CITATION: Silver Streams Homes Inc. (Re), 2015 ONSC 5938
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SUPERIOR COURT OF JUSTICE - ONTARIO

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SILVER STREAMS HOMES INC., SILVER STREAMS HOMES (PUCCINI) INC., 2148993 ONTARIO INC., 2148990 ONTARIO INC., 2147681 ONTARIO INC. AND 2147650 ONTARIO INC.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *S. Schwartz and M. Poliak*, for Silver Streams and Numbered Companies

A. Slavens, for Tarion Warranty Corporation

J. Klein, for MediGroup Incorporated and certain other lien claimants

E. Bisceglia, for Argo Lumber Inc. and Newmar Window Manufacturing Inc.

I. Aversa, for the Monitor

HEARD: June 25, 2015

ENDORSEMENT

[1] On this motion, the applicants in these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") seek an order declaring that they have the requisite authority to enter into a Settlement Agreement (as defined and described below) without the approval of the court, or, alternatively, an order approving the Settlement Agreement.

Background

The Parties and the Puccini Project

[2] The applicants are affiliated Ontario corporations owned by Imran Jinnah ("Jinnah"). Silver Stream Homes Inc. ("Silver") is a residential homebuilder in the GTA. The numbered corporation applicants are the registered owners of lands that comprise phases I, II and III of a development referred to as the "Puccini Project" in Richmond Hill, Ontario.

[3] Silver Streams Homes (Puccini) Inc. ("Puccini") was incorporated for the purpose of selling the homes in the Puccini Project. Over the course of the Puccini Project, the applicants

entered into agreements of purchase and sale for 95 homes in which Puccini was the vendor (the "Purchase Agreements").

[4] This proceeding arises because Silver and the numbered corporation applicants were registered as vendors with Tarion Warranty Corporation ("Tarion") under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "Act"), but Puccini was not.

[5] The applicants initiated these proceedings under the CCAA by the order dated December 17, 2013 of Newbould J. (the "Initial Order"). Subsequently, as a result of the failure to register under the Act, Puccini was charged with four counts of acting as a vendor of a new home without being properly registered, pursuant to a proceeding commenced on September 3, 2014 (the "POA Proceeding").

[6] Jinnah says that he believed that Puccini was registered as a vendor under the Act until he received a summons in the POA Proceeding in September 2014. In an affidavit sworn March 25, 2015 in these proceedings (the "Jinnah Affidavit"), Jinnah states that: (1) the failure to register Puccini as a vendor under the Act was inadvertent; (2) it was always the applicants' intention that all of the corporate entities involved in the Puccini Project would be properly registered under the Act; (3) at all relevant times, he believed Puccini was in fact a registrant under the Act; and (4) it was always the intention of the applicants that Tarion would have recourse and access to the Letters of Credit (as defined below) for the payment by Tarion of any claims against the applicants made by purchasers of the 95 homes covered by the Purchase Agreements.

The Letters of Credit

[7] In connection with the registration of Silver and the numbered corporation applicants under the Act, these parties provided Tarion with letters of credit in the aggregate amount of $920,000 (the "Letters of Credit"), and a deposit in the amount of $320,000 (the "Deposit").

[8] The Letters of Credit comprise letters of credit of the Bank of Montreal ("BMO") in the amounts of $250,000, $400,000 and $270,000, respectively dated April 12, 2012, November 12, 2010 and January 13, 2009.

[9] The Letters of Credit were issued pursuant to banking facilities established initially between Symphony Series Co-Tenancy Co-op ("Symphony") and BMO, pursuant to an offer of financing dated September 2, 2008 (the "Offer to Finance"). The Offer to Finance was amended by a letter between Symphony and BMO dated April 3, 2009. Among other things, this letter substituted as borrowers 2148993 Ontario Inc. ("993") and/or 2148990 Ontario Inc. ("990") and/or 2148991 Ontario Inc. ("991") and/or 2147650 Ontario Inc. ("650"). Pursuant to a further letter agreement between BMO and Symphony dated February 28, 2013, revised financing facilities were agreed to as set out in a term sheet (the "Term Sheet") attached to the letter agreement.

[10] The Term Sheet contemplated as borrowers, 993 and/or 990 and/or 650 and/or 2147681 Ontario Inc. ("681"). It also contemplated Letters of Credit facilities in the amounts of $670,000 and $250,000, which are understood to be represented by the Letters of Credit. The Term Sheet

provided that the Letters of Credit were to be secured by a portion of the net closing proceeds of each sale of homes in phase II of the Puccini Project, in the amount of $75,000 per unit, and from the net closing proceeds of the sales of homes in phase III of the Puccini Project in specified amounts depending upon lot size after repayment of a separate $4.5 million non-revolving demand loan facility provided under the Term Sheet. The cash collateral currently held by BMO to secure the Letters of Credit is herein referred to as the "Security".

[11] With respect to the Deposit, it is my understanding that this security was provided by 991 with respect to sales of homes in phase IV of the Puccini Project and that these lands have been sold in private power of sale proceedings. 991 is not an applicant in these CCAA proceedings. Any issue regarding the current security representing the Deposit after such power of sale proceedings is properly dealt with outside the present proceeding, and accordingly this Endorsement does not address the entitlement to such security.

The Settlement Agreement

[12] The Purchase Agreements pertaining to the 95 homes in the Project sold by Puccini advised the purchasers that a Tarion warranty was available. The Letters of Credit were provided to Tarion to secure the indemnification obligations of the vendor to Tarion in the event the vendor was unable to satisfy its warranty obligations to the purchasers under the Purchase Agreements and the Act.

[13] Each of the Letters of Credit is drawn in favour of Tarion as the beneficiary. In order to draw under each Letter of Credit, Tarion must provide BMO with a certificate stating that the monies being drawn are "in respect of obligations owed or which will be owed by the Registrant to the Beneficiary". In each case, the Registrant identified in the Letter of Credit is Silver rather than Puccini, although, in the case of the first Letter of Credit, the Registrant also includes 650, 990, 993, 681 and 991. Accordingly, Tarion is not able to provide the required certificate under the Letters of Credit entitling it to draw thereunder.

[14] In such circumstances, as the BMO loans contemplated under the Term Sheet have been repaid, if Tarion cannot draw under the Letters of Credit, the Security would be released by BMO and returned to the estate of the applicants to be distributed in accordance with the priorities determined under the CCAA.

[15] To address Tarion's inability to draw under the Letters of Credit as a result of the absence of registration of Puccini under the Act, the applicants, Tarion and Jinnah have entered into an agreement dated February 2015 (the "Settlement Agreement"). The Settlement Agreement provides that, upon the "Effective Settlement Date", Silver and Puccini will enter into an assignment and assumption agreement (the "A/A Agreement"). Pursuant to the A/A Agreement, Puccini will assign and sell to Silver all of Puccini's right, title and interest in the Purchase Agreements. In turn, Silver agrees to pay and perform all of Puccini's obligations in connection therewith, including, for greater certainty, all obligations commensurate with being a registered "vendor" under the Act in connection with the Purchase Agreements. For this purpose, the "Effective Settlement Date" is defined to be the date that an order of this court approving the Settlement Agreement becomes a final order.

[16] The intended effect of the Settlement Agreement is that Silver will assume the obligations of Puccini in respect of Tarion and thereby enable Tarion to provide a certificate referencing the obligations of Silver as a "Registrant". Jinnah will also benefit from the Settlement Agreement in at least two respects. Paragraph 9 of the Settlement Agreement provides that the POA Proceeding will be dismissed or withdrawn on the Effective Settlement Date. In addition, Jinnah's obligations under personal guarantees given to Tarion to secure the applicants' obligations in respect of the Puccini Project will be reduced by the amount of any draws under the Letters of Credit.

[17] I note that the record before the Court on this motion did not disclose any contractual indemnification obligation of Silver to Tarion that would be engaged upon implementation of the Settlement Agreement and would thereby permit Tarion to draw on the Letters of Credit. At the hearing, counsel for Tarion advised that such an obligation would be located in the vendor agreement signed by Silver upon its registration with Tarion. Subsequent to the hearing, in response to a request of the Court for the relevant documentation, the applicants provided copies of a builder agreement and a vendor agreement, each dated March 12, 2004, and referred to the indemnification provisions in section 2.1 of each agreement.

[18] The Court is not required to determine, and therefore makes no determination, regarding whether the Settlement Agreement is effective to engage the indemnification provisions in the builder agreement and the vendor agreement described above in respect of any claims that may be asserted by purchasers under the Purchase Agreements. This motion proceeds on the basis that the applicants and Tarion are of the view that payments out of the guarantee fund administered by Tarion in respect of the homes subject to such Purchase Agreements will give rise to "obligations owed or which will be owed by [a] Registrant to the Beneficiary."

[19] I also note that the Objecting Parties (as defined below) objected to disclosure of the builder agreement and the vendor agreement to the Court, because such documentation had not previously been produced by the applicants in this proceeding. I do not think there is any basis for such an objection given that this documentation is not being used by the Court in any substantive manner in reaching the determination in this Endorsement.

<u>Applicable Law</u>

[20] For the purposes of this motion, the following provisions of the *Ontario New Home Warranties Plan Act* are relevant.

[21] Section 6 of the Act provides that no person shall act as a vendor or a builder unless the person is registered by the Registrar under this Act. It is not disputed that Puccini qualified as a "vendor" under the definition of that term in section 1 of the Act.

[22] Section 13 provides that every vendor of a home provides a warranty to an owner:

13. (1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

[23] Sections 14(3) and 14(4) provide remedies to an owner of a home in the case of a breach of the warranty in section 13:

> (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
>
> (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
>
> (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.
>
> (4) Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1) (b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim within four years after the warranty expires or such longer time under such conditions as are prescribed. Accordingly, pursuant to section 14, an owner may have a claim payable out of the guarantee fund administered by Tarion.

[24] It is significant for present purposes that the Act does not, however, provide a statutory right of indemnification in favour of Tarion in respect of any amounts paid to satisfy claims by owners for a breach of a vendor's warranty out of the guarantee fund administered by Tarion that is described in section 14. To fill this gap in the legal chain, Tarion requires that registrants agree contractually to a right of indemnification in its favour. The obligation of indemnification is set out in a form of indemnity signed by each registrant and any other indemnitor of the registrant. As mentioned, in this proceeding, the applicants rely upon the indemnification provisions referred to above in a builder agreement and a vendor agreement executed by Silver in connection with its registration under the Act.

The Objections

[25] Two groups of lien claimants oppose the requested approval of the Settlement Agreement (collectively, the "Objecting Parties").

[26] A group of construction trade creditors led by MediGroup Incorporated (collectively referred to as the "Trades") have filed an objection which is set out in an affidavit of Frank Del Fatti ("Del Fatti"), sworn April 6, 2015 (the "Del Fatti Affidavit"). In this affidavit, Del Fatti submits that Jinnah should not be able to alter the existing contractual arrangements to the detriment of the Trades who have filed lien claims, given that claims for liens in significant amounts have been filed, a deficiency is anticipated, and a breach of trust action has been started. The Trades submit that Tarion should instead rely on its guarantee from Jinnah. Del Fatti notes that the Settlement Agreement would relieve Jinnah of his obligations under his guarantee in favour of Tarion, as well as resolve the POA Proceeding, and thereby allow Jinnah to build homes in the future.

[27] In addition, two other lien claimants, Argo Lumber Inc. and Newmar Window Manufacturing Inc., are separately represented on this motion and support the submission of the Trades.

Preliminary Observations

[28] The conclusions in this Endorsement are informed by the following observations and determinations.

[29] First, I do not think it is accurate to state, as the Objecting Parties submit, that the effect of the Settlement Agreement would be to elevate Tarion from an unsecured party to a secured party, in the sense that the Settlement Agreement would establish security that did not already exist. The effect of the Settlement Agreement is to allow Tarion to access security that was put in place before the CCAA proceedings by the applicants, other than Puccini, to which Tarion is not currently entitled because of the wording of the Letters of Credit and the absence of any registration of Puccini under the Act.

[30] Second, on the other hand, implementation of the Settlement Agreement changes the *status quo* in three respects. Most significantly, at present, Tarion cannot access the Letters of Credit with the result that the Security held by BMO for the Letters of Credit is effectively available for all of the creditors of the applicants in the CCAA proceedings in accordance with the applicable rules of priority. The effect of implementation of the A/A Agreement is to remove such Security from the estate of the applicants in favour of Tarion to the extent of any claims that Tarion may subsequently assert as a result of payments out of the guarantee fund administered by it. In addition, the POA Proceeding will be dismissed or withdrawn on implementation of the Settlement Agreement. Further, as mentioned, Jinnah will benefit by the reduction of his payment obligations under a personal guarantee given to Tarion in the amount of any draws under the Letters of Credit.

[31] Third, the only parties to the Settlement Agreement are the applicants, Jinnah (their principal shareholder and controlling mind and will) and Tarion. Tarion and Jinnah are also the

only parties that benefit from implementation of the Settlement Agreement. Conversely, the other creditors of the applicants are neither parties to, nor beneficiaries under, the Settlement Agreement and would be adversely affected by its implementation to the extent that any Security is applied in respect of any draws by Tarion under the Letters of Credit.

Analysis and Conclusions

[32] The parties agree that there are three issues to be addressed on this motion:

1. do the applicants have the power to enter into the Settlement Agreement, including without limitation the A/A Agreement, without approval of the court?

2. if not, does the Court have the authority to approve the Settlement Agreement, including without limitation the A/A Agreement? and

3. if yes, should the Court approve the Settlement Agreement, including without limitation the A/A Agreement?

I will address each issue in turn.

The Power of the Applicants to Enter into the A/A Agreement

[33] The applicants argue that they have the corporate power and capacity to enter into and perform the Settlement Agreement, including without limitation the A/A Agreement, and therefore do not require court approval. In particular, they assert that nothing in the CCAA, or in the orders issued in these CCAA proceedings, constrains their corporate power and capacity to enter into and perform the A/A Agreement. The applicants say that Silver therefore continues to have the corporate power and capacity to perform all of Puccini's obligations under the Purchase Agreements and to assume all of its liabilities in connection therewith, notwithstanding the CCAA proceedings.

[34] I do not agree for the following reasons.

[35] As mentioned, the A/A Agreement contains: (1) an assignment of Puccini's rights under the Purchase Agreements to Silver; and (2) an agreement of Silver in favour of Puccini to assume and perform all of Puccini's obligations under the Purchase Agreements, including without limitation all of Puccini's obligations as a "vendor" under the Act.

[36] In the present context, the significant aspect of the A/A Agreement is Silver's assumption of Puccini's obligations as a vendor under the Act. As mentioned, the applicants are proceeding on the basis that the legal effect of such assumption is that Silver will thereafter have an obligation to Tarion to indemnify it for any claims for breach of warranty that are asserted by purchasers of the 95 homes covered by the Purchase Agreements which are satisfied out of the guarantee fund maintained by Tarion.

[37] The parties agree that the execution and performance of the A/A Agreement does not contravene any provision of the CCAA. The more difficult issue is the operation of the Initial Order in these CCAA proceedings.

[38] I agree with the applicants that the provisions of paragraph 5 and of paragraph 10 of the Initial Order are not engaged in the present circumstances. These provisions are permissive rather than restrictive in respect of the applicants' ability to carry on business during the currency of the CCAA proceedings.

[39] However, I am of the opinion that the execution and performance of the A/A Agreement does engage the provisions of paragraph 9(c) of the Initial Order. This paragraph provides, among other things, that except as specifically permitted therein, the applicants are directed to refrain from granting credit or incurring liabilities, except in the ordinary course of business or until further order of the court.

[40] The execution and performance of the A/A Agreement has the result that Silver will incur the liabilities of Puccini under the Purchase Agreements. In doing so, it will incur liabilities otherwise than in the ordinary course of its business, insofar as the Purchase Agreements have already been entered into between Puccini and the purchasers thereunder. This is contrary to the plain meaning of the Initial Order.

[41] The applicants appear to accept that the proposed assumption of liabilities contemplated by the A/A Agreement would be outside the ordinary course of business of Silver. They argue instead that paragraph 9(c) should be interpreted on a consolidated basis, because they say the CCAA proceedings have, at all times, effectively been conducted on a consolidated basis for administrative purposes. In support of this view, the applicants note that all receipts and disbursements have been processed through a single bank account maintained for all of the applicants. The applicants say that, on this basis, paragraph 9(c) should be interpreted to refer to the incurring of new liabilities not already incurred by one of the applicants. On this interpretation, the Initial Order would not prohibit one applicant from assuming the obligations of another applicant.

[42] This was not, however, the manner in which the applicants were operated prior to, and as of, the date of the Initial Order. There is also no formal court order for consolidation of the applicants. Further, the Court understands that the construction lien claims are not being addressed on a consolidated basis in these proceedings. Accordingly, the separate legal and financial status of the applicants remains in effect during these CCAA proceedings.

[43] Given such separate legal and financial status, I conclude that there is no basis for the interpretation of the operation of paragraph 9(c) on a consolidated basis in the manner proposed by the applicants. Accordingly, I also conclude that the applicants require an order of the court to implement the Settlement Agreement.

The Authority of the Court to Approve the A/A Agreement

[44] In the alternative, the applicants argue that the Court has the authority to approve the Settlement Agreement, including in particular the A/A Agreement, to the extent such approval is required under the Initial Order or otherwise.

[45] The applicants say such authority is based on the broad discretion granted to the Court in section 11 of the CCAA. That provision reads as follows:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

[46] In support of their position, the applicants rely on the decision of Morawetz J. in *Nortel Networks Corp.*, Re, 2010 ONSC 1708, 192 A.C.W.S. (3d) 368, and in particular on the following passages at paragraphs 69-71 of that decision :

> In *Re Stelco Inc.*, (2005), 2005 CanLII 40140 (ON CA), 78 O.R. (3d) 254 (C.A.), the Ontario Court of Appeal considered the court's jurisdiction under the CCAA to approve agreements, determining at para. 14 that it is not limited to preserving the *status quo*. Further, agreements made prior to the finalization of a plan or compromise are valid orders for the court to approve: *Grace 2008, supra* at para. 34.
>
> In these proceedings, this court has confirmed its jurisdiction to approve major transactions, including settlement agreements, during the stay period defined in the Initial Order and prior to the proposal of any plan of compromise or arrangement: see, for example, *Re Nortel*, [2009] O.J. No. 5582 (S.C.J.); *Re Nortel* [2009] O.J. 5582 (S.C.J.) and *Re Nortel*, 2010 ONSC 1096 (CanLII), 2010 ONSC 1096 (S.C.J.).
>
> I am satisfied that this court has jurisdiction to approve transactions, including settlements, in the course of overseeing proceedings during a CCAA stay period and prior to any plan of arrangement being proposed to creditors: see *Re Calpine Canada Energy Ltd.,* [2007] A.J. No. 917 (C.A.) [*Calpine*] at para. 23, affirming [2007] A.J. No. 923 (Q.B.); *Canadian Red Cross, supra*; *Air Canada, supra*; *Grace 2008, supra,* and *Re Grace Canada* [2010] O.J. No. 62 (S.C.J.) [*Grace 2010*], leave to appeal to the C.A. refused February 19, 2010; *Re Nortel*, 2010 ONSC 1096 (CanLII), 2010 ONSC 1096 (S.C.J.).

[47] I agree with the statement in *Nortel* at paragraph 69 that a court has authority under section 11 of the CCAA to approve a settlement that is not limited to preserving the *status quo*. More generally, I am satisfied that the Court has the authority by virtue of section 11 of the

CCAA to approve the Settlement Agreement in the present circumstances. Such authority, however, requires demonstration by the applicants that the test for approval of an agreement pursuant to the discretion granted in section 11 has been satisfied.

Should the Court Approve the Settlement Agreement?

[48] The test for approval of a settlement agreement has been set out in *Nortel* by Morawetz J. at paragraph 73 as follows:

> A Settlement Agreement can be approved if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all circumstances. What makes a settlement agreement fair and reasonable is its balancing of the interests of all parties; its equitable treatment of the parties, including creditors who are not signatories to a settlement agreement; and its benefit to the Applicant and its stakeholders generally.

[49] Before addressing the application of the test for approval of an agreement in CCAA proceedings, it is important to note that the circumstances in *Nortel* were very different from the present circumstances. *Nortel* involved a multi-faceted agreement among a number of stakeholder groups, as well as the applicant, respecting the termination of discretionary pension and employment benefit payments that were existing obligations of the applicant. The settlement agreement in that case therefore resolved certain issues among such stakeholders, as well as settled claims between the debtor corporation and certain of the stakeholder groups who were parties to the agreement.

[50] In the present circumstances, the only parties to the Settlement Agreement are the applicants, their principal shareholder, and Tarion. These are also the only parties that benefit from implementation of the Settlement Agreement. The other creditors of the applicants who are neither parties to, nor beneficiaries under, the Settlement Agreement would be adversely affected by its implementation. The purpose of the A/A Agreement is rectification by the applicants of arrangements between themselves and Tarion that arose as a result of negligence, which they prefer to call inadvertence, on the part of the applicants. It does not resolve any issues among stakeholders in respect of outstanding obligations of the relevant applicant, being Puccini.

[51] The applicants say that the Settlement Agreement meets the requirements of the test articulated in *Nortel*. I will address each prong of the test in turn.

[52] First, the spirit and principal purpose of the CCAA is to permit insolvent corporations a period of time to restructure their affairs with their stakeholders with a view to proposing a plan of arrangement that will allow it to continue its business for the benefit of its stakeholders and, more generally, for the benefit of the public. In the present case, the CCAA proceedings permitted the applicants to complete and sell ten homes in the Puccini Project. This has now occurred. There is therefore no sense in which the Settlement Agreement will further the principal purpose of the CCAA.

[53] Given the present circumstances of the applicants, I accept that it may be appropriate to consider the spirit and purpose of the CCAA as it has been developed in the context of a "liquidating CCAA". In *Nortel*, Morawetz J. commented at paragraph 74 on the spirit and purpose of the CCAA in such context as follows:

> The CCAA is a flexible instrument; part of its purpose is to allow debtors to balance the conflicting interests of stakeholders. The Former and LTD Employees are significant creditors and have a unique interest in the settlement of their claims. This Settlement Agreement brings these creditors closer to ultimate settlement while accommodating their special circumstances. It is consistent with the spirit and purpose of the CCAA.

[54] In the present circumstances, the practical effect of implementation of the Settlement Agreement is to alter the entitlement that currently exists with respect to the Security being held by BMO as security for any draws that Tarion might make under the Letters of Credit. It is inconsistent with the purpose of the CCAA, particularly in a liquidating CCAA proceeding, to alter existing priorities in respect of security, even those that arise as a result of inadvertence or negligence. I think the same principle should operate where the issue is the ability to access security.

[55] Further, implementation of the Settlement Agreement does not materially advance the CCAA proceedings in any way, except to the extent of eliminating the prospect of further litigation by Tarion regarding its entitlement to the Security posted for the Letters of Credit. The reduction of such litigation by virtue of implementation of the A/A Agreement between two applicants that would not otherwise further the purposes of the CCAA cannot, by itself, satisfy this requirement of the test for approval of the Settlement Agreement. Moreover, the Objecting Parties remain free to challenge Tarion's right to draw under the Letters of Credit, as they are not parties to the Settlement Agreement. On this basis, it is not clear that it can be meaningfully asserted that implementation of the Settlement Agreement will eliminate the prospect of further litigation.

[56] Given these two considerations, the Settlement Agreement would not satisfy the first requirement of the test in *Nortel*. I would add that, in the absence of an agreement involving a compromise of any claims of any creditors of the applicants, I think there is serious doubt that the Settlement Agreement is an agreement of the nature contemplated by *Nortel*.

[57] The second prong of the test for approval of the Settlement Agreement is demonstration that it is fair and reasonable in all the circumstances. As mentioned, the applicants say that the Settlement Agreement meets this requirement. They submit that implementation of the Settlement Agreement, in particular implementation of the A/A Agreement, will put the parties to the Agreement in the position that the applicants and Tarion intended them to be in. They also say that implementation will also put the Objecting Parties in the position that they expected to be in at the date of the Initial Order. The applicants argue that maintenance of the arrangements

respecting entitlement to the Security, as they existed on the date of the Initial Order, would result in a windfall to the Objecting Parties and the other unsecured creditors of the applicants.

[58] In this regard, Del Fatti himself states in the Del Fatti Affidavit that he accepted as true the statement of Jinnah, in his affidavit sworn December 11, 2013 in the application for the Initial Order, that Puccini was registered with Tarion. He further states that he believed any security posted with Tarion was for the benefit of Puccini.

[59] I am not satisfied, however, that implementation of the Settlement Agreement would be fair and reasonable in the circumstances, notwithstanding the element of rectification and the expectation of the Trades as acknowledged in the Del Fatti Affidavit. I reach this conclusion for the following reasons.

[60] First, insofar as the fairness and reasonableness test requires demonstration of a balancing of conflicting interests of stakeholders, as is suggested in *Nortel* at paragraph 74, the Settlement Agreement cannot satisfy this requirement. The Settlement Agreement does not balance the interests of stakeholders in any meaningful respect. Its purpose is to place one creditor, Tarion, in the position that Tarion and the applicants intended it to be in, all to the detriment of the Objecting Parties.

[61] Second, apart from Tarion, the only other beneficiary of the Settlement Agreement is the principal shareholder of the applicants, Jinnah, whose guarantee obligations are correspondingly reduced to the extent the Security is available to Tarion. In other words, implementation of the Settlement Agreement will have the effect of granting a benefit to a shareholder, in his capacity as an unsecured creditor, at the expense of the other creditors of the applicants, including the lien claimants. Further, Jinnah would receive this benefit notwithstanding the fact that his negligence resulted in the circumstances giving rise to the present motion.

[62] Third, Tarion argues that the Settlement Agreement furthers the public interest generally by preserving the guarantee fund that it administers under the Act for the benefit of the residential home construction industry in this Province. There are two difficulties with this argument.

[63] First, it entails a concept of public interest that is too remote from the purpose of the CCAA to be a consideration on this motion. As mentioned, insofar as the CCAA is directed toward a public benefit, the statute seeks to maintain the continuing operations of a debtor company, with the associated benefits of employment and tax revenues generated thereby.

[64] Second, and more importantly, the calculus of public benefit in the present circumstances is more complex and essentially impossible to assess on the record. Among other considerations, Tarion is a mandatory insurer. It has, or can have, the ability to reserve against unauthorized vendors who fail to indemnify it for warranty claims paid out of the guarantee fund. In this sense, as the Objecting Parties submit, Tarion is better able to spread the risk of loss across all of the residential units it insures than the Objecting Parties whose risk is higher, being dependent upon the unencumbered value of the properties against which they have claims. Further, in terms of moral hazard, it is not clear that the public interest lies in relieving Jinnah of his

personal liability on his guarantee to Tarion and dismissal of the POA Proceeding by permitting the applicants, which Jinnah controlled, to rectify his negligence.

[65] Given the foregoing, I do not think that a court can meaningfully or responsibly make a determination regarding where the public interest lies in the present circumstances, and, accordingly, I make no such determination.

[66] In the present circumstances, while the Settlement Agreement would put Tarion in the position that the applicants may have intended it to be in, the Settlement Agreement will also benefit Jinnah, the principal shareholder and an unsecured creditor in his capacity as a guarantor, at the expense of the other creditors of the applicants, including the lien claimants. It is possible that a court could find such an agreement to be fair and reasonable if there were a reasonable possibility of a plan of compromise or arrangement that would continue the applicants as operating entities. In that event, it may be possible to demonstrate that a proposed agreement of the nature of the Settlement Agreement would be fair to the other creditors based on a reasonable prospect of a benefit to them resulting from a successful plan of arrangement. However, that is not the present case.

[67] Given that the applicants have commenced a liquidating CCAA proceeding and are therefore effectively in bankruptcy proceedings, I think that, on balance, it would be unfair to rearrange the arrangements respecting entitlement to the Security that would otherwise operate in a bankruptcy in the manner proposed by the applicants. After a bankruptcy has occurred, courts are very reluctant to relieve against mistakes that would benefit a few creditors at the expense of the others, particularly where the benefitting creditors include the shareholder of the bankrupt corporation.

[68] Based on the foregoing, I conclude that the Settlement Agreement does not satisfy the requirements for approval of an agreement under section 11 of the CCAA. Accordingly, I conclude that the Court should refrain from exercising its discretion to approve the Settlement Agreement.

Conclusion

[69] Based on the foregoing, the applicants' motion is denied in its entirety.

Wilton-Siegel J.

Wilton-Siegel J.

Date: September 25, 2015