to avoid a consolidation of the claims into one claim for the purposes of voting, as the Appellant numbered company "clearly wished to be able to vote both the value of the claims and individually on behalf of each assignee creditor". The return of the assignment and proxy, as well as the claim being proven, were conditions of payment, although at least 4 creditors were paid on their claim prior to the claims having been proven.

7. The Registrar in his decision of April 14, 1997 made the following findings of fact from the minutes of the creditors and from Victor Goldberg's testimony and/or written summary:

1) Datarite through its solicitor approached some but not all the creditors of Laserworks with the intention of obtaining an assignment of those creditors' claims and consequently the right to vote them on the

proposal. The claims were obtained and the votes utilized to defeat the proposal which would have the effect of placing Laserworks into bankruptcy by virtue of a deemed assignment provision of the **Act**.

2) Datarite's intended purpose was to effect the bankruptcy of Laserworks and to remove a competitor from the marketplace, in other words, the intention of Datarite was to place Laserworks in bankruptcy and the motive was to lessen competition by removing a competitor.

3) Datarite engaged throughout in an improper purpose not contemplated by the **Act**.

4) There is no general principle that secret agreements between creditors should not be enforced.

5) Where the court is satisfied that a creditor is acting to place the debtor in bankruptcy for an improper purpose, the court and, therefore, the Registrar has the jurisdiction to prevent this abuse of the provisions of the **Act**, notwithstanding the lack of any statutory prohibition.

6) Extrapolating from the case law dealing with petitioning into bankruptcy for an improper collateral purpose, the Registrar found where the object of the intermeddling party during the proposal process is to bring about the bankruptcy of the debtor, an improper purpose is present, thereby permitting the court to act to prevent such an abuse of the legislation.

7) It is wrong to allow Datarite to do in the proposal process (buying the claims of members of the class for the purpose of voting against the proposal) what the case law makes it clear it cannot do by Petition, (buying the claims of members of the class of unsecured creditors and using these claims to file a bankruptcy petition against Laserworks).

8) Persons should certainly think twice before they purchase debts for the sole purpose of defeating proposals.

9) By entering into the arrangement with the Appellant numbered company, the 18 creditors tainted themselves with and became embroiled in the improper purpose of Datarite.

The Registrar concluded the votes cast by the Appellant were not able to stand:

> If Laserworks has the right to be free of this type of interference the court must be able to fashion a remedy. This court does have the inherent jurisdiction to supervise the bankruptcy process and consequently the conduct of creditors where that conduct constitutes an abuse of the provisions of the B.I.A. While creditors can certainly vote in their own best interest, they may not collude with a third party to place a debtor in bankruptcy for an improper purpose. Such activity lacks commercial morality and offends the integrity of the bankruptcy process. The Registrar sustained Laserworks objection to the votes of the 18 creditors, noting the result was the approval of the proposal by the class of unsecured creditors.

Grounds of Appeal

The Appellant numbered company states the learned Registrar erred in law in sustaining Laserworks objection to the votes of the 18 creditors by:

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1) failing to appreciate the evidence before him when he concluded that Datarite's purpose in acquiring and in voting the 18 claims was an improper one;

2) applying an incorrect legal test when he concluded that Datarite's purpose in acquiring and voting the claims was relevant to the case before him; and

3) applying an incorrect legal test when he concluded that the 18 creditors tainted themselves and became embroiled in the improper purpose of Datarite, which resulted in their claims being disallowed.

The Appellant numbered company seeks an order reversing the decision. The effect of allowing the eighteen votes cast against the proposal will result in Laserworks being deemed to have made an assignment in bankruptcy, pursuant to s. 57 of the **Act**.

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Failing to Appreciate the Evidence

The Appellant submits the Registrar, in concluding that Datarite's intent and motive was to cause a bankruptcy and remove a competitor, failed to consider or simply forgot to consider the only evidence on point, being the uncontradicted evidence of Victor Goldberg who specifically stated:

> The purpose of the numbered company hopefully in buying the claim is that it'll buy the claims at a reduced price and get full payment one day.

And later:

> You asked what the ultimate goal was for the number company. And the whole purpose of it would be to hopefully get ultimately one day full payment. Just because a company were to go bankrupt, as we all know, a proposal ultimately could take the company out of bankruptcy.

Indeed the Registrar's lack of specific comment on the credibility of the "experienced" officer of the court when ignoring his testimony further supports, the Appellant submits, this void/failure to be one of forgetfulness rather than an attack on credibility without reasons. Counsel for the Appellant numbered company also notes the Registrar's lack of a transcript at the time of writing. There being no other evidence of a motive or intent, the Appellant says the Registrar's suppositions as to Datarite's motive or purpose lacked foundation. This wrong appreciation of the evidence leaves it open to the court to substitute its discretion for that of the Registrar. (Re: *Barrick* (1980), 36 C.B.R. (N.S.) 286 (B.C.C.A.); *Industrial Acceptance Corp v. Lalonde*, [1952] 2 S.C.R. 109.)

A review of the discovery transcript of Victor Golberg clearly reveals the Registrar, at that time, had a very accurate grasp of Goldberg's testimony, as the Registrar, in the context of a motion, succinctly reiterated the numbered company's stated purpose. I am satisfied some twenty days later, the Registrar did not forget this sated purpose and was conscious this explanation of purpose, if accepted, negated the inference he chose to draw from the proven facts as to the intentions of the numbered company in the circumstances. The unmistakable conclusion on reading his reasons is that he did not accept the evidence of Victor Goldberg that the purpose was to purchase the claims, at a discount, intending to profit by receiving a greater distribution from the insolvent company. In rejecting Victor Goldberg's evidence, he chose to draw the inference that the real objective was not to benefit the creditors of the insolvent, but rather, to remove it as a competitor in the market place. His decision, as a result, constituted a finding of a lack of credibility in respect to Victor Goldberg's evidence on this issue,

and having regard to that finding, his inference from the facts, as he found them, was reasonable in the circumstances. As has often been said, the Registrar, having the advantage of being present during the evidence of Victor Goldberg, on March 24, 1997, is in a better position to make findings in respect to the credibility of witnesses than a court, on appeal, and thereby limited to the written transcript. Although this does not mean such a finding of credibility would never be reversed, I am not satisfied, in this instance, that the Registrar's finding, on the issue of credibility, ought to be reversed.

Motive as a state of mind is often not the subject of direct evidence but rather of reasonable inference to be drawn from proven facts. There was no evidence before the Registrar that the motive of the Appellant numbered company in voting as it did on behalf of the eighteen creditors was to remove the competition from the market place and thereby opening up a portion of the market share or goodwill of Laserworks. In fact, the only direct evidence was to the contrary. As noted, Victor Golberg testified that the purpose in voting as the Appellant did was to obtain better recovery. Clearly, the Registrar did not accept Victor Golberg evidence since he determined that the motive was to remove the insolvent company from the market place, by defeating its proposal and thereby causing Laserworks to be deemed a bankrupt pursuant to the **Act**. Clearly, the suggestion that Laserworks, even if bankrupt, could make a further proposal and perhaps even a better proposal for the creditors, did not dissuade the Registrar from concluding on the evidence before him that the real motive was the removal of competition in the interest of the numbered company and not in furtherance of the interest of the creditors as a whole.

I am satisfied there were sufficient facts before the Registrar, to permit him to draw the inference of improper purpose and in view of his finding on Victor Goldberg's credibility, it was the appropriate inference to be drawn; more specifically and without attempting to be all inclusive:

- Datarite a competitor of Laserworks, through a shelf company, in order not to reveal its activities, approached some but not all of the creditors of Laseworks about purchasing claims.

- Datarite provided instruction to counsel.

- Datarite had no contractual relationship with Laserworks and was not a pre-existing creditor of Laserworks, but rather made it its business to find out Laserworks' status and voluntarily and intentionally involved itself in the arrangements with creditors of Laserworks and in doing so acquired the right to vote against the proposal.

- The unusual, although not inappropriate, abusiveness of Victor Goldberg, at the reconvened meeting of creditors, with respect to providing information, created an air requiring further investigation.

- Datarite voted all eighteen claims it obtained against the Laserworks' proposal. There were sufficient numbers to defeat the proposal, admittedly including two that were apparently unrelated and unassociated with Datarite, and to cause Laserworks to be deemed to have made an assignment into bankruptcy with no member of the class of unsecured creditors being paid anything, when the proposal had been promoted by the trustee as beneficial.

After considering all the evidence, I am satisfied a reversal of the Registrar decision is not warranted. His finding of improper purpose is not perverse or unsupported by the evidence. He committed no palpable error as to credibility and his conclusions are drawn from inferences supported by proven facts.

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Whether the Registrar erred in concluding Datarite's purpose in acquiring and voting claims is relevant?

The Registrar concluded that in a situation of abuse, where a competitor of an insolvent company has intentionally bought up votes for the purpose of defeating a proposal, thereby removing one of its competitors from the market place and placing the company into bankruptcy, the court has a supervisory jurisdiction to deal with the votes of the creditors under a proposal and, where necessary, to declare them invalid. He determined that since the Appellant, at the petition stage, could not have purchased the claims of creditors and then, as an assignee, petition Laserworks into bankruptcy, given the motivation in doing so was to put Laserworks out of business, the Appellant, who had no pre-existing debt with Laserworks and was a competitor should not, at the proposal stage, be able to vote arbitrarily, having purchased the proxies, so as to put Laserworks into bankruptcy and thereby indirectly accomplish by voting against a proposal what it couldn't do directly by way of a petition in bankruptcy.

Acknowledging the courts inherent jurisdiction to prevent abuse of its process, normally in fraudulent situations and acknowledging at the petition stage, the Act, clearly states the motive in bringing the petition is relevant and specifically provides the court with judicial discretion and a supervisory function and power to dismiss a petition for improper purpose (s. 43(7)), the Appellant submits the motive of a creditor in acquiring and voting the claims, at the proposal stage, is totally irrelevant and the court by Statute has no equatable supervisory role. The Appellant submits the Registrar has no business inquiring into the motive of the Appellant numbered company in voting as it did with respect to the proposal and erred in applying such an improper purpose test and in extending or extrapolating the very clear law dealing with the court's supervisory role at the petition stage to having the role continue at the proposal stage of the vote when there is no statutory authority.

Besides questioning there being any evidence to support the finding as to motive, the Appellant also questions what law supports the notion that the Registrar can take a look at motive at this stage and act in a supervisory role. The Appellant submits the concept of improper purpose is not applicable to proposals, as a proposal is an offer from the debtor to enter into a new contract with its creditors and the creditor, who owes no duty to the debtor or to other creditors in the class, is free to vote as it chooses, for any reason it chooses, and whether that reason be completely irrational/improper or not.

In determining he had inherent supervisory jurisdiction to prevent a competitor of Laserworks from placing it in bankruptcy by voting against the proposal, the Registrar, in the absence of specific statutory authority and not having the benefit, as I have had of case law dealing with principles of class voting, drew from the existing case law dealing with votes of unsecured creditors at a creditors meeting, where the court alluded to a general supervisory jurisdiction existing, even though no abuse was found (*NSC Diesel Power Incorporated Bankruptcy),* extrapolated from the principles causing petitions to be disallowed and accepted counsels' submissions as to the court ensuring proceedings are conducted in accordance with public policy and philosophy and integrity of the legislation, given parliament's inability to contemplate every possibility, specifically the buying of votes by competitor for the purpose of voting down a proposal to cause the bankruptcy of the company.

In fight of my subsequent findings relating to class voting, there is no need to comment on the appropriateness of the Registrar's findings with respect to inherent supervisory jurisdiction in circumstances where Parliament has included jurisdiction in the legislation in respect to certain proceedings only. It would appear, in respect to reviewing the **Act** to determine the intention of the legislature that the argument is, on the one hand, the supervisory function and responsibility as to motivation in respect to petitions is an indication of an overall general supervisory jurisdiction, and on the other hand, the absence of such a function and responsibility in

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respect to proposals is an indication Parliament intended this to be left to the market place. The Registrar decided the former and the Appellant urges the latter.

In my view, it is unnecessary to resolve this question in this application. With Parliament being silent on this question, it is necessary to look to the common law and any inherent jurisdiction in the court to supervise commercial conduct by majorities of a class as against minorities in the same class or group.

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Although stated in the context of voting by debenture holders when the majority had votes to modify the rights of the debenture holders in a clause, the statements of principle by Viscount Holdane of the Judicial Committee of the Privy Council in *British America Nickel Corporation v. M.J. O'Brien,* [1927] A.C. 369 at p. 371 are, no less, here applicable:

> To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to a majority bears some analogy to such a power as that conferred by s. 13 of the **English Companies Act** of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.

and later at p. 373, noting this to be a principle which does not depend on misappropriation or fraud stated:

> ... But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member.

The court, applying the principle stated by Viscount Holdane, should not sanction a scheme if it appears that the majority have not voted **bona fide** in the interests of the class as a whole.

Justice Quilliam in an unreported decision of the High Court of New Zealand, Re: *Farmers' Co-Operative Organization Society of New Zealand Limited* (M 12/97, 4 August 1987) in addressing the very issue of a company whose proposal had been defeated by the votes cast by some of its direct competitors, in circumstance where the majority had the right to bind the minority by statute relied on the principle enunciated in *British American Nickel Corp. Inc. v. O'Brien,* **supra**, during the objection to votes application before him. He concluded the votes should be discounted as their votes were cast out of self-interest and not in the interest of the class of creditors, as a whole, or of the company. Unlike the present case, he did not determine there was specific activity of an improper purpose other than recognizing the votes were cast by creditors in direct commercial competition with the company.

The Registrar, on his finding of facts, was not faced with a pre-existing creditor voting as it wished for whatever reason. He was faced with a unique set of circumstances where he found the Appellant shelf company and Datarite, a competitor of Laserworks, involved in a selective, secret arrangement with creditors against Laserworks, an arrangement that would hurt some creditors and favour other creditors, although as competitors rather than as creditors, given its purpose of removing Laserworks from the market place and diverting from it, its asset, the market share, so it could be available to Datarite, all of which would result in the balance of the creditors receiving little, if anything, and Laserworks having been deemed a bankrupt.

As noted by counsel for Laserworks, any consideration of the proposal process must include the provisions of the **Act**. The contract is not made in isolation. Without a proposal from the debtor, the creditors' rights are limited to commencing actions and hopefully proceeding to judgment; but, once the debtor enters into the proposal process, the creditors are given rights by the **Act** that they would not otherwise have. The parameters of the debtor-creditor relationship, and creditor-creditor relationship, at the proposal stage, are set by the provisions of the **Act** which

- contemplate the division of various creditors into classes (s. 50 (1.2));

- entitle creditors with proven claims to vote (s. 54 (2) (a));

- mandate voting by classes of creditors (s. 50 (1.2)) (s. 54 (2)(b));

- empower the majority of a class of creditors to bind the minority of that class (s.54(2)(d)).

As noted earlier, Registrar Hill, in reaching his determination to sustain Laserwork's objection and disallow the votes of the eighteen creditors, did not have the benefit of reviewing case law and hearing submissions as to established principles of class voting; more specifically, what principles, if any, apply in deciding whether the majority required to reject the proposal, pursuant to s. 54(2)(d) was obtained in circumstances where a direct competitor, for purposes of removing and placing the debtor in bankruptcy, casts a number of proxy votes against the proposal.

If the Appellant numbered company really voted on the basis of what it, as a creditor believes would be the best interest of the creditor class, then it is entitled to so vote; but, if the motive for voting is not to benefit the class of creditors but simply an ulterior motive not related to the interests of the creditor class of which it is a member but rather is related to its own personal interest, then such a vote does not conform to the interests of the class and is not properly exercised.

I can find no distinction between the voting discretion of a creditor, a shareholder or bond holder. Each acquires rights to vote because of their membership in a class and are, therefore, subject to the principle enunciated by Viscount Holdane. No logical basis for not extending this principle to voting by creditors on a proposal made under the **Act** has been postulated by any of the parties in the proceedings.

Even if this Appellant numbered company was wrong in its belief that by voting in this manner, it was achieving the best interest of itself and the creditors as a whole then it is entitled to so vote, even if that opinion is not shared by the minority or is in fact wrong. That is a right to which it is entitled, absent legislation to the contrary. But that is not the question here. The issue is whether Datarite through the numbered company for motives unrelated to the best interest of the creditor group and only pursuant to its own self interest in removing a potential competitor from the market place is entitled to use its votes to achieve this purpose without regard to

1997 CanLII 1229 (NS SC)

the interests of the other members of its class namely, the other voting creditors? For reasons already stated, the answer is no. The principle enunciated by Viscount Holdane and elaborated by Justice Quilliam applies.

The Appellant is not entitled to use its votes to achieve this improper purpose. The Registrar's decision prevents an abuse on a minority of the class of unsecured creditors and in so doing upholds a fundamental and viable in the circumstances principle of class voting. He did not err in concluding improper purpose is relevant.

1997 CanLII 1229 (NS SC)

Whether the Registrar erred when he concluded the eighteen creditors tainted themselves and become embroiled in the improper purpose of Datarite?

The Appellant submits there is no evidence of the eighteen creditors knowing of any connection between the Appellant and Datarite nor is there evidence that any of the creditors knew why Datarite was causing the Appellant to acquire their voting rights. There being no intent, the Registrar lacked foundation to conclude there was collusion between Datarite and any of the creditors. There was no true collusion as there was no evidence of any agreement between Datarite and any creditor to use the **Act** for an improper purpose and no shared interest to injure Laserworks. The intent of Datarite should not have any effect on the rights of the eighteen creditors to vote as directed by their proxy.

As noted by counsel for the Trustee, this ignores the fact the claims had been obtained by the Appellant and were certainly under the control of the Appellant. In addition the proxy holder, Victor Goldberg, was counsel for Datarite whose specific purpose was to defeat the proposal and remove a competitor.

Datarite purchased these claims to effect this purpose and it was reasonable in the circumstances for the Registrar to draw the inference Datarite directed or influenced the voting of these claims. The negative votes were the very key to accomplishing its intent and without this control, there would have been no agreement to purchase the claims.

The motion to reverse the Registrar's decision is denied and the appeal dismissed.

J.

TAB 6

In the Matter of the Bankruptcy of Edward Lai

[Indexed as: Lai (Re)]

75 O.R. (3d) 451
[2005] O.J. No. 2032
Court File No. 31-OR-207209-T

Ontario Superior Court of Justice,
Ground J.
May 17, 2005

2005 CanLII 17915 (ON SC)

Bankruptcy and insolvency -- Acts of bankruptcy -- Applicant purchasing debts owed by debtor to various execution creditors and bringing application for bankruptcy order on basis that debtor had ceased to meet his liabilities generally as they became due -- No evidence presented of any requests for payment by any creditors that had not been met by debtor -- Debtor providing reasonable explanations as to why creditors had not pursued collection of their judgments against him -- Debtor's credit cards and line of credit being in good standing -- Applicant failing to establish act of bankruptcy.

Bankruptcy and insolvency -- Petition in bankruptcy -- Abuse of process -- Applicant purchasing debts owed by debtor to various execution creditors and bringing application for bankruptcy order -- Applicant purchasing debts and bringing application for sole purpose of punishing debtor for unrelated grievance -- Proceeding brought for improper purpose and constituting abuse of bankruptcy court's process -- Application dismissed.

The applicant company brought an application for a bankruptcy order against L. The applicant was incorporated by R for the purpose of purchasing debts owed by L to various execution creditors. Neither the applicant nor R had previously been a

creditor of L; R had, however, invested in the late 1990s in a company that was managed and controlled by L, and had suffered a substantial loss on that investment which he attributed to some fault on L's part. The act of bankruptcy alleged in the application was that L had ceased to meet his liabilities generally as they became due.

Held, the application should be dismissed.

There was no evidence that there had been any requests for payment by any of the execution creditors which had not been met by L. There was ample evidence of credit cards and a line of credit held by L being in good standing. In addition, L provided reasonable explanations as to why certain of the creditors had not pursued collection of their judgments against him. It could not be concluded that L was not meeting his liabilities generally as they became due.

The bankruptcy was sought solely to punish L for what R believed was L's responsibility for R's unrelated investment losses. R's motives were purely vengeful and vindictive. If a bankruptcy application is brought for some collateral purpose, it will be dismissed. 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. R's motives in bringing the application through the company established that the proceeding was brought for an improper purpose, was an abuse of the court's process and bore no relation to the purpose and intent of bankruptcy legislation. The application would have been dismissed on this basis even if an act of bankruptcy had been established.

Heirs of H.S. Vipond (Re) (1941), 22 C.B.R. 268, 70 Que. K.B. 41; Steintron International Electronics Ltd. (Re), [1986] B.C.J. No. 918, 7 B.C.L.R. (2d) 267, 62 C.B.R. (N.S.) 78 (S.C.); [page452] Westlake (Re), [1984] O.J. No. 2341, 53 C.B.R. (N.S.) 207 (S.C.), not folld

Other cases referred to

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Arnco Business Services Ltd. (Re), [1983] O.J. No. 974, 49 C.B.R. (N.S.) 188 (H.C.J.); Four Twenty-Seven Investments Ltd. (Re), [1985] O.J. No. 1733, 55 C.B.R. (N.S.) 183 (H.C.J.); Harrop of Milton Inc. (Re) (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289 (H.C.J.); Pooley (Re) (1882), 20 Ch.D. 685, 51 L.T. 177, 51 L.J. Ch. 810, 30 W.R. 650 (C.A.); Scott v. De La Hooke, [1934] O.J. No. 261, 15 C.B.R. 485 (H.C.J.)

Authorities referred to

Houlden & Morawetz Bankruptcy and Insolvency Law of Canada, looseleaf (Toronto: Thomson-Carswell, 1992-)

APPLICATION for a Bankruptcy Order.

Richard D. Howell, for applicant 1606276 Ontario Limited.

Marek Z. Tufman, for Edward Lai.

[1] GROUND J.: -- 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

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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. [page453] 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

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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 [page454] 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

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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 [page455] 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 [a] statement by St. Jacques J. in Re Heirs of H.S. Vipond (1941), 22 C.B.R. 268, 70 Que. K.B. 41, at p. 272 C.B.R.

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(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 Re Steintron International Electronics Ltd., [1986] B.C.J. No. 918, 62 C.B.R. (N.S.) 78 (S.C.), at p. 82 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

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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 Re: Harrop of Milton Inc. (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535 (H.C.J.); Re Arnco Business Services Ltd., [1983] O.J. No. 974, 49 C.B.R. (N.S.) 188 (H.C.J.), at paras. 20 and 21; and Re Four Twenty-Seven Investments Ltd., [1985] O.J. No. 1733, 55 C.B.R. (N.S.) 183 (H.C.J.), [page456] at para. 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 w ill be found to be an improper purpose or an abuse of the process of the bankruptcy court. In Scott v. De La Hooke, [1934] O.J. No. 261, 15 C.B.R. 485 (H.C.J.), the court quoted from the decision of the Chancery Division In re Pooley (1882), 20 Ch.D 685, 51 L.J. Ch. 810 (C.A.), at p. 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 ban kruptcy 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.

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[16] In De La Hooke, 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 Bankruptcy and Insolvency Law of Canada, looseleaf (Toronto: Carswell, 1992-), in commenting on that case at p. 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 C.B.R. (N.S.) 334 (Ont. S.C).

[17] I adopt the statements of Potts, J. in Re Westlake, [1984] O.J. No. 2341, 53 C.B.R. (N.S.) 207 (S.C.), at para. 9:

> 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 [page457] 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

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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.

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TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *West Coast Logistics Ltd. (Re),*
2017 BCSC 1970

Date: 20171020
Docket: B160890
Registry: Vancouver

2017 BCSC 1970 (CanLII)

In Bankruptcy and Insolvency

In the Matter of the Intention to make a proposal of West Coast Logistics Ltd.

Between:

Prudential Transportation Ltd.

Appellant

And

West Coast Logistics Ltd.

Respondent

Before: The Honourable Mr. Justice Milman

On appeal from: An order of the Supreme Court of British Columbia dated August 25, 2017 (*West Coast Logistics Ltd. (Re)*, 2017 BCSC 1503, VA B160890).

Oral Reasons for Judgment

Counsel for the Appellant:	G. Dabbs
Counsel for the Respondent:	H. M.B. Ferris
Place and Date of Trial/Hearing:	Vancouver, B.C. October 17, 2017
Place and Date of Judgment:	Vancouver, B.C. October 20, 2017

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I. <u>Introduction</u>

[1] The appellant, Prudential Transportation Ltd. ("Prudential"), appeals from a decision of a registrar of this Court, indexed at 2017 BCSC 1503, disqualifying Prudential from voting on a proposal that the respondent, West Coast Logistics Ltd. ("WCL") wishes to put to its creditors under Part III, Division I of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 (*BIA*).

[2] Prudential is WCL's most significant unsecured creditor. It holds enough of WCL's debt to have an effective veto over the approval of any proposal by the creditors.

[3] The registrar held that Prudential should be disqualified from voting under *BIA* s. 115.1 because its vote was going to be cast for what the registrar found to be an "improper purpose," and that permitting it to vote in that manner would result in a "substantial injustice," i.e., the defeat of the proposal and WCL's consequent bankruptcy.

[4] Prudential raises three grounds of appeal. They can conveniently be summarised as follows:

i. The registrar erred in treating a defeat of the proposal and consequent bankruptcy as if it were a "substantial injustice" that had to be avoided;

ii. The registrar erred in imposing an evidentiary burden on Prudential to justify its intention to vote against the proposal; and

iii. The registrar erred in finding that Prudential would be voting for an improper purpose.

II. <u>Standard of Review</u>

[5] Both parties agree that an appeal such as this from a decision of a registrar in bankruptcy is a true appeal and not a hearing *de novo*: *Asian Concepts Franchising Corporation (Re)*, 2017 BCSC 1338; *Rivers (Re)*, 2014 BCSC 1800.

[6] In *Rivers (Re)*, Sewell J. described the standard to be applied as follows (at paras. 11-13):

> [11] An appeal from a decision of a Registrar in Bankruptcy is a true appeal and not a hearing *de novo*.
>
> [12] An appellate court should not interfere with the exercise of judicial discretion by a registrar, unless it was based on wrong principles or sufficient weight was not given to relevant considerations. The court must give deference to the registrar's findings of fact and inferences. In the absence of manifest error, the court should not substitute its decision for that of the registrar.
>
> [13] On questions of mixed fact and law, the appellate court must determine the standard of review contextually over a spectrum as described in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2012-2013 Annotated Bankruptcy and Insolvency Act* (Toronto, Ontario: Carswell, 2012) at 913:
>
>> All findings of fact by the registrar are deserving of deference unless the registrar made a "palpable and overriding error". Questions of law and matters of principle are reviewed on the standard of correctness. The standard on mixed questions of fact and law lies along the spectrum. At one end, the palpable and overriding error standard applies to questions that primarily involve fact-finding or the making of factual inferences. At the other, where there is an error in characterizing or considering the proper legal standard to be applied, the standard is correctness: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.

[7] Prudential contends that because the grounds of appeal allege errors of law, this appeal attracts a standard of correctness.

[8] WCL argues that the registrar did not err in law but rather referred to the correct authorities and extracted from them the correct legal test. Prudential's real complaint is rather with the registrar's inferences and findings of fact, in which, WCL says, there was no palpable and overriding error shown.

[9] In determining the appropriate standard of review, I must apply a standard of correctness only where the registrar is alleged to have erred, "in characterizing or considering the proper legal standard to be applied." Contrary to WCL's submission, however, it is not enough to show that the registrar cited and referred to the right authorities – he must also be shown to have characterized and considered the correct legal test.

[10] I would classify the errors alleged here as being mixed errors of fact and law.

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[11] The grounds of appeal must therefore be assessed according to where the alleged errors fall along the spectrum. I will identify where I place them on the spectrum when I deal with them individually later in these reasons.

III. The Facts

[12] WCL provides loading and reloading services at a facility that it leases in New Westminster. The facility provides barge, rail and truck access for its customers who are primarily in the lumber, pulp and paper and steel industries. It has 15 full time employees and 30 major clients.

[13] It attributes its current financial difficulties to a decrease in sales which it says it has suffered as a result of, among other things, the state of the facility. The facility requires significant repairs and maintenance that the landlord should be performing. Until that work is completed, WCL says its ability to store high-grade steel, pulp and lumber has negatively impacted its business. WCL has more recently prevailed in separate litigation against its landlord.

[14] On October 17, 2016, WCL filed a notice of intention to make a proposal with the office of the Superintendent of Bankruptcy under the *BIA*. It has unsecured liabilities estimated at $550,000. Just under half of that amount (approximately $250,000) is owed to Prudential, which has provided trucking services to WCL for the past ten years.

[15] On April 13, 2017, WCL filed a proposal for the approval of its creditors. The proposal calls for the unsecured creditors to receive a percentage of the cash flow generated by WCL for two years, i.e., 35% up to a total of $500,000 and 50% for amounts earned above $500,000 per year. Given WCL’s projections, that translates into a return to creditors ranging between 40 and 83 cents on the dollar. The proposal trustee has recommended approval of the proposal on the basis that there would be little or no recovery to the unsecured creditors on a bankruptcy liquidation.

[16] The meeting of the creditors to vote on the proposal was initially scheduled for May 3, 2017. At the meeting, Prudential indicated that it wanted to discuss the proposal

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with WCL, so the meeting was adjourned to May 17, 2017. No such discussions ever occurred, however.

[17] Instead, during that interval, on May 4, 2017, Prudential's principal sent WCL's principal an email stating as follows:

> … this is what we have concluded:
>
> 1. We need a personal guarantee from either one of you, preferably through property of equal debt value, until the debt is paid in full.
> 2. Prudential gets all the container trucking and will bill the client directly for the next five years.
>
> If these terms are agreeable to you, we will vote yes. If not unfortunately we will be voting against the proposal on May 17, 2017.

[18] On May 12, 2017, Prudential sent another email withdrawing that offer and stating that it "will still be voting against the proposal on May 17, 2017, as we feel that [WCL] is under estimating its ability to pay a higher amount and that the equipment has a higher value than appraised."

[19] On May 16, 2017, the proposal trustee emailed Prudential's counsel to convey its analysis of the recovery prospects under various scenarios. That analysis suggested that the prospects for recovery under any scenario were meagre or non-existent. The analysis included updated input from the appraiser whose appraisal was the basis of the May 12, 2017 email from Prudential's principal.

[20] At the meeting on May 17, 2017, Prudential indicated that it would not vote in favour of the proposal unless it was paid in full. The meeting was adjourned by agreement and has not been rescheduled.

[21] On May 20, 2017, WCL heard from one of its customers that a friend of Prudential's principal had been in contact to indicate that WCL was in financial trouble. When WCL followed up with that individual, it was told to contact Prudential's principal. Prudential denies that it instigated such contact.

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[22] Approximately two years before, Prudential was considering purchasing shares in WCL and in that context had received WCL's customer list as part of its due diligence investigations. The transaction did not proceed.

[23] WCL alleges that Prudential is seeking to force WCL into bankruptcy in order to acquire WCL's customers. Prudential denies this. It submits that the allegation is not realistic because they are not direct competitors.

[24] Having formed the view that Prudential would not be casting its vote on the proposal in good faith, WCL applied to this court for an order to disqualify Prudential from voting. An order to that effect was made by the registrar on August 25, 2017. Prudential appeals from that order.

IV. <u>The Registrar's Decision</u>

[25] The registrar instructed himself on the applicable law by referring to the decision of this Court in *Blackburn Developments Ltd. (Re)*, 2011 BCSC 1671. There, Sewell J. adopted the test from *Laserworks Computer Services Inc. (Re)*, 1998 NSCA 42, including the principles that must guide the court on an application to disqualify a creditor from voting on a proposal under the *BIA*.

[26] The parties do not dispute that the law was correctly stated by Sewell J. in *Blackburn*.

[27] The registrar articulated the issue before him to be whether conduct exists amounting to an abuse of process or other tortious conduct, and if so, whether that conduct results in a substantial injustice (at para. 25).

[28] He found it “troubling” that Prudential had WCL's customer list and that its principal had suggested in the May 4, 2017 email that Prudential wished to deal directly with WCL's customers (at para. 28).

[29] His analysis concluded with the following comments (paras. 34-38):

> [34] In this case, legitimate commercial reasons for opposing the proposal are not immediately apparent in the evidence. The appraisal evidence and the

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> trustee's opinion are that bankruptcy will yield a nil recovery for unsecured creditors. Prudential will receive nothing as will the other unsecured creditors as a consequence of Prudential's no vote. The actions of Prudential when viewed in this light do not make commercial sense.
>
> [35] It may be that Prudential hopes to extract further concessions within the bankruptcy in order to ensure West Coast has put the optimum offer on the table. While playing hardball during negotiations is entirely legitimate, conduct amounting to an abuse of process or other tortious or near tortious character is not. In my view, the evidence supports the conclusion that Prudential has crossed the line.
>
> [36] The May 4, 2017 email, in my view, was tortious. It attempted to secure a fraudulent preference and threatened a no vote if West Coast did not agree, which is a form of commercial extortion and therefore an abuse of process. See *Dimple Diapers Inc.*, supra at para. 42.
>
> [37] Although the email of May 4, 2017 was subsequently withdrawn by the May 12, 2017 email, a tort was committed and Prudential has continued to state it will vote no, despite the evidence that Prudential will receive nil in the event of a bankruptcy. Intertwined in the mix is the fact that the West Coast customers have been contacted and put on notice of West Coast's financial difficulties.
>
> [38] I am satisfied that the evidence supports the conclusion that Prudential's vote is being cast for an improper purpose. I am also of the view that a substantial injustice will result. West Coast will be forced into bankruptcy, 15 full-time employees will be out of work, the assets of West Coast will be liquidated, and finally, all the unsecured creditors including Prudential, will receive nil on their outstanding accounts as a result.

V. <u>The Grounds of Appeal</u>

A. Substantial Injustice

[30] The first ground of appeal is that it was an error of law for the registrar to treat the prospect of the defeat of the proposal and consequent bankruptcy as a substantial injustice.

[31] It is common ground that to succeed on its application, WCL had to show that permitting Prudential to cast its vote against the proposal would lead to a "substantial injustice." That language, originally taken from s. 187(9) of the *BIA*, was adopted by Freeman J.A. in *Laserworks* for his articulation of the test that must be met to justify disqualifying a creditor from voting. That same test was in turn adopted by Sewell J. in *Blackburn*. As Sewell J. stated there (at para. 32):

> … the test promulgated in *Laserworks* is difficult to meet. As I understand that test I must be satisfied that there has been conduct amounting to an abuse of process or other tortious or near tortious character and that that conduct has

> resulted in a substantial injustice before I can exercise my discretion to disallow a vote of a creditor.

[32] Prudential argues that it was an error in principle for the registrar to treat the defeat of the proposal and consequent bankruptcy as a "substantial injustice" in that sense. It says that to qualify as such, the injustice must be both antithetical to the objectives of the *BIA* and causally connected to the wrongful conduct alleged. The anticipated bankruptcy in this case, it is argued, satisfies neither of these criteria. First, a bankruptcy is a specifically sanctioned outcome in the *BIA* so it cannot possibly qualify as a substantial injustice. Second, this bankruptcy would not be caused by the wrongful conduct that the registrar had identified, i.e., the unsuccessful attempt reflected in the May 4, 2017 email to secure a fraudulent preference or extort concessions.

[33] I do not find either argument convincing.

[34] First, there was no error in the registrar's basic legal premise that defeating a debtor's restructuring proposal for an improper purpose could give rise to a substantial injustice – i.e., an *unnecessary* bankruptcy. That proposition is well supported by both logic and authority. Indeed, it was to avoid that very kind of injustice that the Court in *Laserworks* disqualified the vote of the creditor in that case. While a bankruptcy can obviously be a legitimate outcome in a restructuring proceeding, an *unnecessary* bankruptcy that is engineered for an improper purpose by a creditor who can control the vote may not be. Freeman J.A. stated as follows in *Laserworks* (at para. 65):

> It is undeniable that the appellant caused injury to the debtor not negligently but deliberately. The debtor made its proposal to avoid bankruptcy; bankruptcy therefore must have been seen by Laserworks as a more injurious alternative than acceptance of the proposal by the creditors. Laserworks had the heavy burden of persuading its creditors that their best interests lay in approving the proposal; it did not have the impossible burden of dissuading a financially stronger competitor bent on using the provisions of the *BIA* to destroy it as a competitor. The appellant derailed the proposal procedure to force the debtor into bankruptcy. Using bankruptcy to cause injury, thereby eliminating the debtor as an entity capable of competing in the marketplace, is abusive of the purpose of the *BIA*. It does not qualify as "the orderly and fair distribution of (its) property." Annihilation of an individual business or a company may be an unfortunate consequence of a bankruptcy, an unavoidable side-effect, but it is not the purpose of the *BIA*. Use of the *Act* to accomplish such an objective is in my view so abusive of the purpose of the legislation as to engage the supervisory

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> jurisdiction of the courts under s. 187(9). It is a substantial injustice to be remedied.

[35] Prudential's second argument, as to causation, proceeds from an incomplete account of the registrar's findings. Ultimately, the registrar concluded (at para. 38) that "Prudential's vote is being cast for an improper purpose" and that permitting its vote to be cast in that manner would result in a substantial injustice.

[36] That conclusion was based in turn on a number of other findings, all of which were made in light of what the registrar found to be Prudential's tortious behaviour in the May 4, 2017 email. The registrar recognised (in para. 37) that the offer itself was withdrawn and led nowhere. His ultimate conclusion flowed instead from the findings that he had reached in the balance of the paragraph and the remainder of the judgment, which included the following:

a. Prudential was willing to commit a tort to achieve what it wanted;

b. that tort included an attempt to extort for itself an ability to bill WCL's customers directly, among other things;

c. Prudential had subsequently contacted WCL's customers to tell them about WCL's weak financial situation; and

d. Prudential continued with its tortious agenda by maintaining an intention to vote against the proposal notwithstanding that such a vote would be, in the registrar's view, commercially nonsensical and contrary to its own interests as a creditor.

[37] All of those considerations collectively led the registrar to conclude that Prudential was planning to cast its vote for an improper purpose. Although the registrar does not elaborate on what he thought that purpose was beyond describing it as improper, it is apparent that he thought it involved a plan to acquire part of WCL's business by voting it into bankruptcy.

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[38] There were three possible explanations for Prudential's declared intention to vote down the proposal. First, it may have honestly believed that it would fare better in a bankruptcy than it would under the proposal. Second, it may have recognised that a bankruptcy would be worse, but it was "playing hardball in the negotiations" with a view to extracting further concessions. Third, it may have been planning to benefit from a bankruptcy in some other way that it was not prepared to acknowledge openly.

[39] The registrar recognised that the first two scenarios would be legitimate. Only the third could be improper.

[40] The registrar rejected the first scenario as nonsensical. While he accepted that the second might be possible, he ultimately concluded that Prudential had "crossed the line" into the third. It was not the emailed offer of May 4, 2017, since withdrawn, that put Prudential on the wrong side of that line in the registrar's view, but rather the improper purpose he found Prudential had for voting down the proposal.

[41] The registrar's reference in that context to Prudential's interest in connecting directly with WCL's customers indicates that he thought Prudential's improper purpose involved those customers. In other words, he appears to have accepted WCL's principal allegation that Prudential's improper purpose in voting down the proposal was its plan to bring about a bankruptcy from which it hoped to benefit by inheriting WCL's customers.

[42] That conclusion was one that was available to the registrar on the evidence that was before him. There was no palpable and overriding error shown in that regard.

B. Evidentiary Burden

[43] The second ground of appeal is that the registrar erred in law by imposing an evidentiary burden on Prudential requiring it to justify its opposition to the proposal. It argues that a creditor is entitled to vote for whatever reason it chooses and ought not to have to explain the rationale for its vote. The registrar's conclusion that Prudential was going to vote against the proposal for an improper purpose was therefore unsound, it is argued, because it flowed from Prudential's failure to meet that artificially imposed burden.

[44] I reject this ground as well. Once again, Prudential has described the basis for the registrar's conclusion too narrowly. The registrar relied on a number of factors to reach that conclusion, only one of which was Prudential's failure to provide a plausible commercial explanation for its opposition to the proposal.

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[45] The registrar did not proceed from a vacuum in the evidence to draw an adverse inference against Prudential. Rather, the registrar considered the proposal trustee's analysis and recommendations and compared them with Prudential's explanation for not accepting them. Of course a creditor in Prudential's position need not accept the recommendation of the proposal trustee or the accuracy of the appraisals on which it is based. But Prudential's other conduct, particularly the May 4, 2017 email, when coupled with its dubious explanation for maintaining its opposition and its reluctance to engage in a serious discussion about recovery prospects, left it open to the registrar to infer that Prudential must have had an ulterior motive for voting against the proposal.

C. Improper Purpose

[46] The third and final ground of appeal is formulated in Prudential's argument as follows: "Did the Registrar err in determining the May 4, 2017 email disclosed an attempt by Prudential to cast its vote on the Proposal to achieve an improper purpose?" I have already addressed the role of the May 4, 2017 email in the registrar's conclusions under the rubric of the first ground of appeal. To reiterate, I do not agree with Prudential's premise that the registrar made the determination that this ground of appeal attributes to him.

[47] But Prudential's arguments under this head are directed more at the question of whether a true abuse of process was established on the evidence. I will address those arguments here.

[48] Prudential's primary argument in this respect is that it was legally impossible for it to commit an abuse of process because it did not initiate any process. In most bankruptcy abuse cases, it argues, the process is abused by a petitioning creditor. There are some rare cases like *Laserworks* in which a creditor can be found to have abused a process initiated by others. Such cases are exceptional, however. They can

give rise to an abuse because the creditor chooses to bring itself into the process for an improper purpose. The creditor in *Laserworks* itself, for example, was a competitor who became a creditor only after the process was underway by purchasing debt so that it could vote down a proposal and bankrupt the debtor. In this case, by contrast, Prudential argues that it did not insert itself artificially into this process to achieve some ulterior objective. It had been a creditor of WCL for many years before the initial filing.

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[49] I agree that the interloping behaviour of the creditor in *Laserworks* was a significant factor in the decision, one that is not present in this case. Freeman J.A. commented on the interloping element in that case as follows (at para. 62):

> It is most significant that the appellant was not a creditor of LaserWorks prior to the proposal. Intermeddling by strangers to the pre-existing debtor creditor relationship for an improper purpose was a determinative factor in *Pappy's Good Eats*. The practice of buying dubious claims against an insolvent for purposes foreign to the bankruptcy process was denounced in the English cases cited in *de la Hooke*. The Registrar in the present case understandably looked askance at it. Few legitimate reasons come to mind for buying into a bankrupt estate. When somebody does so, it is a matter of common sense to assume, subject to correction, they intend to use the bankruptcy process for some purpose it was not meant for. In the present case it was readily apparent that mischief was afoot.

[50] I do not read *Laserworks* or any of the other authorities cited as holding that interloping behaviour is an essential element of an abuse in this context, however. Freeman J.A. certainly found it to be a factor that was "most significant." But in the end it was just another piece of evidence supporting the court's finding, albeit an important one. I am not persuaded that Prudential, as an existing creditor, was legally incapable of abusing the proposal process.

[51] The remainder of Prudential's arguments on this ground go to the quality of the evidence supporting the registrar's finding of an abuse. As I stated earlier, I am not persuaded that there is a proper basis to overturn that finding.

[52] In *Blackburn*, the application to disqualify the interloping creditor, a self-proclaimed vulture fund known as "Streetwise," from voting on the CCAA plan failed on the facts. Sewell J. found at para. 51:

> [51] In this case I cannot find that the predominate purpose of Streetwise's negative vote was to acquire control of Blackburn and hence its tax attributes.

> Mr. Sethi has denied that that was the predominate purpose and the surrounding circumstances do not lead to that conclusion. In addition, the liquidation analysis prepared by the Monitor does not lead to the conclusion that creditors will be worse off under liquidation.

[53] In this case, it was certainly open to the registrar to accept Prudential's evidence that it had no ulterior motive, as Sewell J. found with Streetwise. But it was equally open to the registrar to find, as he did, the converse. In particular, it was open to the registrar to find that the "surrounding circumstances" in this case, unlike in *Blackburn*, led to the conclusion that Prudential was improperly seeking to bring about a bankruptcy with a view to acquiring WCL's business or customers. Unlike in *Blackburn*, the proposal trustee's report in this case did "lead to the conclusion that creditors will be worse off under liquidation" and therefore there was support in this case for the inference drawn by the registrar that was not present in *Blackburn*.

[54] It is not open to this Court to interfere with such findings on appeal absent a palpable and overriding error. No such error has been identified.

VI. Conclusion

[55] I have rejected all three of Prudential's grounds of appeal.

[56] The appeal is therefore dismissed with costs to WCL.

"Milman J."

The Honourable Mr. Justice Milman

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TAB 8

Court of Queen's Bench of Alberta

Citation: Re San Francisco Gifts Ltd. (*Companies' Creditors Arrangement Act*), 2005 ABQB 91

Date: 20050209
Docket: 0403 00170
Registry: Edmonton

2005 ABQB 91 (CanLII)

Between:

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.A. 1985, c. C-36, As Amended

- and -

And In the Matter of a Plan of Compromise or Arrangement of San Francisco Gifts Ltd., San Francisco Retail Gifts Incorporated (Previously Called San Francisco Gifts Incorporated), San Francisco Gift Stores Limited, San Francisco Gifts (Atlantic) Limited, San Francisco Stores Ltd., San Francisco Gifts & Novelties Inc., San Francisco Gifts & Novelty Merchandising Corporation (Previously Called San Francisco Gifts and Novelty Corporation), San Francisco (The Rock) Ltd. (Previously Called San Francisco Newfoundland Ltd.) And San Francisco Retail Gifts & Novelties Limited (Previously Called San Francisco Gifts & Novelties Limited)

Memorandum of Decision
of the
Honourable Madam Justice J.E. Topolniski

INTRODUCTION

[1] The San Francisco group of companies (San Francisco) obtained *Companies' Creditors Arrangement Act*[1] (*CCAA*) protection on January 7, 2000 (Initial Order). Key to that protection was the requisite stay of proceedings that gives a debtor company breathing room to formulate a plan of arrangement. The stay was extended three times thereafter with the expectation that the

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[1] R.S.A. 1985, c. C-36, as am.

entire *CCAA* process would be completed by February 7th, 2005. That date was not met. Accordingly, San Francisco now applies to have the stay extended to June 30, 2005.

[2] A small group of landlords opposes the motion on the basis of San Francisco's recent guilty plea to *Copyright Act* offenses and the sentencing judge's description of San Francisco's conduct as: "…a despicable fraud on the public. Not only not insignificant but bordering on a massive scale…" The landlords suggest that this precludes any possibility of the company having acted in "good faith" and therefore having met the statutory prerequisite to an extension. Further, they contend that extending the stay would bring the administration of justice into disrepute.

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[3] San Francisco acknowledges that its conduct was stupid, offensive and dangerous. That said, it contends that it already has been sanctioned and that it has "paid its debt to society." It argues that subjecting it to another consequence in this proceeding would be akin to double jeopardy. Apart from the obvious consequential harm to the company itself, San Francisco expresses concern that its creditors might be disadvantaged if it is forced into bankruptcy.

[4] While there has been some delay in moving this matter forward towards the creditor vote, this delay is primarily attributable to the time it took San Francisco to deal with leave to appeal my classification decision of September 28, 2004. Despite the opposing landlords' mild protestations to the contrary, it is evident that the company has acted with due diligence. The real focus of this application is on the meaning and scope of the term "good faith" as that term is used in s. 11(6) of the *CCAA*, and on whether San Francisco's conduct renders it unworthy of the protective umbrella of the Act in its restructuring efforts. It also raises questions about the role of a supervising court in *CCAA* proceedings.

BACKGROUND

[5] San Francisco operates a national chain of novelty goods stores from its head office in Edmonton, Alberta. It currently has 62 locations and approximately 400 employees.

[6] The group of companies is comprised of the operating company, San Francisco Gifts Ltd., and a number of hollow nominee companies. The operating company holds all of the group's assets. It is 100 percent owned by Laurier Investments Corp., which in turn is 100 percent owned by Barry Slawsky (Slawsky), the driving force behind the companies.

[7] Apart from typical priority challenges in insolvency matters, this proceeding has been punctuated by a series of challenges to the process and its continuation, led primarily by a group of landlords that includes the opposing landlords.

[8] On December 30, 2004, San Francisco pleaded guilty to nine charges under s. 42 of the *Copyright Act*,[2] which creates offences for a variety of conduct constituting wilful copyright infringement. The evidence in that proceeding established that:

> (a) An investigation by the St. John's, Newfoundland, Fire Marshall, arising from a complaint about a faulty lamp sold by San Francisco, led to the discovery that the lamp bore a counterfeit safety certification label commonly called a "UL" label.[3] The R.C.M.P. conducted searches of San Francisco stores across the country, its head office, and a warehouse, which turned up other counterfeit electrical UL labels as well as counterfeit products bearing the symbols of trademark holders of Playboy, Marvel Comics and others.
>
> (b) Counterfeit UL labels were found in the offices of Slawsky and San Francisco's Head of Sales. There was also a fax from "a Chinese location" found in Slawsky's office that threatened that a report to Canadian authorities about the counterfeit safety labels would be made if payment was not forthcoming.
>
> (c) *Copyright Act* charges against Slawsky were withdrawn when San Francisco entered a plea of guilty to the charges;
>
> (d) The sentencing judge accepted counsels' joint submission that a $150,000.00 fine would be appropriate. In passing sentence, he condemned the company's conduct, particularly as it related to the counterfeit labels, expressing grave concern for the safety of unknowing consumers.[4]

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[2] R.S.C. 1985, c. C-42.

[3] Underwriters' Laboratories (UL) operates facilities globally for the testing, certification and quality assessment of products, systems and services. Products are tested to Canadian standards and, if the product complies with those standards, UL issues an identification or listing mark confirming certification (Transcript of the proceedings held December 30, 2004 at pp.4-5)

[4] Judge Stevens-Guille said: "Quite frankly, this is and should be described as nothing else than a despicable fraud on the public. Not only not insignificant but bordering on a massive scale company, stores, all of these places that we have been told they had stores…We are talking about electrical appliances that cause fires bought by someone who whether they relied on the UL certificate or not it had a certificate on it and to go to the exercise of getting cheap stuff somewhere and dressing it up with false labels and false safety certificates causes me great pause, such pause that if it were an individual who pled guilty before me today my starting point would be a term of imprisonment in a federal penitentiary, without a doubt." (Transcript of the proceedings held December 30, 2004 at pp. 18/15-18 and 19/2-11).

(e) San Francisco was co-operative during the R.C.M.P. investigation and the Crown's prosecution of the case.

(f) San Francisco had been convicted of similar offences in 1998.

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[9] Judge Stevens-Guille's condemnation of San Francisco's conduct was the subject of local and national newspaper coverage.

[10] The company paid the $150,000.00 fine from last year's profits.

ANALYSIS

Fundamentals

[11] The well established remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees.[5] The Act is to be given a large and liberal interpretation.[6]

[12] The court's jurisdiction under s. 11(6) to extend a stay of proceedings (beyond the initial 30 days of a *CCAA* order) is preconditioned on the applicant satisfying it that:

(a) circumstances exist that make such an order appropriate; and

(b) the applicant has acted, and is acting, in good faith and with due diligence.

[13] Whether it is "appropriate" to make the order is not dependant on finding "due diligence" and "good faith." Indeed, refusal on that basis can be the result of an independent or interconnected finding. Stays of proceedings have been refused where the company is hopelessly

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[5] See for example ***Chef Ready Foods Ltd. v. Hongkong Bank of Canada*** (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) and ***Meridian Development Inc. v. Toronto Dominion Bank*** (1984), 52 C.B.R. (N.S.) 109 (ABQB).

[6] ***Elan Corporation v. Comsikey*** (1990), 1 C.B.R. (3d) 101 (Ont. C.A.).

insolvent; has acted in bad faith;[7] or where the plan of arrangement is unworkable, impractical or essentially doomed to failure.[8]

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Meaning of "Good Faith"

[14] The term "good faith" is not defined in the *CCAA* and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in *Black's Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

> A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage.[9] [Emphasis added]

[15] "Good faith" is defined as "honesty of intention" in the *Concise Oxford Dictionary*.[10]

[16] Regardless of which definition is used, honesty is at the core. Honesty is what the opposing landlords urge is desperately wanting now and, as evidenced by San Francisco's earlier conviction for *Copyright Act* offences, was wanting in the past.

[17] Accepting that the duty of "good faith" requires honesty, the question is whether that duty is owed to the court and the stakeholders directly affected by the process, including investors, creditors and employees, or does the *CCAA* cast a broader net by requiring good faith in terms of the company's dealings with the public at large? As will be seen from the following review of the jurisprudence, it usually means the former.

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[7] ***Re Avery Construction Co. Ltd.***, [1942] 4 D.L.R. 558 at 559 (Ont. S.C.).

[8] ***Re Fracmaster Ltd.*** (1999), 11 C.B.R. (4th) 204 (Alta. Q.B.); aff'd 11 C.B.R. (4th) 230 (Alta. C.A.).

[9] *Black's Law Dictionary*, 7th ed. (St. Paul, Minnesota: West Group, 1999), p.701.

[10] *The Concise Oxford Dictionary of Current English*, 6th ed., (Oxford, Eng.: Clarendon Press, 1976), p.373.

[18] ***Re Rio Nevada Energy Inc.***[11] and ***Re Skeena Cellulose Inc***.[12] both involved opposed stay extension applications. In ***Skeena***, one of the company's two major secured creditors argued that the company's failure to carry out certain layoffs in the time recommended by the monitor showed a lack of good faith and due diligence. Brenner C.J.S.C. found that the delay in carrying out the layoffs was not a matter of bad faith. Given the severe consequences of terminating the stay, he granted the extension.

[19] Romaine J. rejected a suggestion of lack of good faith arising from a creditor dispute and allegations of debtor dishonesty in ***Rio Nevada***, finding that: "Rio Nevada has acted and is acting in good faith with respect to these proceedings."[13] [Emphasis added]

[20] ***Sairex GmbH v. Prudential Steel Ltd.***[14] involved an application by a creditor to proceed against a company under *CCAA* protection. Farley J. declined the application despite his sympathy for the creditor's position and his view that the creditor could make out a fairly strong case. He said: "… I would think that public policy also dictates that a company under *CCAA* protection or about to apply for it should not be allowed to engage in very offensive business practices against another and thumb its nose at the world from the safety of the *CCAA*."[15] In the end, he concluded that the dominant purpose behind the company's actions was not to harm the creditor.

[21] Inventory suppliers in ***Re Agro Pacific Industries Ltd.***[16] sought to set aside a *CCAA* stay on the ground that the company had not been acting in good faith in entering into contracts. The suppliers' contention that the company knew it was in shaky financial circumstances when it ordered goods and that it did so to pay down the secured creditors was rejected by Thackeray J. He was not satisfied that there was any lack of good faith or collusion between the company and its secured creditors to disadvantage the unsecured creditors.

[22] ***Re Juniper Lumber Co.***[17] addressed a creditor's allegations of bad faith in the context of an application to set aside the *ex parte* Initial Order. Turnbull J. held that, while fraud may not always preclude *CCAA* relief, it was of such a magnitude in that case as to warrant setting aside

[11] (2000), 283 A.R. 146 (Q.B.).

[12] 2001 BCSC 1423, 29 C.B.R. (4th) 157.

[13] ***Rio Nevada***, at para. 31.

[14] (1991), 8 C.B.R. (3d) 62 (Ont. Ct. Just. (Gen. Div.).

[15] ***Sairex GmbH***, at p. 73.

[16] 2000 BCSC 837, 76 B.C.L.R. (3d) 364.

[17] [2000] N.B.J. No.125 (Q.B.T.D.) (QL).

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the order. He commented that: "basic honesty has to be present" in the course of conduct between a bank and its customer.[18] However, his decision was overturned by the Court of Appeal because the necessary evidentiary foundation was wanting.[19]

[23] ***Elan Corp. v. Comiskey***,[20] although addressing instant trust deeds, which are no longer of concern under the present *CCAA,* offers a useful discussion of "good faith." Doherty J.A., dissenting in part, commented:

> …A debtor company should not be allowed to use the Act for any purpose other than to attempt a legitimate reorganization. If the purpose of the application is to advantage one creditor over another, to defeat the legitimate interests of creditors, to delay the inevitable failure of the debtor company, or for some other improper purpose, the court has the means available to it, apart entirely from s. 3 of the Act, to prevent misuse of the Act. In cases where the debtor company acts in bad faith, the court may refuse to order a meeting of creditors, it may deny interim protection, it may vary interim protection initially given when the bad faith is shown, or it may refuse to sanction any plan which emanates from the meeting of the creditors.[21]

[24] Doherty J.A. referred to an article by L. Crozier, "*Good Faith and the Companies' Creditors Arrangement Act*,"[22] in which the author contends that the possibility of abuse and manipulation by debtors should be checked by implying a requirement of good faith, as American bankruptcy courts routinely do by invoking good faith to dismiss applications under Chapter 11 of the *Bankruptcy Code* where the debtor's conduct in filing for reorganization is found to constitute bad faith.[23] He also suggests that, as a result of the injunctive nature of the stay, the court's power to take into account the debtor's conduct is inherent in its equitable jurisdiction.

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[18] ***Re Juniper***, at para. 13.

[19] 2001 NBCA 30.

[20] (1990), 1 O.R. (3d) 289 (C.A.).

[21] ***Elan Corp***., at p. 313.

[22] (1989), 15 Can. Bus. L.J. 89.

[23] Crozier cites ***Re Victory Construction Co. Inc.*** 9 B.R. 549 (1981) as an example of this. The court in that case found that the debtor company's purpose in filing under c. 11 was to isolate assets from its creditors rather than to reorganize the business. At p. 558, the court commented that good faith was "an implicit prerequisite to the filing or continuation of a proceeding under Chapter 11 of the *Code*."

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[25] An obligation of good faith in the context of an application to sanction a plan of arrangement was implied in ***Re First Investors Corp. Ltd.***[24] While ***First Investors*** was an atypical *CCAA* proceeding, it is worth discussion. Allegations that fraud had been committed on creditors and consumers/investors led to the additional appointment of both a receiver and an inspector under the Alberta *Business Corporations Act*. The inspector had a broad mandate to investigate the company's affairs and business practices that included inquiring into whether the company had intended to defraud anyone.

[26] Berger J. (as he then was) noted that the *CCAA* is derived from s. 153 of the English *Companies Act*, 1929 (19 and 20 Geo. 5) c. 23. Having sought assistance from other legislation with wording similar to the *CCAA* and with a genesis in the British statute,[25] he concluded that the court should not sanction an illegal, improper or unfair plan of arrangement.[26] He emphasized that: "If evidence of fraud, negligence, wrongdoing or illegality emerges, the Court may be called upon by interested parties to draw certain conclusions in fact and in law that bear directly upon the Plans of Arrangement."[27] He also determined that, while it might be expedient to approve the plans, the court was bound to proceed with caution, "so as to ensure that wrongful acts, if any, do not receive judicial sanction."[28]

[27] In the end, Berger J. adjourned the application pending receipt of a report by the inspector. His decision was reversed on appeal[29] on the basis that there was nothing in the plans that sanctioned wrongful acts or omissions. The Court of Appeal remitted the matter back for reconsideration on the merits, stating that while the discretion to be exercised must relate to the merits or propriety of the plans, the court could consider whether approving the plans would sanction possible wrongdoing or otherwise hinder later litigation.

Supervising Court's Role

[28] The court's role during the stay period has been described as a supervisory one, meant to: "…preserve the *status quo* and to move the process along to the point where an arrangement or

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[24] (1987), 46 D.L.R. (4th) 669 at 673-674, 67 C.B.R. (N.S.) 237 (Alta. Q.B.); See also ***Re Agro Pacific Industries Ltd.***, footnote 16, at para. 40 where Thackray J. held that there was an implied duty of good faith on initial applications.

[25] ***First Investors***, at p. 676.

[26] ***First Investors***, at p. 677.

[27] ***First Investors***, at p. 678.

[28] ***First Investors***, at p. 678.

[29] (1988), 89 A.R. 344, 71 C.B.R. (N.S.) 71 (C.A.).

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compromise is approved or it is evident that the attempt is doomed to failure."[30] That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.

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[29] Although the supervising judge's main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the *CCAA* courts, preserving their public esteem, and doing equity.[31] She cannot turn a blind eye to corporate conduct that could affect the public's confidence in the *CCAA* process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those of the public at large.

CONCLUSIONS

[30] While "good faith" in the context of stay applications is generally focused on the debtor's dealings with stakeholders, concern for the broader public interest mandates that a stay not be granted if the result will be to condone wrongdoing.[32]

[31] Although there is a possibility that a debtor company's business practices will be so offensive as to warrant refusal of a stay extension on public policy grounds, this is not such a case. Clearly, San Francisco's sale of knockoff goods was illegal and offensive. Most troubling was its sale to an unwitting public of goods bearing counterfeit safety labels. Allowing the stay to continue in this case is not to minimize the repugnant nature of San Francisco's conduct. However, the company has been condemned for its illegal conduct in the appropriate forum and punishment levied. Denying the stay extension application would be an additional form of punishment. Of greater concern is the effect that it would have on San Francisco's creditors, particularly the unsecured creditors, who would be denied their right to vote on the plan and whatever chance they might have for a small financial recovery, one which they, for the most part, patiently await.

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[30] McFarlane J.A. in ***Re Pacific National Lease Holding Corp.*** (1992), 15 C.B.R. (3d) 265 at 270 (B.C.C.A.), quoting with approval Brenner J. in the court below at [1992] B.C.J. No. 3070 at para. 26 (S.C.) (QL).

[31] L. J. Crozier, footnote 22 at p. 95, quotes Edith H. Jones, in "The Good Faith Requirement in Bankruptcy," Proceedings of the 61st Annual Meeting of the National Conference of Bankruptcy Judges, 1987, as statingd that: "... the bankruptcy judge usually at the instance of counsel, upon the filing of appropriate motions, is principally responsible to protect the institutional integrity of the bankruptcy courts, preserve their public esteem, and do equity in specific cases."

[32] ***First Investors Corp. v. Alberta*** (1988), 89 A.R. 344 at para. 16 (C.A.); ***Re Canadian Cottons Limited*** (1952), 33 C.B.R. 38.

[32] San Francisco has met the prerequisites that it has acted and is acting with due diligence and in good faith in working towards presenting a plan of arrangement to its creditors. Appreciating that the *CCAA* is to be given a broad and liberal interpretation to give effect to its remedial purpose, I am satisfied that, in the circumstances, extending the stay of proceedings is appropriate. The stay is extended to July 19, 2005. The revised time frame for next steps in the proceedings is set out on the attached Schedule.

[33] Although San Francisco has paid the $150,000.00 fine, the Monitor is satisfied that the company's current cash flow statements indicate that it is financially viable. Whether San Francisco can weather any loss of public confidence arising from its actions and resulting conviction is yet to be seen. Its creditors may look more critically at the plan of arrangement, and its customers and business associates may reconsider the value of their continued relationship with the company. However, that is sheer speculation.

Heard on the 17th day of January, 2005.
Dated at Edmonton, Alberta February 9th, 2005.

J.E. Topolniski
J.C.Q.B.A.

Appearances:

Richard T.G. Reeson, Q.C. Miller Thomson LLP (formerly Witten LLP) John Bridgadear Howard J. Sniderman Witten LLP	for the Companies
Michael McCabe, Q.C Reynolds, Mirth, Richards & Farmer LLP	for the Monitor - Browning Crocker Inc.

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Jeremy H. Hockin Parlee McLaws LLP	for Oxford Properties Group Inc., Ivanhoe Cambridge 1 Inc.; 20 Vic Management Ltd.; Morguard Investments Limited; Morguard Real Estate Investments Trust; Millwoods Town Centre, Edmonton; Park Place, Lethbridge; Metro Town , Burnaby, BC; Northgate Mall, Edmonton; Brandon Shopping Mall, MB; Herongate Mall, Ottawa, ON; Westmount Shopping Centre, London; Village Mall, St. John's NFLD; Kingsway Garden Mall; Westbrook Mall; Bonnie Doon Shopping Centre; Red Deer Centre; Marlborough Mall; Circle Park Mall; Kildonan Place Mall; Cambridge Centre; Oshawa Centre; Tecumseh Mall; Downtown Chatham Centre; Simcoe Town Centre; Niagara Square; Halifax Shopping Centre; RioCan Property Services; 1113443 Ontario Inc.; Shoppers World, Brampton, ON; Tillicum Mall, Victoria, BC; Confederation Mall, Saskatoon, SK; Parkland Mall, Yorkton, SK; Cambrian Mall, Sault Ste. Marie, ON; Northumberland Mall, Cobourg, ON; Orangeville Mall, Orangeville, ON; Renfrew Mall, Renfrew, ON; Orillia Square Mall, Orillia, ON; Elgin Mall, St. Thomas, ON; Lawrence Square, North York, ON; Trinity Conception Square, Carbonear, NFLD; Charlottetown Mall, Charlottetown PEI; Timiskaming Square
Kent Rowan Ogilvie LLP	Locher Evers International Neuvo Rags Quality Press
	And Lauer Transportation Services as represented by its employee Tim Shelley

Schedule

Time Frames

1.	February 14, 2005	Date Monitor posts Notice to Creditors on website
2.	February 14, 2005	Date Monitor publishes the advertisement for one day in Globe & Mail or National Post
3.	April 1, 2005	Date for receipt of claims from creditors
4.	May 13, 2005	Date by which Monitor must send Notice of Revision or Disallowance.
5.	June 13, 2005	Last date for bringing application to challenge a Notice of Revision or Disallowance.
6.	June 27, 2005	Date for creditors meeting to vote on the Plan.
7.	July 11, 2005	Date for court application to approve Plan (if required).
8.	August 18, 2005	Date for Distribution to Prove Unsecured Claims

Stay Extended to July 19, 2005

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TAB 9

CITATION: THE CLOVER ON YONGE INC, 2020 ONSC 5444
COURT FILE NO.: CV-20-00642928-00CL
DATE: 20200727

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

2020 ONSC 5444 (CanLII)

RE: IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CLOVER ON YONGE INC. AND THE CLOVER ON YONGE LIMITED PARTNERSHIP

Applicants

BEFORE: Koehnen J.

COUNSEL:

David Gruber for the CCAA Applicants and Concord Land Developments Limited

Steven Graff and Jeremy Nemers for the CCAA Applicants

Geoff R. Hall, Heather L. Meredith and Alexander Steele for the Monitor, PWC

Matthew P. Gottlieb, Andrew J. Winton and Zain Naqi for a group of unit purchasers

Kenneth Kraft for a group of unit purchasers

Karen Groulx for Altus Group Limited

Aaron Grossman for certain brokers

Mark Dunn for Maria Athanasoulis

Jonathan Rosenstein for Aviva Insurance Company of Canada

Fred Tayar for OTB Capital Inc

Nick Stanoulis for Stancorp Properties Inc. and certain unit purchasers

Christopher Henderson for the City of Toronto

HEARD: July 22, 2020

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ENDORSEMENT

[1] This motion arises in the context of a *CCAA* proceeding involving a condominium project known as The Clover on Yonge. I will refer to the project in these reasons as either Clover or the debtor. Clover has approximately 522 residential units plus commercial and parking units and is in the course of being built on Yonge St. in Toronto. Clover has scheduled a motion to disclaim the agreements of purchase and sale that it had entered into with approximately 496 purchasers. Clover says it is economically unfeasible to complete the project with the pricing contained in the purchase agreements because construction prices have increased dramatically since the contracts were entered into in 2015.

[2] Clover commissioned a cost report and an appraisal report, from Altus Group, a consultant, quantity surveyor and appraiser specializing in real estate.

[3] Counsel for the unit purchasers have received a complete copy of the cost report and a redacted copy of the appraisal report. On this motion, the purchasers seek production of an unredacted appraisal report. In addition, Maria Athanasoulis seeks production of only the cost report and a number of real estate brokers seek production of both the cost and appraisal reports.

[4] Clover resists further production to any of the moving parties. It submits that the redacted portions of the appraisal report contain sensitive information which would be detrimental to the debtor if it became public, particularly if the *CCAA* plan fails and the project has to be sold. In those circumstances, dissemination of the information contained in the appraisal report would be prejudicial to the ability to sell the project. Counsel for the purchasers have signed non-disclosure agreements in respect of the cost report and are prepared to do the same for the appraisal report. The non-disclosure agreements restrict the availability of the reports to counsel, experts and a two-person steering committee. The debtor nevertheless is of the view that there is too much risk involved in the production of the unredacted appraisal report. The Monitor shares this view.

[5] For the reasons set out below, I grant the purchasers’ motion for production of the unredacted appraisal report and dismiss the motions of Ms. Athanasoulis and the brokers for production of the cost and appraisal reports.

A. The Purchasers’ Motion

[6] The purchasers point out that the debtor’s deponent, Mr. McCracken, referred to the Altus reports in his affidavit supporting the disclaimer motion as a result of which they say production of the report must be ordered. The purchasers rely on rule 30.04 (2) which provides:

> (2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.

[7] The purchasers submit that this is a mandatory provision that applies in all circumstances without exception. In support of this proposition they rely on language of D.M. Brown J. (as he then was) in *Timminco v. Asensio*, (2009), 95 O.R. (3d) 547 (Sup. Ct.) at para. 28, where he noted that a request to inspect must lead to "immediate and mandatory" production. There are no "[c]arve-outs" for "certain types of documents." Indeed, "[e]ven where a party has referred to an otherwise privileged document in its pleading, it must be produced if inspection is requested."

[8] Nordheimer J. (as he then was) articulated similar views in *R. v. Vijaya,* 2014 ONSC 1653 at para. 35:

> It is a basic principle that a party who files an affidavit as evidence in a proceeding is obliged to produce any material referred to in that affidavit at the request of any other interested party. Normally, any such material should properly be marked as an exhibit to the affidavit, and therefore be automatically available to any other interested party, but the failure to mark the material as an exhibit does not shield it from production. The entitlement to see such material is codified for civil proceedings in rule 30.04 (2)…

[9] The debtor and the Monitor submit that those cases did not involve *CCAA* applications and that a judge within the context of a *CCAA* proceeding has more discretion than the language of *Timminco* and *Vijaya* suggest. I am inclined to agree with the debtor and the Monitor in this regard. It strikes me that a federal statute that permits a court to disclaim contracts based on discretionary considerations and to develop a process for the resolution of litigious disputes within the *CCAA* proceeding that departs significantly from the *Rules of Civil Procedure*, also affords the court the discretion to depart from other "mandatory" provisions of the rules such as rule 30.04 (2).

[10] The question then becomes whether I should exercise my discretion in favour of production or maintain the more limited production that the debtor and the Monitor advocate.

[11] Although I have found that I have the ability to exercise discretion and am not absolutely bound by rule 30.04 (2), the rule remains a relevant factor in the exercise of my discretion. One factor relevant to the exercise of discretion is to consider the way in which a party has used the contested document in its affidavit. A passing, incidental reference to a document may lead a court to exercise its discretion against production. Reliance on the document for a material issue before the court may incline the court towards production. Reference to the Altus appraisal in the debtor's materials tends more in the latter direction.

[12] In Mr. McCracken's affidavit sworn July 8, 2020, he deposes in paragraph 8 that the project cannot be built with the original contracts in place "because the available revenue would

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be insufficient to repay the financing required; but it would be a viable project if the Pre-Sale Contracts were not in place." He goes on in paragraph 19 to state that if the original purchase agreements remain in place, the developer would need to generate approximately $2,125 per square foot from the unsold commercial units and parking units just to break even which, in his view, is impossible.

[13] Mr. McCracken goes on in paragraph 45 of his affidavit to say:

> Altus Group is in the process of preparing an appraisal report providing their view of the anticipated market revenues of the various components of the Clover project, and which I anticipate will be generally in line with Concord's[1] view. I understand it will become available to counsel for unit purchasers and their steering committees who have entered into non-disclosure agreements with the Monitor."

[14] A number of factors emerge from Mr. McCracken's affidavit. First, Mr. McCracken deposes that the revenues from the project make it unfeasible without disclaiming the original contracts. He supported that view by invoking the authority of the Altus appraisal. Thus, the Altus appraisal was not referred to inadvertently or incidentally, but as a means of according legitimacy to Mr. McCracken's views about revenue. It would be unfair to permit a party to influence the court by referring to independent expertise but then decline to produce that expertise.

[15] Second, Mr. McCracken stated in his report that the appraisal report would be available to counsel for the unit purchasers and their steering committees. That affidavit was used in a hearing at which parties made submissions on the process to be followed for the disclaimer motion and I made rulings in that regard. The strategies that parties pursue in respect of a disclaimer motion could reasonably be expected to be influenced by the commitments that an opposite party makes. It would be unfair to have a party and the court be influenced by a statement of the sort Mr. McCracken makes in his affidavit only to have him resile from that commitment later. While it became clear on the scheduling motion that the debtor would not disclose the unredacted appraisal report without a court order, that hearing occurred on July 17, 2020. Mr. McCracken's affidavit was delivered to counsel for the purchasers shortly after July 8, 2020. This is a real-time litigation. As set out in greater detail below, the debtor seeks a speedy determination of the disclaimer motion and of its proposed plan. In those circumstances, for the purchasers to be under a misunderstanding about whether they would get the appraisal for even a few days, can seriously prejudice their ability to mount an effective case.

---

[1] Concord is the new owner of Clover. Concord acquired Clover in the course of the *CCAA* proceeding. When doing so it made clear that it would proceed with the *CCAA* only if it were permitted to disclaim the contracts. If not, it indicated that the *CCAA* proceeding could not succeed.

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[16] Third, the disclaimer motion has been scheduled for August 20, 2020. Even that date is several weeks later than the debtor had asked for. The debtor and its new owner, Concord, have been aware of the disclaimer issue since at least February 2020. It has taken them until late June or July to complete the Altus report. It submits, however, that the purchasers do not need production of the Altus appraisal because they can obtain their own appraisal. The unfairness in this approach is manifest. Although Concord is one of the most sophisticated development companies in the world and has had six months to prepare an appraisal, it suggests that a disparate group of 496 purchasers be given approximately one month to do the same.

[17] Fourth, the debtor seeks the protection of the court. In doing so it obtains substantial advantages. It has prevented creditors from commencing lawsuits against it, it has prevented creditors from assigning it into bankruptcy, all with the object of restructuring in the hope of creating a profitable enterprise out of what it says is now an insolvent one. As part of that process, the debtor wants to disclaim the contracts that it entered into with 496 purchasers without facing any liability.

[18] It strikes me that production of the unredacted appraisal report accompanied by a non-disclosure agreement is a fair price for the debtor to pay for: (i) the right to argue disclaimer of 496 contracts; (ii) on a real-time basis; (iii) that does not give the purchasers adequate time to commission their own appraisal; (iv) after giving those purchasers a false sense of security that they would receive the appraisal report. There is a price to pay for the extraordinary benefits that the debtor seeks. Here the price is merely transparency.

[19] The debtor and the Monitor submit that the issue of producing the appraisal does not require the court to balance the interests as I have done above because the appraisal is not relevant to the disclaimer motion. The debtor notes that, if it is successful on the disclaimer motion, it will offer the units back to the original purchasers on a cost plus formula. It is for that reason that they have produced the unredacted Altus cost report to the purchasers. Clover and the Monitor submit, that the cost report gives the purchasers sufficient information with which to make decisions.

[20] Section 32 (4) sets out the factors the court should consider when determining whether to disclaim contracts and provides:

> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the Monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

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[21] It strikes me that, at a minimum, the appraisal is relevant to the factors (b) and (c). It may well also irrelevant to any other relevant factors that the court is permitted to consider by virtue of the reference to "among other things" in the opening passage of section 32 (4).

[22] When I asked counsel for the Monitor whether production of the appraisal report would not enhance the prospects of a viable arrangement by providing both parties with information that might enable them to reach a mutually acceptable compromise, he responded that this was not the issue on the disclaimer motion. The Monitor submits that the disclaimer motion is a threshold issue which is conceptually distinct from the negotiation or approval of a plan.

[23] While I agree with that in theory, the distinction here is somewhat artificial. Disclaimer cannot necessarily be decided in a vacuum. It strikes me that both the purchasers and the court need to know what range of alternatives is available to decide whether to agree to or permit disclaimer; especially when the debtor proposes to seek plan approval within weeks of the disclaimer motion.

[24] A more extreme example helps make the point. If the value of the property in a *CCAA* sale generated enough profit to pay the unitholders their full damages on the sale, that might lead a court to reject disclaimer because there was no particular benefit associated with it. If, however, sale without disclaimer left nothing for unit purchasers then disclaimer might be more acceptable because it does not put the unit purchasers into any worse position than they would otherwise be in. The commercial reality may be considerably muddier than those two extremes. The two ends of the spectrum do, however, at least demonstrate conceptually why appraisal information is relevant even on the disclaimer motion.

[25] Having appraisal information on the disclaimer motion will assist in determining whether disclaimer will enhance the chance of a compromise and whether it causes significant financial hardship to any party to the agreement.

[26] The debtor and the Monitor note that the Altus reports were commissioned to help obtain financing and help the sales process, if needed. While that may be, Mr. McCracken appeared to recognize its relevance to the purchasers when he stated that it would be disclosed to them.

[27] A further dynamic applies in this case. As noted earlier, the debtor was acquired by Concord in the course of this proceeding. In that light, this is not a situation of the debtor stakeholder having been victimized by economic circumstances beyond its control, but rather where the true stakeholder within the debtor is an entity that came into the situation with eyes wide open in the hope of making a profit with the benefit of the court protection that the *CCAA* affords. The disclaimer involves, as counsel for the purchasers put it, a transfer of wealth from the purchasers to Concord. There is nothing inherently wrong with that. If the project truly is economically unfeasible on its original pricing, Concord is entitled to a reasonable profit on its investment. That might be the only way to permit the purchasers to retain their units. At the same time, however, if a developer wants the court's assistance in facilitating a wealth transfer to itself, the court should have the benefit of full information associated with that wealth transfer.

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[28] Neither the Monitor nor the debtor submit that the purchasers would have some unfair advantage if they obtain the appraisal. Rather, their concern is that if recipients of redacted appraisal information inadvertently leaked it, creditors could suffer significant prejudice if the contracts were not disclaimed and the project had to be sold or if certain units had to be re-sold if their original purchasers did not participate in with whatever compromise may be negotiated. Those are valid concerns. It strikes me, however, that they can be addressed through appropriate non-disclosure mechanisms. By way of example, the debtor and Monitor have already agreed to disclose the cost report to purchasers with non-disclosure mechanisms that limit access to counsel, experts and a two-person steering committee. The purchasers agree that the appraisal report should be subject to the same type of restrictions. Neither the Monitor nor the debtor have identified any particular risks of doing so other than the general proposition that risk of disclosure increases as more people receive the information.

[29] Ms. Groulx stated on behalf of Altus, that the appraisal was prepared for a specific purpose and for a specific party. Altus is concerned about being exposed to liability if others use the report. That too is a fair concern. It can however be addressed by a provision in the production order to the effect that giving the purchasers access to the appraisal does not give them any right of action against Altus. Any use of the appraisal by any party for any purpose other than as originally contemplated when Altus was retained should not give rise to any liability against Altus

[30] For the reasons set out above I order that the Altus appraisal report be disclosed to counsel for the purchasers, their expert and their two-person steering committee in unredacted form. No such recipient is to communicate any of the contents of the appraisal report to anyone other than an authorized recipient of the appraisal report.

B. The Claim of Maria Athanasoulis

[31] Maria Athanasoulis is the former president of Cresford. She has a claim against Cresford and others for wrongful dismissal of $1,000,000. In addition she claims that she was entitled to 20% of the profits of the project.

[32] Ms. Athanasoulis seeks production of the Altus cost report that has already been delivered to counsel for the purchasers. She does not seek production of the appraisal because she agrees that she may be part of a purchaser group who may be interested in acquiring the project if the *CCAA* proceeding is not successful.

[33] Ms. Athanasoulis submits that she needs the cost report to help evaluate the debtor's proposed plan. At this point, the debtor envisages presenting a plan that would offer unit purchasers new contracts, would pay out all secured debt, would pay out all trade creditors and leave remaining unsecured creditors with a dividend of 3% of their claim amount.

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[34] Ms. Athanasoulis is in a different equitable position than the purchasers. Clover never agreed to share either of the reports with her. She has only a potential claim as a judgment creditor. Her claim has not been adjudicated. She is not a unit purchaser and has no particular interest in whether the purchase contracts are or are not disclaimed.

[35] Ms. Athanasoulis is the former President and Chief Operating Officer of Cresford, the holding company with overall control of Clover before Concord acquired it. She is clearly a sophisticated individual with inside knowledge about the project.

[36] Paragraph 61 of her statement of claim states:

> By the fall of 2018, Ms. Athanasoulis, and the rest of Cresford's senior management team, advised Mr. Casey that Clover would require an additional $50 million to complete construction. Though this additional funding requirement would mean that no profit would be earned on this project, all lenders, trades and costs would be paid in full and Cresford could continue as a going concern with a solid reputation. Cresford funded some of the Clover obligations using fees earned on other projects, but a shortfall of $37 million remains.

[37] In other words, she admits the project was losing money. As a result, as of the time she left Cresford her 20% profit share would have had no value.

[38] In addition, her wrongful dismissal claim of $1,000,000 is subject to some ambiguity. Ms. Athanasoulis admits in her statement of claim that she was not paid out of the Clover entities but from another corporation that formally employed Cresford employees. There are 13 corporate parties in her statement of claim against which she claims wrongful dismissal. There would appear to be an issue about how her claim should be allocated between Clover and the other defendants.

[39] As a result of the foregoing, Ms. Athanasoulis is a contingent creditor and a potential purchaser of the debtor in any sale of the property and a party without an economic interest in the disclaimer issue.

[40] Those factors make the cost report significantly less important for Ms. Athanasoulis to have than it is for the purchasers to have the cost and appraisal reports. Given that Ms. Athanasoulis is a potential purchaser of the project, the difficulties posed by her having the Altus cost report are significant. Ms. Athanasoulis admits that it would be improper for her to have the appraisal given that she is a potential bidder in any sale of the project. Giving her the cost report raises similar conflicts.

[41] Given the degree of need that Ms. Athanasoulis has for the cost report, the conflict created by giving her the cost report, her limited interest (if any) in the disclaimer motion and the absence of any commitment by Clover to share the report with her, I dismiss her motion for production of the Altus cost report.

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C.

D. The Real Estate Brokers

[42] The real estate brokers at issue are those who are entitled to commissions under the original purchase agreements. They claim their commissions in the *CCAA* proceeding. If the contracts are disclaimed, they would lose their commissions and also be limited to a 3% dividend under the plan the debtor proposes. The brokers seek both the cost and appraisal reports.

[43] They too have a significantly lesser need for the reports than do the unit purchasers.

[44] Most significantly, the debtor has already agreed that, if the contracts are disclaimed and the original unit buyers re-purchase them, the brokers will be deemed to be the broker and will earn commissions under the new purchase. That significantly reduces the financial impact of a disclaimer to them. If the contracts are not disclaimed, the brokers would likely lose their right to commission in any event in a subsequent receivership or bankruptcy sale.

[45] Even if the contract(s) in respect of which a broker has a commission claim is/are not re-purchased, having cost and appraisal information from Clover would give that broker an advantage over others and over Clover when the unit is re-sold. That subsequent sale to another purchaser is one in respect of which the purchaser is not entitled to transparency because it is an ordinary, arm's length purchase in respect of which Clover has not obtained any advantage vis a vis the new purchaser through the *CCAA* process.

[46] The brokers have articulated no particular reason for needing the reports other than the general proposition that they would be helpful when they are considering their position on the plan. Their claims to the reports are, like those of Ms. Athanasoulis, weaker given that the debtor never promised to produce the reports to them, arguments for and against disclaimer are already being advanced by highly qualified counsel and they stand to earn commissions even if the contracts are disclaimed. As a result, I dismiss the brokers' motion for production of the cost and appraisal reports.

Other Relief

[47] The debtor also sought other relief on the hearing which was not contested and in respect of which I signed orders immediately after the hearing. The principal issue involved an increase to the DIP facility. The increase was clearly necessary. It provided funding to take out the previous secured lender. To that extend it does not prime any other stakeholders. The interest rate on the DIP loan is also more favourable to the debtor than the interest rate on the previous loan. To the extent that the DIP funds ongoing construction and does prime other stakeholders, that construction preserves the value of the project and is in all stakeholders' interests. In

approving the DIP I am not, however, deciding whether the conditions in the DIP that call for further court rulings or orders have been satisfied. Those will be issues for another day.

Conclusion

[48] For the reasons set out above, I grant the purchasers' motion to have access to the unredacted Altus appraisal provided access is restricted to counsel, their expert and the two person steering committee and provided all those who receive access sign a satisfactory non-disclosure agreement. I am available to resolve any disagreements about terms of access or use. I dismiss the motions of Ms. Athanasoulis and the brokers for access to either the cost or appraisal reports.

Koehnen J.

Date: July 27, 2020

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TAB 10

CV-20-00642928-00CL

Re; Clover on Yonge Inc.

1. This is a motion for an order sanctioning the Plan of Compromise and Arrangement dated November 6, 2020 ("**Plan**").

2. The Plan was approved on December 15, 2020 by the requisite statutory majorities of affected creditors with voting claims in each of the Plan's two classes of creditors. 96.6% of the Depositor Creditor Class voted in favour of the Plan and 98.8% of the General Unsecured Creditor Class voted in favour of the Plan.

3. There is one unresolved voting claim advanced by Maria Athanasoulis, which she values at $49 Million ("**Maria's Claim**"). If this claim is accepted in the value asserted, the Plan would be defeated in the General Unsecured Creditor Class. All but $1 Million of Maria's Claim is a claim for a share of profits in a number of projects, including the Clover on Yonge Project.

4. I accept the Monitor's position that with respect to the component of Maria's Claim related to an alleged profit sharing agreement with respect to the Clover on Yonge Project, there was no prospect of any profit from that project because as of March 31, 2020, shortly after the receivership commenced, the Clover on Yonge Project was forecast to generate a loss of $61 Million. As a result because I accept that the proper date of value Maria's Claim is when the Receiver was appointed on March 27, 2020, there was no profit from the Clover on Yonge Project that could be shared with Maria.

5. Mr. Dunn, on behalf of Maria, concedes there can be no profit from this project unless the pre-sale unit purchase contracts are disclaimed. I have already ordered that those contracts can only be disclaimed if the Plan is approved.

6. As the Monitor points out in the Supplementary Report to its 14th Report, any forecast profit is entirely dependent on the restructuring of the Receiver of the Clover on Yonge Project. I accept and adopt the Monitor's following statement:

> "It does not assist Ms. Athanasoulis to argue she is entitled to share in profit derived from a successful Plan that she would vote against and cause to fail if she had a claim."

7. In my view, to argue that the relevant date to calculate her profit-sharing claim is later than the Receivership Appointment date and that profit will be derived from the Clover on Yonge Project is far too remote and speculative and lacks an air of reality. I agree with the Applicants' submission that "there is no profit absent disclaimer, and no disclaimer absent the approval, sanctions and implementation of the Plan". Accordingly, if the profit component of the alleged Athanasoulis Claim is allowed for negative voting purposes, it must follow that the value attributed to it is a profit expectation of $nil, and not a profit expectation of $48 Million."

8. The criterion I must use to determine if Maria's Claim, which is a contingent claim, is to be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In my view Maria's Claim cannot be shown to be neither too remote nor speculative unless the Plan is approved, sanctioned and implemented. This is the very event that Maria would defeat if her contingent profit-sharing claim of $48 Million is allowed for voting purposes.

9. I rely on Justice Morrison's decisions in *Nolcor Energy v. Grant Thornton*, 2015 NBQB 20 at para 35 where he affirmed the proposal trustee's decision to disallow a contingent creditor's claim for purpose of voting on a summary basis on facts that re strikingly similar to the facts in this case.

10. Accordingly, I have concluded, for the reasons outlined above, that Maria's Claim is too speculative and remote in the amount of $48 Million to be allowed for voting purposes. I will therefore not have to consider whether Maria's Claim is an equity claim that should not be counted for voting purposes.

11. With respect to the issue of whether the Plan should be sanctioned, I am satisfied that,

    (a) it has been approved by the requisite statutory majority of the Applicants' non-equity creditors;

    (b) there has been strict compliance with all statutory requirements and adherence to previous orders of the Court;

    (c) nothing has been done or purported to be done that is not authorized by the CCAA; and

    (d) the Plan is fair and reasonable.

12. In conclusion, for the reasons set out above, the Plan is sanctioned by the Court in its entirety and I declare that Maria's Claim cannot be valued at more than $1 Million (the wrongful dismissal portion of the Claim) for voting purposes with respect to the Plan.

13. An order shall go to this effect.

14. I thank all counsel for their helpful submissions.

Hainey, J.

January 8, 2021

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIPAND YSL RESIDENCES INC.

Estate/Court File No.: 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

Proceedings commenced in Toronto

BOOK OF AUTHORITIES OF THE RESPONDENT
(Returnable June 23, 2021)

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