Court File No. 08-CL-7878

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

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 OF ARRANGEMENT OF UNIVERSAL SETTLEMENTS INTERNATIONAL INC.

Applicant

FACTUM OF THE APPLICANT, UNIVERSAL SETTLEMENTS INTERNATIONAL INC. (Bare Trust Motion – Returnable March 16, 2016)

March 11, 2016

RUETERS LLP
250 Yonge Street
Suite 2200, P.O. Box 4
Toronto ON M5B 2L7

Sara J. Erskine, LSUC# 46856G
Email: sara.erskine@ruetersllp.com
Tel: (416) 597-5408
Fax: (416) 869-3411

Lawyers for the Applicant

TO: **ONTARIO REGIONAL OFFICE**
Department of Justice Canada
The Exchange Tower
130 King Street West, Suite 3400, Box 36
Toronto, On M5X 1K6

Dianna Aird
Tel: (416) 952-9630
Fax: (416) 973-0810

AND TO: **SERVICE LIST**

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SERVICE LIST

TO: **TORYS LLP**
79 Wellington St. W.,
30th Floor, Box 270, TD South Tower
Toronto, Ontario M5K 1N2

William McNamara
Tel: (416) 865-7988
Fax: (416) 865-7380
Email: wmcnamara@torys.com

Lawyers for the Applicant

AND TO: **BLAKE, CASSELS & GRAYDON LLP**
199 Bay Street
Suite 2800, Commerce Court West
Toronto, ON M5L 1A9

Katherine McEachern
Tel: (416)863-2566
Fax: (416) 863-2653
Email: Katherine.McEachern@blakes.com

Milly Chow
Tel: (416) 863-2594
Fax: (416) 863-2653
Email: Milly.Chow@blakes.com

Chris Burr
Tel: (416) 863-3261
Fax: (416) 863-2653
Email: chris.burr@blakes.com

Lawyers for the Monitor, Ernst & Young Inc.

AND TO: **ERNST & YOUNG INC.**
Ernst & Young Tower, Suite 1600
222 Bay Street, PO Box 251
Toronto, ON M5K 1J7

Brian M. Denega
Tel: (416) 943-3058
Fax: (416) 943-3300
Email: Brian.M.Denega@ca.ey.com

Karen Fung
Tel: (416) 943-2501
Fax: (416) 943-3300
Email: Karen.L.Fung@ca.ey.com

Chris Hutchinson
Tel: (416) 932-6002
Fax: (416) 943-3300
Email: Chris.Hutchinson@ca.ey.com

Court-appointed Monitor

AND TO: **ORMSTON LIST FRAWLEY LLP**
40 University Avenue
Suite 720
Toronto, ON M5J 1T1

John P. Ormston, Esq.
Tel: (416) 594-0791
Fax: (416) 594-9690
Email: jormston@olflaw.com

Lawyers for Tom Mitchell, Daphne Mitchell, Gilbert Pereira, Rino Bilfolchi, Patrick Runstedler

AND TO: **DR. KARL HAFELE**
Via Principale 43
I-39021 Laces
(Prov. Bolzano) Italy

Tel: +39 331 9035522
Email: karl.hafele@gmail.com

AND TO: **RUDERMAN, SHAW**
Barristers & Solicitors
Suite 1820, P.O. Box 2037
20 Eglinton Avenue West
Toronto, ON M4R 1K8

F.H. Hugh Shaw
Tel: (416) 484-8558
Fax: (416) 484-6918
Email: hshaw@rudermanshaw.com

Lawyers for the Respondents, Ramon Credi Cheja, Helen Marquard de Peterson, Nancy E. Lira-Hereford, Pedro M. Olavarri, Russel E. Kennedy, Ana M. Magaloni De Bustamante, Jose Manuel Rincon Gallardo, Lucia B. Ruiz De Olavarri, Mariagrazia Savini and Esteban Gonzalez Vergara

AND TO: **Garrison, PC**
4514 Cole Avenue
Suite 600
Dallas, Texas 75205

William J. Garrison
Tel: (214) 295-3330
Fax: (214) 295-3331
Email:bill@garrisonpc.com

Agents for Priority Pharmacy, Inc.

AND TO: **BANK AUSTRIA CREDITANSTALT VERSICHERUNGSDIENST GmbH**
ReichsratsstraBe 17
1010 Vienna
Austria

Mario Sandhu
Tel: +43 (0)50505/42330
Fax: +43 (0)50505/42393
Email: Sandhu@ba-cavd.at

AND TO: **John J. Keenan**
Tel: (716) 649-2185
Email: jkeenan71@verizon.net

Lawyers for National Viaticals Inc.

AND TO: **SHIBLEY RIGHTON LLP**
Barristers and Solicitors
250 University Avenue
Suite 700
Toronto, Ontario M5H 3E5

Sandra E. Dawe
Tel: (416) 214-5481
Fax: (416) 214-5482
Email: Sandra.dawe@shibleyrighton.com

Jacqueline King
Tel: (416) 214-5222
Fax: (416) 214-5422
Email: jking@shibleyrighton.com

Lawyers for Cajubi Caja Paraguaya de Jubilaciones y Pensiones

AND TO: **BORDEN LADNER GERVAIS**
Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Edmond F.B. Lamek
Tel: (416) 367-6311
Fax: (416) 361-2436
Email: elamek@blg.com

Lawyers for VCH

AND TO: **BORDEN LADER GERVAIS LLP**
Scotia Plaza
40 King Street West, 44th Floor
Toronto, Ontario M5H 3Y4

Craig J. Hill
Tel: (416) 367-6156
Fax: (416) 361-7301
Email: chill@blg.com

Creditor

AND TO: **WHITE DUNCAN LINTON LLP**
Barristers and Solicitors
P.O. Box. 457
Waterloo, Ontario N2J 4B5

Tel: (519) 886-3340
Fax: (519) 886-8651

Irwin A. Duncan
Email: iad@kwlaw.net

Michael A. Vanbodegom
Email: mvb@kwlaw.net

Lawyers for Ted Buczek ,Boyd Rees, Judy Rees, Peter Dixon, Bogumila Lee, Janusz Poreba and Andrzej Mardula

AND TO: **PICCIN, BOTTOS**
Barristers and Solicitors
4370 Steeles Ave. West
Suite 201
Woodbridge, Ontario L4L 4Y4

Phillip Pittini
Tel: (905) 850-0155 ext. 241
Fax: (905) 850-0498
Email: ppittini@piccinbottos.com

Lawyers for Buonavita Investments Limited

AND TO: **VIDA CAPITAL, INC.**
805 Las Cimas Parkway
Suite 350
Austin, TX 78746
USA

Daniel Young, Esq.
Email: dan.young@vidacapitalinc.com

Purchaser

AND TO: **ALSTON & BIRD**
2828 North Harwood Street
Suite 1800
Dallas, TX 75201-2139

Mark W. Harris
Email: mark.harris@alston.com

Lawyers for the Purchaser

AND TO: **Those parties who have delivered to the Monitor a Service List Request Form, to the Email addresses provided**

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PART I - NATURE OF THE MOTION

1. This is a motion brought by Universal Settlements International Inc. ("USI") in its capacity as trustee for the beneficiaries of Amended Plan of Compromise and Arrangement dated June 16, 2009, as amended by the Amendment to the Plan of Compromise and Arrangement dated November 24, 2014 (collectively the "Plan"), for a declaration *nunc pro tunc* that the trust created by the Declaration of Trust by USI dated July 17, 2009 (the "Canadian Trust") is a bare trust.

PART II - SUMMARY OF FACTS

Prior to the CCAA Application

2. Prior to making an application under the *Company Creditors Arrangement Act* ("CCAA") in December 2008, USI was an Ontario corporation in the business of sourcing and facilitating the purchase of "life settlements" for third party investors in Canada and abroad (the "Purchasers").

3. Investing in life settlements involved the purchase of life insurance policies from insured individuals at a discount from the face value of the policies, and the sale of interests in those policies to investors. Investors earned returns on the maturity of the policies (the death of the insured).

4. USI would locate and purchase policies which reflected the Purchasers' investment instructions, pay the policy premiums required to maintain the policies in good standing to make claims for death benefits, and remit to Purchasers the amounts due under the life settlements upon USI's receipt of death benefits. USI maintained premium reserves with respect to the life insurance policies which underpinned the life settlement contracts with Purchasers, and USI paid the premiums when they became due. The premium reserves for each policy was a portion of the purchase price paid by the Purchasers for the investment.

5. All of the policies USI located for Purchasers were issued by United States ("US") insurance companies insuring the lives of US citizens. All of the policies paid death benefits in US dollars.

6. USI established two bare trusts for the purpose of holding the insurance policies and administering the premium payments for those policies. The trusts were the US Trust and the

Universal Settlements Inc. Trust. The Universal Settlements Inc. Trust was a Canadian trust with very little involvement in the operations. Virtually all of the policies were registered in the name of the US Trust. The US Trust made the actual premium payments, collected the death benefits, and distributed the payments to the Purchasers.

7. The US Trust, known as a "grantor trust" under American income tax law, is a look through entity, i.e. it is ignored for income tax purposes and any income or loss is that of the beneficiaries - the Purchasers. As such, when death benefits were received by the trust on behalf of the beneficiaries, each Purchaser was paid their portion of the death benefits once received by the trust and any income or loss was that of the beneficiaries for income tax purposes.

CCAA Application

8. In 2008, as a result of, *inter alia*, the insured living longer than their life expectancies the premium reserves in respect of certain policies were insufficient to maintain the premium payments. USI faced a cash flow shortfall to make the premium payments required to keep the insurance policies in good standing.

9. On December 2, 2008, USI made an application under the CCAA and an initial CCAA Order dated December 2, 2008 was granted by this Court. Pursuant to the Initial Order, Ernst & Young Inc. were appointed as the monitor of USI (the "Monitor").

10. The 2009 Plan was approved by USI's creditors, including the Purchasers, at a Meeting of the Creditors and then sanctioned by the Court on June 22, 2009. Under the 2009 Plan, all policies held by USI on behalf of the Purchasers and on its own behalf (the "Policies") were pooled to be held in trust by USI, as trustee, for the benefit of USI's two classes of creditors as defined in the

2009 Plan: Purchasers and Ordinary Creditors (collectively, the "Creditors") pursuant to the Declaration of Trust by USI dated at July 17, 2009 – the date of implementation of the 2009 Plan. There are approximately 3500 Creditors, the bulk of whom (roughly 89%) are not residents of Canada.

Declarations of Trust

11. Pursuant to the provisions of the 2009 Plan, a Canadian trust and a United States trust were created for the purpose of holding Policies and Insurance Proceeds (as defined under the 2009 Plan). The beneficiaries of the Canadian Trust are the beneficiaries of the 2009 Plan. Further, section 6.2(e) of the 2009 Plan provides that the Declarations of Trust must provide that the assets "shall only be dealt with in the manner provided for in this Plan".

12. In accordance with the terms of the 2009 Plan, a Declaration of Trust by Mills, Potoczak & Company ("Mills") dated at July 17, 2009 created the United States trust to act under the 2009 Plan as the US service agent for the Policies on behalf of USI, and to continue to service Policies for USI ("Mills US Trust").

13. Since the implementation date of the 2009 Plan, USI and Mills, in their capacity as trustees, have been administering the Policies under the supervision of the Court and the Monitor pursuant to the terms of the 2009 Plan and the Declarations of Trust until the Policies were sold in 2015.

14. Mills did not have, or exercise, any discretion in its role as agent and trustee of the Mills US Trust. Further, and as set out in more detail below, USI did not have, or exercise, any appreciable degree of discretion over the Policies.

The Monitored Trust Account

15. In addition to the Declarations of Trust, section 4.2 of the 2009 Plan also provided that USI would establish a segregated bank account or bank accounts and, subject to the terms of the 2009 Plan, such account(s) are to be held in trust for the Creditors, pursuant to the Declarations of Trust executed by USI. These two accounts (one in Canadian dollars, the other in US dollars) are defined under the 2009 Plan as the Monitored Trust Account.

16. As trustee of the Monitored Trust Account, the 2009 Plan required that USI enter into an agreement with the Monitor which stipulates the mechanics of operation of the Monitored Trust Account, and the terms of oversight of the Monitored Trust Account to be provided by the Monitor. USI entered into this Monitored Account Agreement as of July 17, 2009 – the same day of the Declarations of the Mills US Trust and the Canadian Trust.

17. Pursuant to the terms of the 2009 Plan and the Monitored Account Agreement, after the plan implementation date, all Policies, Insurance Proceeds, Litigation Recovery, Cash on Hand, and TPI Proceeds (as defined in the 2009 Plan) were deposited by USI into the Monitored Trust Account.

18. Article 2.12 of the Monitored Account Agreement provides that with the exception of bank charges, all disbursements, withdrawal or transfers from the Monitored Trust Account shall be subject to the prior review and approval of the Monitor. Pursuant to the Monitored Account Agreement and the 2009 Plan, any approval, consent or other exercise of the right or discretion by the Monitor is to be exercised, withheld or conditioned, as the Monitor may determine in its sole and absolute discretion.

19. In accordance with the provisions of the Monitored Account Agreement, USI has always sought and received the prior written approval of the court appointed Monitor before any amounts are paid out of the Monitored Trust Account, including payment of, *inter alia*, Premiums, Professional Costs, Administrative Fees, or Borrowing Costs as prescribed by and defined in the 2009 Plan.

20. Further, Article 5 of the Monitored Account Agreement requires USI to provide regular reports to the Monitor concerning the Cash on Hand in the Monitored Trust Account and other deliverables in Schedule B to that agreement. Moreover, the Article requires USI to provide the Monitor with full access to the books and records of USI and Mills for the purpose of supervision and monitoring of the Trust Accounts and compliance with the Agreement and the 2009 Plan.

21. As the trustee for the beneficiaries under the 2009 Plan, USI has not acted without the prior direction or approval of the Monitor, the Creditors and/or the Court.

Amendment to the Plan and Sale of the Policies

22. By fall 2014, after almost six years since the implementation of the 2009 Plan, there had been insufficient insurance proceeds available to make any distributions, as contemplated by the 2009 Plan, to the Creditors. There had also been insufficient policy maturities to continue to pay the costs of maintenance, and USI and the Monitor projected that by early 2015, absent significant maturities or securing new or additional financing, there would be insufficient funds to pay the Premiums and the Policies would lapse.

23. To address this liquidity issue, USI, in consultation with the Monitor, recommended to its Creditors that the Monitor be permitted to conduct a process to market and sell the Policies.

24. The 2009 Plan did not permit a sales process to commence under these circumstances. Accordingly, USI, in consultation with the Monitor, proposed an amendment to the 2009 Plan (the "Plan Amendment") which, among other things, would amend the Sale Process provisions in section 4.9 of the 2009 Plan, to allow the Monitor to commence a process for the sale of or investment in, financing or re-financing of all or some of the Policies that had not matured, pursuant to the proposed Sale and Investment Solicitation Process ("SISP").

25. The Creditors approved the Plan Amendment at a Creditors' Meeting on November 24, 2014. On November 27, 2014, USI sought and obtained an order (the "Sanction Order") sanctioning the 2009 Plan, as amended by the Plan Amendment (the "Plan"). Upon obtaining the Sanction Order, the Monitor commenced the SISP.

26. On March 23, 2015 USI, as trustee for the beneficiaries of the Plan and the Canadian Trust, executed an asset purchase agreement (the "APA") with Vida Capital, Inc. (the "Buyer") for the sale of all remaining unmatured Policies (collectively, the "Purchased Policies"), conditional on, among other things, receiving an approval and vesting order from the Court. On April 9, 2015, USI obtained Court approval of the APA pursuant to an approval and vesting order (the "Approval and Vesting Order"); and the sale of the Purchased Policies to the Buyer closed on April 10, 2015.

27. Under the APA, USI was required to fulfill various post-closing covenants including, but not limited to, completing the necessary change forms with the applicable insurance companies to affect the transfers of Purchased Policies to the Buyer and administering such Purchased Policies until such transfers are completed. The last remaining Purchased Policy required to be transferred was formally transferred by the applicable insurance companies to the Buyer on January 7, 2016.

Tax Reserve in the APA

28. The proceeds of the sale of the Policies were approximately US$38.6 million. In connection with the purchase of the Policies, the Buyer required that at least 25% of the sales proceeds be held in escrow and not be released to USI, as trustee of the Canadian Trust, until there has been (i) a final determination by Canada Revenue Agency (the "CRA") of the amount of any taxes payable, and this amount has been paid out of the escrow to the Receiver General of Canada, or (ii) a compliance or clearance certificate has been obtained from the CRA under the *Income Tax Act* (the "Tax Reserve"). The Tax Reserve is set out in provision 8.6 of the APA.

CRA and Clearance Certificate

29. In order to comply with the requirements of section 8.6 of the APA and the Tax Reserve, USI's counsel, William Innes, wrote to CRA on July 23, 2015 advising it that USI has been acting, and continues to act, as the administrator of the Policies for the Creditors pursuant to terms of the Canadian Trust under a CCAA Plan and that the Canadian Trust is a bare trust. In the letter, Mr. Innes requested that a clearance certificate under section 159 of the *Income Tax Act* be issued to USI to permit distributions to the Creditors in accordance with the Plan. Attached to Mr. Innes' letter of July 23, 2015 were copies of the Plan and Declarations of Trust.

30. In the period between July 23, 2015 and September 21, 2015, CRA reviewed the July 23, 2015 letter and considered USI's request. On September 21, 2015, Cynthia Crocker from CRA advised USI's counsel that she was unsure of how to deal with USI's situation and that she would speak with another member of CRA and try to figure out the next step.

31. Then on September 29, 2015, Ms. Crocker advised USI's counsel that CRA would not grant a clearance certificate without a trust number having been assigned to the Canadian Trust by CRA. Ms. Crocker did not express a view whether the Canadian Trust was a bare trust or a true trust. However, she stated that if CRA agreed following further review that the Canadian Trust was a bare trust, it would decline to issue a trust number.

32. Treatment of the Canadian Trust as a true trust may result in the Canadian Trust having significant Canadian income tax liability and require USI to withhold non-resident withholding taxes from payments to the non-residents – the majority of the Creditors. It may also result in the Canadian resident Creditors having significant income tax liability for 2015.

33. When the 2009 Plan was implemented, the maturity value of the Policies was approximately US$195 million. The sale proceeds of approximately US$38.6 million results in the Creditors receiving approximately 27% of their original investment based on approximately US$35 million being available for distribution. Given that approximately 89% of the 3500 Creditors are non-residents of Canada, this will significantly increase the administration and distribution costs under the Plan, and the Creditors would receive an even smaller distribution.

34. Conversely, if the Canadian Trust is a bare trust, it will not be subject to Canadian income tax liability with respect to the disposition of the Policies. If there is any Canadian income tax liability, it would be a matter between the individual Creditors (as beneficial owners of the Policies) and CRA. This would permit a distribution under the Plan of all of the proceeds from the sale of the Policies (except the Tax Reserve), less a reserve amount for administrative and professional costs as required by the Plan.

35. USI as trustee of the Canadian Trust is also pursuing obtaining representation and warranties insurance in the amount of the Tax Reserve and on terms satisfactory to the Buyer of the Policies. Discussions with potential insurers and with Vida are ongoing and it is expected that if Vida's tax exposure is insured to their satisfaction, Vida will waive the requirement for the Tax Reserve and the balance of the Sale Proceeds can be paid the Creditors.

The Motion is Urgent

36. The motion was originally scheduled for February 12, 2016 and was adjourned to March 16, 2016 to permit CRA to have additional time to consider its position with respect to the relief sought in the motion.

37. However, if the Canadian Trust is a true trust, it is required to prepare and file a T3 Trust Income Tax and Information Return on or before March 30, 2016 – 14 days from the date of the motion. As a result, it is necessary to have a determination of the issue of whether the Canadian Trust is a bare trust or a true trust without further delay in order to give USI, as trustee of the Canadian Trust, sufficient time to prepare and file the tax returns if required.

PART III - LAW & AUTHORITIES

The Motion is properly brought before the Superior Court of Justice

38. This motion seeks, *inter alia*, directions from the court on a question affecting the rights of individuals in respect of the execution of a trust, the determination of rights that depend on the interpretation of a declaration of trust, and/or the variation of a trust. Such relief is properly brought as an application before the Ontario Superior Court of Justice.[1]

39. This motion is also brought within the context of a Plan of Compromise and Arrangement under the CCAA. As such, the CCAA court retains exclusive jurisdiction in respect of any orders or relief sought in respect of the Plan.[2]

The Broad Discretion of a CCAA Judge to make Orders

40. The CCAA is remedial legislation. Its goals are to avoid the social and economic costs of liquidation, balance stakeholder interest, protect creditors' interest and permit an orderly administration of the debtor's affairs. Proceedings under the CCAA are designed to be flexible and responsive, with a view to providing fairness, certainty, and stability for the stakeholders. The CCAA is to be liberally interpreted to achieve those ends.[3]

41. The CCAA regime is a flexible, judicially supervised process that allows for creative and effective decisions. The CCAA judge is accorded broad discretion because the proceedings are a

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[1] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 14.05.
[2] Paragraph 7.7 of the 2009 Plan.
[3] *Kerr Interior Systems Ltd., Re*, 2011 ABQB 214 (Q.B.) at paras. 23, 25 ("*Re Kerr*")

fact-based exercise that requires ongoing monitoring. The Supreme Court of Canada has said in *Century Services Inc. v. Canada (Attorney General)* that:

> The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. 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 the liquidation of an insolvent company.[4]

42. When an order is sought that realistically advances the CCAA's purpose, the ability to make it is within the discretion of the CCAA court.[5]

43. USI respectfully submits that the relief sought by USI for a declaration *nunc pro tunc* that the trust created by the Declaration of Trust by Universal Settlements International Inc. dated July 17, 2009 (the "Canadian Trust") is a bare trust, is within the CCAA court's broad discretion. As set out further below, a declaration that the Canadian Trust is a bare trust furthers the CCAA's remedial purpose of avoiding or preventing the Creditors from suffering further economic losses from USI's CCAA Application.

Bare Trusts and Agency

44. The term "bare trust" is not defined in the *Income Tax Act* ("Act"). The closest it comes to a definition is subsection 104(1) of the Act:

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[4] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at paras. 21, and 69-70 ("*Century Services*")
[5] *Ibid*, at para. 71.

> 104. (1) In this Act, a reference to a trust or estate (in this subdivision referred to as a "trust") shall, unless the context otherwise requires, be read to include a reference to the trustee, executor, administrator, liquidator of a succession, heir or other legal representative having ownership or control of the trust property, but, except for the purposes of this subsection, subsection (1.1), subparagraph (b)(v) of the definition "disposition" in subsection 248(1) and paragraph (k) of that definition, *a trust is deemed not to include an arrangement under which the trust can reasonably be considered to act as agent for all the beneficiaries under the trust with respect to all dealings with all of the trust's property* unless the trust is described in any of paragraphs (a) to (e.1) of the definition "trust" in subsection 108(1). [Emphasis Added]

45. The leading Ontario authority on bare trusts is the decision of the Court of Appeal in *Trident Holdings Ltd. v. Danand Investments Ld.*[6] In *Trident*, Justice Morden accepted the following description of a bare trust:

> "The distinguishing characteristic of the bare trust is that the trustee has no independent powers, discretions or responsibilities. His only responsibility is to carry out the instructions of his principals -- the beneficiaries. If he does not have to accept instructions, if he has any significant independent powers or responsibilities, he is not a bare trustee ..."[7]

46. The *Trident* decision was cited with approval by the Tax Court in *Peragine v. The Queen*:[8]

> Bare trustees have also been compared to agents. The existence of a bare trust will be disregarded for income tax purposes where the bare trustee holds property as a mere agent or for the beneficial owner. In *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 1988 CanLII 194 (ON CA), 64 O.R. (2d) 65 (Ont. C.A.), Mr. Justice Morden, speaking for the Ontario Court of Appeal, made the distinction between an ordinary trust and a bare trust. He reproduced the following passages from Scott, The Law of Trusts, 4th ed. (1987):
>
> > An agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary, although he is under a duty to deal with the trust property for the latter's benefit in accordance with the

[6] *Trident Holdings Ltd. v. Danand Investments Ld.*, 1988 CanLII 194 (ON CA) (cited with approval: *642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ON CA))
[7] *Ibid*, at para. 36.
[8] 2012 TCC 348 ("*Peragine*").

> terms of the trust, and can be compelled by the beneficiary to perform this duty. The agent owes a duty of obedience to his principal; a trustee is under a duty to conform to the terms of the trust [Vol. 1, p. 88].
>
> ...
>
> A person may be both agent of and trustee for another. If he undertakes to act on behalf of the other and subject to his control he is an agent; but if he is vested with the title to property that he holds for his principal, he is also a trustee. In such a case, however, it is the agency relation that predominates, and the principles of agency, rather than the principles of trust, are applicable [Vol. 1, p. 95].

Mr. Justice Morden also quoted with approval from an article by M.C. Cullity, "Liability of Beneficiaries — A Rejoinder", (1985-86), 7 Estates & Trusts Quarterly 35, at p. 36:

> It is quite clear that in many situations trustees will also be agents. This occurs, for example, in the familiar case of investments held by an investment dealer as nominee or in the case of land held by a nominee corporation. In such cases, the trust relationship that arises by virtue of the separation of legal and equitable ownership is often described as a bare trust and for tax and some other purposes it is quite understandably ignored.
>
> The distinguishing characteristic of the bare trust is that the trustee has no independent powers, discretions or responsibilities. His only responsibility is to carry out the instructions of his principals --- the beneficiaries. If he does not have to accept instructions, if he has any significant independent powers or responsibilities, he is not a bare trustee.[9]

47. In the circumstances of *Peragine*, Justice Webb held that the taxpayer had in fact acted as a bare trustee:

> It seems to me that the Appellant was simply acting as the agent for Leo Peragine in holding the Victoria Property. The Appellant did not have any beneficial interest in the property nor did the Appellant have any independent power, discretion, or responsibility with respect to the Victoria Property. Therefore the trust would not be a trust as determined in accordance with the provisions of subsection 104(1) of the Act and would be what has been described as a bare trust. As a result any gain arising from the sale of the Victoria Property would not be included in the Appellant's income.[10]

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[9] *Ibid*, at para. 18.

[10] *Ibid*, at para. 20.

48. In the present case, there is no evidence that USI exercised, or was contemplated to exercise, any significant degree of control over the Policies. Its role was simply that of an agent in carrying out the Creditors' instructions as set out and defined in the Plan, including ensuring that the premiums were paid. Any significant decision (such as, for example, the decision to sell the Policies) could only be made under the direction of the Creditors and the Court.

Is the Canadian Trust an Agency Relationship?

49. As Morden J.A. noted in *Trident* bare trusts and agency relationships may or may not arise out of the same set of facts:

> On these facts and in the light of the preceding legal analysis, it is clear that, as far as the contract with Trident is concerned, Danand was not exercising any power or discretion conferred on it by the trust agreement, or ownership rights (although, of course, it was important that it held the legal title to the property benefited by the contract) but, rather, was carrying out the mandate of the beneficiaries. In the words of Scott (p. 95), the agency relationship predominated over the trust relationship.
>
> Before concluding on this issue I should mention decisions or dicta which may be argued to support the view that even a bare trusteeship insulates the beneficiaries from liability on contracts made by the trustee. Reference may be made to Parkview Towers of Hamilton Ltd. v. Canadian Imperial Bank of Commerce; Peach Blossom Builders Ltd. v. Parkview Towers of Hamilton Ltd. (1980), 1981 CanLII 1835 (ON CA), 30 O.R. (2d) 294, 116 D.L.R. (3d) 721, 9 E.T.R. 133; result affirmed 31 O.R. (2d) 233n, 118 D.L.R. (3d) 384n, E.T.R. loc. cit.; Prince v. Gundy, [1936] O.W.N. 397 at p. 401; Mills v. Tibbetts (1916), 11 O.W.N. 251 at p. 252, and Creasor v. Wall (1983), 1982 CanLII 1804 (ON SC), 38 O.R. (2d) 35 at p. 46, 25 R.P.R. 1; reversed on other grounds 1983 CanLII 1761 (ON CA), 40 O.R. (2d) 644, 27 R.P.R. 8. I do not intend to discuss these cases in any detail. In the articles to which I have referred, neither Mr. Flannigan nor Mr. Cullity (who takes a less expansive view of the liability of beneficiaries than does Mr. Flannigan) thinks that they necessarily stand for the proposition that agency relationships will not exist in cases of bare trusts. I refer, in particular, to Mr. Cullity's statement in his article in 7 E. & T.Q. 35 at p. 48:
>
> > If the suggested explanation of the above dicta and the decisions that have held beneficiaries of bare trusts to be immune from liability is correct, those cases are not

> authority that an agency relationship will not exist in cases of bare trusts.[11]

50. In the present case, there is no evidence that the agency relationship "predominated" over the bare trust relationship. Indeed the only evidence of the Creditors actively participating in a significant decision in respect of the Policies after approving the 2009 Plan, is the Creditors voting and approving the amendment to the Plan in order to permit the sale of the Policies.

A Declaration of a Bare Trust Advances the Policy Objectives of the CCAA

51. Prior to the CCAA Plan, the Purchasers' interests in the Policies were held for them in bare trusts. These trusts operated as mechanisms to hold and administer the Policies which were owned by the individual Purchaser. Once policies matured and death benefits were received, they were paid directly to the Purchasers and for tax purposes any income or loss was that of the Purchasers as the beneficiaries of the bare trusts.

52. USI's CCAA Application was prompted by the risk that there would be insufficient funds in the trust to continue to pay premiums on certain polices and those policies would lapse causing the Purchasers to lose their investments. These Purchasers only became "creditors" as a result of the CCAA process and are defined under the Plan as Purchaser Creditors.

53. Since the time that Declarations of Trust were settled for the Mills US Trust and the Canadian Trust (pursuant to the terms of the Plan approved by the Creditors), both of these trusts were intended to operate, and have operated, as mechanisms to hold and administer the Policies

[11] *Trident, supra*, at para. 43 and 44.

where were own by the Purchasers. It was always intended that the trusts would be bare trusts and USI would be bare trustees.

54. At the time the Plan was implemented, the Policies had death benefits of approximately US$195 million. Now, more than 6 years after the Plan was implemented, the sale proceeds of approximately US$38.6 million results in the Purchaser Creditors receiving less than 30% of their original investment. These Purchaser Creditors have suffered significant economic losses.

55. A declaration *nunc pro tunc* that the Canadian Trust is a bare trust is consistent with the operations of USI prior to the CCAA Application, and gives effect to the goal of the CCAA to avoiding causing further economic losses arising from the implementation of the Plan.

56. Under the *Income Tax Act* (the "ITA) a bare trust is, generally speaking, not treated as a taxpayer and whatever the tax consequences of a transaction or transactions these are treated as though they were incurred directly by the trust beneficiaries/owners. There is no mechanism under the ITA to register a bare trust and bare trusts are not required to file income tax returns. The bare trust is a creature of provincial and territorial law with no counterpart under federal legislation or in the federal court system. True trusts are subject to a complex regime of taxation under the ITA which can, in some circumstances, lead to forms of double taxation.

57. As a bare trust, the Canadian Trust will not be subject to Canadian income tax liability with respect to the sale of the Policies and USI as the trustee would not be required to withhold taxes from a distribution to the Purchaser Creditors. Rather, as it was prior to the CCAA Plan, any liability for Canadian income tax would be a matter between the individuals Purchaser Creditor and CRA.

58. If the Canadian trust is regarded as a true trust, there is the possibility that as much as 50% and possibly more of the proceeds of the sale of the Policies will be needed to pay the resultant income tax liability of the Trust. As an economic matter, the Purchaser Creditors have already suffered a loss in the order of US$85 million on the sale of the policies. It would be unjust and unfair for the Purchaser Creditors to suffer further economic loss in this case.

PART IV - ORDER REQUESTED

59. USI, as trustee for the beneficiaries of the Plan request that the Court grant its motion for a declaration *nunc pro tunc* that the trust created by the Declaration of Trust by Universal Settlements International Inc. dated July 17, 2009 (the "Canadian Trust") is a bare trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of March, 2016.

for Sara J. Erskine

RUETERS LLP
250 Yonge Street
Suite 2200, P.O. Box 4
Toronto ON M5B 2L7

Sara J. Erskine, LSUC# 46856G
Email: sara.erskine@ruetersllp.com
Tel: (416) 597-5408
Fax: (416) 869-3411

Lawyers for the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

Tab	Cases
1	*Kerr Interior Systems Ltd., Re*, 2011 ABQB 214 (Q.B.)
2	*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
3	*Trident Holdings Ltd. v. Danand Investments Ld.*, 1988 CanLII 194 (ON CA)
4	*642947 Ontario Ltd. v. Fleischer*, 2001 CanLII 8623 (ON CA)
5	*Peragine v. The Queen*, 2012 TCC 348

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Courts of Justice Act
R.R.O. 1990, REGULATION 194

RULES OF CIVIL PROCEDURE

RULE 14 ORIGINATING PROCESS

APPLICATIONS — BY NOTICE OF APPLICATION

Notice of Application

14.05 (1) The originating process for the commencement of an application is a notice of application (Form 14E, 14E.1, 68A or 73A) or an application for a certificate of appointment of an estate trustee (Form 74.4, 74.5, 74.14, 74.15, 74.21, 74.24, 74.27 or 74.30). R.R.O. 1990, Reg. 194, r. 14.05 (1); O. Reg. 484/94, s. 5; O. Reg. 43/14, s. 5 (1).

Information for Court Use

(1.1) Form 14F (Information for court use) shall be filed together with a notice of application in Form 14E, 14E.1, 68A or 73A. O. Reg. 260/05, s. 2; O. Reg. 43/14, s. 5 (2).

Application under Statute

(2) A proceeding may be commenced by an application to the Superior Court of Justice or to a judge of that court, if a statute so authorizes. R.R.O. 1990, Reg. 194, r. 14.05 (2); O. Reg. 292/99, s. 1 (2).

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3.

Court File No. 08-CL-7878

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 OF ARRANGEMENT OF UNIVERSAL SETTLEMENTS INTERNATIONAL INC.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

FACTUM OF THE APPLICANT,
UNIVERSAL SETTLEMENTS INTERNATIONAL INC.
(Bare Trust Motion, Returnable March 16, 2016)

RUETERS LLP
250 Yonge Street
Suite 2200, P.O. Box 4
Toronto ON M5B 2L7

Sara J. Erskine, LSUC# 46856G
Tel: (416) 597-5408
Fax: (416) 869-3411
Email: sara.erskine@ruetersllp.com

Lawyers for the Applicant,
Universal Settlements International Inc.