COURT FILE NUMBER	1703 12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	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 ARRANGEMENT OF CANADA NORTH GROUP INC., CANADA NORTH CAMPS INC., CAMPCORP STRUCTURES LTD., D.J. CATERING LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. and 1919209 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF KINGDOM PROPERTIES LTD. AND KINGDOM CATS LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Bishop & McKenzie LLP 2300, 10180 – 101 Street Edmonton, AB T5J 1V3 **Attention: Tara L. Hamelin** Telephone 780-426-5550 Fax 780-426-1305 **File No. 101,597-014**

I. INTRODUCTION

1. Kingdom Properties Ltd. ("Kingdom Properties") and Kingdom Cats Ltd. ("Kingdom Cats") (collectively "the Respondents") are the Plaintiffs in Action No. 1603 21142 ("the Action"). The Action seeks judgment against Kilometer 147 GP Ltd. through its Limited Partner Kilometer 147 LP ("Kilometer 147") for breaches of two sublease agreements with Kingdom Properties and for non-payment of services provided by Kingdom Cats.

2. Canada North Camps Inc. ("185") and 726 Modular Finance Canada, Ltd. ("726 Modular") are named as Defendants in the Action on the basis of indemnities provided for all amounts owing by Kilometer 147 to the Respondents under the Subleases ("the Indemnity Agreements").

3. On October 25, 2017, Justice Nielsen granted 726 Modular a temporary stay of the Action, which the Respondents submit expired as of January 31, 2018 ("the 726 Stay").

4. If this Court determines that the 726 Stay remains in effect, the Respondents submit that the circumstances which initially prompted the Court to issue the stay have changed, and there are no longer any compelling policy reasons to continue the stay in favour of a party wholly unrelated to the Applicants.

5. The Respondents therefore seek an Order lifting the 726 Stay and directing that the Respondents' action against 726 Modular in Action Number 1603 21142 ("the Kingdom Action") can proceed.

II. BACKGROUND

6. On November 20, 2014, Kingdom Properties as sublandlord entered into subleases with Kilometer 147 as subtenant ("the Subleases") for two parcels of land located in the County of Lac La Biche. Kilometer 147 operated an oilfield services camp on the lands ("the Camp").

7. Pursuant to the terms of the Subleases, Kilometer 147 was required to provide additional indemnities for all amounts for which it was responsible under the Subleases.

8. On November 20, 2014, 185 and 726 (collectively "the Indemnitors") executed the Indemnity Agreements and agreed to pay all rent and other amounts payable by, and to perform each and every obligation of, Kilometer 147 under the Subleases.

9. Kilometer 147 refused or neglected to pay amounts owing under the Subleases (including rent and services provided by Kingdom Cats), and Kingdom Properties terminated the Subleases on April 4, 2016.

10. The Respondents filed their Statement of Claim in the Kingdom Action on November 30, 2016.

11. On August 11, 2017, the Respondents filed an application for Summary Judgment ("the Application") against 726 Modular, on the basis of its Indemnity Agreement.

12. As of the date of filing of the Application, Kilometer 147 was indebted to Kingdom Properties pursuant to the Subleases in the amount of $12,927,866.55, inclusive of GST plus interest on all overdue amounts and solicitor/own client legal costs.

13. On October 27, 2015, Justice Nielsen extended the stay in these proceedings to 726 until January 31, 2018 ("the 726 Stay"). The stated rationale for granting the 726 Stay was that 726 Modular would require the assistance of the principals of 185 to respond to the Application, but that 185's focus needed to remain on its restructuring efforts.

14. No Order outlining the terms of the 726 Stay has ever been entered.

III. ARGUMENT

The 726 Stay

15. The Respondents submit that the transcript of the October 25, 2017 ("the Transcript") contains ambiguities regarding the end date for the 726 Stay. A close reading of the Transcript equally supports the interpretation that the 726 Stay would remain in effect only until January 31, 2018, and that Kingdom Properties could apply to lift the 726 Stay before that time if it wished to do so. The 726 Stay was not revisited after January 31, 2018, and it is the Respondents' position that it expired according to its terms.

16. Alternatively, if the Court ultimately determines that the 726 Stay remains in effect, the Respondents submit that there is no longer any compelling reason to extend or continue the 726 Stay.

17. The Respondents repeat and rely on the submissions in their Bench Brief filed October 24, 2017 that this is not an appropriate situation for the Court to exercise its discretion to extend the stay in the Initial Order to include 726 Modular.

18. At the application for the 726 Stay, the Court expressed its reservations about allowing the Respondents' action against 726 Modular and the Application to proceed, on the grounds that:

    a. 726 would require the assistance and participation of the principals of 185 in order to respond to the allegations raised by the Respondents in their summary judgment application, and that it would be best for all parties that 185's focus remained on its restructuring efforts; and

    b. if the Action proceeded against 185 at a later date, there was a risk of inconsistent judgments.

19. The conversion of these proceedings from the originally contemplated restructuring has essentially eliminated many of the concerns expressed by the Court at the original stay application. A Plan of Arrangement was sanctioned by the court on March 28, 2018,

which was in effect a sale of the camp business, and the Court subsequently expanded the power of the Monitor to essentially that of a Receiver.

20. It is Kingdom's understanding that the majority of the remaining issues in these proceedings relate to priority disputes and related issues between the Monitor and secured creditors, and that the involvement of 185's representatives is now far more limited than originally anticipated.

21. There is no reason to believe (and no evidence has been led to support an allegation) that the principals of 185 are unable to provide the assistance which 726 claims it requires to defend the Application. In fact, no evidence has been led by 726 at all regarding its efforts to communicate with or obtain supporting documents from 185's representatives in the year which has passed since 726's original stay application was heard.

22. With respect to the allegation that the Application could lead to inconsistent verdicts against 185 as a co-indemnitor, the Indemnities are clear that the Respondents are not required to proceed against both Indemnitors at the same time, or at all.

23. Section 4 of the Indemnity Agreements states:

> In the event of a default under the Sublease or under this Indemnity, the Indemnifier waives any right to require the Sublandlord to:
>
> (a) proceed against the Subtenant or pursue any rights and remedies against the Subtenant with respect to the Sublease;
>
> (b) proceed against or exhaust any security of the Subtenant held by the Sublandlord; or
>
> (c) pursue any other remedy whatsoever in the Sublandlord's power.

23. As such, pursuant to the express terms of the Indemnity Agreements, the Respondents are entitled to proceed with the Application against 726 alone, regardless of any stay currently in place against 185 or otherwise. If the Respondents are successful, 726 would of course be at liberty to seek contribution from 185, however, that should have no effect whatever on the Respondents' ability to proceed with the Application.

24. Realistically, 185 is likely an empty company with few or no assets with which to satisfy any judgment obtained by the Respondents, so the Application may be the only application for judgment to proceed in the Kingdom Action. It has already been

acknowledged by counsel for the CCAA Applicants that Kilometer 147 (the Subtenant and primary debtor) is effectively an empty company.[1]

Notices of Disallowance

24. For the reasons given above, the Respondents are not required to proceed with their appeals of the Monitor's disallowances prior to proceeding with the Application

25. A creditor is not required to exhaust all avenues against the primary debtor prior to proceeding with an action against the indemnitor. An indemnitor's obligations are not conditional on the primary borrower's default, and the indemnitor must pay even in the absence of default by the primary debtor.[2]

26. The Application is a stand-alone claim based on 726 Modular's primary and independent obligations under the Indemnity Agreements. The Respondents are not required to pursue all available remedies against Kilometer 147 as the Subtenant or 185 as indemnitor (including any appeals of the Disallowances) prior to proceeding with their action against 726 based on the Indemnity Agreements.

27. Further, the Respondents submit that it is reasonable to presume that any appeals by unsecured creditors of the disallowances are unlikely to proceed. It does not seem probable at this point that the secured creditors in these proceedings will be fully indemnified, or that there will be any funds to distribute to the unsecured creditors.

The Replevin Action

27. The Respondents have no objection to adjourning the application relating to the ownership of the equipment at issue in the Replevin Action to be heard at the same time as 726's application in the within proceedings on December 4-5, 2018.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2018.

BISHOP & MCKENZIE LLP

Per: ______________________

Tara L. Hamelin
Solicitor for the Respondents

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[1] Transcript of Proceedings, October 25, 2017, at page 26, lines 30-33.

[2] *Credit Foncier Trust Company v. Zatala Holdings Inc. (Titan Electric Ltd.), Ready and Nelson*, [1986] B.C.J. No. 516, paras. 10 and 12 **[TAB 1]**

TAB 1

1986 CarswellBC 156
British Columbia Court of Appeal

Credit Foncier Trust Co. v. Zatala Holdings Inc.

1986 CarswellBC 156, [1986] B.C.W.L.D. 3217, [1986] B.C.J. No. 516, 39 A.C.W.S. (2d) 464, 4 B.C.L.R. (2d) 25

CREDIT FONCIER TRUST COMPANY v. ZATALA HOLDINGS INC. (TITAN ELECTRIC LTD.), READY and NELSON

Carrothers, Anderson and McLachlin JJ.A.

Judgment: June 26, 1986
Docket: Vancouver No. CA003400

Counsel: *M. J. Hargreaves*, for appellant.
D. L. Strathmoen, for respondent.

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Guarantee and Indemnity --- Nature and definition — Guarantee and indemnity distinguished

Mortgages --- Action on covenant — Liability on covenant — Guarantor

Mortgages — Action on the covenant — Liability of the covenantor — R. covenanting to pay moneys secured by mortgage to mortgagee and to indemnify mortgagee from breaches by mortgagor — R. being indemnitor and not mere surety — Renewal of mortgage with higher interest rate without notice to R. not discharging R.'s obligations under covenant.

Guarantee and indemnity — Indemnity — Indemnity defined and distinguished — Indemnitor being primarily liable to pay, even in absence of default by debtor — R. covenanting to pay moneys secured by mortgage to mortgagee and to indemnify mortgagee from breaches by mortgagor — R. being indemnitor and not mere surety — Renewal of mortgage with higher interest rate without notice to R. not discharging R.'s obligations under covenant.

On 12th October 1979 the petitioner granted a mortgage to the respondent Z. Ltd. The respondent R., a shareholder in Z. Ltd. was included on the covenant in the mortgage which stated that the loan was made at the request of R., "in consideration of which [he] gives his promise" that he will "at all times pay or cause to be paid to the mortgagee the monies hereby secured ..." The covenant also contained a proviso that the covenantor will "at all times indemnify ... the mortgagee from all loss ... in respect of this mortgage ..." and that no dealings between the mortgagee and mortgagor would alter the liability of the covenantor.

The mortgage was renewed at a higher rate of interest without notice to R. Z. Ltd. defaulted on the mortgage and the plaintiff sued Z. Ltd. and R. R. succeeded in his application to have the claim against him struck out on the grounds that he was a guarantor and his obligations had been discharged by the renewal agreement. The plaintiff appealed.

Held:

Appeal allowed.

A surety or guarantor is liable only if the principal defaults. An indemnitor is primarily liable to pay, even in the absence of default by the debtor. There was nothing which made R.'s obligation as covenantor conditional on the default of the mortgagor. He may have been sued on the mortgage debt at any time and he gave his primary obligation to repay the mortgage debt. The fact that he also agreed to indemnify the mortgagee against the mortgagor's defaults did not detract from his clear assumption of a primary obligation to the mortgagee. Having so covenanted, R. could not bring himself within the special rules giving additional protection to mere sureties. A covenantor who is primarily liable on the obligation unlike a mere surety, remains liable on the covenant notwithstanding material changes to the agreement to which he is a party and to which he does not agree. The appeal was accordingly allowed and the matter remitted to the trial division for determination of the issue of novation.

Appeal from order striking out claim on mortgage covenant.

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

1 This is an appeal from an order dismissing Credit Foncier's claim that David Ready was liable as covenantor on a mortgage granted by Credit Foncier to Titan Electric.

2 The facts may be summarized as follows. On 12th October 1979, Credit Foncier granted a mortgage to Zatala Holdings Inc., now known as Titan Electric Ltd. Mr. Ready was a shareholder in Titan Electric. He was included on the covenant in the mortgage. Some time before 12th October 1982, Mr. Ready sold his shares in Titan Electric. The mortgage matured 1st October 1982. Credit Foncier made an offer to Titan Electric to renew the mortgage at a higher rate of interest on 30th September 1982. The offer was accepted by Titan Electric on 10th October 1982. Credit Foncier did not consult or advise Mr. Ready of the renewal agreement, of which Mr. Ready remained ignorant until some time later.

3 Titan Electric defaulted on its mortgage in June 1984. The plaintiff Credit Foncier sued not only Titan Electric but Mr. Ready on the covenant contained in the original mortgage. Mr. Ready then applied to have the claim against him struck out. The chambers judge acceded to that request. It is from that decision that this appeal is brought.

4 A transcript of the judge's reasons is not available. However, counsel agree that the basis of the judge's dismissal of Credit Foncier's claim against Mr. Ready, was the judge's conclusion that Mr. Ready was a surety with respect to the obligations of the mortgagor, Zatala Holdings Inc., and as such, was discharged from any obligation on the mortgage because of the renewal agreement, based on the decision of the Supreme Court of Canada in *Holland-Can. Mtge. Co. v. Hutching; Holland-Can. Mtge. Co. v. Royal Trust Co.*, [1936] S.C.R. 165, [1936] 2 D.L.R. 481 [Alta.].

5 The main issue is whether the chambers judge erred in holding that Mr. Ready was a guarantor for surety and not a principal debtor or indemnitor. The appellant, Credit Foncier, concedes that if Mr. Ready is a guarantor, then *Holland* applies and he is not liable. This is because it is well settled that sureties who guarantee a contract are released from all liability if the parties to the contract effect a material variation in it which is not approved by the sureties. As Lord Westbury put it in *Blest v. Brown* (1862), 4 De G.F. & J. 367 at 376, 45 E.R. 1225, in a passage cited with approved in *Holland* [p. 172]:

> It must always be recollected ... in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say. 'The contract is no longer that for which I engaged to be surety: you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end.'

6 The same rule does not apply to a person primarily liable on the obligation. In *Prospect Mtge. Invt. Corp. v. Van-5 Dev. Ltd.* (1985), 68 B.C.L.R. 12 at 23, this court, per Esson J.A., held that *Holland* did not apply to covenantors, as opposed to mere sureties. If a surety does not consent to changes in the primary obligation, his liability is discharged. However, a covenantor who is primarily liable on the obligation remains liable on the covenant, notwithstanding material changes to the agreement to which he is not a party and to which he does not agree.

7 The question, then, is whether Mr. Ready is a mere surety. The mortgage document in its preamble and closing

describes him as a "covenantor". The only portion of the document which deals with Mr. Ready's obligation is the following:

> The loan hereby secured is made at the request of the covenantor and in consideration thereof the covenantor doth hereby covenant, promise and agree to and with the mortgagee that he will at all times pay or cause to be paid to the mortgagee, the principal monies, interest and other monies hereby secured, at the time or times respectively appointed therefor, and that he will observe and perform or cause to be observed and performed, all the covenants, terms, provisos, stipulations and conditions herein contained on the part of the mortgagor to be observed and performed and that he will at all times indemnify, protect and save harmless the mortgagee form (sic) all loss, costs and damage in respect of this mortgage and every matter and thing herein contained, and that no release or releases of any portion or portions of the said lands and premises, and no indulgence shown by the mortgagee in respect of any default by the mortgagor which may arise under this mortgage, and that no extension or extensions granted by the mortgagee to the mortgagor for payment of the monies thereby secured, or for the doing, observing or performing of any covenant, agreement, matter or thing herein contained to be done, observed or performed by the mortgagor, and that no taking of any further security from the mortgagor, nor any other dealings between the mortgagee and the mortgagor shall in any way modify, alter, vary or otherwise prejudice the mortgagee or effect the liability of the covenantor in anywise under this covenant, which shall continue and be binding upon the covenantor, his heirs, executors, administrators, successors and assigns as well after as before default, and as well after as before maturity of this mortgage until the said monies are fully paid and satisfied, and the mortgagee shall not be bound to exhaust its recourse against the mortgagor or any other persons before enforcing its rights against the covenantor.

8 In many respects this provision resembles the primary obligation found in the *Prospect Mtge.* case. The loan is stated to have been made at the request of the covenantor, "in consideration of which the covenantor gives his promise". The promise itself is couched in absolute and primary terms; the covenantor agrees that he will **"at all times** pay or cause to be paid to the mortgagee the principal monies, interest and other monies hereby secured ..." The covenantor agrees to "observe and perform or cause to be observed or performed, all the covenants, terms, provisos, stipulations and conditions herein contained on the part of the mortgagor to be observed, performed ..." Finally, both the mortgage in this case and in *Prospect*, contain a clause which states that no indulgences, time extensions, taking further security from the mortgagor, "nor any other dealings between the mortgagee and mortgagor shall in any way modify, alter, vary or otherwise prejudice the mortgagee or affect the liability of the covenantor ..."

9 On the other hand, the covenant in this case, unlike that found in *Prospect Mtge.*, includes a proviso that the covenantor will "at all times indemnify, protect and save harmless the mortgagee from all loss, costs and damage in respect of this mortgage ..." Moreover, the covenant in *Prospect* provided expressly that the covenantors gave their covenants "as primary obligors and not as guarantors". No such clause is found in the mortgage in this case.

10 Mr. Ready contends that the reference in the covenant to his obligation to indemnify and save harmless the mortgagee makes him a mere surety or guarantor with the result that *Holland* applies and he is discharged from liability on the renewed agreement. The appellant on the other hand, relies on the legal distinction between a guarantor or surety on the one hand, and an indemnitor on the other. In essence, the distinction is this. A surety or guarantor is liable only if the principal debtor defaults. An indemnitor, on the other hand, is primarily liable to pay, even in the absence of default by the debtor.

11 The distinction is set out in Jowitt's Dictionary of English Law, 2nd ed. (1977), vol. 1, p. 959:

> [An indemnity] differs from a guarantee (q.v.), which is required to be evidenced by writing by the Statute of Frauds, 1677, s. 4, in that a guarantee contemplates the primary liability of a third person, whereas an indemnity gives to the person to whom it is made the immediate right to look for satisfaction to the person by whom it is made. An indemnify [sic] may be illustrated by "If you will supply goods to A. I will see you paid"; a guarantee by "If A does not pay you, I will."

12 In the clause under consideration in this case, there is nothing which makes Mr. Ready's obligation as covenantor conditional on the default of the mortgagor. He may be sued on the mortgage debt at any time. He has given the mortgagee his own primary undertaking to repay the mortgage debt and otherwise abide by the mortgage covenants. The fact that he additionally agrees to indemnify and save harmless the mortgagee against the defaults of the mortgagor does not, in my view,

detract from his clear and unambiguous assumption of a primary obligation to the mortgagee. The agreement to indemnify is a primary assumption of responsibility, not a conditional guarantee. Having so covenanted, Mr. Ready cannot bring himself within the special rules which give additional protection to mere sureties, who have not bound themselves to pay the creditor in any event and enter into their obligation of guarantee merely as a secondary accommodation of another.

13 These considerations lead me to the conclusion that Mr. Ready was not a mere surety, as were the guarantors in *Holland*. I would allow the appeal and reverse the order of the chambers judge below, striking out Credit Foncier's claim against Mr. Ready. The matter is remitted to the trial division for determination of the issue of novation.

Appeal allowed.

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