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COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	Calgary	
PLAINTIFF	**ALBERTA ENERGY REGULATOR**	
DEFENDANTS	**LEXIN RESOURCES LTD., 1051393 B.C. LTD., 0989 RESOURCE PARTNERSHIP, LR PROCESSING LTD. and LR PROCESSING PARTNERSHIP**	
DOCUMENT	**BENCH BRIEF OF THE RECEIVER**	

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Robyn Gurofsky/Garrett Finegan Borden Ladner Gervais LLP 1900, 520 3rd Ave. S.W. Calgary, AB T2P 0R3 Telephone: (403) 232-9774 / 9445 Facsimile: (403) 266-1395 Email: rgurofsky@blg.com /gfinegan@blg.com File No. 547730-000021

INTRODUCTION

1. This Bench Brief is submitted on behalf of Grant Thornton Limited, in its capacity as the court-appointed receiver (the "**Receiver**") of Lexin Resources Ltd. ("**Lexin**"), 1051393 B.C. Ltd. ("**105**"), 0989 Resource Partnership ("**0989**"), LR Processing Ltd. ("**LR Ltd.**") and LR Processing Partnership ("**LR Processing**" and collectively with Lexin, 105, 0989 and LR Ltd. the "**Lexin Group**"), in support of the Receiver's applications to:

    (a) approve the Settlement Agreement dated September 24, 2018 between the Receiver and MFC Energy Finance Inc., 1049597 B.C. Ltd., 1059032 B.C. Ltd., Alberta Energy Regulator, and MFC Power Limited Partnership by its general partner MFC Power General Partnership; and

    (b) approve the proposed LTAM PSA for the sale of Lexin's interest in the High River area petroleum and natural gas properties.

2. The facts in support of the Receiver's applications are set out in detail in the Ninth Report of the Receiver filed on November 7, 2018 (the "**Ninth Report**") and the Tenth Report of the Receiver filed on November 19, 2018 (the "**Tenth Report**"). The Receiver adopts the facts set-out in the Ninth and Tenth Reports as if they were reproduced herein. All capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Ninth and Tenth Reports.

APPLICABLE LEGAL PRINCIPLES

Receivership Sales

3. A Receiver has an obligation to act honestly and in good faith, and to deal with the property of the insolvent person in a commercially reasonable manner.[1]

4. In considering whether to approve a proposed sale, the Court considers:

    (a) Whether the receiver made sufficient effort to obtain the best price and has not acted improvidently;

    (b) The interests of all parties;

    (c) The efficacy and integrity of the process by which the offers have been submitted; and

    (d) Whether there has been any unfairness in the process.[2]

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 247 [***BIA***] [**TAB 1**].
[2] *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1, 1991 CarswellOnt 7706 (CA) [***Soundair***], at para 46 [**TAB 2**].

Court Approval of Settlement Agreements in the Receivership Context

5. The *Soundair* principles are also relevant when the Court considers whether to approve a settlement agreement entered into by a receiver to settle or compromise claims and actions instituted by the or against the debtor.[3] However, courts have commented that "there is a subtle distinction to make between reliance on a receiver's commercial expertise concerning a recommended sale and the receiver's expertise in regards to a settlement of a legal dispute (while of course taking into account that such a receiver will have had appropriate legal advice from its own counsel). That distinction is based on the fact that the court is the 'expert' in respect of the law and will generally be in a better position to assess the law involved in a situation than it would be as to the commercial aspects of a sale of property."[4] As such the Court, with the assistance of counsel, "should conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, sufficient for the court to conclude that the proposed settlement fell within the range of what was fair and commercially reasonable."[5]

6. Approval of a settlement agreement negotiated by the receiver is discretionary.[6] A number of principles are relevant to the exercise of the Court's discretion:

(a) Whether the receiver provided the court with all material and evidence reasonably necessary to enable the court to exercise its discretion in approving, or not approving, the settlement of actions;[7]

(b) Whether the settlement of the actions was provident, that is to say, whether the settlement reasonably reflected the value of the litigation in issue;[8]

(c) Whether the settlement provides substantial benefits to other stakeholders.[9]

7. With respect to the first element of the above test, a receiver should "prepare materials showing the strengths and weaknesses of the case, the different issues in the litigation, benefits of certainty, avoidance of delay, the likelihood of appeals, all of which should be sufficient for the court to conclude that the proposed settlement is fair and commercially reasonable."[10] All that is required

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[3] *Re IWHL Inc*, 2011 ONSC 5672 [***IWHL***], at para 4-5 [**TAB 3**].
[4] *Re Ravelston Corp.*, 2005 CarswellOnt 4267 (ONSC) [***Ravelston***], at para 3 [**TAB 4**].
[5] *Ravelston* at para 3 [**TAB 4**].
[6] *Confederation Life Insurance Co. v. Double Y Holdings Inc,* 1992 CarswellOnt 2767 (ONCA) [***Confederation***], at paras 1-3 [**TAB 5**].
[7] *Ibid* [**TAB 5**].
[8] *Ibid* [**TAB 5**].
[9] *Re Maple Bank GmbH*, 2016 ONSC 7218 [***Maple Bank***], at para 8 [**TAB 6**].
[10] *Weig v Weig*, 2013 ONSC, 4427 [***Wieg***] at para 10 [**TAB 7**].

is that there be sufficient evidence for the Court to conclude that that the settlement is fair and reasonable. In the absence of contrary evidence, the receiver's assessment of the facts is to be accepted.[11] The receiver need not disprove speculative or unsubstantiated claims that a better deal might be had.[12] Even where the receiver has arguably failed to provide evidence on a relevant issue, the Court should ask itself whether this omission is "fatal" to the Court's ability to assess the reasonableness of the settlement.[13]

8. In some cases, the receiver has submitted a legal opinion to the Court to assist with the Court's assessment of the issues in the litigation and the merits of a proposed settlement.[14] However, this is not necessary in all cases, especially where the settlement arises only after Court has been fully briefed on the subject matter of the litigation in preparation for hearing the dispute.[15]

9. With respect to the second element of the test, whether a settlement is "provident" or "fair and commercially reasonable", the Court's expertise in assessing the legal aspects of a settlement is unquestioned. However, taking a "strictly legalistic approach" to assessing settlement is to be discouraged.[16] The Court must also take into account "the realities of commerce and business efficacy."[17] In this regard, "while courts will scrutinize the procedures followed by receivers to ensure that they are fair, courts rely upon the expertise of their appointed receivers and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations."[18] In the context of complex and uncertain litigation, courts are more likely to take into account the business judgment of a court officer involved in the negotiation of a settlement.[19]

10. In assessing whether a receiver has been fair and commercially reasonable in entering into a settlement agreement, Courts have noted that:

> Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable,

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[11] *Confederation* at para 3-4 **[TAB 5]**.
[12] *Confederation Life Insurance Co. v. Double Y Holdings Inc.* 1992 CarswellOnt 2844 (ONSC), at para 14 **[TAB 8]**.
[13] *Confederation* at para 4 **[TAB 5]**.
[14] *Ibid* at para 3 **[TAB 5]**.
[15] *Ravelston* at para 4 **[TAB 4]**.
[16] *Re Samji*, 2013 BCSC 2101, at para 23, citing *Re Resident Warranty Co. of Canada Inc.*, (2006), 21 CBR (5th) 57 (ABQB), at para 27 **[TAB 9]**.
[17] *Ibid* **[TAB 9]**.
[18] *Ravelston*, at para 7, citing *Re Regal Constellation Hotel Ltd*, (2004), 71 O.R. (3d) 355 (Ont. C.A.), para. 23 **[TAB 4]**.
[19] *Maple Bank*, at para 9 **[TAB 6]**.

> interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an even-handed manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.[20]

11. The third element which the Court may consider is whether the settlement provides substantial benefits to other stakeholders.[21] In this regard, courts have been influenced to approve a settlement when key stakeholders, who are likely to be most affected by the settlement agreement, have consented to it.[22] Other factors which have been influential in prompting a Court to determine that a settlement provides substantial benefit to other stakeholders include circumstances where the settlement will:

    (a) facilitate a sales process and allow for a timely distribution to creditors;[23]

    (b) avoid costly and uncertain litigation that would deplete the value of the estate, especially where the estate is modest and cannot support litigation costs;[24]

    (c) <u>not</u> prejudice other stakeholders by affecting their ability to advance their own independent claims against parties who have settled with the receiver.[25]

12. Finally, in considering all of the above factors, the overriding public interest in promoting settlement remains relevant in receivership cases.[26] As noted by our Court of Appeal, "in these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice."[27] Settlement "promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system."[28] As such where a proposed settlement in a

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[20] *Weig*, at para 8, citing *Re Ravelston Corp*, 2005 CarswellOnt 9058 (ONCA), at para 40 **[TAB 7]**.
[21] *Ibid* at para 8 **[TAB 7]**.
[22] *Ibid* at para 10 **[TAB 7]**.
[23] *Walter Energy Canada Holdings, Inc.* (Re), 2017 BCSC 1968, at paras 34-35 **[TAB 10]**; *IWHL* at para 69 **[TAB 3]**.
[24] *IWHL* at para 51-52 **[TAB 3]**.
[25] *Ibid* at para 55 **[TAB 3]**.
[26] *Weig*, at para 10 **[TAB 7]**.
[27] *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, at para 27 **[TAB 11]**.
[28] *Ibid*, citing *Loewen, Ondaatje, McCutcheon & Co. c Sparling*, [1992] 3 SCR 235 (SCC), at 259, citing *Sparling v. Southam Inc.* (1988), 66 OR (2d) 225 at 230 (Ont HC) **[TAB 11]**.

receivership otherwise accords with the principles discussed above, the Court should not hesitate to approve it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF NOVEMBER, 2018.

BORDEN LADNER GERVAIS LLP

Per: ______________________________
Robyn Gurofsky / Garrett Finegan

Solicitors for the Receiver/Applicant

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 247

s 247. Good faith, etc.

Currency

247.Good faith, etc.

A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

Amendment History

1992, c. 27, s. 89(1)

Currency

Federal English Statutes reflect amendments current to October 25, 2018
Federal English Regulations are current to Gazette Vol. 152:21 (October 17, 2018)

TAB 2

1991 CarswellOnt 7706
Ontario Court of Justice (General Division)

Royal Bank of Canada v. Soundair Corp.

1991 CarswellOnt 7706, 26 A.C.W.S. (3d) 683

BETWEEN: THE ROYAL BANK OF CANADA Plaintiff and SOUNDAIR CORPORATION, CANADIAN PENSION CAPITAL LIMITED and CANADIAN INSURERS' CAPITAL CORPORATION Defendant

Rosenberg J

Judgment: May 1, 1991
Docket: 48593/90Q

Counsel: Lyndon Barnes and Lawrence Ritchie for the Royal Bank of Canada
William G. Horton, Nancy Spies and Carmen theriault for Ontario Express Ltd. and Frontier Air Ltd., Sean F. Dunphy for Ernst & Young Inc., Receiver of Soundair Corporation, Jack Berkow and S. Goldman Canadian Pension Capital Limited and Canadian Insurer's Capital Corporation, John Morin for Air Canada

ROSENBERG J:

NATURE OF PROCEEDINGS

1 Ernst & Young Inc. (the "Receiver") moved for an order approving the share Purchase agreement dated March 8, 1991 between Frontier Air limited, Ontario Express Limited ("OEL"), 174590 Canada Inc. and the Receiver (the "OEL Offer") and for an order authorizing and directing the Receiver and 174590 Canada Inc., as vendors, to complete that agreement in accordance with its terms.

2 The defendants, Canadian Pension Capital limited and Canadian Insurers' Capital Corporation (collectively "CCFL"), moved for an order approving the offer of 922246 Ontario Limited ("922") dated April 5, 1991 (the "922 Offer") to purchase the assets of Air Toronto, a division of Soundair Corporation ("Air Toronto" and "Soundair", respectively), or in the alternative for directions regarding the sale of the assets of Air Toronto.

3 Either as a result of the motion by CCFL or as a practical matter, the third possibility before the court is to order that neither offer be accepted and to make an order setting out the procedure to be adopted by the Receiver in dealing with the two competing groups wishing to purchase the assets of Air Toronto.

PARTIES

4 Matters involving the Soundair receivership came before me on a number of occasions and it was necessary to make a number of preliminary orders with regard to the aforesaid motions (i.e. ordering disclosure of certain information setting out time tables for offers to be submitted, scheduling cross-examinations, etc.). As a result of these preliminary appearances and on hearing what cross-examinations had taken place and who participated, it became clear that the real issue to be determined was whether OEL or 922 would be successful in purchasing Air Toronto assets. This was the real contest before me. The OEL offer was supported by Canadian International Airlines Limited ("Canadian International") and the CCLF offer was supported by Air Canada and Air Canada was a substantial participant in this 922 offer by the time the motion was heard. Accordingly, I added OEL as a party with the full right to participate in the proceedings. CCFL being a party to the one motion was allowed to participate fully as a party with regard to both motions and Air

Canada was allowed to participate to the extent that they wished to counter any allegations that were made against Air Canada. In fact, Air Canada did not make any submissions.

FACTS

5 Prior to April 26, 1990, Soundair was engaged in the air service business and operated three divisions, being Air Toronto, Odyssey International and Soundair Express. Air Toronto operates a scheduled airline, providing commuter services from Pearson International Airport in Toronto on an exclusive basis to certain cities in the United States of America (the "routes"). Many of the routes served as important feeders to various Air Canada routes.

6 By an order of Mr. Justice O'Brien of the Supreme Court of Ontario dated April 26, 1990 (the "Order"), Ernst & Young Inc. were appointed Receiver of the assets, property and undertaking of Soundair and the manager and operator of the assets, property and undertaking of Air Toronto.

7 Prior to the appointment of the Receiver, Soundair had been negotiating a sale of its Air Toronto division to Air Canada for approximately $18,000,000 pursuant to the terms of a letter of intent dated April 4, 1990 from Air Canada to Soundair (the "Letter of Intent").

8 Paragraph 4(c) of the Order directed the Receiver,

> ... to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

NEGOTIATIONS WITH AIR CANADA

9 Upon being appointed, the Receiver advised Air Canada that it was prepared to complete a sale of the assets or business of Air Toronto to Air Canada as outlined in the letter of Intent. To that end, the Receiver entered into an agreement with Air Canada dated April 30, 1991. Pursuant to the terms of that agreement, the Receiver agreed, *inter alia*, to negotiate exclusively with Air Canada, such agreement being terminable by either party on five day's written notice.

10 During the negotiations from April to June of 1990, Air Canada conducted due diligence searches with respect to the assets and business of Air Toronto and had unlimited access to financial information relating to Air Toronto. On June 14, 1990, Air Canada lowered its offer for Air Toronto to $8,200,000. The offer was subject to certain conditions and was stated to be open for acceptance by the Receiver until June 29, 1990.

11 On June 19, 1990, Mr. Raymond Lindsay, Vice President, Corporate Development and Commercial Holdings of Air Canada, wrote to Mr. Tim Prior, Manager of the Special Loans Branch of the Royal Bank of Canada, with a rationale for the reduction in the price Air Canada was willing to pay from $18 million to $8.2 million. The letter attached a formal offer to purchase Air Toronto for $8.2 million. This letter also stated that if Air Canada did not acquire Air Toronto, Air Canada would terminate its existing contractual arrangements with Air Toronto and pursue alternatives to protect or retain connector traffic and revenues now associated with Air Toronto. The letter went on to say that Air Canada would not, except to the extent that it might be contractually obligated, continue to support Air Toronto after the expiry date contained in the offer even in circumstances where Air Toronto either continued to be operated in receivership in a connector relationship with Air Canada, or is sold to third parties not competitive to Air Canada (including Air Toronto employees) who wish to retain a connector relationship with Air Canada.

12 Contractual arrangements between Air Canada and Air Toronto included a connector agreement, a ground handling agreement and a hangarage agreement. The Receiver was of the view that if Air Canada took steps to terminate these agreements, the operations of Air Toronto would cease immediately and the possibility of a sale of Air Toronto would virtually be eliminated.

13 The Receiver advised Air Canada that based on the April 30, 1990 agreement, Air Canada had waived defaults, in particular defaults related to the receivership, under its agreements with Air Toronto and that, secondly, under the terms of the Court Order. Air Canada was not entitled to terminate the contractual arrangements without first seeking leave of the Court. The Receiver also advised Air Canada that the Receiver did not think that Air Canada's approach was "a very ethical way to deal".

14 The Receiver did not accept the Air Canada offer and allowed it to lapse on June 29, 1990.

15 On July 20, 1990, Air Canada served a Notice of Termination formally terminating the April 30, 1990 agreement. On the same day, by letter dated July 20, 1990 the solicitors for Air Canada formally advised the Receiver that Air Canada would not be participating in any "auction process" to sell Air Toronto. Mr. Lindsay of Air Canada also orally advised the Receiver at a meeting on or about the same date that Air Canada would not consent to the assignment of the Air Toronto connector agreement to any other party. The Receiver was of the opinion that the operations of Air Toronto were such that it required a connector agreement with one of the two main Canadian airlines in order to be a viable operation.

16 The Receiver had determined that certain conditions in the Air Canada offer of $8.2 million could not be met and that the price would be further reduced and accordingly the Receiver embarked on a process of offering Air Toronto assets for sale generally in order to obtain a price better than the net anticipated in the Air Canada offer of $8.2 million ($8,200,000).

17 The receivership of Air Toronto had generated publicity in the airline industry as had the breakdown of negotiations with Air Canada. In August 1990 the Receiver contacted a number of potential bidders and those who had expressed an interest. The Receiver allowed interested parties to examine some financial and other information with respect to Air Toronto and advised these parties that expressions of interest were to be received by August 20, 1990.

18 A variety of offers for the purchase of Air Toronto were solicited and received by the Receiver before August 20, 1990. All of these offers were rejected as inadequate by the Receiver. One of these offers was participated in by Air Canada through Air Ontario, one of Air Canada's connector airlines.

19 The Receiver also approached a number of large American airlines to inquire about their interest in purchasing Air Toronto. The Receiver found in all cases that these airlines had no interest in acquiring Air Toronto.

20 The Receiver approached Canadian Airlines through its parent PWA Corporation ("PWA") to determine its interest in acquiring Air Toronto. The Receiver was advised by PWA to deal with OEL on any such transaction since OEL had the "franchise rights for the operation of regional routes in the geographical area served by Air Toronto and had the connector agreement in place with Canadian Airlines.

THE OEL AGREEMENT

21 OEL was contacted by the Receiver from time to time on matters relating to jet stream aircraft since both OEL and Air Toronto fly the same aircraft. The initial discussions with OEL revolved around the possibility that OEL might enter into a management contract with the receiver pursuant to which OEL would manage Air Toronto while Air Toronto remained in the possession of the Receiver. The Receiver and OEL had discussions on this possibility because it was the Receiver's view that while Air Canada had been forced to continue the connector agreement until it expired in 1992, Air Toronto had no ability to renew it. The Receiver's objective was to prevent Air Toronto from being out of business at the expiry of the Air Canada connector agreement.

22 The discussions between the Receiver and OEL started off with an evaluation on both sides as to what synergies there might be from a joint operation and how to share the benefit of those synergies. Air Toronto had the routes and a management group that was good. OEL had a maintenance facility. OEL could provide a backstop on a much

longer connector agreement and they also had the ability to move other aircraft onto these routes and there would be, as between the two parties, a saving in lease costs and fixed aircraft ownership costs. At some point in mid-January 1991, the Receiver took the position with OEL that it wanted a definitive agreement and did not want to operate in a joint venture for ever. The Receiver wanted to have "an out on these arrangements".

23 The negotiations led to the delivery of a Letter of Intent dated February 8, 1991 sent by OEL to the Receiver which set forth the terms of a proposed purchase of the assets of Air Toronto by OEL. This Letter of Intent was accepted by the Receiver on February 11, 1991 and it contained the following provision:

> Soundair and the Receiver agree not to negotiate with potential purchasers of, or solicit offers for, the Purchased Assets of Air Toronto from the date hereof to February 201 1991.

This provision was similar to the provision which the Receiver had agreed to when it was negotiating with Air Canada. The February 20 date was extended from time to time by agreement of the parties. The exclusive negotiation provision was intended to minimize the disruption to the operations of Air Toronto and was agreed to by the Receiver in recognition of the complex and time consuming negotiations which would be necessary and the need for OEL to produce confidential information to the Receiver in the course of the negotiations.

24 OEL also took the position that it did not want its offer shopped around and used to obtain higher offers.

25 The question of whether Air Toronto was to be affiliated with Air Canada or affiliated with Canadian Airlines was of some consequence because if Air Toronto operated out of Terminal 2 at Pearson International, the Terminal in which Air Canada operated, passengers flying from American cities via Air Toronto to Canadian cities other than Toronto, such as Winnipeg, Calgary, Vancouver, Ottawa, etc., would automatically fly on connecting Air Canada planes. Conversely, if they went into Terminal 3 where Canadian Airlines operated, they would fly to these other Canadian cites by Canadian Airlines. It was estimated that the connector travellers would generate millions of dollars per year of business for whichever airline was in the same terminal as Air Toronto and operated a connector agreement with them.

26 The Receiver's reasoning in agreeing to confine its negotiations for the time being to OEL arose from its concern about the disruption to the employees of Air Toronto as a result of a number of the potential bidders seeking information from employees during the due diligence periods and also because it felt that there were only two practical buyers from whom it could obtain the best price - a purchaser affiliated with Air Canada or a purchaser affiliated with Canadian Airlines - since Air Canada had indicated and unwillingness to get into a "auction". it appeared that the only practical alternative was to deal with OEL. The Receiver's assumption about two possible purchasers was consistent with the fact that the present motions involve only two purchasers and each is affiliated with one of the major Canadian airlines.

27 There were only two creditors concerned with the sale of Air Toronto assets. The Royal Bank was owed in excess of $65 million and CCFL was owed in excess of $9.5 million. The Royal Bank was of the opinion based on the information received from the Receiver that the total recovery from the sale of all of the assets of Soundair would be in the range of $25 million. The expected deficiency therefore would be in the range of $50 million. Consequently, CCFL and the Royal Bank are the only creditors who will directly benefit monetarily from the sale of the Air Toronto assets.

28 The Royal Bank and CCFL were parties to an agreement (the "Inter Lender Agreement") governing the distribution of funds realized from the security that they both held with regard to Soundair. There was a dispute between CCFL and the Royal Bank as to the division of the proceeds of the sale of Air Toronto. In December 1990 CCFL informed the Receiver that it might be interested in acquiring Air Toronto. Brown of CCFL at first tried to put together a bid with the management of Air Toronto for the assets of Air Toronto. On January 16, 1991 the Receiver provided CCFL with additional information concerning assets and the business of Air Toronto. By late January CCFL was aware that the Receiver was negotiating with DEL for the sale of Air Toronto. On February 8, 1991 the Receiver signed the Letter of Intent with DEL. By February 21, 1991 Brown of CCFL felt that the time frame was too short to deal with any other party and that CCFL should proceed with a bid on its own because of the negotiations between the Receiver and DEL.

By February 28, 1991 CCFL was aware that the Receiver was negotiating solely with DEL. On March 1, 1991 Brown attended on Smith of Air Toronto. Smith provided to Brown further current financial information concerning assets and affairs of Air Toronto. Smith also provided Brown with a copy of a draft offering memorandum concerning the sale of Air Toronto which had been prepared at the direction of the Receiver. The memorandum had not been finalized and what was provided was not the latest draft. The latest draft was actually finalized on March 1, 1991. During this meeting Smith also responded to all of the questions of Brown concerning Air Toronto and provided Brown with all of the information which he requested. It was acknowledged by Mr. Berkow, counsel for CCFL, that as of March 1, CCFL had all of the information that it required to submit an offer for Air Toronto. The draft offering memorandum had been given to Brown by Smith contrary to the instructions of the Receiver. Having all the necessary information to submit an offer, CCFL both verbally and in writing advised the Receiver as follows:

> I am writing to confirm my previous verbal advice that we will be submitting an offer to you in regards to the Air Toronto operations and assets no later than noon on Tuesday March 5, 1991. *As we discussed this morning, our offer will not contain any conditions other than licence transfer provisions and other customary commercial provisions readily satisfied by you and/or the secured creditors.* Our offers will be for the assets of Air Toronto including all of the fixed assets understood to be $2.7 million as of December 31st, 1990 as well as all consumable spares understood to be $900,000 as of December 31, 1990. This, of course, will be detailed more fully in our offer. The purchase price will be $9 million as follows: $6 million in cash on closing; $3 million over five years based on a comprehensive and realistic royalty arrangement - Total $9 million. (Emphasis added).

Counsel for the Receiver answered as follows:

> I have your letter of March 1, 1991 and look forward to receipt of your offer on Tuesday as indicated therein .... As a court appointed receiver, Ernst & Young is aware that they have an obligation to consider all offers made for the assets objectively with a view to maximizing realization. Indeed, this obligation extends right up until the time of court approval even if the receiver has agreed to accept another offer. In consequence you can be assured that your offer will be considered and brought to the attention of the court regardless of what recommendation is made.

29 Whether or not this response is consistent with the Receiver's obligation to OEL, it cannot be interpreted as refusing to consider the CCFL offer at a time when CCFL had all necessary information to submit an offer.

30 The Receiver received an offer on March 7th from CCFL for the purchase of the assets and undertaking of Air Toronto. The offer was not consistent with the information set forth in CCFL's letter of March 1, 1991. It was subject to conditions which were entirely beyond the control of the Receiver. It required a resolution of the problem with the Inter Lender Agreement between CCFL and the Royal Bank which could not be resolved by the Receiver. CCFL must have been aware when it submitted the offer with this condition that it was in direct contradiction to its letter of March 1, 1991.

31 In addition to the provision with regard to the Inter Lender Agreement which provided that the proceeds of sale go $3.375 million to CCFL and the balance to the Royal Bank, the Agreement also provided that the purchase price was subject to a downward adjustment by the amount by which the book value of the fixed assets on closing was less than $3,5 million.

32 On March 8, 1991 the Trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

33 On March 26, 1991 this matter came before me on the application of CCFL to require the Receiver to provide additional information concerning Air Toronto and to require the Receiver to receive a further bid from CCFL. I directed

that further information be made available subject to certain agreements between counsel. On April 1, Air Canada initiated a site inspection on the premises of Air Toronto at which representatives of Air Canada and legal counsel for both Air Canada and CCFL were present. This on site inspection was not consistent with the agreement between counsel or my order of March 26th.

34 On March 26th I also ordered that CCFL be given until April 5, 1991 to submit a bid without prejudice to the position of OEL with regard to the approval of the Receiver's acceptance of OEL's bid.

35 On April 5th, an offer on behalf of 922 was submitted to the Receiver. 922 was incorporated specifically by CCFL and Air Canada to make this bid.

36 In order to remove the most objectionable condition from the 922 bid, CCFL entered into an agreement with the Royal Bank resolving the Inter Lender dispute in the Royal Bank's favour. In this agreement the Royal Bank agreed to support the 922 bid when it came before the court in preference to not only the OEL bid but any higher and better bid obtained. In addition, by letter supplemental to the agreement settling the Inter Lender dispute, CCFL confirmed to the Royal Bank that certain deductions possible under the agreement with the Receiver would be deducted from CCFL's share of the proceeds.

37 All of this was done without the participation of or the knowledge of the Receiver. At the time of the hearing the only creditors who would participate in the sale proceeds were in favour of the 922 offer and wanted to reject the OEL offer. These two creditors were prepared to favour the 922 offer regardless of any other offer that might be received.

COMPARISON OF THE TWO OFFERS

38 It is not possible to accurately compare the two offers. The Receiver's analysis of the two offers favours the OEL offer. Basically the OEL offer is for $2 million cash and an additional amount by way of a share of the gross revenue of Air Toronto. The 922 offer is for $6 million cash and up to $3 million as a share of the net profit of Air Toronto. The 922 offer includes assets valued at about $525,000 that are not included in the OEL offer. In addition, there are a number of adjustments probable in the 922 offer since the 922 offer requires that the 922 receive all profit and cover all losses from the time that the offer is accepted and also requires certain adjustments with regard to inventory that appear likely to lower the cash available on closing. In analysing the two offers however, I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss that the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

39 After analysis of the arguments from both sides, that of the Receiver and OEL arguing that the OEL offer is better, and, the Royal Bank and CCFL arguing that the 922 offer is better, I have concluded that the 922 offer is marginally superior.

40 In addition to the fact that the 922 offer is slightly superior and is supported by the only two creditors who share in the proceeds, the offer is also supported by a large group of the employees of Air Toronto who wish to be under the Air Canada sphere of influence as preferred to the Canadian Airlines sphere of influence. I have not considered this aspect as relevant in my deliberations. I do not know the reasons that the pilots, for instance, have come to this conclusion. They may have a misunderstanding of the risk to their employment as a result of an OEL purchase. In any event, I do not consider that the wishes of the employees should influence the decision that has to be made. None of them came forward to testify so that the reasons for their support of the 922 bid could be tested.

DECISION

41 Mr. Burko on behalf of CCFL argued that CCFL and Air Canada had not been given an even playing field on which to compete and that therefore the process was defective. In my view the process was fair and equitable and

reasonable from a business point of view at the time that the OEL offer was accepted. By that time any inequities to CCFL had been erased in that CCFL had all necessary information. They promised an offer and then submitted an offer that was entirely inconsistent with that promise. CCFL conveyed to the Receiver that there was no practical alternative to the OEL offer. Entering into the type of negotiations with CCFL and Air Canada that had taken place in the past was not desirable as the end was not predictable. The OEL offer was in final form and as counsel for the Receiver put it, the Receiver was looking at a fully baked loaf of bread versus some dough that possibly could be fashioned into a loaf of bread that might be marginally superior. On March 8, 1991 when the Receiver accepted the OEL offer, the Receiver had no assurance that the objectionable clauses in the 922 offer could be removed. Having determined that the process leading to the acceptance of the OEL offer and the entering into the contract subject to court approval was proper and further having determined that the interest of the creditors were marginally better served by the 922 offer, it is appropriate to consider the principals established by the case law to determine which offer should be approved by the court.

42 While the playing field was level and that the process was fair at the time the OEL offer was accepted, the process did not remain fair until the April 5th offer was received from 922. While it was clear when the parties appeared before me in March that the offer of 922 must in some respect be better than or at least arguably be better than the OEL offer, there was no assurance to that effect. However, by the agreement that resolved the Inter Lender dispute between the Royal Bank and CCFL, CCFL was able to determine that at least from the Royal Bank's point of view if they removed the objectionable condition their offer would be better than the OEL offer.

43 The Royal Bank knew the details of the OEL offer. By my order the two offers were to be made without either offeror knowing what the other offer's terms were. To this extent 922 received an advantage. For instance, if they had said in the negotiations with Royal Bank - no details of these negotiations were disclosed to the court - that we will remove the conditions and agree to the priorities but we will reduce our offer by $1 million and the Royal Bank had said, "no, that is not satisfactory", then they would have an indication of what was required in the Royal Bank's mind to beat the OEL offer. They had accordingly an assurance that what they were offering was better than the OEL offer from the Royal Bank's point of view. OEL had no equal information with regard to the 922 offer when they started their negotiations in good faith that culminated in a signed offer on March 8th. Accordingly, the process from March 8th to April 5th lacking in fairness and equity was through no fault of the Receivers.

THE LAW

44 I consider first whether or not the contract between OEL and the Receiver should be approved by the court. In light of my decision in that regard, I do not have to consider the question of the 922 offer being accepted or the third alternative of directing the Receiver as to the Receiver's further activities.

45 A body of case law has developed with regard to the court's approval of sales by court appointed receivers. A secured creditor has other options. He could appoint a private receiver. That gives the secured creditor such as the Royal Bank a freedom of action but the bank would bear the consequences of doing so directly. By having a court appointed receiver the bank reduces the risk of a suit by a debtor with regard to an allegation of an improvident realization of assets and is relieved from legal liability for failure to close a transaction. Also the bank reduces the possibility of unfavourable publicity but the *quid pro quo* is that the creditor has a degree of loss of control when the court supervises. The process of a sale by a court appointed receiver has a unique vulnerability. In the intervening time between the contract by the receiver and the court approval there is a window of opportunity to be used by unsuccessful bidders or by creditors or by others to improve on the offer. The case law attempts to balance the process and the credibility of the process against the interest of the creditors and provides that while the interests of the creditors is always the primary consideration of the receiver and the court, it is not the only consideration. The courts have consistently held that they will also consider the fairness and the effectiveness of the process and the role of the receiver.

46 In the case of *Crown Trust Co. et al. v. Rosenberg et al.* (1986) 39 D.L.R. (4th) 526, Mr. Justice Anderson considered the bidding process with regard to a bid that was some $15 million higher than the group of bids that the receiver had recommended be accepted. He stated at p.531:

> The duties of the court I conceive to be the following, and I do not put them in any order of priority:
>
> I. It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently ....
>
> II. The court should consider the interests of all parties, plaintiffs and defendants alike ....
>
> III. The court must consider the efficacy and integrity of the process by which the offers are obtained ....
>
> IV. The court should consider whether there has been unfairness in the working out of the process ....

In that case Anderson J. refused to allow the bidder to intervene notwithstanding that his bid appeared to be some $15 million higher than the group of bids that were accepted. He found that the $15 million was not a significant increase in light of the total amount involved. In my view the activities of the receiver in this case comply with all four of the duties of the court as defined by Justice Anderson in the *Crown Trust* case.

47 The argument put forth by Mr. Berkow on behalf of the 922 offer is supported by the decision of the *British Columbia Development Corporation v. Spun Cast Industries limited et al.*26 C.B.R. (N.S.) at p.28. Justice Berger held that when everyone with a financial stake in the assets sought approval of the sale the court does not having a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow.

48 A leading case with regard to this issue and one often referred to is the case of *Cameron v. Bank of Nova Scotia et al.* (1981), 38 C.B.R. (N.S.) 1. In that case the court's decision was unanimous, however, the decision delivered by Hart J.A. and agreed with by Pace J.A. included the following:

> ... Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. otherwise he could have deprived the creditors of a substantial sum of money. (p.10).

49 On the other hand, Macdonald J.A. while agreeing in the result saw the matter somewhat differently and stated at p.11.

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard - this would be an intolerable situation. once a receiver puts a deadline on bids then he and other interested parties are entitled to assume that bids received after such deadline are not relevant. The receiver can safely accept the highest bid received before the deadline expires and enter into a binding agreement of sale subject to court approval. Such approval as above mentioned should not be refused simply because some person after the close of bids makes a higher offer.
>
> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where

> the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors. It is for such reason that I hold the view that court approval should not be withheld simply because a higher bid has been received after the expiration of the deadline for submitting bids.

50 On a thorough examination of the relevant case law, I am of the view that the Ontario courts have more consistently followed Macdonald J.A.'s reasoning.

51 In the case of *Salima Investments Ltd. v. Bank of Montreal and Mammoth Developments Ltd. and Bolero Management Ltd.* (1985), the Alberta Court of Appeal while refusing to upset a trial judge's finding that the receiver had acted improvidently stated at p.6 of its oral decision:

> We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an enquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently.

52 In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 Saunders J. stated at p.246:

> In dealing with the request for approval, the court has to be concerned *primarily* with protecting the interest of the creditors of the former bankrupt. A *secondary* but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity. (Emphasis added).

Saunders J. then adopts the statements that I have quoted from the judgment of Macdonald J.A. in the *Cameron v. Bank of Nova Scotia* case, *supra*, and added;

> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, *the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.*
>
> The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration *in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.* Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.
>
> In this case the price offered by Leung, in my opinion, is not so much greater as to put in question the efforts of the receiver . . .
>
> (Emphasis added).

53 In my view the words of Saunders J. are applicable to the case at bar. The 922 offer is not so much greater as to put in question the efforts of the Receiver in obtaining the OEL offer. Had the 922 offer, for example, been $18 million (the original price in the Letter of Intent of Air Canada), then this might have indicated that the Receiver had not properly canvassed the market but such is not the case.

54 In the case of *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237, Saunders J. enunciated the same principles. In that case he was considering a bid made on the application for approval of the sale to another purchaser. He stated at p.242:

As counsel for Noevir pointed out, one or more preferred creditors would benefit to the extent of at least $36,000 and perhaps as much as over $100,000 if the final Noevir offer were to be accepted and the most optimistic view of the realization of the inventory occurred.

I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:

1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or

2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

And further at p.243:

This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration. If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

55 The 922 offer is superior but the difference is not of such a magnitude as to warrant the disruption of the process.

56 In the *Crown Trust v. Rosenberg* case, *supra*, Anderson J. in considering a higher bid than that approved by the receiver made statements that appear to be equally applicable to the case at bar when he stated at p.547:

The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. *The difference is not such as to create any inference that the Disposition Strategy and its application by the Receiver was inadequate or unsuccessful.* (Emphasis added).

Applying that reasoning to the present case, the process having been determined to have been appropriate, the difference between the CCFL offer and the OEL offer is only marginal and the difference is not such as to create an inference that the disposition strategy of the Receiver was inadequate or unsuccessful.

57 Anderson J. further stated:

In essence the position of the Receiver was this: having before it the Larco offer with the concerns about it which it entertained, having before it the offers which it now recommends which occasioned no such concerns, considering that in relative terms the difference in return was not material, the Receiver elected to recommend the somewhat lower offers which were not attended by troublesome concerns against the higher one which was. In my view the Receiver acted reasonably in doing so.

Those words are equally applicable to the Receiver's decision on March 8th where he had before it the OEL offer which had not been fully negotiated and reduced to an acceptable agreement and the 922 offer which contained provisions which were not acceptable and beyond the control of the Receiver.

58 At p.550 Anderson J. stated:

It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

And further on the same page:

> ... In all of those cases the courts have recognized that they are not making a decision in a vacuum; that they were concerned with the process not only as it affected the case at bar, but as it stood to be effected in situations of a similar nature in the future. In what was called by MacDonald J.A. in *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 3039, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303, "the delicate balance of competing interests". that is a relevant and material one.

59 Anderson J. further commented on the balancing of these criteria when he said at p.551:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them ....
>
> Plainly, each case must be decided upon its own facts, and with a view to producing a proper result within the legal framework to which I have made reference. Such policy considerations as I have just enunciated are: as they were said to be by Saunders J., secondary, but they are none the less relevant and material.

60 In the case of *Canadian Commercial Bank et al. v. Pilum Investments Limited*, (unreported, released January 14, 1987), Anderson J. again considered a similar situation and repeated very much of the reasoning that he had followed in the *Crown Trust* case and recited some of his reasoning in that case and further stated at p.10:

> I add one thing arising out of the circumstances of this case. The court, upon the motion for approval, ought not to be asked to review the entire stewardship of the receiver from the inception of the receivership, and if asked to do so, should decline.

61 That reasoning commends itself to the circumstances of the case at bar. As of March 1st, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the Receiver had disappeared. They created a situation as of March 8th, where the Receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The Receiver acted appropriately in accepting the OEL offer.

62 In the case of *Re Selkirk* (1987), 64 C.B.r. (N.S.) 140 McRae J. stated at p.142:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

63 In a decision of the Manitoba Court of Appeal in the matter of the *Winding Up Act, R.S.C. 1970, c.W-10 and in the matter of Northland Bank between Touche Ross Limited (Applicant/Respondent) and Mauricio Kuperman et al.* an unreported decision released April 21, 1989, Kuperman had entered into an agreement with the receiver subject to court approval to purchase certain property in Grande Prairie for $4.58 million. Between the date of the signing and the date when court approval was sought there were some remarkable developments affecting Grande Prairie. Proctor and Gamble announced that it expected to spend $365 million in the expansion of its existing pulp mill that would result in 900 new direct or indirect jobs in the community. Also, the price of oil increased from $15 U.S. a barrel to $18 U.S. a barrel. Both factors materially affected the value of real estate in the Grande Prairie area. Before court approval the liquidator received a further offer from Osgoode Properties for $4.75 million which the liquidator also accepted.

Kuperman then revised his offer under protest to $4.8 million. The judge in the lower court then decided that there should be an opportunity given to the two bidders to tender and Kuperman made a tender again under protest for $5,257,000 which was approved by the court, the other tender of Osgoode Properties having been for a lower amount. On appeal the court remarked that Kuperman was bound by his first agreement and the court confirmed the first agreement and price notwithstanding the impact on the creditors by the reduction of the price. The court stated at the bottom of p.4:

> It is certainly true that the principal function of the court is to obtain as high a price as possible in a liquidation as in a receivership. Nevertheless, where, as in this case, a process is set up with the consent of the major creditors to have a sale procedure which will normally result in the highest price being obtained, it is not reasonable that court discretion should be withheld or that an auction sale should be carried on by the court.

64 In the present case the Royal Bank who had originally obtained the court appointment of the Receiver was made aware of the process throughout and tacitly approved it. The Royal Bank knew the terms of the letter of Intent in February 1991 and made no comment although that letter set out the very terms of the OEL offer which it now opposes. To quote from the decision of the Manitoba Court of appeal in the *Northland Bank* case at p.6:

> In my opinion the discretion to be exercised by a judge under s.35(1) of the *Winding Up Act* in approving or disapproving of a sale made by a liquidator must be exercised fairly. The discretion cannot be used as a means of getting a higher price due to changed circumstances. If the court is satisfied with the process (and here the court itself set up the process or approved of the process), then the discretion should be exercised in favour of the sale *where the price was not improvident at the material time*. (Emphasis added).

65 For all of the reasons stated the application of the Receiver is granted and the agreement with OEL is approved by the court. The application of CCFL is dismissed. If the parties cannot agree on the question of costs, written submissions in that regard may be made.

End of Document

TAB 3

2011 ONSC 5672
Ontario Superior Court of Justice [Commercial List]

IWHL Inc., Re

2011 CarswellOnt 12311, 2011 ONSC 5672, 209 A.C.W.S. (3d) 314, 84 C.B.R. (5th) 223

In the Matter of the Receivership of IWHL Inc., Formerly o/a "1759395 Ontario Inc.," and "Iwheels Dedicated Inc." of the City of Toronto in the Province of Ontario

Mesbur J.

Heard: September 13, 2011
Judgment: September 27, 2011
Docket: 31-1362614

Counsel: Catherine Francis for Receiver
Frank Bennett, Kevin MacDonald for TTR
Bruce D. Day for Trailcon
Bruce Jaeger for Receiver in its personal capacity
Lorne Silver for Wheels Holdco Inc.
C. Chang for New Solutions Financial Corporation
Harry Fogul for Dart Supply Chain Solutions Inc.

Subject: Insolvency; Estates and Trusts; Corporate and Commercial

MOTION by receiver for court approval of settlement with one of bankrupt debtor's creditors.

Mesbur J.:

The motion and the applicable legal principles:

1 On June 29, 2010 Segal & Partners Inc. was appointed Receiver over the assets of IWHL Inc. (the Debtor). The Debtor is now bankrupt, and Segal & Partners Inc. acts as its Trustee in Bankruptcy as well. On this motion in the receivership, the Receiver seeks court approval of a settlement with one of the Debtor's creditors/stakeholders, TTR. The settlement, if approved, would see $1 million come into the estate, and settle complex, difficult, time consuming and expensive claims between the estate/Receiver and TTR. It would also likely create funds for the bankruptcy of the Debtor. If the settlement is not approved, the claims will continue, the estate will continue to incur significant costs, and the Receiver will be unable to make any distributions until the litigation is resolved.

2 Two creditors oppose the settlement: New Solutions Financial Corporation and Dart Supply Chain Solutions. All others who appeared on the motion support it, although Mr. Silver, for Wheels Holdco Inc. supports it if and only if his client's secured claim is paid out as part of the overall resolution of this motion.

3 The factual background of this receivership is extremely confusing and complicated. Simply put, it is a mess. Nevertheless, I will try to outline the facts as best I can, in order to approach my decision in a principled fashion based on the applicable legal principles.

4 The parties essentially agree on the legal principles that must inform my decision. Although this is not a sale approval motion, they agree that the principles enunciated in *Soundair* apply here. [1]

5 Thus, the court must consider:

a) Whether the Receiver has made sufficient effort to get the best price and has not acted improvidently;

b) The interests of the parties;

c) The efficacy and integrity of the process by which offers are obtained; and

d) Whether there has been unfairness in the process.

6 Receivers will be acting providently and making enough effort to get the best price if they carefully consider the available information and use their expertise to determine how to maximize the value of those rights. When the Receiver is considering how to deal with a cause of action, the Receiver can meet its responsibility by settling the matter as long as the proposed compromise is commercially reasonable. [2]

7 Farley J dealt with assessing whether a settlement of litigation was commercially reasonable in *Ravelston* [3]. He noted the subtle difference between the Receiver's expertise in a commercial sale and its expertise regarding settlement of a legal dispute. He grounded that difference on the fact that it is the Court that is the "expert" in matters of law, and "will generally be in a better position to assess the law involved in a situation than it would be as to the commercial aspects of a sale of property ... the court ... should conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, sufficient for the court to conclude that the proposed settlement fell within the range of what was fair and commercially reasonable." [4]

8 It is against this general framework that I turn to the factual underpinning of this receivership and the proposed settlement.

The facts:

9 IWHL and its predecessor companies are in the trucking business. For ease of reference, I will refer to them as the Debtor. The Debtor's primary business was as a regional freight carrier, serving the automotive industry. The Debtor's primary assets were its business supply contracts with GM and Ford in order to meet their "just in time" manufacturing needs. Both GM and Ford can terminate these contracts essentially at will.

10 For some years, the Debtor generated significant profits from its business. With the worldwide economic downturn of 2008, however, it suffered serious financial reverses. The automotive industry was particularly hard hit. As a result, the Debtor lost a great deal of money.

Dart/NFM acquire shares in the Debtor

11 Wheels Holdco Inc. (which I will refer to as "Holdco") owned all the Debtor's shares. After feeling the effects of the events of 2008, Holdco decided to sell its shares. It entered into negotiations with Dart Supply Chain Solutions Inc. (Dart) and its principal, Mr. Donnelly, for Dart or one of its affiliates to purchase Holdco's shares. They reached agreement, and entered into a share purchase agreement between Holdco and one of Dart's affiliates, NFM. The share purchase agreement was effective Aug 14, 2009.

12 The transaction was structured so that NFM agreed to pay $10 for the Debtor's shares, the purchase price was subject to a working capital adjustment, and NFM was required to hold back $200,000 pending determination of the working capital adjustment.

13 In addition, the Debtor agreed to execute a promissory note for $5,104,212.10. This represented the amount of indebtedness the Debtor owed Holdco. On closing, the Debtor was to pay $600,000 on account of the note. The Debtor/

Dart/NFM also agreed to assign any federal or provincial tax refunds it obtained for 2006 and 2007, and grant a security interest in them to Holdco.

14 Holdco's sole recourse on the note was the $600,000 paid on closing, the holdback of $200,000 and the federal and provincial tax refunds.

15 NFM needed financing in order to complete the purchase. It obtained financing from New Solutions Financial Corporation (New Solutions) in order to acquire the shares of the Debtor and to operate the Debtor's business. The financing was made up of a bridge loan of $800,000 to acquire the Debtor, and an accounts receivable factoring facility of $1.2 million to fund operations. Later, the bridge loan was increased to $950,000 and the factoring facility to $2 million. The facilities were increased several more times until eventually the factoring facility became $5.3 million. Apparently, these increases were made in anticipation of Dart's plan to acquire another complementary business, TTR.

16 Although New Solutions originally had a security interest in the Debtor in order to secure its lending facilities, it later failed to file a financing statement to reflect the Debtor's new name, and thus became an unsecured creditor.

17 Since the Debtor had operated its business using a Commercial Vehicle Operator's Registration licence that belonged to Holdco, as part of the transaction the Debtor had to switch the licence into its own name before the end of 2009.

TTR enters the picture and somehow acquires the Debtor's business

18 Around the beginning of 2009 a company called TTR entered the picture. TTR is run by Steve Chandler. TTR is a transportation and logistics company. In March of 2010, TTR acquired the Debtor's business. According to Mr. Chandler, this happened as follows.

19 Chandler was trying to sell TTR's business. After NFM/Dart had acquired the Debtor's business in August of 2009, Chandler contacted Dart to see if Dart was interested in acquiring TTR's business as well as the Debtor's. Dart was.

20 In September of 2009, Dart and TTR signed a confidentiality and nondisclosure agreement to that end. In anticipation of Dart's acquiring TTR, New Solutions increased its financing to Dart.

21 On December 21, 2009, another Dart entity entered into a share purchase agreement with TTR. Through it, Dart was to acquire the shares of TTR and its subsidiaries for $5,750,000. Dart paid a deposit of $1.2 million as part of the transaction. Again, it was New Solutions that provided the financing. The transaction was scheduled to close on Feb 28, 2010. One of NFM/Dart's employees (a former Holdco employee) advised Ford and GM of this pending transaction. He told them that effective March 1, 2010 (the day after closing), the Debtor's operations would become a numbered company, operating as TTR Transport.

22 Although Dart's purchase of TTR was to close on February 28, 2010, it did not. The deal was then restructured.

23 In late March of 2009 the Debtor's Ford and GM contracts were transferred into TTR's name, presumably in anticipation of Dart's plan to acquire TTR's business under the restructured transaction. This would make Dart the owner of both the Debtor's business and TTR's. It planned to operate both as TTR Transport. From that point onward, Dart/NFM/the Debtor operated the Debtor's business in TTR's name, using its licence. Mr. Chandler, TTR's principal, knew about and consented to the arrangement.

24 From late March of 2009, therefore, it was TTR that operated the Debtor's business. In July of 2010 TTR gave Dart notice it had 5 days to complete its purchase of TTR's shares. Dart failed to close. As a result Dart forfeited the $1.2 million deposit that New Solutions had financed. New Solutions is suing Dart for the return of that money. New Solutions is also suing Dart and TTR for fraud.

The Debtor receives the Federal tax refund

25 In April of 2010, CRA advised the Debtor that it was paying the 2006 and 2007 portion of a federal tax refund to the Debtor. That tax refund was $942,916.61. The money, of course, was due to Holdco as part of the original sale of the Debtor's shares to Dart/NFM. Holdco therefore asked the Debtor to endorse the refund to Holdco. The Debtor did not. As a result, Holdco launched a suit to compel payment.

26 Although the Debtor advised the court it had not yet received the refund, and undertook to the court that it would pay Holdco the money immediately on receipt, it turned out it had already received and disbursed the funds. One of Dart's principals has been found in contempt. He awaits sentencing. In the meantime, Holdco's suit to recover the federal tax refund remains outstanding.

27 Holdco is also suing TTR for damages.

The provincial tax refund and other money

28 On May 18, 2010 Holdco learned that the Debtor was entitled to provincial tax refunds totalling $544,982.00. (the Provincial Refund).

29 The Provincial Refund is now in the Receiver's hands. On the basis of a legal opinion it has received, it is satisfied Holdco has a valid security interest in the Provincial Refund. If outstanding claims between the Receiver and TTR can be resolved, the Receiver proposes to pay the Provincial Refund to Holdco.

30 The Receiver has also collected some additional money. GM paid just over $485,000 to TTR for some accounts receivable. TTR endorsed the cheques totalling this amount over to the Receiver.

31 If the claims between TTR and the Receiver are not resolved, then the Receiver is not in a position to make any payments out, pending resolution of TTR's claims.

Notice of intention to file a proposal

32 NFM and Debtor both filed Notices of Intention to file a proposal on May 20, 2010. Kunjar Sharma & Associates Inc. was named as proposal Trustee for both. On May 25, 2010 New Solutions demanded payment from the Debtor and from Dart and various guarantors.

Interim Receiver appointed

33 On May 26, 2010 Holdco moved successfully to have Sharma appointed as interim receiver appointed over the Debtor and NFM. The interim receiver's role was for the limited purpose of controlling cash receipts and disbursements of each company, and to direct CRA to deliver the tax refunds to Sharma.

Holdco sues everyone

34 On June 20, 2010 Holdco sued TTR, NFM, the Debtor and their various principals. The suit claimed damages of $5 million and declaratory relief.

Holdco seeks a Receiver

35 Holdco then moved on June 29, 2010 for an order appointing Segal as Receiver of the Debtor and NFM. The order was granted, along with an order termination both the Debtor's and NFM's proposal proceedings. As a result, both the Debtor and NFM became bankrupt. At the first meeting of creditors on July 20, 2010, the creditors substituted Segal as the Debtor's Trustee. Sharma remains the Trustee in the NFM bankruptcy.

New Solutions sues Dart and TTR

36 Around the same time, New Solutions launched a suit against Dart, TTR and others. The suit claims damages for fraud, breach of trust, conversion, defalcation of trust funds and other relief.

TTR formally takes control of the Debtor's busienss

37 Near the end of July, 2010 TTR, with the Receiver's consent, assumed control of the Debtor's business operations. This left the issue of how to deal with TTR's operation of the business before that date.

TTR's claims against the Receiver

38 TTR takes the position that it had been running the Debtor's business as the Receiver's agent, and had incurred significant losses as a result. It puts those losses at about $4 million and claims that amount from the estate and the Receiver in priority to all other claims. The Receiver denies there was any agency relationship between it and TTR, and also denies TTR had actually incurred any losses in its operation of the Debtor's business.

The Receiver's claims against TTR

39 The Receiver has also advanced claims against TTR. It takes the position that for the period up to July 2010 any accounts receivable TTR collected from GM and Ford are the property of the Debtor, and vest in the Receiver for the benefit first of the secured creditors, and then for the unsecured creditors proving in the Debtor's bankruptcy. The Receiver has calculated the accounts receivable, net of TTR's expenses is just under $1.9 million, subject to adjustments. TTR denies it owes anything.

40 The Receiver views the legal issues between itself and TTR as factually and legally complex. The Receiver assumes that if these claims go ahead, a trial of the issues will likely be necessary. This will add significant cost and delay to the estate's administration. Given the vagaries of litigation, the outcome of these issues is, of course, uncertain. These uncertainties led to discussions between TTR and the Receiver to settle their respective claims.

Settlement discussions between the TTR and the Receiver

41 TTR initially proposed to settle with the Receiver on the basis of its paying the Receiver $1.4 million, and releasing any of its claims against the estate or the Receiver. The creditors and other stakeholders supported this settlement. The transaction was conditional, however, on TTR's obtaining financing. It approached its bank, CIBC, for the financing. Instead of providing financing, CIBC called TTR's loans. Needless to say, the transaction did not close.

42 Time passed. The estate was no closer to being in a position to distribute funds to anyone. TTR began to assert its position it was owed somewhere in the range of $4 million and owed the Debtor nothing. TTR threatened to bring a motion to cross-examine the Receiver. Matters became more complicated and convoluted, rather than less. At this point, in the summer of 2011, TTR made another settlement proposal to the Receiver.

TTR makes a new settlement proposal to the Receiver

43 In early August of 2011, TTR's counsel asked to meet with the Receiver's counsel privately. They did so. On August 2, TTR's counsel made an oral offer to the Receiver to settle all the outstanding claims between TTR and the Receiver for the sum of $1 million. TTR has paid a deposit of $100,000 on account of the settlement. The balance of the settlement funds would be paid within 10 days of the settlement's being approved.

44 The following day, the Receiver disclosed the proposed settlement to New Solutions. The Receiver told New Solutions it thought the settlement should be approved.[5] That evening, Dart's principal contacted the Receiver with questions about the proposed settlement, to which the Receiver responded. Several days later, Dart's counsel indicated Dart intended to make a "superior offer" that would generate more than $1 million for the estate, would enable the

Receiver to continue its claims against TTR, but would require the Receiver's consent for Dart to speak to GM and Ford about its plan to purchase the Debtor's assets. The Receiver was not prepared to give that consent.

45 On August 5 the Receiver advised Holdco's counsel about the proposed settlement with TTR. Through its counsel, the Receiver told Holdco's counsel it did not see Dart's potential offer as having an "air of reality". It said this because Dart does not have the necessary licences to operate the business. The Receiver pointed out that since TTR was running the business under TTR's name, from TTR's premises, using TTR's employees and licences, and had integrated the business into TTR's operations, Dart would have to start fresh, and does not have the money to do so. [6]

46 The Receiver and TTR finalized the terms of the settlement on August 18, 2011 and signed Minutes of Settlement. The settlement is subject to court approval. Once the Minutes were signed, the Receiver advised all creditors with claims over $10,000 about the settlement, and also told them the date of the motion to approve the settlement.

47 The Receiver views this as a good deal for the estate, and asks the court to approve it. It takes the position that given the odd nature of the Debtor's business now, it would be a waste of time and money to pursue a standard marketing process. The Receiver sees the proposed settlement as the best it can likely get for the estate. The Receiver points out that the proposed settlement would extinguish the outstanding claims between the Receiver and TTR, but the other lawsuits among all the other parties would be unaffected. Thus, the settlement would put the estate in a position where the Receiver would be able to administer some funds, pay out the Provincial Refund, and provide some money for the Debtor's bankruptcy.

48 All the stakeholders support the proposed settlement with the exception of Dart and New Solutions. They oppose the settlement for a variety of reasons that I will review below.

Discussion:

The Receiver's reasons in favour of the settlement

49 In a nutshell, the Receiver sees the proposed deal as being the best deal it can get in the circumstances. To support its position, the Receiver points to the some of the following factors.

50 First, the outcome of TTRs claims against the estate and the Receiver, and the estate's claims against TTR is by no means certain. If there is no settlement, the next step will be TTR's motion to cross-examination the Trustee. Since the law on that issue is not settled, it is not unreasonable to expect that whatever the outcome of that motion, an appeal is likely. All this means additional time and considerable expense to the estate.

51 As I have mentioned above, the claims between the estate/Receiver and TTR are factually complex, and will likely require a trial of the issues. A trial (and perhaps an appeal following the trial) will add delay, expense and uncertainty. The Receiver cannot make any distribution until these issues are resolved.

52 Second, the estate has little money. Apart from the tax refund, over which Holdco claims security, there is only about $300,000, and that has already been earmarked for professional fees to date. What this means is that there is no money in the estate to fund any ongoing fight with TTR.

53 Third, since the Receiver's fees have a priority, the tax refund may be looked to in order to fund those fees, thus eroding Holdco's security. Certainly, if the settlement is not approved, the Receiver cannot pay out the tax refund to Holdco now.

54 Fourth, although the proposed settlement is for less than what TTR offered before, it was not able to fund the larger sum without financing. It could not obtain that financing. The current settlement proposal is unconditional. TTR has paid a deposit of $100,000, and will pay the balance within ten days.

55 Fifth, the proposed settlement would resolve all the issues between the Receiver/estate and TTR. Other stakeholders' claims against TTR would be unaffected by the settlement, and thus their positions would not be prejudiced.

56 Last, the proposed settlement provides certainty to the estate, with a guarantee of significant funds being generated now for the benefit of creditors. The Receiver anticipates most of the funds would be paid to the Debtor's Trustee and be applied to pay unsecured claims. If the settlement is not approved, there is no guarantee of any recovery. There is no clear indication of when any recovery might occur. The estate would not be administered for some time.

57 The Receiver also relies on the principles in *Soundair* to support its opinion that the settlement is in the interests of the estate. I will deal with the *Soundair* principles in the context of objections to the settlement, below.

58 As far as a marking process is concerned, all stakeholders agree that because of the peculiarities of this case, a normal marketing process would not be appropriate. There is no real business to sell, since the Debtor's business was transferred to TTR long before the Receivership. As a result, it is appropriate for the Receiver to have looked to stakeholders in order to try to generate value. Of them, it is really only TTR and Dart (who are both in similar businesses to the Debtor) who might be potential purchasers.

59 Dart was twice unable to close its proposed share purchase agreements with TTR. Had it done so, it would have effectively acquired the Debtor's business. The Receiver points out that Dart's claims as creditor appear to be against NFM in its bankruptcy. The Receiver suggests that Dart has minimal (if any) interest as a creditor of the Debtor. Instead, the Receiver characterizes Dart's interest as a would-be purchaser of the Debtor's business and as a defendant in litigation with Holdco and New Solutions. [7]

Objections to the settlement

60 Dart and New Solutions both oppose the settlement. While they concede a normal marketing process is not appropriate in a situation such as this, they object to the process the Receiver has engaged in. They view it as unfair and lacking transparency.

61 Dart does not believe the settlement is reasonable because it feels TTR is getting a valuable asset and paying less than fair value for it. I reject this argument for a number of reasons.

62 First, no one has any clear sense of what asset the Receiver actually has to sell or what its fair value might be. It is true that Campbell J made an order declaring the Ford and GM contracts are the Debtor's property. The Ford and GM contracts have no certain future value, however, since both Ford and GM can cancel them at their convenience.

63 Second, Dart's analysis of what TTR is paying for excludes any analysis of the value to the estate of settling litigation with TTR. TTR's potential claims against the estate and the Receiver for losses must be considered as part of the overall consideration for the deal. When that is put into the mix, along with the cost and uncertainty of continued litigation, I cannot conclude the settlement is unreasonable.

64 Third, Dart says TTR has failed to provide sufficient records. The Receiver is satisfied with the records produced. I give no effect to this complaint.

65 Fourth, Dart quantifies the value of the Debtor's accounts receivable at a figure significantly higher than what the Receiver does. It appears to be agreed that the Debtor is entitled to the accounts receivable TTR collected until July 2010, the date of the receivership. Dart puts the value of those receivables at over $8 million, and therefore suggests TTR's paying only $1 million to settle the Receiver's claim for the accounts receivable is patently unreasonable. Again, I disagree.

66 What Dart's analysis fails to take into account is TTR's expenses that offset those receivables collected. The Receiver has quantified the net figure at somewhere around $1.9 million to $2.5 million. Settlement of a claim of that magnitude

for $1 million is not on its face unreasonable. When I look at the other claims and costs that are also extinguished by the $1 million settlement figure, it becomes more and more reasonable. I must look at the $1 million settlement in the context of its also settling TTR's potential claim for $4 million.

67 Dart's real complaint is that it wanted to put in an offer to purchase the Debtor. It says its offer would have been better than TTR's. Dart has had a long time to make an offer. It has not. Dart was in extensive negotiations with TTR to purchase its entire business, including the Debtor's business. Twice Dart failed to close. This history gives the court little comfort that Dart would be able to consummate an offer. I say this in large part because Dart has failed to make a formal offer. I contrast this with TTR's executed Minutes of Settlement. Under the Minutes, TTR has provided a $100,000 deposit. The Minutes are conditional only on court approval, and will close within 10 days of that approval. Certainty and speed are important factors for the court to consider in deciding whether or not to approve the settlement. They militate strongly in favour of approving it.

68 Another difficulty with Dart's position is that even if Dart made a superior offer in terms of price, any Dart offer would not settle the TTR claim. That claim is very complex, and if not settled will likely lead to a trial of the issue, with attendant legal fees, risk and significant delay. There would be no immediate benefit to the estate, and risk and cost to the estate would continue.

69 The Receiver's efforts to resolve claims with TTR must be a priority for the receivership as a whole. All the other outstanding lawsuits are between and among the other stakeholders. They do not include the estate or the Receiver. Since this proposed settlement would resolve outstanding claims against the estate, as well as the estate's claim against TTR, it would put the Receiver in the position of being able to administer the estate, and have funds flowing to creditors. I agree that this is in the overall interests of all the creditors and the Receivership as a whole.

70 New Solutions also opposed the proposed settlement. New Solutions is perhaps in the worst position, in that it has significant money invested, and has lost its security. Its main complaint is that last fall, when the Receiver first negotiated with TTR, the negotiations were among all the stakeholders, in an effort to settle all the outstanding litigation among all of them. New Solutions suggests that since it was not directly involved in negotiating the current proposed settlement with TTR, somehow the settlement is tainted.

71 New Solutions feels excluded from the process. It is worried about how the $1 million figure was arrived at. This leads it to have concerns about a lack of transparency in the process.

72 In my view, the Receiver's Sixth Report explains both the process of the negotiation adequately. I am satisfied the Receiver kept all the stakeholders "in the loop" between the time TTR made its offer, and TTR and the Receiver executed the minutes of settlement about two and a half weeks later.

73 Last, New Solutions raises a concern that if TTR gets the vesting order it seeks if the settlement is approved, this will be perceived as a defence available to TTR in New Solutions' lawsuit against TTR. Both the Receiver and TTR assure me this is not so. In any case, any order I make can be clear on this issue.

74 This leaves some general issues to consider under both the *Soundair* and *Ravelston* criteria.

75 Both the Receiver and TTR have advanced reasonable bases for their respective claims against one another. I cannot determine which might prevail. I agree with the Receiver that a trial would likely be necessary to determine those issues. The strengths and weaknesses of their respective positions cannot really inform my decision. The cost and delay that would come with requiring a trial of those issues is, however, a significant factor.

76 What about the interests of the parties? All the stakeholders but Dart and New Solutions support the settlement. I see Dart's position as analogous to that of a "bitter bidder", although Dart has failed to actually make an offer. The other parties support the settlement. Overall, I see the settlement as a sure thing that will create immediate value for the estate. That is in the overall interests of all the parties. The Receiver has properly considered the interests of the parties.

77 As to the efficacy and integrity of the process, New Solutions in particular complains about being left out in the cold during the Receiver's negotiation with TTR. The Receiver points out earlier negotiations were conducted among all the stakeholders in an effort to resolve all the outstanding issues among everyone. That process failed.

78 This process, if one can call it that, involved TTR making a proposal, the Receiver advising all the stakeholders of the proposed settlement, and then assessing the offer and finalizing terms with TTR.

79 I see nothing in the process that lacks integrity or efficacy. TTR made an offer. The Receiver considered it. The Receiver discussed it with other creditors/stakeholders. Having done all this, the Receiver recommends it.

80 Was there anything unfair in the process? For the reasons I have set out above, I do not see any unfairness in the process of reaching a settlement. What I think Dart and New Solutions are really bothered by is what they see as TTR ending up with an unfair advantage. They suggest TTR is effectively stealing the Debtor's business for an unreasonably low price. I am not persuaded.

81 The Receiver has quantified its maximum potential recovery against TTR for profits as being in the range of about $1.9 million to $2.5 million. It suggests that in the context of TTR's potential claim of over $4 million against the estate in relation to losses and the cost and uncertainty of litigation the $1 million proposed settlement is reasonable, particularly since it will extinguish TTR's claims against the estate, and the Receiver will be in a position to disburse the funds and get on with its business of establishing a claims procedure and moving on with administering both the Receivership and the bankruptcy.

82 In coming to its conclusion to recommend the settlement, the Receiver quite properly considered both the adequacy of the price TTR proposes to pay, offset against the potential liability of the estate if TTR's claims were to succeed. The Receiver included in its analysis the delay, cost and uncertainty of ongoing litigation with TTR. Its overall analysis suggests that the TTR settlement is fair and reasonable in all the circumstances. I tend to agree.

83 When I look at the vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, there is sufficient evidence for me to conclude that the proposed settlement falls within the range of what is fair and commercially reasonable." [8]

84 Is the Receiver/Trustee considering its own interests? Dart and New Solutions suggest that it is, since TTR is advancing claims against the Receiver itself. To some degree the Receiver is considering its own interests, but on balance I find it is primarily looking to obtain maximum recovery for the estate in the most expeditious fashion.

Decision:

85 For these reasons, the settlement is approved. The settlement is without prejudice to the rights of all the other stakeholders in relation to their own outstanding litigation with TTR.

86 Once the settlement is concluded and the settlement funds are paid, the Trustee is then also authorized to pay out the Provincial Refund to Holdco, pursuant to its security.

87 Although the Trustee sought to have its activities as set out in its Third, Fourth, Fifth and Sixth Reports approved, the parties' position on that issue was dependent on whether the court approved the settlement. As a result, the parties will arrange a 9:30 appointment at the first available date in order to schedule a motion to approve the Trustee's activities.

Motion granted.

Footnotes

1 *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.)

2 *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340 (Ont. C.A.)

3 *Ravelston Corp., Re* (2005), 14 C.B.R. (5th) 207 (Ont. S.C.J. [Commercial List])

4 *Ibid*, at paragraph 3

5 Receiver's Sixth Report, dated September 8, 2011, page 2

6 Email from Catherine Francis to Lorne Silver August 5, 2011

7 Receiver's Sixth Report, page 7

8 *Ravelston*, at paragraph 3

End of Document

TAB 4

2005 CarswellOnt 4267
Ontario Superior Court of Justice [Commercial List]

Ravelston Corp., Re

2005 CarswellOnt 4267, 142 A.C.W.S. (3d) 18, 14 C.B.R. (5th) 207

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 RAVELSTON CORPORATION LIMITED AND RAVELSTON MANAGEMENT INC.

AND IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED, AND THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

Farley J.

Heard: August 25, 2005
Judgment: August 26, 2005
Docket: 05-CL-5863

Counsel: Alex MacFarlane for RSM Richter Inc. in its capacity as Receiver, Interim Receiver and Monitor of The Ravelston Corporation Limited, Ravelston Management Inc. Argus Corporation Limited, 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., 509647 Inc.
Matthew Gottlieb for Hollinger Inc.
Robert W. Staley, Derek J. Bell for Hollinger International Inc.
Lyndon Barnes, Nancy Roberts for CanWest Global Communications Corporation

Subject: Insolvency

MOTION by receiver for court approval of settlement.

Farley J.:

1 These are the short reasons promised yesterday where I approved the settlement between the Receiver of Ravelston and CanWest concerning the dispute between them as to the termination fee owing under the Management Services Agreement dated November 15, 2000 between Ravelston, CanWest and National Post. As I pointed out, the business efficacy of the Management Services Agreement may well be questioned; however what was to be decided by me was not that, but rather the issue of the termination arrangements.

2 The Receiver and CanWest — the day before the hearing of this dispute reached a settlement, subject to court approval, whereby the parties would exchange mutual releases and CanWest would pay the Receiver $12.75 million. This amounted to 50% of the amount the Receiver was claiming pursuant to the notice of termination which Ravelston gave CanWest the day before Ravelston filed for protection pursuant to the CCAA (with the Receiver being the monitor under the CCAA proceedings) and for the appointment of the Receiver as the court appointed receiver of Ravelston. The two Hollinger companies, Inc. and International, were not happy with the amount of the settlement, although it appears that both were content with a settlement at a higher amount being paid the Receiver. Inc. did not support the approval of the settlement but did not oppose it. International actively opposed the settlement; its position was that the Receiver ought to have obtained a settlement in the 75% range. Both Inc. and International assert that they ought to have been more involved with the settlement process as they assert a special relationship owing to claimed security

interests in the claim and its proceeds. One could well posit a situation where the process of settlement could have been improved by more involvement of Inc. and International. However, what we are concerned with is not perfection, but rather has there been material and relevant prejudice so as to taint the process to the degree that the court ought not to entertain the settlement. However, in this situation, Mr. Gottlieb for Inc. volunteered that Inc. had been alerted to the settlement prior to its being entered into, albeit just immediately prior (where in my view it would have been better to have alerted Inc. that settlement discussions were to be actively engaged in and then given progress reports at meaningful times along the way). International was kept more abreast of the situation; the Receiver and its Canadian counsel dialogued with International's counsel, Mr. Staley, including a meeting on June 7, 2005 which, *inter alia*, dealt with International's view concerning the dispute with CanWest. The Receiver of course had the benefit of the active participation of International leading up to the hearing scheduled for August 17th including a detailed factum by International opposing the CanWest position that it owed nothing. On August 15th, Mr. Staley was advised that the Receiver would be meeting with CanWest's counsel the next day to see if a settlement could be reached. While Mr. Staley was otherwise engaged on the 16th, he did indicate that a settlement would be preferable to having the matter litigated. International did not ask that another lawyer be allowed to participate in or observe the settlement discussions, nor did it indicate that a floor amount should be achieved in order that International would be supportive of a settlement.

3 The Receiver submitted that a motion to approve a settlement entered into by a court-appointed receiver is analogous to a motion to approve a sale of assets by a court-appointed receiver so that the 4 part set of principles/considerations of *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16 would come into play. See *Bakemates International Inc., Re*, [2003] O.J. No. 3191 (Ont. S.C.J.), affirmed 2004 CarswellOnt 2339 (Ont. C.A.). However, it seems to me that there is a subtle distinction to make between reliance on a receiver's commercial expertise concerning a recommended sale and the receiver's expertise in regards to a settlement of a legal dispute (while of course taking into account that such a receiver will have had appropriate legal advice from its own counsel). That distinction is based on the fact that the court is the "expert" in respect of the law and will generally be in a better position to assess the law involved in a situation than it would be as to the commercial aspects of a sale of property. In this regard, one may wish to consider the analogous situation of expert opinions as discussed in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.). Thus it seems to me that the court, with the assistance of counsel (both counsel supporting the approval of a settlement and counsel opposing), should conduct an analysis of the strengths and weaknesses of the case, including the general vagaries of litigation plus the benefits of certainty and the avoidance of delay concerning possible appeals, sufficient for the court to conclude that the proposed settlement fell within the range of what was fair and commercially reasonable. The case here involved an all or nothing result if the case went on to a court decision.

4 I have had the benefit of reviewing in detail the material for the August 17th hearing immediately prior to being advised that the Receiver and CanWest had reached a settlement, subject to court approval. In my view there was much to be said for the merits of each side's position. There was much to be said about the pros and cons — and it was carefully detailed in that material and so was said. I have now had as well the benefit of the material filed and argued concerning the approval of the settlement as concerns the merits of the dispute which was to have been heard on August 17th. If the case had not settled, then I would have had to make a decision, a decision on an all or nothing basis. I would have made that decision — but I cannot predict now what it would have been, nor could I predict how the Court of Appeal would have decided, given the fact that inevitably my decision would have been appealed. It would have been an interesting decision to write. There certainly was no slam-dunk either way, nor nothing approaching that certainty of result. In my view, the settlement on a 50% basis falls within the general range of acceptability on a fair and commercially reasonable basis. I therefore have approved the settlement.

5 Allow me to observe that in the fact circumstances of this case and the law as eventually argued in the respective factums, I agree that it is highly likely that attempts to negotiate a settlement before almost reaching the court house steps would have been premature. It was indeed necessary and appropriate that each side reflect on its own strengths and weaknesses once it had the benefit of refined argument on the strengths of the other side.

6 Mr. Gottlieb makes a fair request in my view where he asks on behalf of Inc. for advance notice of any intention to deal with the proceeds of this settlement. I leave it to the Receiver in consultation with International and Inc. to deal with the issue of proceeds disposition and notice generally.

7 Order approving settlement to issue as per my fiat.

Order accordingly.

TAB 5

1992 CarswellOnt 2767
Ontario Court of Appeal

Confederation Life Insurance Co. v. Double Y Holdings Inc.

1992 CarswellOnt 2767, 33 A.C.W.S. (3d) 1196

Re: Confederation Life Insurance Company, (Plaintiff/Respondent) v. Double Y. Holdings Inc., The York-Trillium Development Group Ltd., Howard Hurst, Martti Paloheimo and Canada Trustco Mortgage Company, (Defendants/ Appellants Excepting Canada Trustco Mortgage Company — Respondent)

Osborne J.A., Tarnopolsky J.A., Weiler J.A.

Heard: May 27, 1992
Judgment: June 11, 1992
Docket: CA C11847

Proceedings: Affirmed (April 20, 1992), Doc. 91-CQ-72, 254/91 (Ont. Gen. Div.)

Counsel: *Kenneth Prehogan* and *David Wingfield* , for Appellant Double Y. Holdings Inc.
P.S.A. Lamek, Q.C. and *A.T. McKinnon* , for Respondent Receiver and Manager.
J. Berkow and *S. Goldman* , for Respondent Canada Trustco.
B. Grossman , for Respondent Confederation Life.

Subject: Corporate and Commercial; Civil Practice and Procedure

Per Curiam:

1 The appellants, who contend that the motions court judge erred in approving the settlement of two actions by a court appointed receiver, raise two issues on this appeal. These issues require consideration of:

> 1. Whether the receiver provided the court with all material and evidence reasonably necessary to enable the court to exercise its discretion in approving, or not approving, the settlement of actions, referred to in the material as Cantel 1 and Cantel 2.
>
> 2. Whether the settlement of the two Cantel actions was provident, that is to say, whether the settlement reasonably reflected the value of the litigation in issue.

2 It is apparent that the two issues above referred to are related. In order to determine whether a settlement is reasonable, the evidence going to that issue must be complete, and sufficient to permit the motions court judge to exercise, in a balance and informed way, a discretion open to him, in accepting or rejecting the settlement proposed by the receiver.

3 In our view, the record before the motions court judge was sufficient. We do not propose to review it in detail. Suffice it to say, it included a comprehensive legal opinion, which contained an analysis of the legal issues involved in the Cantel litigation. In that opinion, serious questions were raised with respect to the liability issue in Cantel 2. It may be noted that the record did not contain a competing opinion. Thus, the legal opinion obtained by the receiver, for all practical purposes, stands unchallenged.

4 There is no doubt that the evidence filed in support of the settlement did not include a property valuation (as distinct from a business valuation) of the York Mills Centre. In the circumstances, we think that the motions court judge was

correct in concluding that this omission, if indeed it was an omission, was not fatal. We do not think that it is necessary for us to deal further with that issue.

5 In concluding that the settlement of the two Cantel actions should be approved, the motions court judge, who was familiar with all aspects of the receivership, considered all relevant factors. He weighed and balanced the risks and benefits of proceeding with the two actions. In that assessment, he took into account the fact that the proposed settlement would achieve finality, certainty, and avoid a lengthy delay and significant expense. It secured a tenant-in-occupation, a fact important to the future marketing of the York Mills Centre.

6 The Cantel 2 action is an action in which consequential damages arising out of Cantel's alleged breach of an agreement to lease are claimed. It is clear that the motions court judge was mindful of the evidence which supported the conclusion that, in the legal sense, Cantel's alleged breach of contract did not cause the collapse of the appellant's business enterprise.

7 In our opinion, the evidence on the causation issue compels the conclusion that the appellant's loss of equity had already occurred when the agreement to lease was allegedly breached. We think the motions court judge was correct in viewing this as a significant fact in his assessment of the chances of success, were Cantel 2 to proceed further.

8 The receiver is not an agent of the parties, but rather an officer of the court. His opinion concerning the propriety of settling the Cantel litigation should be given considerable weight, although, we observe that the receiver's opinion is not determinative.

9 It is not for this court to re-hear the motion for approval of the settlement recommended by the receiver. For the appellant to succeed, we must be satisfied that the motions court judge erred in exercising his discretion as he did, in approving the settlements. We are not persuaded that the motions court judge erred. Thus, the appeal must be dismissed with costs.

End of Document

TAB 6

2016 ONSC 7218
Ontario Superior Court of Justice

Maple Bank GmbH, Re

2016 CarswellOnt 18250, 2016 ONSC 7218, 273 A.C.W.S. (3d) 367

IN THE MATTER OF MAPLE BANK GmbH

IN THE MATTER OF THE WINDING-UP AND RESTRUCTURING ACT, R.S.C. 1985, C.W-11, AS AMENDED

IN THE MATTER OF THE BANK ACT, S.C. 1991, C.46, AS AMENDED

Geoffrey B. Morawetz R.S.J.

Heard: November 18, 2016
Judgment: November 18, 2016
Docket: CV-16-11290-00CL

Counsel: Alex MacFarlane, Thomas Gertner, for KPMG Inc., in its capacity as the Liquidator of the Business in Canada of Maple bank GmbH and its Assets as defined under s. 618 of the Bank Act
Peter Hamilton, Maria Konyukhova, for German Insolvency Administrator
Samantha Gordon, for Bank of Montreal

Subject: Corporate and Commercial

MOTION by liquidator for approval and vesting order related to winding-up of Canadian branch of German bank.

***Geoffrey B. Morawetz R.S.J.*:**

1 KMPG Inc. (the "Liquidator") brought this motion, on consent of the parties present, for an order (the "Approval and Vesting Order") for:

(a) Approving a settlement (the "Settlement") contemplated by a letter agreement dated October 31, 2016 (the "Settlement Agreement") between the Liquidator and the Bank of Montreal ("BMO"), as appended to the Confidential Supplement to the Eighth Report of the Liquidator dated November 15, 2016 (the "Confidential Supplement");

(b) Approving the sale transaction (the "Sale Transaction" and collectively with the Settlement the "Transactions") contemplated by a letter agreement dated October 31, 2016 (the "Sale Agreement") between the Liquidator and BMO, as appended to the Confidential Supplement and vesting in BMO, Maple Bank's right, title and interest in and to the assets described in the Sale Agreement; and

(c) Sealing the Confidential Supplement until all remaining amounts owing by Maple Bank to any counterparty in connection with the early termination of any of Maple Bank's derivative transactions in Canada have been settled and paid, unless otherwise ordered by the Court.

2 The facts with respect to this motion are fully set out in the Eighth Report of the Liquidator dated November 15, 2016 (the "Eighth Report") and the Confidential Supplement. The facts are also briefly outlined in the Factum submitted by counsel to the Liquidator. Accordingly, the facts are not repeated in this Endorsement.

3 With respect to to the Settlement Agreement, the major terms are as follows:

(a) BMO will pay to the Liquidator the Final Payment (as defined in the Settlement Agreement) within 15 days of the date on which the conditions precedent to the settlement are satisfied or waived by the parties;

(b) BMO will retain the BMO Held Securities;

(c) Maple Bank will retain the Toronto Branch Held Securities;

(d) The Liquidator agrees not to disclose any Confidential Information (as defined in the agreement) subject to certain exclusions including:

i. If the Liquidator believes that such disclosure is necessary in order to discharge its duties, or as otherwise directed by the Court; or

ii. If required to be disclosed by applicable law to any governmental or regulatory authority;

(e) Mutual releases will be provided by BMO and Maple Bank in connection with the Repo Transactions, the early termination of the ISDA Transactions and the Master Agreement; and

(f) There is an outside date by which the conditions precedent are to be satisfied or waived by the parties failing which the Settlement Agreement automatically terminates.

4 With respect to the Sale Agreement, the major terms are as follows:

(a) The effective date of the purchase is October 7, 2016;

(b) The purchase price includes reimbursement of principal and interest payments received by BMO under the Maple MBS since February 16, 2016;

(c) The purchase price is payable within fifteen days from the date upon which all of the conditions precedent have been satisfied or waived by the parties;

(d) The sale is on an "as is, where is" basis, with no representations and warranties other than the Liquidator confirming that all of the Maple MBS constituted withdrawn NHA MBS pursuant to the Maple Assets APS;

(e) The conditions precedent to closing include the Court granting an order approving the transaction and vesting in BMO all of the right, title and interest of Maple Bank, if any, in the Maple MBS free and clear of all encumbrances; and

(f) There is an outside date by which the conditions precedent must have been satisfied or waived by the parties failing which the transaction is automatically terminated.

5 The Confidential Supplement consists of unredacted copies of the Settlement Agreement and the Sale Agreement. Counsel to the Liquidator requests a sealing order, in order to prevent the disclosure of commercially sensitive information that could be prejudicial to the interests of the Toronto Branch. The following information has been redacted in the copies of the Settlement Agreement and Sale Agreement included in the Liquidator's Eighth Report:

(a) In respect of the Settlement Agreement:

i. the final payment amount;

ii. the outside date; and

iii. Schedules A, A-1 and B, which provide a detailed build-up of the final payment amount;

(b) In respect of the Sale Agreement:

i. the purchase price;

ii. the outside date; and

iii. schedule A, which provides details of the purchase price.

6 Counsel submits that on account of the fact that the Liquidator is engaged in ongoing negotiations in respect of the valuation of certain other terminated ISDA transactions with another financial institution (the "Other FI"), it is necessary to have the Confidential Supplement sealed until the earlier of:

(a) All remaining amounts owing by Maple Bank to any counterparty in connection with the early termination of any of Maple Bank's derivative transactions in Canada have been settled and paid; and

(b) Further order of the court on notice to the Liquidator.

7 The issues to be determined are:

(a) Should the court approve the Settlement Agreement and vest the Maple MBS in BMO?

(b) Should the court approve the Sale Transaction?

(c) Should the court seal the Confidential Supplement to the Eighth Report?

Issue 1 - Should the court approve the Settlement Agreement?

8 In assessing a settlement in the context of an insolvency proceeding, the following factors are considered:

(a) Whether the settlement is fair and reasonable;

(b) Whether it provides substantial benefits to other stakeholders; and

(c) Whether it is consistent with the purpose and spirit of the relevant insolvency legislation.

(See: *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 (Ont. S.C.J. [Commercial List]).

9 Further, where the matter that is the subject of a settlement is complex, the court can also take into account the business judgment of a court officer involved in the negotiation of a settlement (See: *Nortel Networks Corp., Re*, 2010 ONSC 1096 (Ont. S.C.J. [Commercial List])).

10 Having reviewed the Record and hearing submissions, I am satisfied that the Settlement Agreement is fair and reasonable in the circumstances. I accept that it has been designed to maximize value and avoid potentially costly and uncertain litigation. I am also satisfied that the Settlement Agreement provides substantial benefit to the Toronto Branch Estate. As noted, the GIA had consented to the Settlement Agreement. The GIA is essentially the most affected stakeholder with an economic interest in the Settlement Agreement. The Settlement Agreement is approved.

Issue 2 - Should the court approve the Sale Transaction and vest the Maple MBS in BMO?

11 In considering whether it is appropriate to approve the sale of assets by a court-appointed officer, including in proceedings conducted under the WURA, the following factors outlined by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) are considered:

(a) Whether sufficient effort has been made to obtain the best price and the applicant has not acted improvidently;

(b) The interests of all parties;

(c) The efficacy and integrity of the process by which offers were obtained; and

(d) Whether there has been unfairness in the process.

(collectively, the "Soundair Principles").

12 I am satisfied that it is appropriate to approve the Sale Transaction. In arriving at this conclusion, I have taken into account that the assets were marketed as part of a marketing process approved by the court to arrange for potential purchasers and that the assets have been on sale for over six months. I have also noted that the Liquidator is of the view, based on the realizations it generated on the sale of other assets approved by the court, during these WURA proceedings that the Sale Agreement is commercially reasonable in the circumstances and is in the best interests of the Toronto Branch Estate. Again, the GIA has consented to the Sale Transaction and the GIA is effectively the only stakeholder with an economic interest in the Sale Transaction.

Issue 3 - Should the court seal the Confidential Supplement to the Eighth Report?

13 The test for determining whether a sealing order should be granted is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42 (S.C.C.). The test is as follows:

A confidentiality order under Rule 151 should only be granted when:

(a) Such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) The salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which, in this context, includes the public interest in open and accessible court proceedings.

14 I am satisfied that the documents in question are commercially sensitive and that the disclosure of any or all of this commercially sensitive information would be harmful to the Toronto Branch, as it would prejudice the ability of the Liquidator to resolve a similar outstanding ISDA dispute with the Other FI emanating from the form of the 1992 Master Agreement. It is noted that the Liquidator submits that sealing the Confidential Supplement will not have any deleterious effects on any parties with an interest in these proceedings. I accept this submission.

15 Having considered the foregoing, I am satisfied that it is appropriate to grant an order sealing the Confidential Supplement.

16 In the result, the motion is granted and the requested Approval and Vesting Order has been signed in the form submitted.

Motion granted.

End of Document

TAB 7

2013 ONSC 4427
Ontario Superior Court of Justice [Commercial List]

Weig v. Weig

2013 CarswellOnt 8861, 2013 ONSC 4427, 229 A.C.W.S. (3d) 739

Matvei Weig, Applicant and Roman Weig, Leib Broner, Lev Spitzin, Benjamin Finkelstein, 2014210 Ontario Ltd. c.o.b. Deluxe International Group, 2014052 Ontario Ltd. c.o.b. Deluxe Windows of Canada, 2014213 Ontario Ltd. c.o.b. Oakwood Fine Products, 1275330 Ontario Ltd., 973590 Ontario Ltd., Cleidons Deluxe Doors Inc., Cleidons Deluxe Windows Inc., Deluxe Developments International Inc., Deluxe Window Industries Inc., Deluxe Windows International Inc., Riz Management Inc., Royal Deluxe Profiles Limited, 1321867 Ontario Ltd., Northview Windows & Doors Inc., Evrica Enterprises Inc., Pride Windows and Doors Inc., 976017 Ontario Ltd., Floating Residence Inc., Oakwood Architectural Lumber Inc., Shrimp Deluxe Ltd., Vildrom Construction Ltd., Vimach Delux Arches Inc., Riga-22 Weg, LLC, MTI Ltd., California Deluxe Windows Industries, Inc., Wrought Iron Art Ltd., Royal Deluxe Windows International, Inc. (U.S.), Stone Mason and Architectural Carvers Creators Ltd., Roman W. Marketing and 1273268 Ontario Ltd., Respondents

Sofia Weig and Faina Prupes, Applicants and Matvei Weig, Roman Weig, Leib Broner, Lev Spitzin, Benjamin Finkelstein, 2014210 Ontario Ltd. c.o.b. Deluxe International Group, 2014052 Ontario Ltd. c.o.b. Deluxe Windows of Canada, 2014213 Ontario Ltd. c.o.b. Oakwood Fine Products, 1275330 Ontario Ltd., 973590 Ontario Ltd., Cleidons Deluxe Doors Inc., Cleidons Deluxe Windows Inc., Deluxe Developments International Inc., Deluxe Window Industries Inc., Deluxe Windows International Inc., Riz Management Inc., Royal Deluxe Profiles Limited, 1321867 Ontario Ltd., Northview Windows & Doors Inc., Evrica Enterprises Inc., Pride Windows and Doors Inc., 976017 Ontario Ltd., Floating Residence Inc., Oakwood Architectural Lumber Inc., Shrimp Deluxe Ltd., Vildrom Construction Ltd., Vimach Delux Arches Inc., Riga-22 Weg, LLC, MTI Ltd., California Deluxe Windows Industries, Inc., Wrought Iron Art Ltd., Royal Deluxe Windows International, Inc. (U.S.), Stone Mason and Architectural Carvers Creators Ltd., Roman W. Marketing and 1273268 Ontario Ltd., Respondents

D.M. Brown J.

Heard: June 26, 2013
Judgment: June 27, 2013
Docket: 05-CL-5949, CV-11-9340-00CL

Counsel: M. Greenglass, for Receiver, Schwartz Levitsky Feldman Inc.
S. Rosen, for Matvei Weig
B. Salsberg, for Roman Weig
D. Moore, for Avital Weig and Frances Weig
S. Zeitz, I. Klaiman, for Sofia Weig

Subject: Corporate and Commercial; Insolvency

MOTION by receiver for approval of interim settlement with judgment debtor and related parties.

D.M. Brown J.:

I. Receiver's motion for approval of an interim settlement with the judgment debtor and related parties

1 Roman Weig owes his brother, Matvei Weig, approximately $1.587 million under a judgment of this Court. Roman has not paid the Judgment. By Reasons dated December 21, 2012 (2012 ONSC 7262 (Ont. S.C.J. [Commercial List])) I appointed, on the application of Matvei, Schwartz Levitsky Feldman Inc. as receiver, without security, of all of the assets, undertaking and properties of Roman Weig to act as a receiver in aid of execution. By Reasons made April 18, 2013 [2013 CarswellOnt 4771 (Ont. S.C.J. [Commercial List])], I gave directions to the Receiver regarding (i) the sale of Roman Weig's interest in the matrimonial home located at 18 Franklin Avenue, Thornhill, Ontario, (ii) the ownership of the Cottage located at 990 Arnold Street, Innisfil, Ontario, and (iii) the delivery of information requested by the Receiver.

2 By a Third Report dated May 31, 2013 and a Fourth Report dated June 24, 2013, the Receiver reported on its activities regarding those three matters, including a proposed interim settlement in respect of them it had entered into with Roman Weig and Sofia Weig, subject to court approval.

3 The Receiver has filed a Fifth Report dated June 25, 2013 seeking approval of the interim settlement and explaining its reasons for recommending the settlement for court approval.

4 All parties agreed with the parts of the proposed settlement concerning the Franklin Avenue home and the access to corporate information, as described in paragraphs 13 and 14 of the Fourth Report. I have reviewed those aspects of the interim settlement and find them reasonable in the circumstances. I approve them. I would observe, however, that the Franklin Avenue house must be sold with all due dispatch. If disputes between the Receiver and Sofia Weig continue to delay the sales process, then I will place complete control of the sales process into the hands of the Receiver.

5 As to the Cottage, the Receiver has recommended the approval of a settlement regarding the disputed ownership of the Cottage. The details are described in paragraph 12 of its Fourth Report. In short, the settlement of the Cottage issue would see the Receiver and the family of Roman Weig split the equity of that property 50:50 (subject to Roman's family bearing responsibility for tax arrears) either through an independent valuation/buy-out approach which would give the family until the end of August to purchase a 50% interest or, failing a buy-out, splitting the proceeds of the sale of the Cottage with the Receiver controlling the sale process.

6 Roman Weig, his wife, Sofia Weig, who uses the Cottage, and their two daughters, Avital and Frances who assert beneficial ownership of the Cottage, supported the proposed settlement. Matvei Weig strongly opposed the settlement, submitting that approval of it would constitute an error in principle.

II. Governing legal principles

7 Where a receiver has fully analyzed a situation before arriving at its decision or recommendation, a court should not proceed against those recommendations except in special circumstances and where the necessity and propriety of doing so are plain. [1] While courts will scrutinize the procedures followed by receivers to ensure that they are fair, courts rely upon the expertise of their appointed receivers and "are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations". [2]

8 The rationale for that approach was explained by the Court of Appeal in *Ravelston Corp., Re*:

> Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable, interests. Those decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others. Usually, there will be many factors to be identified and weighed by the receiver. Viable arguments will be available in support of different options. The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an even-handed manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of

> reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision. [3]

9 Paragraph 2 of the December 21, 2012 Order appointing the Receiver empowered it to "act at once in respect of the Property", which was defined as "all of the assets, undertakings and properties" of Roman Weig, including the power to settle any indebtedness owing to the debtor and to settle or compromise any proceedings with respect to the Debtor. As put in *Bennett on Receiverships, Third Edition*:

> Associated with the power to defend or institute proceedings is the corollary power to settle or compromise claims and actions instituted by or against the debtor prior to the receivership. The receiver, however, must be commercially reasonable in doing so, since the settlement of a claim or action may adversely affect the ultimate equity of the debtor.
>
> . . .
>
> [T[he receiver is not *prima facie* obliged to pursue all causes of action to judicial finality. The receiver should attempt to settle or seek a compromise rather than pursue causes of action at the expense of the creditors... [4]

10 Bennett also writes that a receiver should "prepare materials showing the strengths and weaknesses of the case, the different issues in the litigation, benefits of certainty, avoidance of delay, the likelihood of appeals, all of which should be sufficient for the court to conclude that the proposed settlement is fair and commercially reasonable." [5] Finally, in the context of complex litigation, the Court of Appeal has observed that the promotion of settlement is fundamental to the proper administration of justice. [6]

III. Evidence

11 Roman Weig is the registered owner of the Cottage on Lake Simcoe. At the trial last October, Roman produced two August 28, 2003 declarations of trust in favour of his daughters as the beneficial owners of the Cottage. At the trial I heard evidence from Ellena Steiner, the lawyer who had prepared those trust declarations, as well as from one of the daughters, Avital Weig. I also heard evidence about some post-trust declaration dealings by Roman with the Cottage property which arguably were not for the benefit of the two daughters. I summarized the evidence adduced on the Cottage ownership issue at paragraphs 61 through to 77 of my December Reasons. Then, later in my Reasons, I wrote:

> [119] Fourth, Roman has ignored the limitations the law places on his ability, as purported trustee, to deal with the Cottage and has treated the Cottage as his own property to his own advantage, while at the same time taking the position that the property is not available for execution by his creditors. The evidence about the August, 2003 transfer of the Cottage into Roman's name in trust and the execution of the declarations of trust was consistent with an intention, at that point of time, to gift the Cottage to his two daughters, Avital and Frances. Those transactions occurred well before the melt-down in the relations between the two brothers and the start of the 2005 litigation.
>
> [120] However, since executing the declarations of trust in August, 2003, Roman has treated the Cottage as if it was his own property. No evidence was adduced that the adult beneficiary, Avital, consented to the December 1, 2003 mortgage on the Cottage to the Bank of Nova Scotia. Although Avital testified that she agreed to the 2004 CIBC mortgage going on, at the time Frances was a minor. The declarations of trust made Roman a bare trustee. He possessed no authority to encumber a minor's interest in the Cottage without court approval; none was sought or obtained. As to the 2007 First National mortgage, Avital provided no evidence of her consent and Frances remained a minor at the time.
>
> [121] Matvei submitted that the trust created by the 2003 declarations of trust in fact was a sham. To establish that assertion Matvei must demonstrate that all of the parties to the sham had a common intention that the acts done or documents executed did not create the legal rights and obligations which they gave the appearance of creating. When viewed as a whole, the evidence concerning Roman's use of the Cottage to secure financing, including the First

National financing for his business at Deluxe, and the payment by Roman of all expenses related to the Cottage with the daughter-beneficiaries contributing nothing, raises pointed questions about the validity of the 2003 trusts. On his examination Roman refused to produce the documentation regarding the underwriting of the First National collateral mortgage on the Cottage. In my view, before any formal declaration of ownership can be made about the Cottage, the receiver should investigate further the circumstances surrounding the encumbrances of the property by Roman to ascertain whether Roman represented he was dealing with the property as trustee or as his own.

12 The Receiver did make further investigations. In its First Report the Receiver identified the following information it had discovered about the Cottage:

(i) No land transfer tax was paid on the transfer of the Property from Yehuda Mundrian, as trustee for the benefit of Roman, to Roman, as trustee, in 2003, suggesting that the transfer was from the trustee of a beneficial owner to a different trustee for the same beneficial owner;

(ii) A 2007 declaration of trust delivered to First National Financial GP Corporation showed that Roman was holding the Cottage in trust for himself;

(iii) A 2007 net worth statement given by Roman to First National Financial GP Corporation disclosed that he owned 100% of the Cottage;

(iv) All payments of utilities and carrying costs of the Cottage were done through either Roman or Sofia, or the corporations controlled by them;

(v) In 2008 Roman represented to the Bank of Nova Scotia that he owned the Cottage;

(vi) Insurance for the Cottage and the 18 Franklin Avenue home were contained in a single policy of insurance where the named insureds were Roman and Sofia Weig.

As the Receiver summarized the state of its investigations in paragraph 18 of its First Report:

> Other than the existence in year 2003 of the trust declarations in favour of the children, there is no evidence to justify that the cottage was actually held in trust for the children or that any trust created was actually carried out. All the conduct of Roman Weig is consistent with him treating that the cottage was his property.

13 In its Third Report the Receiver recommended that the Court declare that the Cottage and associated chattels, such as the boats, were the assets of Roman and direct the Receiver to sell those assets for the benefit of Roman's creditors. That report pre-dated the settlement discussions.

14 In its most recent Fifth Report, the Receiver explained why it was recommending the approval of the portion of the interim settlement dealing with the Cottage. The Report contained a June 24, 2013 letter from Receiver's counsel to counsel for Matvei which stated:

> The settlement with respect to the cottage property is, in the opinion of the Receiver, reasonable. There are two competing Trust Declarations. One Trust Declaration says that the property is owned by the children and the other Trust Declaration says that it is owned by Roman Weig. The difficulty that I see in this matter is that the Trust Declaration in favour of the children was, as a matter of timing, executed first and it was done in circumstances when Roman Weig was solvent and would be solvent even after disposition to his children of the cottage property. His subsequent mortgaging of the cottage property and subsequent treating of same as his own property would technically be actionable by his children, but does not destroy the first Trust Declaration. Any ruling by Mr. Justice Brown would be subject to an Appeal and in order to provide finality with respect to the cottage property, this settlement is reasonable.

In its Fifth Report the Receiver added:

The Receiver considered not only the probability of success but also issues of cost and finality. The Receiver has previously reported to the Court as to the charges being incurred in this Receivership. At the current time there is no funding in the Estate. This settlement will provide some funding to the Receiver and it will ensure that ultimately a distribution to creditors will occur. It is not the intention of the Receiver to have all assets eaten up by the continuing of a dispute between brothers and where the dispute is to be litigated without regard to economic reality.

15 On the issue of the Receiver's fees, on April 18, 2013, I approved Receiver's fees and disbursements of $82,535.50, and by the end of May the Receiver had incurred a further $89,225.38 in fees and disbursements.

16 No current valuation of the Cottage exists. Estimates of value proffered by counsel for the Receiver and Matvei Weig placed the value in the range of $800,000 to $1.2 million. CIBC holds a first mortgage on the Cottage in the amount of $400,000 and has indicated that it wishes to commence mortgage enforcement proceedings. For purposes of this approval motion, the equity in the Cottage likely ranges between $400,000 and $800,000. Under the proposed settlement, the Receiver's likely recovery would be between $200,000 and $400,000. If a court determines that Roman owns the property, then the recovery might be double that.

17 Counsel for Sofia Weig has delivered to the Receiver a trust cheque in the amount of $100,000 representing a deposit on the acquisition of a 50% interest in the Cottage.

IV. Analysis

18 As the above review of the evidence discloses, there can be no doubt that the Receiver fully analyzed the pros and cons of the settlement before making its recommendation. The sole issue, as I see it, is whether the Receiver's recommendation falls within the broad bounds of commercial reasonableness.

19 Matvei's primary objection to the settlement was that it unreasonably ignored the strength of the case that Roman beneficially owned the Cottage. In support Matvei pointed to the Receiver's own request in its Third Report that the Court declare Roman as the owner of the Cottage. No litigation case is a slam dunk, and I think the Receiver fairly summarized the strengths and weaknesses of the claim regarding Roman's ownership in its letter of June 24, 2013, reproduced in paragraph 14 above. To that must be added the observation which I made in paragraph 121 of my December Reasons that some case law would suggest that in order to demonstrate that the 2003 trust declarations in favour of the daughters were a sham, one would have to demonstrate that "all of the parties to the sham had a common intention that the acts done or documents executed did not create the legal rights and obligations which they gave the appearance of creating". Whether that case law is right or wrong, I would recall that no evidence was adduced before me that the daughters knowingly participated in a sham transaction.

20 To that evidence regarding the chances of success of the claim that Roman owned the Cottage must be added the other considerations which the Receiver reported as taking into account. I think the Receiver's view about the probability of an appeal from any finding that Roman owned the Cottage is most reasonable. Given the history of this litigation between the two brothers, which I recounted in my December Reasons, I think such an appeal would be a certainty. That would delay any attempt to realize on the equity of the Cottage.

21 Picking up on that last point, in this receivership proceeding the consequences of delay are significant. As the Receiver reported, the estate has no money. Indeed, Matvei sought out the appointment of a receiver in-aid-of-execution because he could no longer afford to pursue the standard judgment enforcement mechanisms. The Receiver has incurred approximately $200,000 in fees without receiving any payment. As reported by the Receiver, work remains to be done to sell the Franklin Avenue house and to sort out ownership and value issues in respect of the various corporations.

22 Matvei submitted that since the sale of the Franklin Avenue home was a certainty, the Receiver should wait until then for payment of its fees. I think such an approach disregards "economic reality", as put by the Receiver. Although on its appointment the Receiver was granted a charge on Roman's property in priority to most secured interests, the

Receiver's charge ranks subordinate to any security interest Sofia is found to enjoy in Roman's property. That issue has not been determined. The Receiver has done significant work on this file, as attested to by its detailed reports. It is unreasonable to expect a court-appointed officer to work without payment for an extended period of time in the absence of a meaningful indemnity agreement, with uncertainties surrounding the timing of the realization of any assets, and with the outstanding issue of whether Sofia enjoys some priority as a secured creditor.

23 Finally, the mortgagee of the Cottage has indicated it intends to commence mortgage enforcement proceedings. If the Cottage needs to be sold, control of the process by the Receiver likely would enhance the overall amount recovered.

24 Accordingly, when one considers as a whole the prospects of success on the claim, the certainty of an appeal in the event Roman were to be found the sole owner of the Cottage, the economic realities of this particular receivership and the prospect of mortgage enforcement proceedings, I conclude that the Receiver's recommendation to approve the portion of the settlement concerning the Cottage falls within the broad bounds of commercial reasonableness.

25 As an alternative argument Matvei submitted that approval of the Cottage settlement should include a condition that in the event Roman's family purchases a 50% interest, they must disclose to the Receiver the source of their funds. Given the Receiver's access to the companies' accounting systems under the interim settlement, I see no need for such a condition.

26 I therefore approve the settlement proposed by the Receiver in respect of the Cottage as set out in paragraph 12 of its Fourth Report.

27 Consequently, I vacate the remaining trial date of tomorrow, June 28, 2013. I also direct the Receiver to report back to me during the second week of September on all three aspects of the interim settlement. The Receiver should book hearing time for that week.

Motion granted.

Footnotes

1 *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.), p. 109g; *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.), para. 40.

2 *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), para. 23.

3 *Ravelston, supra.*

4 Frank Bennett, *Bennett on Receiverships, Third Edition* (Toronto: Carswell, 2011), p. 263.

5 *Ibid.*, pp. 264-5.

6 *M. (J.) v. Bradley* (2004), 71 O.R. (3d) 171 (Ont. C.A.), paras. 65-66.

TAB 8

1992 CarswellOnt 2844
Ontario Court of Justice (General Division)

Confederation Life Insurance Co. v. Double Y Holdings Inc.

1992 CarswellOnt 2844, 33 A.C.W.S. (3d) 14

Confederation Life Insurance Company, Plaintiff and Double Y Holdings Inc., The York-Trillium Development Group Ltd., Howard Hurst, Martti Paloheimo and Canada Trustco Mortgage Company, Defendants

Farley J.

Heard: April 10, 1992
Judgment: April 20, 1992
Docket: 91-CQ-72, 254/91

Proceedings: Affirmed (June 11, 1992), Doc. CA C11847 (Ont. C.A.)

Counsel: None given.

Subject: Corporate and Commercial

***Farley J.*:**

1 This was a motion to approve the conditional acceptance of the Receiver to settle Cantel #1 and #2 (64826/91 Q and 32568/91 U) with the ancillary aspects including empowering the Receiver to enter a lease with Rogers Cantel Inc. ("Rogers") (the leasehold interest not to be disturbed so long as Rogers is not in default).

2 The Receiver strongly advocated the settlement on the basis of it being in the best interests of all parties (including the defendants). Since in a practical sense there is nothing left over for the defendants in such a settlement, the basis for this would have to be founded on the grounds that the potential shortfall envisaged by the Receiver would not be as great as it otherwise would be. I think this is clear from the positions especially of the plaintiff lenders (Confederation Life and Canada Trust) that what the defendants wish to do is roll the dice on Cantel #2 since the defendants are "not playing with their own money". In effect the lenders say that the defendants are expecting the lenders to finance the litigation and if the Cantel litigation is won on a big dollar basis (despite overwhelming odds), the defendants have everything to gain from such a (lottery style) win but they have not even purchased a ticket.

3 The Receiver analyzed the legal aspects of Cantel #1 and #2 with the Osler Hoskin opinion. It is interesting to note that the Receiver has two counsel generally involved — Osler Hoskin and Genest Murray. There was no Genest Murray opinion but one I think reasonably assumes that since Mr. Lamek strongly advocated its acceptance in affirming this motion one could conclude that he was comfortable that it was a solidly reasoned opinion. Mr. Lamek submitted that the acceptance by the Receiver of the settlement was based largely on a financial analysis. However he cited three other aspects that favoured such a settlement:

(a) the settlement would bring an end to the litigation with its costs, distractions and the elements of uncertainty.

(b) it would be advantageous to the whole project to have a major tenant in place generating more traffic for the retail side.

(c) it was desirable to have a major tenant in place for phase IV particularly when the project was offered for sale.

4 I only raise the point that with respect to (b) and (c), the question of major tenant does not appear to be as vital as the question of having the space actually rented out and occupied (on favourable terms generally). It would not matter if it were a single major tenant or a dozen smaller ones. As to the question of certainty in (a), the settlement avenue is to be generally preferred to a law suit. One can never be certain in a law suit. What was said by the Court of Appeal in *McKay Estate v. Love* (1992), 6 O.R. (3d) 519 at p.520 about bigger or more birds in the bush has relevance for settlements vs. trials generally. As well there is the element that one does not have to wait 'x' months or years for an initial decision which is then possibly appealed. Litigation is not cheap; however while it is a factor to consider I think it less important in this case since the amounts in issue are such as would justify a fair expenditure. This might be contrasted to a situation where it would be futile to spend hundreds of thousands to chase the potential of hundreds of thousands. However I do recognize that the Cantel litigation promises to be very expensive and this is proper to keep in mind. As to the question of distractions, I think it fair to observe that it will demand Receiver time and attention. That will in turn increase the costs of what is already a very sizeable receivership cost. However then one must also consider that key witnesses in any trial will be, among others, the individual defendants themselves. To date the defendants have been very vocal and litigious vis-a-vis not only the lenders but also the Receiver. This culminated last Wednesday with a motion to remove the Receiver for conflict of interest and negligence. One might question then whether the strong working relationship needed for litigation of this nature would be (or perceived to be) present.

5 The Osler opinion indicated that the Cantel #1 situation was relatively strong but concluded that Cantel #2 in essence might well have significant difficulty vis-a-vis allowable damages. It also indicated that to the extent the individual defendants recovered damages in place of the defendant companies, they would also be subject to the liabilities. I think it worthwhile to reflect that the individual defendants have asserted that the corporate defendants are bare trustees for the individuals.

6 It would have been preferable in my view to have had a definitive opinion from the defendants if they wished to advance the inapplicability of the Osler opinion. Criticisms of the Osler opinion must be viewed in this light of no "competing" opinion being available. Mr. Prehogan indicated that at worst it was worth pursuing for its nuisance value but there does not appear to be any full development of what he suggests would be its best potential (vs. some number estimates).

7 A hurdle that the defendants (Receiver) would have to overcome in Cantel #2 is that the walkaway (assuming it wrongful) caused the collapse of the defendants' business organization. It was submitted that this was far from the case — that the defendants and the project were already "underwater" even if there had been no walkaway but a walkin on the original lease terms. The walkaway may have advanced the timing of the pulling of the plug by the lenders but not its (virtual) certainty.

8 The financial aspects of Cantel #1 were canvassed as to what was the original lease worth on a stream of income basis discounted for time and risk; a similar analysis ensued for both the value of the settlement offer and the question of expected mitigation. One might quarrel to some extent with the cost of debt and equity assumptions here (e.g. TSE 300 and long term Government bonds) and whether the analysis should be done pretax or after tax. However even if the more liberal assumptions are made, there would not appear to be a radical end result change. True enough several millions more might be left on the table but when one considers the other factors (risk, time horizon, etc.) I do not think that the difference is materially significant for this analysis. The value of the settlement is still significantly above the value of mitigation (which would be similarly affected by a change in assumptions).

9 Does Cantel #2 add anything (of significance) to what was left on the table with the acceptance of the settlement (vis-a-vis Cantel #1)? The Osler opinion raised the concerns of whether a consequential business loss would be favourably received by the Court and the attendant problems of causation and remoteness. Osler also proposes that if the defendants succeeded in Cantel #2, they could not also claim Cantel #1 damages as this would be double counting. In essence the consideration was what could the project be sold for (with Cantel in place on its original basis) — and would the proceeds exceed the debt applicable. In other words on such a sale the stream of cash from Cantel to the end of the lease would be

incorporated in the capitalized value of the project — with the building assumed to have a life of 60 years. It may well be that the building has a greater life but the impact on present value of such additional cash flow is greatly diminished as one approaches and passes 60 years (similarly the lease value of the land).

10 What the Receiver did again here was value the discounted cash flow of the leases — both on their known terms — and then assumed to increase beyond the known terms at a rate of 4% a year. The base valuation using what the Receiver considered to be reasonable assumptions was some $111,000,000 and using other "feasible" assumptions gave a range of $85,000,000 to $130,000.000. This is far below the debt owed to the lenders of over $200,000,000 for a project that is not quite complete (i.e. that requires more funds to put it in shape to be "fully" leased for the next 60 years (including presently existing leases).

11 The lenders supported the Receiver's recommendations. They stressed that I should note the conditional approval by the Receiver — i.e. the Court should not second guess the Receiver by in essence doing the Receiver's job of analysis. I do not think this is a major extrapolation but rather a short extension of the reasoning in *Royal Bank of Canada v. Soundair Corp. et al* (1991), 4 O.R. (3d) 9 (C.A.) . The lenders were also concerned that waiver may be vital to the case and this depends on the facts; the Osler opinion was based on the facts as were now known and concluded a good case on waiver. The lenders were concerned that this good case may only worsen as more facts became known. The lenders also submitted that based on the present values they were the only parties with a true financial stake and cited Berger J. at p.30 of *British Columbia Development Corporation v. Spun Cast Industries Ltd. et al* (1977), 26 C.B.R. (NS) 28 (B.C.S.C.) . where he said

> Here all or those with a financial stake in the plane have joined in seeking the Court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what cause of action they should follow. It is their money.

12 I think however to accede to such submissions without further analysis would be inappropriate. They assume that the defendants have no possible financial involvement — but do they? There is the very uneasy feeling that I have when the Receiver has valued the project (a) based upon the number crunching of future cash flow discounted back. This of course is one of the acceptable methods of valuing real estate (and this project is nothing more than a specialized type of real estate — and certainly one in which the future cash flow will be quite important). The two other methods that come quickly to mind are (b) replacement value — i.e. what it would cost to reconstruct the project at the present time and (c) comparable sales — what have other projects sold for after plugging in all the "quasi scientific" adjustments to make it (hopefully) an apples to apples comparison. Would the project be built now — quite possibly not given the recent slump but one can only speculate whether building costs would be the same. However I do not think I risk too much debate if I speculate that costs would be lower today. But how much lower than the two hundred odd million poured into the project? If one went to comparables what would the end result be — another speculation. These would have been good comparison tests of the capitalization of earnings method.

13 However more to the point the Receiver appears to have done its analysis on a "green eyeshade" basis — the Receiver did not look at the property and value it with a property appraiser's eye — that is on a proxy basis for what a "property investor" would pay for the property. I am greatly puzzled by this failure.

14 However is this omission fatal? The defendants submitted the Cole and Stewart Young critiques which prodded various areas of the Receiver's analysis to poke holes in it. These critiques are skeleton in form and while they may have had great potential if fleshed out with some substantial material (e.g. how Cole supports the drop of $50 per foot or if Stewart Young gave cap rates for a real estate project of this value that prevailed in the real estate market in January 1991), they did not go that far.

15 One does know that the lenders as experienced real estate lenders loaned over $200,000,000 on this project and in part based their decision on real estate valuations. However that is not definitive since those loans were made in palmier days than January 1991. The question is have real estate values deteriorated that significantly from the dates of any legitimate

valuation (and the loans) such that the project (and the bare beneficiaries) are still submarined. I note that the Lincoln North opinion presumably relied on by one of the lenders indicated a value with Cantel in place of some $201,000,000. However this appraisal was over a year old in a falling real estate market by the time of the Cantel walkaway. One can only presume that the value at the time of walkaway was less and likely millions less. However what is clear is that (i) winning Cantel #2 and (ii) winning it big are not certainties — rather they are a long shot as to (ii) certainly.

16 There is no question that the Receiver owes a fiduciary duty to the defendants. See Frank Bennett *Receiverships* (Casswell Company, Toronto: 1985), *Re Newdigate Colliery, Limited* , [1912] 1 Ch.468 and *Plisson v. Duncan*, [1905] 36 S.C.R. 647 . I would not think that this fiduciary duty is changed in nature notwithstanding the possibility that there is no equity in the project.

17 I do not see the merit in the defendants suggesting that the project might have a greater value on a liquidation value versus a going concern value. These two elements are more easily distinguishable in a manufacturing or other "active" type of business. However here in a rental property — with leases in place — on a practical basis the two values would appear to merge unless one got into some highly imaginative (and speculative) re-engineering of the project — e.g. how realistic is it to consider selling units in the project? I think this approach not very useful to pursue.

18 The defendants complain that they were not able to find out what was going on in the Cantel litigation after my November 27, 1991 determination and the March 2, 1992 resolution of the precise terms of monitoring (although this order has not yet technically been taken out) with the result that the settlement which was disclosed to them on March 13, 1992 came as a surprise. Such a state of affairs is to be deplored — deplored on either side. I note in passing that if either side had wished to, the terms of the order could have been quickly resolved by an attendance on me. Necessary attendances, after a bona fide effort to resolve an order amongst counsel, are no problem. One can only hope that even the bitterest of contestants can on most occasions co-operatively work out wording of an order without court involvement.

19 I would think that there may have been merit in the defendants' position that the debt on the property should not be taken into account if the individuals were completely separate from the corporate defendants. However as bare beneficiaries and bare trustees there appears to be a merger of legal personality. Therefore the "debtor" involved is a joint debtor.

20 When one weighs the great uncertainties of the Cantel #2 litigation, it appears to me that *McKay Estate v. Love* reasoning comes back into play — particularly in light of not being able to piggyback Cantel #2 damages onto Cantel #1 damages but rather there is an overlap. Even without these uncertainties, it appears that the project was on borrowed time and underwater on the walkaway date. Under those circumstances I think that the value of Cantel #2 becomes quite speculative and not worth the risk of rejecting the settlement. The financial benefits are worthwhile preserving in comparison with the risks and timing and costs of continued litigation. There are the additional values of having a bird in the hand building traffic for the complex and more attraction to a potential buyer than vacant space with the potential of rent out at a potential rent amount.

21 Motion to go in form requested as amended for the Metro/TTC registered documents. As to costs, one must be critical of the Receiver for failure to present the "best" evidence. The defendants' involvement was not inappropriate. Receiver to pay the defendants $5,000 forthwith.

End of Document

TAB 9

2013 BCSC 2101
British Columbia Supreme Court

Samji, Re

2013 CarswellBC 3522, 2013 BCSC 2101, 235 A.C.W.S. (3d) 22, 7 C.B.R. (6th) 309

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Rashida Abdulrasul Samji

Gerow J., In Chambers

Heard: September 6, 2013; October 18, 2013
Judgment: November 20, 2013
Docket: Vancouver B121430

Counsel: C.J. Ramsay for Applicant, Trustee in Bankruptcy
D.F. Sutherland for Mohinder Sandhu, Parminder Vickram, Dr. Cameron Vickram and Atul Mehra
P.R. Bennett for Plaintiff, Class VA S121627

Subject: Insolvency; Estates and Trusts

APPLICATION by trustee in bankruptcy seeking order approving terms of settlement proposal.

Gerow J., In Chambers:

1 The applicant is the trustee in bankruptcy of Rashida Samji, Rashida Samji Notary Corporation, and Samji & Assoc. Holdings Ltd. (collectively, the "Samji Group"). The Samji Group operated a fraudulent investment scheme from 2003 until it was discovered in January 2012. Some investors received more money from the scheme than they invested (the "Net Winners"), while many others lost money (the "Net Losers"). The Net Losers comprise the majority of the creditors of the Samji Group's bankruptcy estates.

2 On this application, the applicant seeks an order approving the terms of a settlement proposal with two of the Net Winners, John and Diana Tang (the "Tang Settlement"). Four of the Net Losers, Mohinder Singh Sandhu, Parminder Vickram, Dr. Cameron Vickram and Atul K. Mehra oppose the granting of the order (collectively, the "respondents"). The respondents take the position they would be materially prejudiced by the granting of the order because it would preclude their ability to bring an action for fraudulent preference and tracing of trust funds against the Tangs. As well, the respondents say the Tang Settlement would be a precedent for other Net Winners disgorging only their profits. The respondents say this type of settlement would result in an unfair sharing amongst the investors of the total losses from the scheme.

Background

3 From 2003 to January 2012, the Samji Group promoted a fraudulent scheme in which "returns" were paid to investors from their own money or money paid into the scheme by subsequent investors, and not from profits earned by an individual or organization running a legitimate business. At no time did the Samji Group pursue any legitimate business purpose through the scheme. This type of fraudulent scheme is known as a Ponzi scheme.

4 On or about December 5, 2012, Ms. Samji, Rashida Samji Notary Corporation and Samji & Assoc. Holdings Inc. were all assigned into bankruptcy. The applicant was appointed as the trustee in bankruptcy of each of the three estates.

5 Approximately 218 investors invested in the scheme promoted by the Samji Group. Instead of depositing the investors' money into a trust account as agreed upon in Letters of Direction executed by investors, the Samji Group dispersed the monies without the investors' knowledge or consent. As a result of the Samji Group's conduct, certain investors suffered loss and damage because they did not receive as much money from the scheme as they invested.

6 Some investors, including the Tangs, enjoyed false profits because they received more money from the scheme than they invested. The Tangs received approximately $157,800 more than the amount they invested in the scheme.

7 In June 2013, the applicant began taking steps to recover some, or all, of the monies paid to the Net Winners. In August 2013, the applicant received a settlement proposal from the Tangs. The Tangs offered to repay all the funds they received from the scheme in excess of their investment provided they receive a release from any and all claims which the Samji Group's bankruptcy estate and its creditors may have against the Tangs.

8 On August 19, 2013, the inspectors of the Samji Group's bankruptcy estate passed a resolution approving the acceptance of the Tang Settlement. The Tangs' proposal has been reviewed by the trustee and in the opinion of the trustee the acceptance of the Tang Settlement is in the best interests of the creditors of the Samji Group's estate.

9 The applicant seeks an order approving the terms of the Tang Settlement including a release of any and all claims which the Samji Group's bankruptcy estate and its creditors have against the Tangs.

Trustee's Position

10 The trustee takes the position that the Tang Settlement should be approved by the Court under its inherent jurisdiction. The trustee submits that the approval of the Tang Settlement is in the best interests of the Samji Group's creditors as a whole, and that any potential prejudice to an individual creditor is outweighed by the benefits to the creditors as a whole.

11 The trustee submits the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], provides a scheme in which a trustee in bankruptcy is allowed to administer an estate without interference from creditors. It is very difficult for a trustee to administer an estate if every creditor who disagrees with the actions of the trustee can interfere, unless the creditor can show the trustee is exercising an excess of power or improperly administering the estate.

12 The trustee submits that the two preconditions to a court exercising its inherent jurisdiction have been met in this case: (1) the *BIA* is silent on the point; and (2) the benefit of granting the relief outweighs the relative prejudice to those affected by it. The trustee points to the fact that the administration of the *BIA* requires a pragmatic problem-solving approach in which the realities of commerce and business efficacy are considered.

13 The trustee says that if it is not allowed to enter into settlements with the Net Winners, lawsuits will have to be commenced against all of the Net Winners, and limitation periods are running out. The trustee and the inspectors are in a position to assess whether a settlement is advantageous to the creditors as a whole. The trustee points to the fact the inspectors have reviewed the Tang Settlement and approved it. The trustee disagrees that the order being sought sets a precedent for all other Net Winners, and says each case will be determined on its facts.

Respondents' Position

14 The respondents take the position that the approval of the inspectors and the opinion of the trustee should be disregarded or discounted. The respondents submit that contrary to the assertion the trustee was not aware of any party who would be materially prejudiced by the Tang Settlement, they would be prejudiced in two respects:

> 1) The terms of the proposed order preclude pursuit of both a fraudulent preference and a tracing of trust funds claim by the respondents against the Tangs which might seek to recover the monies the Tangs would have lost if they shared the losses from the scheme equally with the Net Losers; and

2) The Tang Settlement would be part of, and a precedent for, an accounting adjustment whereby the Net Winners would disgorge their profits but no more. Setting such a precedent will not assist with the accounting and adjustment which is ultimately suitable under applicable principles and procedures, which mandate an adjustment to equalize recovery as far as practical.

15 The respondents agree the Court has jurisdiction to grant the order being sought. However, the respondents submit the release sought goes beyond the scope of the bankruptcy to compromise a chose in action. The respondents say as a result granting such a release would exceed the power of a trustee and therefore the trustee is exercising excessive power.

16 The respondents say they appear to have a cause of action against the Tangs for fraudulent preference, and that right should not be extinguished by granting the order sought. The Court ought not to extinguish a cause of action without hearing the case on its merits unless it meets a test somewhat more stringent but comparable to the plain and obvious test that there is no merit to the cause of action: *Maple Homes Canada Ltd., Re*, 2000 BCSC 1443 (B.C. S.C.) at paras. 30-34.

17 The respondents also rely on *Titan Investments Ltd. Partnership, Re*, 2005 ABQB 637 (Alta. Q.B.), in arguing they have a fraudulent preference action against the Net Winners for not only their profits but also the amount of their investment.

18 In the alternative, the respondents have made a trust claim which was declined by the trustee and which the respondents are intending to appeal. Trust claims pursued by a claimant are not extinguished by the bankruptcy process except on their merits.

Analysis

Applicable Law

19 A superior court retains its inherent jurisdiction in the context of proceedings under the *BIA*: s. 183(1) of the *BIA*; *Eagle River International Ltd., Re*, 2001 SCC 92 (S.C.C.) at para. 20.

20 In order for a court to exercise its inherent jurisdiction in the context of proceedings under the *BIA*, two preconditions must be met:

1) The *BIA* must be silent on a point or not have dealt with the matter exhaustively; and

2) After balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it.

Residential Warranty Co. of Canada Inc., Re, 2006 ABQB 236 (Alta. Q.B.) at para. 26; aff'd 2006 ABCA 293 (Alta. C.A.).

21 The respondents take issue with the decision of the trustee to accept the Tang Settlement proposal. The section which provides relief for an aggrieved creditor under the *BIA* is s. 37 which provides:

> Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

22 In *Hoque, Re* (1996), 148 N.S.R. (2d) 142 (N.S. C.A.), the court discussed the role of the trustee, noting that even when the trustee has the benefit of a group of experienced creditors' representatives acting as inspectors, the trustee has to act with integrity and in a competent and reasonable manner. A court is to show deference to the business decision made by those entrusted by the creditors and the *BIA* to make such decisions. The court adopted the following comments at para. 41:

I agree with the comments of Mcfarlane J. in *Groves-Raffin Construction Ltd. (No. 2), Re* [1978] 4 W.W.R. 451, 28 C.B.R. (N.S.) 104 where he stated at (C.B.R.) 112:

> In considering the conduct of a trustee it is well to keep in mind that the scheme of the Act is to allow the trustee to administer the estate under the supervision of the inspectors without interference unless there has been an excess of power, fraud, a lack of bona fides, or unless the actions of the trustee and the inspectors are unreasonable from the standpoint of the good of the estate.

23 In *Roberts v. E. Sands & Associates Inc.*, 2013 BCSC 902 (B.C. S.C.) at paras. 40-41, the court made the following comments in the context of a complaint by a creditor that the trustee should not have allowed claims of some of the creditors on the basis that a limitation period had expired:

> [40] In *Kortev v. Deloitte Haskins & Sells* (1996), 44 C.B.R. (3d) 259 (Alta. Q.B.), Cooke J. made these statements regarding the preferable procedure to be followed in order to resolve questions similar to the question here:
>
> > The purpose of the *Bankruptcy Act* is to ensure that insolvencies are dealt with expeditiously and efficiently. In the words of the Manitoba Court of Appeal:
> >
> > > The fundamental idea of the legislation is that all claims against the bankrupt be dealt with within the context of the bankruptcy proceedings.
> >
> > The Alberta Supreme Court has acknowledged that the *Bankruptcy Act* provides an expeditious and inexpensive method for distributing the property of an insolvent person among his creditors. (*Bowles v. Barber* (1985) 60 C.B.R. (N.S.) 311; Can. *Credit Men's Trust Assn. v. Umbrel* (1931) 13 C.B.R. 40) ...
>
> [41] The solutions under the *B.I.A.* take into account the realities of commerce and business efficacy: "A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, ...": *per* Topolniski J. in *Resident Warranty Co. of Canada Inc. (Re)* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.), at para. 27.

Application to the Facts

24 I agree with the applicant and the respondents that the Court has the inherent jurisdiction to make the order approving the Tang Settlement, including the release.

25 The issue is whether this is an appropriate case in which to exercise the Court's inherent jurisdiction to approve the Tang settlement proposal.

26 I also agree with the applicant that the pre-condition that the *BIA* is silent with regards to this issue has been met. The *BIA* is silent with regards to the approval of a settlement between a bankrupt and third party that includes a full and final settlement of any and all claims against the third party which the bankrupt and the bankrupt's creditors may have against the third party.

27 The second pre-condition is whether after balancing the competing interests, does the benefit of granting the relief outweigh the prejudice to those affected by it.

28 As stated earlier, the respondents oppose the granting of the order because they have potential claims for fraudulent preference and tracing of trust funds, and the order sought would preclude them from advancing such claims against the Tangs. The trustee submits that the approval of the Tang Settlement proposal is in the best interests of the Samji Group's estates' creditors as a whole and any potential prejudice to the respondents is outweighed by the benefits to the creditors as a whole.

29 The trustee points to the fact that if it is not permitted to enter into settlements with the Net Winners, actions will have to be commenced against every Net Winner and the costs will be exorbitant. There are a number of Net Winners who wish to settle in exchange for similar releases.

30 It is apparent from a review of the *Titan* case relied upon by the respondents that it was decided on the basis of its facts. In *Titan*, the court found the individual operating the Ponzi scheme, Mr. Comte's decision to ignore the requests of certain investors for redemption of their funds and to instead pay full redemptions to investors who made no such requests, was evidence that Mr. Comte made a decision to prefer some investors over others. The respondents could not point to any other case in which a court has ordered that the Net Winners in a Ponzi scheme pay back not only the profits they received but also the principal they had invested.

31 It is clear from the case law that both the trustee and inspectors are entitled to rely on legal advice as to the potential success of actions against the Net Winners.

32 The trustee in this case submits that the approval of the Tang Settlement proposal will avoid potentially lengthy and expensive litigation which would not only subject the Samji Group's estates to a level of risk, but may in fact ultimately lead to the recovery of less funds for the creditors of the Samji Group's estates. The approval of the Tang Settlement will allow the trustee to move forward in negotiations with other investors who are willing pay back their profits from the investment scheme provided they are assured of a full and final release. The approval of the Tang Settlement proposal is key to the successful negotiation of settlements with other investors.

33 In the trustee's submission the ability to settle some of the Samji Group's estates' claims would allow the trustee to administer the estates in an efficient manner and would likely provide for the best ultimate recovery for the creditors as a whole.

34 In my view, the procedure followed by the trustee in attempting to have the Net Winners disgorge their profits in exchange for a release is sound and in keeping with the objectives of the *BIA*.

35 The cases acknowledge that the purpose of the *BIA* is to ensure that bankruptcies are dealt with expeditiously and efficiently. In this case, not only has the trustee reviewed the proposed settlement and release, but the inspectors have also reviewed and approved it.

36 The solutions under the *BIA* take into account the commercial realities of the circumstances of the particular bankruptcy. In this case, the approach the trustee is taking maximizes the returns to the creditors without having to commence costly litigation against all of the Net Winners. The trustee reviewed the terms of the Tang Settlement and determined it was in the best interests of the creditors as a whole.

37 If the trustee is not able to enter into settlement discussions with investors who are willing to pay back any profit received from the scheme, the trustee will be forced to commence multiple, potentially costly, civil actions against all of the investors who profited from the scheme even in circumstances where it would otherwise be more beneficial to the creditors to enter into a settlement.

38 The decision of the trustee was to enter into a settlement with the Tangs without costly litigation. Having considered the evidence and the submissions of counsel, I have reached the same conclusion. In my view, the granting of a court ordered release in the context of the Tang Settlement does not set a precedent whereby the trustee cannot commence actions against other Net Winners, for the return of not only the profit they received but the invested capital if it is deemed appropriate. Actions have already been commenced by the trustee against some of the Net Winners.

39 The respondents say the decision of the trustee to seek an order which would preclude them from commencing an action against the Tangs for fraudulent preference and the tracing of trust funds is unreasonable.

40 However, the evidence is that the trustee is attempting to enter into settlements rather than pursuing costly litigation against all of the Net Winners. In my view, the decision of the trustee (with the approval of the inspectors) to accept the Tang Settlement was a legitimate business decision. The trustee and inspectors acted reasonably and the settlement was not contrary to the interests of the creditors generally.

Conclusion

41 After balancing the competing interests, I am of the view that the benefit to the creditors as a whole of approving the Tang Settlement outweighs the potential prejudice to the respondents. As a result, I have concluded that this is an appropriate circumstance in which to exercise the Court's inherent jurisdiction to approve the Tang Settlement.

42 Accordingly, I am making the following orders:

• The Tang Settlement proposal is approved and shall be binding upon the Samji Group's estates and the Samji Group's estates' creditors.

• Upon full payment of the Tang Settlement monies to the trustee:

(a) any and all Tang claims, whether contingent or not, which the Samji Group's estates and/or the Samji Group's estates' creditors may have against the Tangs shall be released; and

(b) the Tangs shall be released and have no further liability whatsoever to the Samji Group's estates and/or the Samji Group's estates' creditors.

Application granted.

End of Document

TAB 10

2017 BCSC 1968
British Columbia Supreme Court

Walter Energy Canada Holdings, Inc. (Re)

2017 CarswellBC 3037, 2017 BCSC 1968, [2017] B.C.W.L.D. 6712, [2017] B.C.W.L.D. 6713, 284 A.C.W.S. (3d) 688, 54 C.B.R. (6th) 57

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, as Amended

And In the Matter of a Plan of Compromise and Arrangement of New Walter Energy Canada Holdings, Inc., New Walter Canadian Coal Corp., New Brule Coal Corp., New Willow Creek Coal Corp., New Energybuild Holdings ULC

Fitzpatrick J.

Heard: October 6, 2017
Judgment: November 1, 2017
Docket: Vancouver S1510120

Counsel: P. Riesterer, for Petitioners
T. Jeffries, for United Mine Workers of America 1974 Pension Plan and Trust
M. Nied, for Warrior Met Coal, LLC
J. Sanders, for United Steelworkers, Local 1-424
V. Tickle, P.J. Reardon, for Monitor, KPMG

Subject: Civil Practice and Procedure; Insolvency

APPLICATION by respondent for approval of settlement of appeal.

***Fitzpatrick J.*:**

Introduction

1 The petitioners, now called the New Walter Canada Group, apply for an order approving a settlement of certain claims. This is a significant development in these *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") proceedings, in that the settlement will pave the way so as to allow all other claims to be settled expeditiously. Importantly, it will also allow the distribution of substantial funds to the creditors arising from the earlier monetization of the majority of the assets.

2 The petitioners also seek authorization to advance further funds to the U.K. arm of the Walter Energy group of companies, and specifically, Energybuild Group Limited or Energybuild Ltd. ("Energybuild"), on a secured basis and not exceeding an aggregate amount of 900,000. Finally, the petitioners seek an extension of the stay period to December 15, 2017.

3 For the reasons that follow, I grant the relief sought by the petitioners.

Background

4 The history of this matter has already been recounted in numerous decisions of this Court: *Walter Energy Canada Holdings, Inc., Re*, 2016 BCSC 1413 (B.C. S.C.) ; 2016 BCSC 2470 (B.C. S.C.); 2017 BCSC 53 (B.C. S.C.). Essentially, the coal mining assets of the petitioners were sold and the focus of the proceeding then moved to a consideration of the claims advanced by creditors, or alleged creditors.

5 The amounts available for distribution to the creditors is estimated to be in excess of $63 million by the end of 2017.

6 The most significant claim advanced against the petitioners was that of a U.S. entity, the United Mine Workers of America 1974 Pension Plan and Trust (the "1974 Plan"). The 1974 Plan asserted its claim pursuant to certain "controlled group" provisions of U.S. legislation, being the *Employee Retirement Income Security Act of 1974*, 29 U.S.C.]§ 1001, as amended ("*ERISA*"). The significance of the 1974 Plan's claim cannot be understated as it was in excess of $1.2 billion. If the claim was valid, it stood to consume the majority of the funds available for distribution to the other creditors, such that the substantial Canadian creditors' claims would have received only a nominal recovery.

7 The validity of the 1974 Plan's claim was addressed by this Court. On May 1, 2017, I held that the 1974 Plan's claim was governed by Canadian substantive law and not U.S. substantive law: *Walter Energy Canada Holdings, Inc., Re*, 2017 BCSC 709 (B.C. S.C.) at paras. 177-78, 182. Effectively, this resulted in the rejection of the 1974 Plan's claim against the petitioners.

8 The 1974 Plan filed an application for leave to appeal from my decision. Leave was granted by the British Columbia Court of Appeal on June 9, 2017. The appeal was scheduled to be heard on August 16, 2017. Eventually, the hearing date was adjourned in light of the ongoing negotiations between the parties which, if successful, would obviate the need to proceed.

9 In late September 2017, those negotiations were successful and resulted in the preparation of the Settlement Term Sheet Re Plan of Compromise and Arrangement (the "Settlement Term Sheet") which is presented for approval on this application.

10 There is no opposition to the approval of the Settlement Term Sheet. All stakeholders appearing are in support. The evidence on this application includes the affidavit #15 of William Aziz of BlueTree Advisors Inc., the Chief Restructuring Officer, and the Monitor who has filed its Thirteenth Report dated October 4, 2017.

The Settlement Term Sheet

11 As described above, the Settlement Term Sheet is the result of lengthy arm's length negotiation between the petitioners, the 1974 Plan and Warrior Met Coal, LLC ("Warrior"). Warrior is another U.S. entity who had advanced claims against some of the petitioners' assets. Warrior's claim was significant because, if the 1974 Plan's claim was not valid, the full amount of the claims against the operating subsidiaries within the New Walter Canada Group would be paid in full, resulting in monies flowing to the holding companies within the New Walter Canada Group against which Warrior's claim had been filed.

12 The essential terms of the Settlement Term Sheet are as follows.

a) Settlement of Warrior's Claims

13 The Settlement Term Sheet provides for a settlement and allowance of two claims asserted by Warrior: (i) a claim in respect of certain shared services provided by the U.S. Walter Energy entities to the Canadian Walter Energy entities (the "Shared Services Claim"); and (ii) a claim in relation to accrued but unpaid interest owing in respect of a promissory note between Walter Energy, Inc. and Walter Energy Canada Holdings, Inc. dated April 1, 2011 and related documents, which claim was compromised pursuant to an order of the Court pronounced December 21, 2016. That compromise was made pursuant to a proposal by the original Canadian Walter Energy entities pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, which proposal was approved by the Court on December 21, 2016 (the "Hybrid Debt Claim").

14 Under the Settlement Term Sheet, Warrior's claims will be an Allowed Claim, as that phrase is defined in a Claims Process Order granted in these proceedings on August 16, 2016. Warrior's claims will be as follows: the Shared Services Claim will be an Allowed Claim in the amount of $9,892,193.32; and, the Hybrid Debt Claim will be an Allowed Claim to be further compromised such that it is equal to the amount of the Available Net Proceeds (as described below). Further, in the Settlement Term Sheet, Warrior expressly consents to the use of the Available Net Proceeds in the manner described below.

b) Settlement of the 1974 Plan's Claim, Appeal and Related Cost Awards

15 The Settlement Term Sheet provides that, in consideration of the 1974 Plan abandoning its appeal, the petitioners will pay the first $13 million of Available Net Proceeds to the 1974 Plan, and Warrior shall receive the remainder (if any) of Available Net Proceeds (after the payment of certain other amounts described below) in respect of the Hybrid Debt Claim.

16 Further, the petitioners have agreed that, in consideration of the abandonment of the 1974 Plan's appeal, they will (i) not pursue costs against the 1974 Plan in relation to proceedings arising from the assertion of its claim, both in this Court and in the Court of Appeal; and (ii) pay the costs of the United Steelworkers Local 1-424 ("USW"). The USW had been very much involved in opposing the efforts of the 1974 Plan to assert its claim. The USW's costs are fixed at $75,000, which is to be paid from the funds available for distribution.

17 The 1974 Plan's agreement to abandon its appeal is contingent upon the petitioners' payment of $13 million to the 1974 Plan from the Available Net Proceeds. The uncertainty as to whether this payment can be made arises because it is not yet known exactly what claims might be advanced against the petitioners.

18 The process under the Claims Process Order has been underway for some time now. Arising from that process, there are Allowed Claims of $23.8 million and unresolved claims of $7.5 million. However, more recently, the Monitor has been undertaking the process of flushing out any further restructuring claims pursuant to the Claims Process Amendment Order granted August 15, 2017. No claims have yet been received, however, the claims bar date is at the end of today. As of the hearing, no claims had been received that would potentially result in less than $13 million being available to be paid to the 1974 Plan from the Available Net Proceeds.

19 Accordingly, the 1974 Plan will adjourn its appeal so as to conclude the unresolved restructuring claims process towards determining that $13 million will, in any event, be available to be paid to the 1974 Plan, rather than Warrior, after deducting (i) all payments and taking all reserves required to administer and wind down the estate as contemplated; (ii) payment of the USW costs amount; and (iii) payment in full of all Allowed Claims, including the Shared Services Claim but excluding the Hybrid Debt Claim (the "Available Net Proceeds"). The 1974 Plan will then abandon its appeal following the petitioners' payment to the 1974 Plan of $13 million.

20 In the event that additional claims are filed in the unresolved restructuring claims process and they become Allowed Claims, such that it is determined that the Available Net Proceeds will be insufficient to pay $13 million to the 1974 Plan, the Settlement Term Sheet provides that (i) the 1974 Plan may bring its appeal at that time; and (ii) the petitioners, the Monitor and the USW may pursue costs against the 1974 Plan in relation to proceedings arising from the assertion of its claim, both in this Court and in the Court of Appeal.

21 Under the Settlement Term Sheet, the 1974 Plan's claim shall not become an Allowed Claim unless the 1974 Plan brings forward its appeal in the manner permitted by the Settlement Term Sheet and a final order is issued declaring that the 1974 Plan's claim is an Allowed Claim in respect of the petitioners.

22 The Settlement Term Sheet also provides that the director of the corporations composing the petitioners (who was also the director of the original Canadian Walter Energy petitioner companies) shall be paid an aggregate amount

of US$250,000 from the Available Net Proceeds "in consideration for his commitment to [the petitioners] throughout the *CCAA* [p]roceedings".

c) Plan of Compromise or Arrangement

23 Upon the completion of the unresolved restructuring claim process or such earlier date as the petitioners and the Monitor may decide (after consultation with Warrior), the petitioners intend to bring forward a motion seeking the Court's approval of a plan of compromise or arrangement (the "Plan") that contains the principal terms set out in the Settlement Term Sheet. I am advised that the petitioners will bring this motion only if they and the Monitor are satisfied that sufficient funds will be available to address all remaining matters in the *CCAA* proceedings and the orderly wind-down or other process for the Walter U.K. Group, which includes Energybuild.

24 The terms that will be included in the proposed Plan are set out in the Settlement Term Sheet and include, among others terms, the following:

a) Warrior, as the sole claimant with a claim that is to be compromised under the Plan, shall be the sole claimant entitled to vote on the Plan;

b) the Plan will provide for the payment in full in cash of all claims that become Allowed Claims other than the Hybrid Debt Claim, provided that the petitioners and the Monitor determine that:

i. the petitioners have an amount sufficient to pay in full in cash all Allowed Claims and the full amount of all Claims that become Allowed Claims after the date of the Settlement Term Sheet;

ii. if there is an interim distribution, the petitioners have an amount sufficient to pay in full in cash any claim that is the subject of an unresolved Notice of Dispute if all such disputed claims were to become Allowed Claims; and

iii. the petitioners have retained an amount sufficient to address professional fees and other costs necessary for the effective administration of all remaining matters in connection with these *CCAA* proceedings, and to address whatever process occurs with respect to the Walter U.K. Group.

25 The 1974 Plan has agreed to support the petitioners in obtaining Court approval and implementation of the Plan.

d) Release of Claims against the Walter U.K. Group

26 Cambrian Energybuild Holdings ULC ("Cambrian") is one of the petitioners. It is the holding company for the coal mining operating companies in the United Kingdom. Its subsidiaries include Energybuild, the operating entity or entities that own and operate the Aberpergym underground coal mine located at the Neath Valley in Wales. The mine is currently in care and maintenance.

27 Efforts have been underway for some time on the part of the petitioners and the directors of the Walter U.K. Group in analyzing Energybuild's business and seeking opportunities to sell Energybuild and its affiliates or their assets. An interested party has come forward regarding a potential sale of Energybuild and certain of its affiliates. The interested party remains interested in acquiring these assets, but has requested that certain conditions be satisfied in respect of claims that may be made against Energybuild and any of its affiliates that may be acquired. One of those potential claims is that of the 1974 Plan, who similarly asserts that the Walter U.K. Group entities are liable for its claim under *ERISA*. In addition, there appears to be the potential for Warrior to assert claims directly against the Walter U.K. Group entities in relation to its intercompany claims by the U.S. Walter Energy entities.

28 Therefore, the petitioners and the Walter U.K. Group have sought, as part of the Settlement Term Sheet, to address any such claims. If not addressed, these lingering issues may result in the interested party disengaging entirely from the negotiations which the stakeholders hoped would lead to a sale of Energybuild and its assets.

29 The Settlement Term Sheet addresses the principal conditions precedent that relate to the sale of Energybuild and certain of its affiliates. In order to facilitate the sale of the Walter U.K. Group, any entity included within that Group or any of their respective assets, the Settlement Term Sheet provides for releases by both the 1974 Plan and Warrior on certain terms. These releases are effective immediately and are not dependent on whether there is at least Available Net Proceeds of $13 million available for payment to the 1974 Plan or that the appeal is abandoned. Accordingly, these releases allow the petitioners and the directors of the Walter U.K. Group to proceed immediately to conclude a sale in the U.K., if possible.

30 The Term Sheet provides that the proceeds from any sale of the U.K. assets are to be applied as follows:

a) first, to repay amounts advanced to or for the benefit of the Walter U.K. Group on a secured basis, as has already been authorized by orders granted in these *CCAA* proceedings. To date, 600,000 has been advanced and it is proposed that authorization be given for a further 300,000;

b) second, to wind up any Walter U.K. Group entity that is not the subject of any sale in a cost effective and tax efficient manner that protects the Walter U.K. Group's directors and officers from liability to the fullest extent possible, at the discretion of the petitioners;

c) third, if any amounts remain, such amounts shall be distributed to Warrior in respect of Warrior's claim asserted against the Walter U.K. Group, up to the maximum amount of 4,666,779; and

d) fourth, if any amounts remain, such amounts shall be distributed to Cambrian on account of its equity interest in Energybuild.

Approval of Settlement Term Sheet

31 The petitioners seek approval of the Settlement Term Sheet pursuant to the *CCAA*, s. 11, which provides that I may exercise my discretion to make any order that I consider "appropriate in the circumstances".

32 In *Great Basin Gold Ltd., Re*, 2012 BCSC 1773 (B.C. S.C. [In Chambers]) at para. 16, I concluded that s. 11 provides the necessary jurisdictional basis to consider and approve a settlement agreement even before the presentation of a plan of arrangement.

33 Regional Senior Justice Morawetz of the Superior Court of Justice has articulated, a number of times, the relevant considerations in approving a settlement in the *CCAA* context:

a. is the settlement fair and reasonable?

b. does the settlement provide substantial benefit to stakeholders? and

c. is the settlement consistent with the purpose and spirit of the *CCAA*?

See: *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078 (Ont. S.C.J. [Commercial List]) at para. 49, leave to appeal refused 2013 ONCA 456 (Ont. C.A.); *1511419 Ontario Inc., Re*, 2015 ONSC 7538 (Ont. S.C.J.) at para. 14.

34 In my view, all three of the above considerations are satisfied here and support that the Settlement Term Sheet should be approved:

a) the settlement removes a major stumbling block in providing a distribution to creditors, many of whom are former employees of the petitioners who have suffered financial distress as a result of not being paid their wages and other benefits;

b) if the 1974 Plan's claim were to proceed to a hearing of the appeal, there would be significant delay in resolving the issues. In addition, there would be significant cost to the petitioners, the CRO and the Monitor in participating in those proceedings;

c) the settlement avoids the risk of the 1974 Plan being successful, a result that would effectively deprive the claimants with Allowed Claims of any meaningful recovery;

d) the settlement allows the petitioners to proceed to a determination of the remaining claims on their merits which will also facilitate a final distribution to the creditors;

e) all of the Allowed Claims, many of whom are former employees, will receive their claim amounts in full. Only Warrior will face any compromise of its claim. Effectively, the payment of $13 million to the 1974 Plan has no effect on the Allowed Claims since it is sourced from the Available Net Proceeds that would otherwise be paid to Warrior; and

f) the settlement will also facilitate the sale of the Walter U.K. Group assets in terms of the releases from the 1974 Plan and Warrior, which are effective immediately. A timely resolution of that aspect of the restructuring will be to the benefit of all parties in bringing these proceedings to a close.

35 There can be no doubt but that this settlement achieves what few *CCAA* proceedings achieve, namely a somewhat timely but full recovery for the vast majority of claimants. That the parties were able to resolve their differences to avoid the complex and costly legal battles to come is a testament to the ingenuity of the stakeholders and the flexibility that the *CCAA* affords in these difficult circumstances.

36 In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) , the Court confirmed the well-known description of the *CCAA* as being a remedial statute and that the court has "broad and flexible authority" to facilitate the reorganization of the debtor towards achieving the objectives of the *CCAA*, including avoiding the social and economic losses arising from restructuring proceedings: paras. 15-19.

37 These particular comments of the Court in *Century Services* bear repeating in respect of this application:

> [70] . . . Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. <u>Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit</u>.
>
> [Emphasis added.]

38 The Monitor supports the approval of the Settlement Term Sheet as being fair and reasonable, describing it as a "highly favourable outcome" for the petitioners' creditors who are to be paid in full. The Monitor expects that there will be sufficient funds to pay all of the Allowed Claims such that there is little likelihood of there being insufficient funds with which to pay $13 million to the 1974 Plan. In the circumstances, this appears to be a reasonable expectation.

39 The only hesitation I had with respect to the approval of the Settlement Term Sheet arose from the proposal that the director be paid US$250,000, in light of what was described as his commitment and the risks that he has undertaken in the fulfillment of his duties throughout these proceedings.

40 A somewhat similar circumstance arose in *Veris Gold Corp., Re*, 2015 BCSC 399 (B.C. S.C.) , where approval of fees was sought in relation to amounts said to have accrued throughout a *CCAA* proceeding. In that case, the approval of the fees would have affected pre-existing claims after the fact:

[62] The matter of timing requires some discussion. The effect of the relief now sought by the Special Committee is such that their fees would be paid in priority to DB's security. WBox takes no position in respect of the relief sought, no doubt given the higher priority of its security as against DB's secured position.

[63] If such an application had been brought in a more timely manner, then the court would have been in a position to consider the matter based on the circumstances at the time. In addition, the stakeholders, such as DB, would have been able to assess the relief sought in respect of its position at that time. Court-ordered charges to protect persons providing services to the debtor can be sought under the *CCAA*: see for example, s. 11.4 (critical suppliers); s. 11.52 (fees and expenses of financial, legal and other experts).

[64] This is not unlike a situation where court-ordered charges are sought when services have already been provided and relief is only sought some time later. Inevitably, the argument is that it is only "fair" that the services delivered prior to the date of the charge be included. In addition, this is not unlike the situation where limits of spending have been imposed in respect of such charges, and the limits are exceeded and only later sought to be increased. In all of these circumstances, delay in seeking relief disadvantages the stakeholders in terms of considering the effect of the relief sought in the context of the current situation, and deprives them of a consideration of other options that might be available at the time. In addition, this delay puts the court in the very uncomfortable position of potentially depriving persons who have provided such services in good faith of the normal costs of doing so.

[Emphasis added.]

41 Having considered the matter, I do not see that any similar issues or disadvantages to the stakeholders arise in relation to the proposed payment to be made to the director. Unlike the situation in *Veris Gold*, this amount to be paid is only sourced from the Available Net Proceeds, which effectively means that Warrior will fund that amount from funds that would otherwise be paid to it. Warrior agrees to the payment of that amount. Accordingly, no Allowed Claims will be affected.

42 I conclude that the Settlement Term Sheet is fair and reasonable, that it provides a substantial benefit to the creditors of the petitioners and that it is consistent with the purpose and spirit of the *CCAA*.

Approval of Further Advances to the Walter U.K. Group

43 As set out above, the petitioners have already been funding the Walter U.K. Group in respect of its working capital requirements. The advances, which are secured, are currently outstanding in the amount of 600,000.

44 Mr. Aziz indicates that, with the releases set out in the Settlement Term Sheet now in hand, further time will be needed to hopefully conclude the negotiations with the party who has expressed an interest in purchasing the Walter U.K. Group's assets. The petitioners have been provided with cash flow forecasts for Energybuild that indicate a cash need of approximately 300,000 through to the end of the proposed extended stay period, namely December 15, 2017.

45 As such, the New Walter Canada Group is seeking this Court's authorization to advance up to an additional 300,000 (for an aggregate maximum of 900,000) on a secured basis to the Walter U.K. Group to fund Energybuild's working capital needs while negotiations regarding a potential sale continue. Mr. Aziz advises that no additional funds will be advanced unless the petitioners determine that such further advance will be in the best interests of Cambrian and the other members of the petitioners. By that statement, I take it to be the case that, if the negotiations do not result fairly quickly in a sale of the assets, other measures will be considered to deal with the Walter U.K. Assets as expeditiously and efficiently as possible.

46 All of the circumstances here support the conclusion that the further interim financing should be approved based on the factors set out in the *CCAA*, s. 11.2(4). That financing is approved on the terms sought.

Stay Extension

47 The current stay period expires today, October 6, 2017.

48 The petitioners seek an extension of the stay period to December 15, 2017. This extension is being requested to allow them to complete the unresolved restructuring claims process; possibly bring court proceedings to address any disputed claims; sell the Walter U.K. Group assets, if possible; develop the Plan and bring it before the Court for approval to implement the Settlement Term Sheet; and finally, address the distribution of the proceeds.

49 Both Mr. Aziz and the Monitor confirm what is manifestly apparent; namely, that the petitioners continue to act in good faith and with due diligence in these proceedings. The Monitor supports the extension of the stay period as being a reasonable estimate of the time required to address these final matters.

50 I have no hesitation in concluding that the requested stay extension is appropriate in the circumstances and that the petitioners are acting in good faith and with due diligence: *CCAA*, s. 11.02(2) and (3).

Conclusion

51 The proposed settlement, as contained in the Settlement Term Sheet, is fair and reasonable. The Settlement Term Sheet, between the petitioners, Warrior and the 1974 Plan is approved. I also order that the parties to the Settlement Term Sheet comply with their obligations under the Settlement Term Sheet and that the Monitor assist in that respect by taking all reasonable and necessary steps to do so.

52 Cambrian Energybuild Holdings ULC is authorized to advance up to a further 300,000 (for an aggregate maximum of 900,000) to Energybuild, on a secured basis.

53 Finally, the stay of proceedings in respect of the petitioners is extended to December 15, 2017.

Application granted.

TAB 11

2001 ABCA 110
Alberta Court of Appeal

Amoco Canada Petroleum Co. v. Propak Systems Ltd.

2001 CarswellAlta 575, 2001 ABCA 110, [2001] 6 W.W.R. 628, [2001] A.W.L.D. 397, [2001] A.J. No. 600, 105 A.C.W.S. (3d) 56, 200 D.L.R. (4th) 667, 248 W.A.C. 185, 281 A.R. 185, 4 C.P.C. (5th) 20, 91 Alta. L.R. (3d) 13

Amoco Canada Petroleum Company Ltd., The George R. Brown Partnership, Encor Energy Corporation Inc., David W. Feeney, Trustee of the Estate of Eleanor Deering, deceased, Feliciana Corporation, Heather Oil Ltd., Joli Fou Petroleums Ltd., Lacana Petroleum Limited, Ralph S. O'Connor, Mark Resources Inc., Star Oil and Gas Ltd., Union Pacific Resources Inc., Westcoast Petroleum Ltd. and Wintershall Oil of Canada Ltd. (Respondents/Plaintiffs) and Propak Systems Ltd., Lynn Tylosky, L. Moore (Appellants/Defendants) and Quantel Engineering (1981) Ltd., V.J. Pamensky Canada Inc., WEG Exportadora S.A., Electromotores WEG S.A. and Gerry Brooks carrying on business as SDL Trucking and Cawa Operating & Consulting Ltd. (Respondents/Defendants) and Standard Electric Ltd., Mark Resources Inc., Able Industries Limited, Terrence Dingwall operating as Able Industries, Cawa Operating & Consulting Ltd., Flint Canada Inc. formerly known as Flint Engineering & Construction Ltd., Lovejoy Inc. and Engineered Bearings & Drives Ltd. formerly known as Engineered Bearings Co. Ltd. and Quantel Engineering (1981) Ltd. (Respondents/Third Parties) and ABC Company Ltd. (Not a Party to this Appeal/Third Party) and Able Industries Limited, Terrence Dingwall operating as Able Industries or Able Industries Limited, Cawa Operating & Consulting Ltd. and Flint Canada Inc., formerly known as Flint Engineering & Construction Ltd., Lovejoy Inc., Engineered Bearings & Drives Ltd. formerly known as Engineered Bearings Co. Ltd. and Quantel Engineering (1981) Ltd. (Respondents/Fourth Parties) and Able Industries Limited, Standard Electric Ltd., Gerry Brooks, carrying on business as SDL Trucking, Quantel Engineering (1981) Ltd., Flint Canada Inc., formerly known as Flint Engineering & Construction Ltd., V.J. Pamensky Canada Inc. WEG Exportadora S.A. (Respondents/Fifth Parties) and Propak Systems Ltd. (Appellant/Fifth Party)

Conrad, Sulatycky, Fruman JJ.A.

Heard: June 12, 2000
Judgment: May 4, 2001
Docket: Calgary Appeal 99-18589

Proceedings: affirming *Amoco Canada Petroleum Co. v. Propak Systems Ltd.* (1999), 74 Alta. L.R. (3d) 194, 39 C.P.C. (4th) 308 (Alta. Q.B.)

Counsel: *D.A. McDermott, Q.C.*, for Appellants.
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J.B. Rooney, Q.C., for Respondent, V.J. Pamensky Canada Inc.
G.S. Dunnigan, for Respondent, Gerry Brooks.
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D.J. Chernichen, Q.C., for Respondent, Standard Electric Ltd.

D.J. Cichy, for Respondent, Mark Resources Inc.
H.D.D. Lloyd, for Respondent, Lovejoy Inc.

Subject: Civil Practice and Procedure

APPEAL by non-settling defendant from judgment reported at (1999), 39 C.P.C. (4th) 308, 74 Alta. L.R. (3d) 194 (Alta. Q.B.), dismissing defendant's claims for contribution and indemnity from settling parties.

The judgment of the court was delivered by *Fruman J.A.*:

1 The question in this appeal is whether Alberta courts should permit some defendants in complex multi-party litigation to settle, even though the defendants who are left behind might encounter difficulties gathering pre-trial evidence to defend the lawsuit. The answer is yes.

BACKGROUND

2 On November 1, 1990, a fire occurred at the Eta Lake Gas Processing facility, near Drayton Valley, Alberta. The resulting claims for loss of property and profit allege both negligence and breach of contract for which the plaintiffs seek damages of several million dollars. Given the sizeable stakes, the plaintiffs cast their litigation nets as widely as possible, adding more defendants in successive amended versions of the statement of claim. The defendants in turn endeavoured to minimize their respective risk by maximizing the number of parties potentially responsible for the loss. They issued notices to co-defendants and added third, fourth and fifth parties to this action. With the current tally at eleven groups of defendants, a schematic diagram of who is suing whom looks like the "triple reverse" from a football play book.

3 The case has meandered towards trial, with extensive though as yet incomplete discovery and document production. Now, nearly a decade after the fire occurred, ten groups of defendants want out and the plaintiffs want to let them go. They have entered into a type of settlement agreement known as a "Pierringer agreement" named after *Pierringer v. Hoger*, 124 N.W.2d 106 (U.S. Wis. S.C., 1963), the Wisconsin case in which this type of agreement was first considered. Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non-settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a "proportionate share settlement agreement".

4 If given effect, the settlement agreement in this case would greatly simplify the trial by reducing the number of litigants from twelve groups, represented by twelve different lawyers, to two groups: the plaintiffs, and the appellants, Propak Systems Ltd. together with two of its employees, Lynn Tylosky and L. Moore ("Propak"). The settlement agreement entered into on June 23, 1999 (AB II at 150), stipulates the removal from this suit of the third, fourth and fifth parties and co-defendants (the "settling defendants") as a condition precedent to its main provisions coming into effect. It provides that:

1. The plaintiffs will discontinue their claims against all of the settling defendants (s. 1);

2. The plaintiffs covenant not to sue any of the settling defendants (s. 2);

3. The plaintiffs will amend their pleadings to abandon their claims against Propak, except to the extent of Propak's several share of liability, and will not seek to recover from Propak any amounts for which Propak would be entitled to contribution or indemnity from the settling defendants (s. 3);

4. All of the settling defendants will abandon their indemnity claims and any claims for costs against one another, and against Propak (s. 6);

5. The settling defendants will cooperate with the plaintiffs by making witnesses, documents and expert reports available to them (s. 10); and

6. To the extent required by law and the rulings and guidelines of the Law Society of Alberta, the agreement will be disclosed to the Court of Queen's Bench and to Propak (s. 11).

5 The agreement requires amendments to the statement of claim that would focus the issue for determination at trial solely on Propak's proportionate share of the loss. The previous version of the statement of claim set out diverse claims of alternative liability against various defendants in 28 paragraphs and sub-paragraphs (AB I at P-39). The newly amended statement of claim refers to four specific breaches by Propak relating to its faulty reinstallation of a motor in a refrigeration compressor on the Eta Lake Gas Processing facility (AB II at 145, paras. 29 - 31). It alleges that Propak's failure to properly preload the bolts fastening the coupling to the hub of the motor and its failure to align the motor led to the escape of gas and resulting fire.

6 The litigation is under case management. On September 3, 1999, the settling defendants brought an application before the case management judge to remove them from the lawsuit. At the same time, the plaintiffs applied to amend the statement of claim.

7 Propak resisted both applications, arguing that due to potential prejudice it would be made a scapegoat for liability at trial. It noted that because the *Alberta Rules of Court*, Alta. Reg. 390/68 do not contain an express rule permitting pre-trial discovery against third parties, Propak would lose its pre-trial procedural rights against the settling defendants if they were released from the lawsuit. Propak contended that this would affect its ability to gather evidence to show that the fire resulted from the settling defendants' actions, and would impede the court's ability to apportion Propak's share of the liability fairly.

THE CASE MANAGEMENT JUDGE'S DECISION

8 The case management judge granted both applications. He noted that the settlement agreement limits Propak's liability to its own several liability to the plaintiffs. Given Propak's limited exposure, he queried the basis on which Propak's claims for contribution and indemnity from the settling defendants could continue (AB I at 100).

9 The judge then observed that even if the settling defendants were removed from the suit, leaving the plaintiffs and Propak as the only remaining litigants, the court would nevertheless be compelled to determine the degrees of fault of all contributors to the plaintiffs' damages, whether parties to the action or not. The court would be required to make this assessment for two reasons: in order to isolate Propak's several liability, and because s. 2(1) of the *Contributory Negligence Act*, R.S.A. 1980, c. C-23 compels the court to do so (AB I at 102). Therefore, even though the settlement agreement sufficed to extinguish all issues of liability among the plaintiffs and settling defendants, and the settling defendants and Propak, removing the settling defendants from the suit could affect the court's ability to apportion fault properly.

10 The case management judge recognized that removing the settling defendants from the action would cause Propak to lose its rights of discovery and production of documents in respect of those parties. The judge noted that although examinations for discovery were not complete, Propak had the advantage of significant oral examination and discovery of the documents. He was unable to find that "Propak would be in any way prejudiced or disadvantaged by 'losing' the opportunity of further discovery of parties to whom it would no longer be adverse in interest [by virtue of the agreement taking effect]" (AB I at 105). Accordingly, he directed that the third, fourth and fifth party notices and notices to co-defendants be struck, the respective parties be dismissed from the suit, and the amendments to the statement of claim be allowed (AB I at 105-106).

PROPORTIONATE SHARE SETTLEMENT AGREEMENTS

An Introduction

11 The litigation of large losses in Canada has been characterized by two opposing trends: first, the practice of adding every conceivable party as a defendant or third party in order to spread out the risk of liability, which complicates and

slows the litigation process; and second, the use of settlement agreements to help speed litigation and curb legal fees. See Barbara Billingsley, "*Margetts v. Timmer Estate*: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" (1998), 36 Alta. L. Rev. (No. 4) 1017.

12 Now past is the day when "settlement agreement" can be understood to refer solely to the final resolution of all outstanding issues between all parties to a lawsuit, effectively bringing the suit to an end. In the last several years, in response to increasingly complex and commensurately dilatory and costly litigation, a new generation of settlement agreements has been cautiously adopted by the litigation bar.

13 The new settlement agreements, which include such exotically named species as the Mary Carter agreement and the Pierringer agreement, endeavour to attain a more limited objective: rather than trying to resolve all outstanding issues among all parties, a difficult task in complicated suits, they aim to manage proactively the risk associated with litigation. In short, contracting litigants prefer the certainty of settlement to the uncertainty and expense of a trial and the possibility of an undesirable outcome. This "risk-management" objective is accomplished by settling issues of liability between some but not all of the parties, thereby reducing the number of issues in dispute, simplifying the action, and expediting the suit. Ancillary benefits include a reduction in the financial and opportunity costs associated with complex, protracted litigation, as well as savings of court time and resources.

14 To the extent that a proportionate share settlement agreement completely removes the settling defendants from the suit, it is like a conventional settlement agreement that brings all outstanding issues between the settling parties to a conclusion. Proportionate share settlement agreements therefore typically include the following elements:

> 1. The plaintiff receives a payment from the settling defendants in full satisfaction of the plaintiff's claim against them;
>
> 2. In return, the settling defendants receive from the plaintiff a promise to discontinue proceedings, effectively removing the settling defendants from the suit;
>
> 3. Subsequent amendments to the pleadings formally remove the settling defendants from the suit; and
>
> 4. The plaintiff then continues its suit against the non-settling defendants.

15 There is, however, an added complication that a proportionate share settlement agreement must address. As a result of third party proceedings, settling defendants are almost always subject to claims for contribution and indemnity from non-settling defendants for the amount of the plaintiff's loss alleged to be attributable to the fault of the settling defendants. Before the settling defendants can be released from the suit, some provision must be made to satisfy these claims.

16 This obstacle is overcome by including an indemnity clause in which the plaintiff covenants to indemnify the settling defendants for any portion of the damages that a court may determine to be attributable to their fault and for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability. Alternatively, the plaintiff may covenant not to pursue the non-settling defendants for that portion of the liability that a court may determine to be attributable to the fault of the settling defendants. It is the latter approach that prevails in the agreement at issue in this suit, but in either case the goal of the proportionate share settlement agreement is to limit the liability of the non-settling party to its several liability.

The Competing Positions

17 This court recently considered the validity of a "new generation" settlement agreement in *Margetts (Next Friend of) v. Timmer Estate* (1996), [1997] 1 W.W.R. 25 (Alta. Q.B.), aff'd (1999), 178 D.L.R. (4th) 577 (Alta. C.A.). There, the trial court recognized and this court affirmed that a tortfeasor has a legitimate and "undoubted right to contract to minimize his financial exposure to the plaintiffs": at W.W.R. 39.

18 However, in *Margetts, supra*, the settlement was in the nature of a Mary Carter agreement, which did not completely remove the settling defendants from the suit. As the settling parties continued to be adversarial in interest, a non-settling party remained entitled to full pre-trial disclosure from them. In *Margetts*, therefore, the court did not need to reconcile settlement rights with a non-settling defendant's ability to exercise its pre-trial procedural rights in an effort to deflect the plaintiff's accusation of fault.

19 In addition to being grounded in fundamental principles of justice and framed in the *Alberta Rules of Court*, a non-settling defendant's ability to defend against a suit is anchored in the statutory requirement found in s. 2(1) of the *Contributory Negligence Act*:

> 2(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.

20 The effect of this provision is to compel the court to determine the degrees of fault of all contributors to the plaintiffs' damage, whether or not they currently are or ever have been parties to the action. In effect, this provision acts as a safeguard to establish the proportionate share of each defendant's liability, whether settling or non-settling.

21 It therefore becomes apparent that the right to settle, fixing a settling defendant's financial liability to the plaintiff through contract, may have a direct effect on a non-settling defendant's pre-trial rights of discovery and production of documents in order to gather evidence to defend the lawsuit.

The B.C. Ferry Approach

22 The Canadian cases in which proportionate share settlement agreements have been considered attempt to balance the right to settle against the right to pre-trial disclosure. One approach is represented by the decision of the British Columbia Court of Appeal in *British Columbia Ferry Corp. v. T & N plc* (1995), 27 C.C.L.T. (2d) 287 (B.C. C.A.). There, the court decided that the non-settling defendants could not maintain a claim for contribution or indemnity against third parties that had settled with the plaintiffs, pursuant to the terms of a proportionate share settlement agreement. However, the court allowed the non-settling defendants to maintain a claim for a declaration to determine the degree to which the plaintiff's damages were attributable to the settling defendants. The court therefore permitted the action for declaratory relief to remain, keeping the settling defendants in the lawsuit for the purely procedural purpose of allowing the non-settling parties access to pre-trial procedural rights.

23 The court concluded that the non-settling defendants would be prejudiced in establishing the fault of the third parties, and thus in maintaining their own defence, if they did not retain the benefit of full pre-trial procedural rights against the settling parties: at 302. The decision is based on the proposition that it would be "manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action": at 302 (emphasis added).

24 The difficulty with the *B.C. Ferry* approach is its emphasis on the potential prejudice a non-settling party might suffer. Indeed, it is likely that a non-settling party will always be able to allege some possible disadvantage when it remains as the sole target for liability after other parties abandon the litigation. That is true whether a partial settlement occurs during the course of litigation or even before an action is launched. The *B.C. Ferry* approach would seem to permit an action for declaratory relief to be maintained for purely procedural purposes against anyone who settled, whether or not they were ever a named party to the litigation, and even though there were no possibility that they might be liable.

25 Litigation, including settlement, is all about advantage, and corresponding disadvantage or prejudice. Settlement, after all, is nothing more than a compromise, in which parties gamble by trading prospective rights for certainty. Nor does prejudice run in only one direction. Failure to allow settlement by parties who want an exit ramp from costly and prolonged litigation may give a party who refuses to settle an even stronger tactical advantage. An unreasonable party can hold the other parties at ransom, virtually dictating the terms of settlement.

26 It is argued that without complete pre-trial disclosure a court will be unable to properly apportion the loss. This argument cuts both ways. The plaintiff always bears the burden of proof at trial. By agreeing to remove the settling defendants from the suit and focussing only on the non-settling defendant's alleged misdeeds, a plaintiff runs the risk of no recovery at trial, for it may fail to prove any basis on which a trial court could assign liability to the non-settling party. Decisions to settle with some but not all defendants give rise to challenging issues. What use can be made by the non-settling defendant of settling defendants' discoveries? Will adverse inferences be drawn against the plaintiff if it does not call settling defendants as witnesses? A plaintiff may encounter considerable obstacles in its attempt to recover any damages. It by no means follows that as a result of a partial settlement the non-settling defendant will shoulder a greater portion of the liability than it ought.

27 The *B.C. Ferry* approach undervalues the importance of settlement. In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice. The Supreme Court of Canada noted the strong public policy reason which encourages settlement in *Loewen, Ondaatje, McCutcheon & Co. c. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.), at 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 at 230 (Ont. H.C.):

> [T]he Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system. [Emphasis deleted.]

In *Geleta v. Alberta (Minister of Transportation & Utilities)* (1996), 193 A.R. 67 (Alta. C.A.) at 69, this court recognized that "public policy is to encourage compromise, whether it is partial or full".

28 Indeed, the Court of Queen's Bench of Alberta gives a high priority towards settlement. It has devoted considerable judicial resources to a successful judicial dispute resolution initiative and case management program. Proportionate share settlement agreements are most likely to be used in complex multi-party lawsuits, which are expected to consume more than 25 days of trial time. Such cases are considered to be "very long" trials which are subject to mandatory case management under *Court of Queen's Bench of Alberta Civil Practice Note No. 7 — The Very Long Trial* (September 1, 1995). *Practice Note No. 7* focuses on full or partial settlement. One of its purposes is "to canvass settlement or other disposition of all or as many of the issues as possible" (s. 23). It provides for mandatory settlement conferences, "to settle some or all of the issues in the action" (s. 48). In decisions upholding proportionate share settlement agreements, Alberta trial courts have relied upon the public policy reason which supports settlement: *Slaferek v. TCG International Inc.* (1997), 46 Alta. L.R. (3d) 279 (Alta. Q.B.) at 286; and *Wright (Next Friend of) v. VIA Rail Canada Inc.* (2000), 76 Alta. L.R. (3d) 166 (Alta. Q.B.) at 175.

Potential Prejudice

29 Alberta courts have grappled with the *B.C. Ferry* approach, attempting to balance the certain benefit of settlement against the potential problem of prejudice. Faced with the difficulty of predicting future prejudice, they have looked to the past, assessing such things as the age and complexity of the action; the number of parties involved; how long the present structure of defendants and third parties has been in place; at what stage in the proceedings the application was made; whether discoveries have taken place, documents been produced and expert reports exchanged; whether a trial date has been set; delays and the reason for them; and whether the non-settling party has diligently exercised discovery rights. See *Slaferek*, *supra*; *Viridian Inc. v. Dresser Canada Inc.* (1999), 73 Alta. L.R. (3d) 348 (Alta. Q.B.) at 363; *Vandevelde v. Smith* (1999), 243 A.R. 161 (Alta. Q.B.); and *Wright*, *supra*.

30 Generally, the longer the action has been in existence and the greater the pre-trial disclosure received by the non-settling defendant, the less likely an Alberta judge will find potential prejudice and the more likely the settlement agreement will be given effect. See *Slaferek*, *supra*; and *Wright*, *supra*. Indeed, that approach was followed in the present

case. The case management judge concluded that because Propak had the advantage of significant oral examination and discovery of documents, it was "clearly better off" than if the settling parties had not been sued or had been formally released by the plaintiffs from the outset, and would not "in any way" be disadvantaged or prejudiced (AB I at 105).

31 This approach has a number of flaws. First, the analysis tends to be superficial and the conclusions unpersuasive. From a pre-trial disclosure point of view, most parties will be better off at a more advanced stage in the litigation process. But a non-settling party, although better off, could still be disadvantaged if a court were to truncate its pre-trial procedural rights by giving effect to a proportionate share settlement agreement. No matter how dilatory the defendant has been, no matter how interminable its efforts to mine for information, the potential always exists for the next discovery question it asks to be the one that blows the litigation apart. It is difficult for any judge to definitively conclude that there is no potential for prejudice.

32 A second flaw is that this approach always favours settlement at advanced stages rather than earlier stages of litigation. But public policy dictates otherwise. Early settlement means reduced legal costs and less strain on the court system. In modern, complex litigation, it is the pre-trial skirmishes that consume most of the court's calendar. The surge in the number of cases under case management, and the need for intricate practice notes regulating long trials, such as *Practice Note No. 7,* confirm this.

33 A third flaw is that it gives little guidance to judges, and creates uncertainty for litigants. Because courts are looking at potential rather than actual prejudice, they sometimes have a difficult time evaluating the competing positions. In *Viridian*, *supra* at 363, for example, the judge noted that he did not "have a clear appreciation of the comparative procedural consequences" and was uncertain whether the negative effects would be of substantial significance. He concluded that "the appropriate response to my uncertainty [...] is to maintain the existing structure of this action".

34 A test which institutionalizes this degree of uncertainty is no test at all. By properly drafting a proportionate share settlement agreement, settling parties can ensure that a non-settling defendant is responsible only for its proportionate share of the loss. But a non-settling defendant can always assert some form of potential prejudice, which settling parties cannot avoid by contractual means. Litigants will no doubt be reluctant to spend time evaluating their legal position and displaying their hand in settlement negotiations if there is little ability to predict whether a proportionate share settlement agreement will be given effect by the court.

35 The fundamental problem with the current approach is that it requires judges to balance two competing interests, but gives judges few tools with which to do so. The *Alberta Rules of Court* contain no express rule permitting third party discovery and at least to this point, no one has come up with a creative way of achieving equivalent disclosure by practice note, statute or private agreement.

36 Judges in other jurisdictions do not face the same difficulty. For example, in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.) the court evaluated the non-settling defendant's procedural objections in light of the public policy which encourages settlement, concluding that the procedural complaints could be addressed without "a wholesale rejection of the proposed settlement agreement": at 147. The court made specific orders requiring pre-trial disclosure by the settling parties, as permitted by the Ontario class action statute being considered in that case. See also *The Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 31.10 and British Columbia *Supreme Court Civil Rules,* B.C. Reg. 221/90, R. 28(1), which permit parties to apply to examine on discovery third parties, who may have information relevant to a material issue in an action.

37 Alberta judges do not enjoy this type of flexibility. Because they can do little to remedy potential prejudice, the so-called balance they are supposed to achieve is no balance at all: to uphold a settlement agreement, a judge must conclude that there is little or no potential for prejudice. But in reality, curtailing pre-trial disclosure rights will almost always result in possible procedural disadvantage to the non-settling defendant. In most cases the disadvantage does not stem from the fact of settlement, but from the pre-trial disclosure regime which exists in this province. It is therefore more productive to focus on the cause, rather than the potential for prejudice.

38 Alberta's current pre-trial disclosure regime severely restricts third party discovery rights. This limitation, which affects all litigants equally, should not be equated to prejudice. Nor should it be used to justify jettisoning proportionate share settlement agreements in this province. A better solution is to introduce some form of third party discovery in Alberta, to address the type of procedural complaints levied in this case. The fact that non-settling defendants are confined to a statutory disclosure regime constrained by the *Alberta Rules of Court* is not a proper basis for refusing to give effect to proportionate share settlement agreements.

39 It is one thing when the *Alberta Rules of Court* limit rights of pre-trial disclosure. It is another matter entirely when settling parties deliberately thwart a non-settling party's ability to get at the truth. Courts need not countenance agreements containing express provisions that narrow the procedural rights a non-settling defendant would otherwise have or create other obstacles, for example, prohibiting a settling party from cooperating with a non-settling party, participating in interviews, or voluntarily making documents available.

40 A proportionate share settlement agreement should be disclosed to the non-settling party: *Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright*, [1997] 10 W.W.R. 622 (Man. Q.B.), aff'd (1998) 131 Man. R. (2d) 133 (Man. C.A.). To ensure that the trial judge is aware of the circumstances under which the non-settling defendant has operated, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

Summary

41 In summary, in evaluating proportionate share settlement agreements:

1. A court must keep in mind the strong public policy reason which encourages settlement;

2. The fact that a non-settling defendant has restricted rights of third party disclosure under the *Alberta Rules of Court* does not justify refusing to give effect to a proportionate share settlement agreement;

3. A court need not approve a proportionate share settlement agreement containing contractual provisions that directly limit the procedural rights a non-settling defendant would otherwise have; and

4. A proportionate share settlement agreement should be disclosed to the non-settling party. To further reduce potential prejudice, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

APPLICATION

42 The case management judge decided that Propak's liability was strictly limited to its own several liability to the plaintiffs and that it faced "no exposure for anything beyond that" as all claims, including claims for contribution and indemnity, had been settled (AB I at 100). That finding was not attacked by Propak on appeal. However, during oral argument the panel asked whether Propak asserted that its third party notices established independent duties which continue to give rise to a claim for indemnification.

43 Some confusion exists about claims for contribution and claims for indemnity. Although it is common practice for multiple defendants to issue cross-claims against one another seeking "contribution and indemnity" in respect of the plaintiff's loss, a claim for contribution is usually based on s. 2 of the *Contributory Negligence Act* and s. 3 of the *Tort-feasors Act*, R.S.A. 1980, c. T-6. The combined effect of these statutory provisions is the creation of joint and several liability, whereby a plaintiff may claim the whole of its loss from any one defendant, and that defendant may in turn claim contribution from the other defendants in proportion to their respective degree of fault. In contrast to the statutory basis for a claim for contribution, a claim for indemnity is grounded in either contract or tort, arising from an independent duty of care that one defendant or third party owed to another.

44 Proportionate share settlement agreements are relatively straightforward when all defendants are potentially liable to the plaintiff. A settlement is proper so long as the non-settling defendant's liability is strictly limited to the loss it actually caused. The situation is more complicated when the non-settling defendant has issued a third party notice claiming an independent duty that is owed to it, but not to the plaintiff. A settlement cannot extinguish the non-settling defendant's entitlement to indemnification from the third party unless it also extinguishes the non-settling defendant's liability to the plaintiff in respect of claims for which it could seek indemnification from the third party.

45 Propak was invited to present additional written submissions on these points, but did not avail itself of this opportunity. Having reviewed the settlement agreement, amended statement of claim and pleadings, we see no reason to question the case management judge's determination that Propak faces no exposure beyond its several liability for which it has no remaining right to indemnification.

46 The case management judge distinguished *B.C. Ferry*, *supra*, in which an action for declaratory relief was permitted to remain for purely procedural purposes, on the basis that no claim for declaratory relief had been advanced in this case. While *B.C. Ferry* should not be applied, the case need not have been distinguished on this basis. In Alberta, claims for declaratory relief are rarely maintained for purely procedural purposes; instead a legal right or interest must be at stake: *Brown v. Alberta* (1998), 64 Alta. L.R. (3d) 62 (Alta. Q.B.) at 74. Whether or not the non-settling party has asked for a declaration setting out its proportionate share of fault, a court is compelled to determine the degree of fault of all contributors to a plaintiff's damages, pursuant to s. 2(1) of the *Contributory Negligence Act*. The presence, or absence, of a request for declaratory relief adds little to the analytical framework and is not a factor which weighs in the balance.

47 The case management judge commented that "it would be a rare case [...] in which optimizing a non-settling party's access to discovery and/or production of documents would outweigh the benefits of a multi-party settlement and a shortened trial" (AB I at 105). He therefore properly considered the strong public policy reason which favours settlement. The judge noted that under the *Rules* only parties who are adverse in interest have discovery rights and that no such rights would exist with respect to the settling parties, who would be "mere witnesses". He commented that Propak "would have full recourse to all rights of subpoena and production which would apply to any party seeking to call evidence in a civil trial in Alberta" (AB I at 105). He therefore recognized that potential prejudice which arises as a result of the third party disclosure regime in the *Alberta Rules of Court* is not a proper basis for refusing to give effect to a proportionate share settlement agreement.

48 The case management judge did not mention disclosure provisions contained in the agreement, although he undoubtedly considered them. In fact, they do not limit Propak's procedural rights. Section 10 requires the settling defendants to cooperate with the plaintiffs, by making witnesses, documents and expert reports available to them, but does not restrict the settling defendants from cooperating with Propak. As Propak has a continuing right to examine the plaintiffs, it will also be entitled to any documents received by the plaintiffs from the settling defendants. Section 11 provides for disclosure of the settlement agreement to both Propak and the Court of Queen's Bench.

49 Propak has failed to show that the case management judge erred.

OTHER ISSUES

50 Propak has advanced several other issues in this appeal, which will be dealt with summarily.

51 Although R. 77 requires that a notice to a co-defendant be filed and served within ten days after filing a defence, Propak filed notices to co-defendants more than five years after its statement of defence. Propak sought leave for late filing in the application heard by the case management judge on September 3, 1999. The judge declined to grant leave. Noting that the delay was inordinate, he found the real issue to be whether Propak had advanced a reasonable excuse for the delay. On the evidence before him, he was unable to make such a finding (AB I at 111). Propak appeals this decision.

52 In light of the decision giving effect to the proportionate share settlement agreement, this issue is academic. In any event, a review of the evidence filed in support of Propak's leave application indicates no error in the case management judge's conclusion.

53 Second, Propak asks that this court "deem [it] released along with [the] other joint tortfeasors" on the basis of its interpretation of the *Tort-feasors Act*, R.S.A. 1980, c. T-6 (Propak's Factum at 26). Whether the settling defendants and Propak are joint tort-feasors is a question of mixed fact and law, requiring an evidentiary basis and fact finding. Whether a proper interpretation of the *Tort-feasors Act* supports Propak's release from this action is a question of law. Neither issue was put before the case management judge and no evidence was adduced. It is inappropriate for this court to consider such questions for the first time on appeal.

54 Finally, Propak asks this court to provide guidance on the procedural and substantive limits they have "as to what response they may make to the restructured lawsuit" (Propak's Factum at 26). As a court of appeal sitting in review, it is not our job to provide this type of guidance. Propak should address its request to the case management judge.

55 The appeal is dismissed.

Appeal dismissed.

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