TAB 21

Helga Petranik *Appellant*;

and

Alice Dale, Frederick W. Parker and Eugene F. Berwick *Respondents.*

1976: May 5; 1976: October 5.

Present: Laskin C.J. and Judson, Ritchie, Spence and Dickson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mortgages — Foreclosure — Power of sale in mortgage — Sale under power after judgment nisi in foreclosure — Right of redemption — Equity — Whether exercise of alternative remedy valid — Whether sale void — Rules of Practice, R.R.O. 1960, Reg. 396, Rule 465.

Appellant brought an action against D, P & B claiming that a mortgage purportedly executed by her in favour of D was null and void and that P and B who purchased the property from D under the power of sale held the property in trust for appellant. D as mortgagee had started foreclosure proceedings in 1961 and a specially endorsed writ was issued against appellant as mortgagor. Appellant failed to appear and a default judgment was taken in 1962. The judgment directed a reference and when originally drawn up in typed form contained a clause providing for a reconveyance to the appellant upon payment of the amount due to the mortgagee. This reconveyance clause was struck out and the deletion initialled by the Assistant Registrar. No explanation was given for the deletion. Appellant did not however proceed with the reference directed in the default judgment but instead purported to act under the power of sale contained in the mortgage. The trial judge founding himself on *Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857, found that the direction for a reference in the default judgment was enough to preclude exercise of the power of sale without leave of the Court. The Court of Appeal reversed.

Held (Judson and Ritchie JJ. dissenting): The appeal should be allowed.

Per Laskin C.J. and Spence J.: The default judgment was a judgment *nisi* for foreclosure. The mortgagor would have been entitled to invoke the equitable jurisdiction of the Court to claim a right to redeem on payment of the amounts found owing on the reference and on such other terms as the Court might fix. The

Helga Petranik *Appelante*;

et

Alice Dale, Frederick W. Parker et Eugene F. Berwick *Intimés.*

1976: le 5 mai; 1976: le 5 octobre.

Présents: Le juge en chef Laskin et les juges Judson, Ritchie, Spence, et Dickson.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Hypothèques — Forclusion — Pouvoir de vente attaché à l'hypothèque — Vente en vertu du pouvoir après jugement conditionnel de forclusion — Droit de rachat — Equity — L'exercice d'un recours alternatif est-il valide? — La vente est-elle nulle? — Règles de pratique, R.R.O. 1960, Reg. 396, Règle 465.

L'appelante a intenté une action contre D, P & B, prétendant qu'une hypothèque qu'elle aurait consentie en faveur de D était nulle et non avenue et que P et B qui avaient acheté l'immeuble à D en vertu du pouvoir de vente le détenaient en fiducie pour le compte de l'appelante. D, en sa qualité de créancière hypothécaire, avait entamé des procédures de forclusion en 1961 et un bref spécialement endossé avait été délivré contre l'appelante, débitrice hypothécaire. L'appelante n'ayant pas comparu un jugement par défaut fut rendu en 1962. Le jugement ordonnait un renvoi et, dans sa rédaction originale sous forme dactylographiée, comportait une clause prévoyant une rétrocession en faveur de l'appelante contre paiement du montant dû à la créancière hypothécaire. Cette clause était biffée, la suppression portant les initiales du registraire adjoint. Aucune explication de cette suppression n'a été fournie. Toutefois, l'appelante ne fit pas procéder au renvoi ordonné par le jugement par défaut, mais se résolut plutôt à agir en vertu du pouvoir de vente attaché à l'hypothèque. Le juge de première instance, s'appuyant sur l'affaire *Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857, a conclu que l'ordonnance de renvoi du jugement par défaut suffisait à empêcher l'exercice du pouvoir de vente sans permission de la Cour. La Cour d'appel a infirmé ce jugement.

Arrêt (les juges Judson et Ritchie étant dissidents): Le pourvoi doit être accueilli.

Le juge en chef Laskin et le juge Spence: Le jugement par défaut était un jugement conditionnel de forclusion. La débitrice hypothécaire aurait eu le droit d'invoquer la compétence d'*equity* de la Cour pour se faire reconnaître le droit de racheter, sur paiement des sommes trouvées dues lors du renvoi et aux conditions que la mortgagee was not entitled to improve her position by proceeding to a sale under the mortgage without leave when she had crystallised her remedies through a judgment *nisi* which called for a reference. Rule 460A (introduced in 1941 and now Rule 465, R.R.O. 1960, Reg. 396 of the Rules of Practice), which provides for filing of a notice of desire of opportunity to redeem if a mortgagor does not otherwise wish to defend the foreclosure action, must be read with Rule 467 [now Rule 472] which makes it clear that failure to appear or to file a D.O.R. notice enables the plaintiff to sign judgment for immediate foreclosure subject to a reference as to encumbrances. The Rule changes did not however deal with the matter on appeal.

Per Dickson J.: An equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land. Equity has always jealously guarded the mortgagor's right to redeem. Having obtained a judgment of the type obtained by D, the mortgagee must carry out that judgment or obtain the leave of the Court to do otherwise. The failure of appellant to file a D.O.R. did not extinguish her equity of redemption.

Per Judson J., *dissenting*: Appellant was in default under the mortages, and the property was completely pledged to or claimed by others. When the foreclosure proceedings were instituted she was not able to nor did she indicate a desire to redeem the property. The judgment *nisi* effectively foreclosed her equity of redemption and directed a reference. The mortagee was entitled to pursue alternative remedies. The fact of obtaining such a judgment *nisi* did not preclude the mortgagee from exercising her power of sale under the mortgage since the sale did not prejudice any rights asserted by or accorded to appellant in the foreclosure proceeding.

Per Ritchie J., *dissenting*: For the reasons given by Arnup J.A. in the Court of Appeal the appeal should be dismissed.

[*Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857; *De Beck v. Canada Permanent Loan and Savings Co.* (1907), 12 B.C.R. 409; *Marshall v. Miles*, [1970] 3 O.R. 394; *Casborne v. Scarfe* (1737), 1 Atk. 603, 26 E.R. 377; *Burgess v. Wheats* (1759), 1 Eden 177, 28 E.R. 652; *Heath v. Pugh* (1881), 6 Q.B.D. 345; *Tarn v. Turner* (1888), 39 Ch. D. 456; *Campbell v. Holyland* (1877), 7 Ch. D. 166 referred to.]

Cour pouvait déterminer. La créancière hypothécaire n'avait pas le droit d'améliorer sa position en procédant, sans permission, à une vente en vertu de l'hypothèque, alors qu'elle avait cristallisé ses recours dans un jugement conditionnel qui imposait un renvoi. La règle 460A (mise en vigueur le 31 mai 1941, maintenant règle 465, R.R.O. 1960, Reg. 396 des Règles de pratique), qui oblige le débiteur hypothécaire à déposer un avis exprimant son désir d'avoir l'occasion de racheter D.O.R. s'il n'entend pas présenter d'autres défenses à l'action en forclusion, doit être lue avec la règle 467 [présentement la règle 472] qui indique clairement que le défaut de comparaître ou de déposer un D.O.R. habilite un demandeur à obtenir jugement en forclusion immédiate, sauf si un renvoi est exigé quant aux créanciers. Toutefois, les modifications apportées aux règles n'ont pas touché au cas faisant l'objet du pourvoi.

Le juge Dickson: Un droit de rachat est un droit réel immobilier que le débiteur hypothécaire peut céder, léguer, attribuer, louer ou hypothéquer comme n'importe quel autre droit réel immobilier. L'*equity* a toujours jalousement protégé le droit de rachat du débiteur hypothécaire. Ayant obtenu un jugement de la nature de celui qu'a obtenu D, le créancier hypothécaire doit exécuter ce jugement ou obtenir de la cour la permission d'agir autrement. Le défaut par l'appelante de déposer un D.O.R. n'a pas éteint son droit de rachat.

Le juge Judson, *dissident*: L'appelante avait cessé ses paiements hypothécaires et l'immeuble était complètement obéré. Au moment où les procédures de forclusion ont été engagées, elle n'était pas à même de racheter la propriété et elle n'en a pas manifesté le désir. Le jugement conditionnel de forclusion a effectivement forclos son droit de rachat et ordonné un renvoi. La créancière hypothécaire avait plusieurs moyens à sa disposition. Le fait qu'elle ait obtenu un jugement conditionnel de forclusion ne l'empêchait pas d'exercer son pouvoir de vente résultant de l'hypothèque, puisque la vente ne portait atteinte à aucun droit reconnu ou conféré à l'appelante lors des procédures de forclusion.

Le juge Ritchie, *dissident*: Pour les motifs du jugement rendus par le juge Arnup au nom de la Cour d'appel, le pourvoi doit être rejeté.

[Arrêts mentionnés: *Stevens v. Theatres, Ltd.*, [1903] 1 Ch. 857; *De Beck v. Canada Permanent Loan and Savings Co.* (1907), 12 B.C.R. 409; *Marshall v. Miles*, [1970] 3 O.R. 394; *Casborne v. Scarfe* (1737), 1 Atk. 603, 26 E.R. 377; *Burgess v. Wheats* (1759), 1 Eden 177, 28 E.R. 652, *Heath v. Pugh* (1881), 6 Q.B.D. 345; *Tarn v. Turner* (1888), 39 Ch. D. 456; *Campbell v. Holyland* (1877), 7 Ch. D. 166.]

APPEAL from a judgment of the Court of Appeal for Ontario[1], allowing an appeal from a judgment of Moorhouse J., declaring null and void a conveyance made in exercise of a power of sale under a mortgage. Appeal allowed, Judson and Ritchie JJ. dissenting.

Nelles Starr, Q.C., and *Walter S. Gonet, Q.C.*, for the appellant.

George T. Walsh, Q.C., and *Tom Pratt*, for the respondents.

The judgment of Laskin C.J. and Spence JJ. was delivered by

THE CHIEF JUSTICE—This appeal arises out of an action brought by the appellant on April 28, 1969 claiming a declaration that (1) a mortgage on certain property allegedly given by her to one Alice Dale on July 12, 1958, registered on January 8, 1959 and subsequently recorded in full on June 15, 1962, was void because the signature thereon was not hers, and (2) a conveyance of the property by Alice Dale to the respondents Parker and Berwick on June 1, 1962 under the power of sale contained in the mortgage was void and that the respondents held the property in trust for the appellant.

Neither the trial judge nor the Ontario Court of Appeal found in the appellant's favour on her contention that the mortgage was not executed by her, and this question was not pressed in this Court. What is evident from the record is that the mortgage transaction between the appellant and Alice Dale (who was not represented in this Court nor in the Court of Appeal), and other transactions in which the appellant and her husband were involved were carried out by a solicitor whose irresponsibility, incompetence and negligence are made plain in reasons of the trial judge given in a companion case which, as to the evidence and findings, was by consent of counsel, made applicable to the present case. The solicitor in question arranged the mortgage on which no more than $4,000 was advanced although it is stated to be for

[1] [1973] 2 O.R. 217.

POURVOI à l'encontre d'un arrêt de la Cour d'appel de l'Ontario[1] accueillant un appel d'un jugement du juge Moorhouse qui a déclaré nul et non avenu un transfert fait en vertu d'un pouvoir de vente attaché à une hypothèque. Pourvoi accueilli, les juges Judson et Ritchie étant dissidents.

Nelles Starr, c.r., et *Walter S. Gonet, c.r.*, pour l'appelante.

George T. Walsh, c.r., et *Tom Pratt*, pour les intimés.

Le jugement du juge en chef Laskin et du juge Spence a été rendu par

LE JUGE EN CHEF—Ce pourvoi a son origine dans une action intentée par l'appelante le 28 avril 1969 par laquelle elle demandait qu'il soit déclaré (1) qu'une hypothèque sur un certain immeuble prétendument consentie par elle à une nommée Alice Dale le 12 juillet 1958, enregistrée sommairement le 8 janvier 1959 et pleinement enregistrée le 15 juin 1962, est nulle parce que la signature figurant à l'acte n'est pas la sienne et (2) qu'un transfert de l'immeuble par Alice Dale aux intimés Parker et Berwick, le 1er juin 1962, en vertu du pouvoir de vente attaché à l'hypothèque est nul et que les intimés détiennent l'immeuble en fiducie pour le compte de l'appelante.

Ni le juge de première instance ni la Cour d'appel de l'Ontario n'ont fait droit à la prétention selon laquelle l'hypothèque n'avait pas été signée par l'appelante et on n'a pas insisté sur ce point devant notre Cour. Ce que le dossier montre à l'évidence, c'est que l'opération hypothécaire entre l'appelante et Alice Dale (qui n'était pas représentée devant cette Cour, ni en Cour d'appel) ainsi que d'autres opérations auxquelles étaient parties l'appelante et son mari ont été menées par un avocat dont l'irresponsabilité, l'incompétence et la négligence ressortent des motifs exposés par le juge de première instance dans une affaire connexe dont la preuve et les conclusions ont été, sur consentement des procureurs, admises dans la présente affaire. L'avocat en question a préparé une hypothèque sur laquelle il n'a pas été avancé plus

[1] [1973] 2 O.R. 217.

$5,000. He acted for both parties to the mortgage, and then took foreclosure proceedings on behalf of the mortgagee, Alice Dale. She was an elderly woman and, as found by the trial judge, relied on her daughter, who was the solicitor's secretary, and upon the solicitor, in respect of the transaction in this case. The daughter herself was involved in a mortgage transaction affecting the very property which is the subject of these proceedings.

A question arose in these proceedings whether the appellant had ever been served with the writ in the foreclosure action and, although it was left open by the trial judge who found on other grounds in the appellant's favour, I agree with the Court of Appeal that the issues in this case must be considered on the footing that there was proper service, as indeed is shown by a sheriff's officer's certificate.

Arising out of the foregoing is another matter that should be laid to rest, one which the trial judge considered favourably to the appellant and on which the Court of Appeal did not pronounce because, as it noted, no argument was addressed to that Court on it. I refer to the matter of the delay *ex facie* involved in the prosecution by the appellant of her claim herein. The proceedings out of which this appeal arises were commenced on April 28, 1969. Since they relate to the foreclosure action, which was begun on July 17, 1961, and to the exercise of a power of sale on June 1, 1962, an explanation of the delay was obviously required.

Default judgment in the foreclosure action was signed against the appellant on March 23, 1962 and a writ of possession was issued on April 17, 1962 and executed at the solicitor's behest. If the appellant did not know of the default judgment (and it appears that she did not), she certainly knew of the writ of possession; the evidence makes this clear. On learning of the sale to Parker and Berwick on June 1, 1962 pursuant to an accepted offer of May 17, 1962, the appellant took certain proceedings which proved abortive. It is enough to say that by an order of the Ontario Court of

de $4,000, bien qu'il soit déclaré qu'elle est de $5,000. Il a représenté les deux parties à l'hypothèque, puis il a intenté des procédures de forclusion au nom de la créancière hypothécaire, Alice Dale. Celle-ci était une femme âgée et, selon les conclusions du juge de première instance, elle s'en remettait à sa fille, qui était la secrétaire de l'avocat, et à celui-ci, en ce qui concerne l'opération en litige. La fille elle-même était mêlée à une opération hypothécaire portant sur l'immeuble même qui fait l'objet du présent procès.

Dans le présent procès, s'est soulevée la question de savoir si le bref d'action en forclusion avait jamais été signifié à l'appelante et, quoique cette question ait été laissée ouverte par le juge de première instance qui s'est prononcé pour d'autres motifs en faveur de l'appelante, je suis d'accord avec la Cour d'appel que les points en litige doivent être étudiés en prenant pour acquis qu'il y a eu signification régulière, comme le montre d'ailleurs le procès-verbal du fonctionnaire des services du shérif.

Ce qui précède soulève également une question qui doit être mise de côté; le juge de première instance l'a tranchée en faveur de l'appelante et sur laquelle la Cour d'appel ne s'est pas prononcée parce que, comme elle l'a noté, elle n'a pas été plaidée devant elle. Je veux parler du retard apparent avec lequel l'appelante a intenté les poursuites. Les procédures qui sont à l'origine du présent pourvoi ont été entamées le 28 avril 1969. Puisqu'elles sont relatives à une action en forclusion commencée le 17 juillet 1961 et à un pouvoir de vente exercé le 1er juin 1962, une explication de ce retard s'imposait.

Jugement par défaut dans l'action en forclusion a été rendu contre l'appelante le 23 mars 1962 et un bref de possession a été délivré le 17 avril 1962 et exécuté à la requête de l'avocat. Si l'appelante n'a pas eu connaissance du jugement par défaut (et il semble qu'elle ne l'ait pas eue), elle a certainement eu connaissance du bref de possession; la preuve le démontre. Ayant appris la vente à Parker et Berwick le 1er juin 1962 à la suite d'une offre acceptée le 17 mai 1962, elle intenta certaines procédures qui échouèrent. Il suffit de dire que par ordonnance du 10 décembre 1968, la Cour d'appel

Appeal of December 10, 1968, that Court gave leave to the appellant to re-open an action instituted by her in 1964 against Alice Dale, Parker and Berwick, or to institute such other proceedings as she might be advised, under a limiting date in either case of February 3, 1969. A motion by the appellant to re-open the former action was dismissed on April 9, 1969 and the proceedings now in appeal were begun, as already stated, on April 28, 1969. The trial judge indicated that there was no evidence to show that the motion to re-open was not commenced before February 3, 1969. Hence, he proceeded to deal with the case before him on the merits. I think, in view of all the circumstances, that was the proper course. It was the one that the Court of Appeal took, and it was on the merits that the argument proceeded in this Court.

The default judgment in the foreclosure action, which as already noted, was signed on March 23, 1962, was in the following terms:

UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed;

I. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

II. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

When originally drawn up in typed form, the proposed default judgment consisted of three clauses, the first and third clauses being those set out above and a second clause which was as follows:

2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that (subject to the provision of

de l'Ontario donna à l'appelante la permission de rouvrir une action qu'elle avait intentée contre Alice Dale, Parker et Berwick en 1964 ou d'intenter toute autre procédure qu'elle jugerait opportune, avant une date limite fixée dans les deux cas au 3 février 1969. Une requête en réouverture de l'ancienne action présentée par l'appelante fut rejetée le 9 avril 1969 et les procédures maintenant devant nous furent entamées, comme je l'ai déjà dit, le 28 avril 1969. Le juge de première instance indiqua qu'il n'y avait aucune preuve que la requête en réouverture n'avait pas été présentée avant le 3 février 1969. En conséquence, il procéda à l'audition au fond de l'affaire qui était devant lui. Je pense que c'était, eu égard à toutes les circonstances, la conduite à suivre. C'est celle qu'a suivie la Cour d'appel et c'est donc sur le fond que l'on a plaidé devant notre Cour.

Le jugement par défaut dans l'action en forclusion, rendu, comme je l'ai déjà dit, le 23 mars 1962, était rédigé en ces termes:

[TRADUCTION] VU le bref d'assignation délivré dans la présente action et l'attestation sous serment de la signification dudit bref, en l'absence de comparution et aucun avis n'ayant été déposé exprimant le désir de la défenderesse d'avoir l'occasion de racheter les lieux hypothéqués;

I. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés, les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* en la ville de Toronto.

II. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que la défenderesse mette immédiatement la demanderesse ou la personne qu'elle peut désigner, en possession des biens-fonds et lieux en question dans la présente cause ou de toute partie de ceux-ci qui peuvent être en la possession de ladite défenderesse.

Lors de sa rédaction originale sous forme dactylographiée, le jugement par défaut proposé comportait trois clauses, la première et la troisième étant celles qui sont reproduites ci-dessus et une deuxième ainsi libellée:

[TRADUCTION] 2. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que, après dépôt du rapport du *Master*, la défenderesse paye immédiatement à la demanderesse ce qui lui sera trouvé dû en capital, intérêts et frais à la date dudit rapport et, sur paiement du montant qui lui est dû, que (sous réserve des disposisection 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.

This clause was struck out, the deletion being initialled by the Assistant Registrar. No explanation was given for the deletion. It is common ground that had this stricken clause remained in the default judgment the appellant would have been entitled to succeed and to have a proper reference at which the accounts would be taken and the amount properly owing on the mortgage ascertained. There was a contention by the respondents that their position was better than that of Alice Dale in that they were purchasers for value, but it is quite clear that they were aware of the foreclosure proceedings and of the default judgment. Since they took with notice thereof, their title would be vulnerable if the mortgagee was disentitled to act when she did under the power of sale in the mortgage.

I note also that Alice Dale swore an affidavit on May 31, 1962 in respect of the sale to the respondents in which she alleged a continuing default of interest under the mortgage to the date of the sale, which she said was May 29, 1962. The deed of June 1, 1962 also recited that there was default in interest for more than two months (this being a proviso in the mortgage permitting sale) and that it had continued to date. The record shows that the solicitor who was behind all the transactions involving the appellant's mortgaged property had in fact paid up the interest to the end of April, 1962, which was for a period beyond the date on which default judgment was signed and beyond the date of the writ of possession.

The default judgment was a judgment *nisi* for foreclosure, and para. 1 thereof directed a reference to the Master for the usual enquiries with respect to the accounts and as to redemption or foreclosure. Alice Dale did not proceed with the reference which was directed by para. 1 of the default judgment but, instead purported to act under the power of sale contained in the mortgage, and this is what raises the central issue in the present case. In short, was she entitled to exercise

tions de l'article 2 de *The Mortgages Act*) la demanderesse rétrocède les lieux hypothéqués et rende tous documents les concernant.

Cette clause a été biffée, suppression parafée par le registraire adjoint. Aucune explication de cette suppression n'a été fournie. Il n'est pas contesté que, si la clause biffée était demeurée dans le jugement par défaut, l'appelante aurait pu prétendre, avec succès, à un renvoi approprié au cours duquel les comptes auraient été dressés et le montant exact de la dette hypothécaire déterminé. Les intimés ont prétendu qu'ils étaient en meilleure position qu'Alice Dale parce qu'ils étaient des acquéreurs à titre onéreux, mais il est parfaitement clair qu'ils étaient au courant des procédures de forclusion et du jugement par défaut. L'ayant acquis en connaissance de cause, leur titre serait vulnérable, si la créancière hypothécaire n'avait pas le droit d'agir comme elle l'a fait en vertu du pouvoir de vente attaché à l'hypothèque.

Je note également qu'Alice Dale a fait, le 31 mai 1962, une déclaration sous serment lors de la vente aux intimés dans laquelle elle alléguait défaut continu de paiement des intérêts sur l'hypothèque jusqu'à la date de la vente, qu'elle disait être le 29 mai 1962. L'acte du 1[er] juin 1962 indique également qu'il y avait défaut de paiement des intérêts depuis plus de deux mois (il s'agit là d'une clause de l'hypothèque permettant la vente) et qu'il avait continué jusqu'à cette date. Le dossier révèle que l'avocat qui était derrière toutes les opérations relatives à l'immeuble hypothéqué de l'appelante avait, en fait, payé les intérêts jusqu'à la fin d'avril 1962, c'est-à-dire sur une période allant au-delà de la date à laquelle le jugement par défaut a été rendu et au-delà de celle du bref de possession.

Le jugement par défaut était un jugement conditionnel de forclusion et son 1[er] paragraphe ordonnait un renvoi au *Master*, pour les recherches habituelles relatives aux comptes et au rachat ou à la forclusion. Alice Dale ne fit pas procéder au renvoi ordonné par le 1[er] paragraphe du jugement par défaut mais prétendit plutôt agir en vertu du pouvoir de vente attaché à l'hypothèque, et c'est ce qui soulève la question au cœur du présent litige. En bref, avait-elle le droit d'exercer le pouvoir de the power of sale against the appellant who had not entered an appearance, had not filed a defence and had not filed a notice of her desire of an opportunity to redeem, and to do so after the judgment *nisi* for foreclosure and without the leave of the Court?

The trial judge founded himself on the principle expressed in *Stevens v. Theatres, Ltd.*[2], a case which was followed by the British Columbia Court of Appeal in *De Beck v. Canada Permanent Loan and Savings Co.*[3] and approvingly referred to by Stewart J. in *Marshall v. Miles*[4], at p. 397. Although there is language in the reasons of Farwell J. in the *Stevens* case that indicates that it was because the decree *nisi* of foreclosure directed a reference and also a reconveyance (as under the paragraph deleted from the default judgment herein) that the power of sale was suspended and could not be exercised without leave of the Court, the trial judge viewed the case in wider compass. For him, the direction in para. 1 of the default judgment for a reference was enough to preclude exercise of the power of sale without leave of the Court.

In the Court of Appeal, Arnup J.A. speaking for the Court, was of opinion that the *Stevens* case was inapplicable by reason of the omission of the deleted paragraph from the default judgment and, moreover, that his result was compelled by the change in mortgage practice that occurred in Ontario after 1941. His reasons contain the following:

> In my opinion, the *Stevens* rule did not apply in Ontario after 1941 in a situation where a defendant by writ (as mortgagor) did not enter an appearance nor file a D.O.R., even if there were encumbrancers, thus requiring a reference. There would be in such a case no judgment under which the mortgagor acquired rights that would be taken away by the mortgagee's exercising his power of sale. This conclusion is further justified by the facts of this case, namely, that the actual judgment issued is completely silent as to any right of redemption, or direction to the mortgagee to reconvey on payment. The exercise of the power of sale by the mortgagee was

[2] [1903] 1 Ch. 857.
[3] (1907), 12 B.C.R. 409.
[4] [1970] 3 O.R. 394.

vente à l'encontre de l'appelante qui n'avait pas comparu, n'avait pas produit de défense et n'avait pas déposé d'avis exprimant son désir d'avoir l'occasion de racheter? Avait-elle le droit de l'exercer après le jugement conditionnel de forclusion et sans la permission de la Cour?

Le juge de première instance s'est appuyé sur le principe exprimé dans *Stevens v. Theatres, Ltd.*[2], arrêt suivi par la Cour d'appel de la Colombie-Britannique dans *DeBeck v. Canada Permanent Loan and Savings Co.*[3] et cité avec approbation par le juge Stewart dans *Marshall v. Miles*[4], à la p. 397. Bien que le libellé des motifs du juge Farwell dans *Stevens* indique que c'est parce que le jugement conditionnel de forclusion ordonnait un renvoi et également une rétrocession (comme dans le paragraphe supprimé dans le jugement par défaut, dans l'espèce présente) que le pouvoir de vente était suspendu et ne pouvait être exercé sans permission de la Cour, le juge de première instance a vu l'affaire sous un angle plus large. Pour lui, l'ordonnance de renvoi au 1er paragraphe du jugement par défaut suffisait à empêcher l'exercice du pouvoir de vente sans permission de la Cour.

Parlant au nom de la Cour d'appel, le juge Arnup a été d'avis que *Stevens* était inapplicable en raison de l'omission du paragraphe supprimé dans le jugement par défaut et qu'au surplus ce résultat était imposé par les changements intervenus dans la procédure hypothécaire en Ontario depuis 1941. Ses motifs contiennent le passage suivant:

> [TRADUCTION] A mon avis, la règle *Stevens* ne s'applique plus en Ontario depuis 1941 dans la situation où un défendeur actionné en tant que débiteur hypothécaire ne fait pas acte de comparution ni ne dépose un D.O.R., même s'il y a des créanciers subséquents, obligeant ainsi à un renvoi. Il n'y a dans ce cas aucun jugement en vertu duquel le débiteur hypothécaire a acquis des droits qui lui seraient ôtés par l'exercice, par le créancier hypothécaire, de son pouvoir de vente. Cette conclusion est encore plus justifiée en l'espèce puisque le jugement effectivement rendu est complètement silencieux sur une quelconque faculté de rachat ou obligation du créancier

[2] [1903] 1 Ch. 857.
[3] (1907), 12 B.C.R. 409.
[4] [1970] 3 O.R. 394.

not in any way contrary to the order of the Court which had been issued at the behest of the mortgagee.

I would observe that the learned judge's statement in the above-quoted passage that there was no right of redemption given in the default judgment herein is not correct, unless it be taken as a specific reference to the mortgagors right of redemption as depending only on whether there was a direction to reconvey, pursuant to the deleted paragraph. In the absence of this paragraph, it was the learned judge's opinion, fortified by the change in Ontario mortgage practice, that para. 1 of the default judgment referred only to redemption by subsequent encumbrancers and, even if there were such encumbrancers, the failure to proceed to a reference was not a matter of which the mortgagor could complain.

Arnup J.A conceded that his conclusion "may seem to be a highly technical position to reach but the *Stevens* rule itself is a technical one . . .". I do not think so in the light of the regard which equity has always had for the position of a mortgagor. "Once a mortgage, always a mortgage" is not an idle maxim when even a final order of foreclosure may, in some circumstances, be set aside. Under the original draft of the default judgment containing the paragraph subsequently deleted, the only provision for redemption is in para. 1; the deleted paragraph builds upon para. 1 by referring back to it, and is based upon the assumption that a reference before the Master will take place.

Counsel for the respondent in this Court viewed the deleted paragraph as relating to judgment on the covenant for payment of the mortgage debt, but I do not think that this meets the issue here. The question in this case is whether the excision of the draft para. 2 *ipso facto* relieves the mortgagee in equity from holding the property to answer the exercise by the mortgagor of the equitable right to redeem when the legal right has been lost by a default in payment at the time prescribed in the

hypothécaire de rétrocéder après paiement. L'exercice, par le créancier hypothécaire, de son pouvoir de vente, n'était aucunement contraire à l'ordonnance que la cour avait rendue à sa requête.

Je ferais observer que l'affirmation du savant juge, dans le passage précité, selon laquelle le jugement par défaut n'accordait en l'espèce aucune faculté de rachat, n'est pas exacte, à moins de la considérer comme voulant faire dépendre uniquement la faculté de rachat du débiteur hypothécaire de l'existence d'un ordre de rétrocession, comme dans le paragraphe supprimé. En l'absence de ce paragraphe, et fortifié par les changements intervenus dans la procédure hypothécaire en Ontario, le savant juge était d'avis que le 1[er] paragraphe du jugement par défaut visait seulement le rachat par des créanciers subséquents et que, même s'il y avait de tels créanciers, le débiteur hypothécaire n'avait pas lieu de se plaindre du défaut de faire procéder au renvoi.

Le juge Arnup a reconnu que sa conclusion [TRADUCTION] «peut sembler une prise de position extrêmement procédurale mais la règle *Stevens* elle-même est une règle de procédure . . .». Je ne pense pas qu'il en soit ainsi, si l'on considère la façon dont l'*equity* a toujours considéré la position du débiteur hypothécaire. [TRADUCTION] «Une hypothèque est toujours une hypothèque» n'est pas une maxime vaine lorsque même une ordonnance définitive de forclusion peut, dans certaines circonstances, être révoquée. Selon la rédaction originale du jugement par défaut contenant le paragraphe supprimé par la suite, la seule disposition envisageant le rachat se trouve au 1[er] paragraphe; le paragraphe supprimé se fonde sur le par. 1 en s'y référant et repose sur la présomption qu'un renvoi devant le *Master* aura lieu.

Le procureur de l'intimée devant cette Cour voyait le paragraphe supprimé comme se rapportant au jugement sur l'engagement de paiement de la dette hypothécaire, mais je ne pense pas que cela réponde à la question dont il s'agit ici. La question en l'espèce est de savoir si la suppression du par. 2 du projet de jugement dispense *ipso facto* le créancier hypothécaire en *equity* de conserver l'immeuble pour faire face à l'exercice, par le débiteur hypothécaire, du droit que lui confère mortgage. The contention of the respondent, which was upheld by the Ontario Court of Appeal, is that para. 1 of the default judgment did not preserve any right of redemption by the mortgagor.

In the *Stevens* case, it does not appear that the judgment *nisi* for foreclosure was a default judgment. The recital of facts includes the statement that the order *nisi* for foreclosure was in the common form, directing accounts and directing the plaintiff to reconvey the property on payment of what should be found due. Instead of proceeding to a reference the mortgagee gave notice to the mortgagor of intention to sell, and two weeks later entered into a contract of sale which was later followed by a conveyance to the purchaser. The holding of Farwell J. that the power of sale in the mortgage was suspended in view of the judgment *nisi* for foreclosure and could not be exercised without leave of the Court "because it prejudices the rights given to the mortgagor under the direction to reconvey" relates, of course, to the actual terms of the judgment *nisi* in that case.

The question that arises is whether the *Stevens* case expresses a principle which is equally applicable where there is a provision, as here, for a reference and for redemption or foreclosure under a default judgment *nisi* which, as approved by the Registrar (or Assistant Registrar) omits the follow-up clause containing the direction to reconvey upon payment of the amounts found due on the reference. In the course of his reasons, Farwell J. made some general observations as to the relations of mortgagor and mortgagee which, I think, are relevant here. He said this (at p. 860):

> Now this question—whether a decree for foreclosure directing accounts and reconvenance, or, by parity of reasoning, a decree for redemption directing accounts and reconveyance, on payment, operates to prevent the exercise of the power of sale in the mortgage, or that given by the statute—has to be decided on principle in the absence of authority. The first proposition, which I think is plain, is this—neither the mortgagee nor the mortgagor is entitled to dismiss his action, or to discon-

l'*equity* de le racheter lorsque, faute de payer à l'échéance prescrite par l'hypothèque, il en a perdu la faculté en droit strict. La prétention de l'intimée, accueillie par la Cour d'appel de l'Ontario, est que le par. 1 du jugement par défaut ne préservait aucun droit de rachat par la débitrice hypothécaire.

Dans *Stevens*, il ne semble pas que le jugement conditionnel de forclusion était un jugement par défaut. L'exposé des faits contient l'affirmation que l'ordonnance conditionnelle était en la forme usuelle, ordonnant que les comptes soient dressés et que le demandeur rétrocède l'immeuble après paiement de ce qui lui était dû. Au lieu de faire procéder à un renvoi, le créancier hypothécaire avisa le débiteur de son intention de vendre et, deux semaines après, passa un contrat de vente suivi plus tard d'un transfert à l'acheteur. La décision du juge Farwell, selon laquelle le pouvoir de vente attaché à l'hypothèque était suspendu en raison du jugement conditionnel de forclusion et ne pouvait être exercé sans permission de la Cour [TRADUCTION] «parce qu'il porte atteinte aux droits donnés au débiteur hypothécaire en vertu de l'ordre de rétrocession», est évidemment reliée au libellé même du jugement conditionnel dans cette affaire.

La question qui se pose est de savoir si *Stevens* exprime un principe qui est également applicable lorsque renvoi et rachat ou forclusion sont prévus, comme ici, dans un jugement conditionnel par défaut qui, avec l'approbation du registraire (ou du registraire adjoint), omet la clause complémentaire contenant l'ordre de rétrocéder sur paiement des montants trouvés dus lors du renvoi. Le juge Farwell a, dans ses motifs, fait quelques observations générales sur les relations du débiteur et du créancier hypothécaires qui sont, je crois, pertinentes en l'espèce. Il dit ceci (p. 860):

> [TRADUCTION] Ceci dit, la question de savoir si un décret de forclusion ordonnant des comptes et la rétrocession ou, par analogie, un décret de rachat ordonnant des comptes et la rétrocession sur paiement a pour effet d'empêcher l'exercice du pouvoir de vente attaché à l'hypothèque ou de celui prévu par la loi, doit, à défaut de jurisprudence, être résolue compte tenu des principes. La première proposition, qui me paraît évidente, est celle-ci: ni le débiteur hypothécaire ni le créancier hypo-

tinue after judgment. The general principle on which the Court acts with regard to actions of this sort is to regard the plaintiff as dominus litis until judgment; but if, and so far as the judgment operates for the benefit, nor merely of himself but for some one else, he cannot get rid of his action mero motu after judgment. . . .

Now, if the plaintiff cannot get rid of his action after judgment because the judgment is for the benefit also of the defendants, it must follow that he cannot in any way vary the form of that judgment by doing an act which would put it out of his power to perform that which the Court has directed him to do as the condition of getting the judgment.

It is also useful to consider the British Columbia case of *DeBeck v. Canada Permanent Loan and Savings Co., supra*. There, a mortgagee obtained a judgment *nisi* for foreclosure against the mortgagor who had appeared in the action and filed a defence, and also a judgment *nisi* for foreclosure against a second mortgagee who did not (apparently) appear and did not file a defence. A reference was had, and neither the mortgagor nor the second mortgagee attempted to redeem within the six month period fixed on the reference. The foreclosing mortgagee then purported to sell the property, having given notice to the mortgagor but not to the second mortgagee, but without having obtained an order absolute for foreclosure and without having the leave of the Court. The purchaser knew of the foreclosure proceedings. Three years later the mortgagor and the second mortgagee made a tender seeking redemption, and when it was denied they sued the foreclosing mortgagee and the purchaser claiming that they were entitled to redeem.

Their claim was upheld by Hunter C.J. whose judgment, relying on the *Stevens* case, was sustained on appeal. The trial judge noted that the sale agreement was made before the expiry of the time fixed for redemption, and the foreclosing mortgagee was therefore disentitled to sell without leave of the Court. This is entirely consistent with the principle of the *Stevens* case. If a private sale is prohibited without leave of the Court where a

thécaire n'a le droit de se désister de son action ou de renoncer après jugement. Le principe général qu'appliquent les tribunaux dans des actions de cette sorte est que le demandeur doit être considéré comme le *dominus litis* jusqu'au jugement; mais dès lors que le jugement, et dans la mesure où il le fait, produit des effets en faveur non seulement du demandeur mais aussi de quelqu'un d'autre, il ne peut se défaire de son action *mero motu* après jugement. . . .

Ceci dit, si le demandeur ne peut se défaire de son action après jugement parce que le jugement profite aussi aux défendeurs, il doit s'ensuivre qu'il ne peut en aucune façon modifier la forme de ce jugement en accomplissant un acte qui se situerait en dehors de son pouvoir d'exécuter ce que la cour lui a ordonné de faire comme condition d'obtention du jugement.

Il est également utile d'examiner l'affaire de Colombie-Britannique, *DeBeck v. Canada Permanent Loan and Savings Co.*, précitée. Il s'agissait d'un créancier hypothécaire qui avait obtenu un jugement conditionnel de forclusion contre le débiteur hypothécaire qui avait comparu à l'action et produit une défense, ainsi qu'un jugement conditionnel de forclusion contre un second créancier hypothécaire qui (apparemment) n'avait pas comparu ni produit de défense. Un renvoi eut lieu et ni le débiteur ni le second créancier hypothécaire ne tentèrent de racheter durant la période de six mois fixée en renvoi. Le créancier hypothécaire saisissant entendit alors vendre l'immeuble, après en avoir avisé le débiteur, mais sans en aviser le second créancier hypothéraire et sans avoir obtenu de jugement définitif de forclusion ni la permission de la Cour. L'acheteur était au courant des procédures de forclusion. Trois ans plus tard, le débiteur et le second créancier hypothécaire firent une offre de rachat et, celle-ci ayant été refusée, ils poursuivirent le créancier hypothécaire saisissant et l'acheteur, prétendant avoir le droit de racheter.

Leur demande fut accueillie par le juge en chef Hunter dont le jugement, qui s'appuyait sur *Stevens*, fut confirmé en appel. Le juge de première instance releva que le contrat de vente avait été passé avant l'expiration du délai fixé pour le rachat et que le créancier hypothécaire saisissant n'avait donc pas le droit de vendre sans la permission de la Cour. Cela est parfaitement compatible avec le principe posé par *Stevens*. Si une vente reference is directed but has not been held, it must equally be prohibited where it is held but the period fixed thereunder for redemption has not expired.

What emerges from the *DeBeck* case is a reassertion of the well-established proposition that the equitable right to redeem is more than a mere equity but is, indeed, an interest in the mortgaged land which is not lightly to be put aside and which is enforceable by courts of equity: see *Falconbridge*, *Law of Mortgages* (3rd. ed. 1942), pp. 50-53. I question, therefore, whether it can be put aside by a rule of practice that would preclude a Court from considering all the circumstances that may support a discretion to allow redemption, albeit on terms.

In his reasons in the Court of Appeal, Arnup J.A. emphasized the view that the reason for the suspension of the power of sale under a judgment *nisi* for foreclosure, unless leave of the Court is obtained, is that the mortgagor is given certain rights under the foreclosure judgment (for example, the right to a reconveyance on paying what is owing, as ascertained on a reference), and a sale without leave would deprive him of those rights. I think that this overlooks the fact that a mortgagor under a judgment *nisi* for foreclosure has not yet been deprived of his pre-existing equitable right to redeem; the judgment *nisi* cannot be said to have conferred new rights but rather to have prescribed a procedure by which the existing right could be pursued and the property reclaimed, so long as the foreclosure did not become absolute.

There were in the present case, subsequent encumbrancers, namely, another mortgagee and two execution creditors, and if the mortgagee had on that account proceeded to a reference instead of purporting to exercise a power of sale without leave, I am of the opinion that the mortgagor, although not entitled to notice of the reference by reason of her non-appearance, would have been entitled to invoke the equitable jurisdiction of the Court to claim a right to redeem on payment of the amounts found owing on the reference and on

privée est interdite sans la permission de la Cour quand un renvoi a été ordonné mais n'a pas eu lieu, elle doit l'être également lorsque le renvoi a lieu mais que le délai de rachat qui y est fixé n'est pas expiré.

Ce qui ressort de *DeBeck*, c'est la réaffirmation d'une théorie bien établie selon laquelle le droit de racheter en *equity* est plus qu'une simple faculté mais est, en réalité, un droit réel sur le bien-fonds hypothéqué qui ne saurait être écarté à la légère et que les cours d'*equity* pourront faire respecter: voir *Falconbridge*, Law of Mortgages (3e éd. 1942), pp. 50 à 53. Je me demande, en conséquence, si un tel droit peut être écarté par une règle de procédure qui empêcherait un tribunal de prendre en considération toutes les circonstances de nature à le justifier d'exercer son pouvoir discrétionnaire et d'autoriser le rachat, sous certaines conditions.

Dans ses motifs en Cour d'appel, le juge Arnup a souligné que la raison pour laquelle le pouvoir de vente est, sauf autorisation judiciaire, suspendu aux termes d'un jugement conditionnel de forclusion, est que le débiteur hypothécaire se voit conférer certains droits par le jugement de forclusion (par exemple, le droit à une rétrocession sur paiement de la dette fixée en renvoi) et qu'une vente sans autorisation le priverait de ces droits. Je pense que c'est oublier que le débiteur hypothécaire qui est sous le coup d'un jugement conditionnel de forclusion, n'est pas encore privé de son droit de rachat préexistant en *equity*. On ne peut dire que le jugement conditionnel confère de nouveaux droits mais plutôt qu'il détermine la procédure selon laquelle le droit existant peut être exercé et l'immeuble réclamé, tant que la forclusion n'est pas devenue définitive.

Dans la présente espèce, il y avait des créanciers subséquents, à savoir un autre créancier hypothécaire et deux créanciers saisissants en vertu d'un jugement. Si le créancier hypothécaire avait en conséquence procédé à un renvoi au lieu de prétendre exercer un pouvoir de vente sans permission, je suis d'avis que la débitrice hypothécaire, quoique n'ayant pas le droit d'être avisée du renvoi puisqu'elle n'avait pas comparu, aurait eu le droit d'invoquer la compétence d'*equity* de la Cour pour se faire reconnaître le droit de racheter sur paiesuch other terms as the Court might fix in view of the default of appearance. If this be so, I do not see how the mortgagee could improve her position by proceeding to a sale under the mortgage without leave when she had crystallized her remedies through a judgment *nisi* which called for a reference. To sell in such circumstances, not by order of the Court nor by its leave, is to defeat what the Court has formally directed.

The Court of Appeal would have it that Ontario Rule 460A, introduced as of May 31, 1941 and companion changes in the Rules, have altered the position of a mortgagor by obliging him to file a notice of desire of opportunity to redeem (known as a D.O.R.) if he does not otherwise wish to defend the foreclosure action; failing this (and failing defence), his previous automatic right to redemption is said to be lost. Rule 460A, which became Rule 465 in the 1960 consolidation of the Ontario Rules and which was in force at the material times herein, is as follows:

> Where a defendant by writ in an action for foreclosure or sale desires an opportunity to redeem the mortgaged premises but does not otherwise desire to defend the action, he shall within the time allowed for appearance file and serve a memorandum entitled in the action to the following effect: 'I desire an opportunity to redeem the mortgaged premises', whereupon he shall be entitled to four days notice of the taking of the account of the amount due to the plaintiff and shall have six calendar months from the time of the taking of the account to redeem the mortgaged premises.

This Rule must be read with Rule 467 which makes it clear that the failure to appear or to file a D.O.R. enables the plaintiff to sign judgment for immediate foreclosure, subject to a reference being required as to encumbrancers, and the plaintiff will be entitled to a final order of foreclosure if on the reference no encumbrancer proves a claim.

The Rule changes do not appear to have dealt with the case where, as here, a plaintiff does not proceed to final judgment for foreclosure upon a

ment des sommes trouvées dues en renvoi et aux conditions que la Cour pouvait déterminer étant donné le défaut de comparution. S'il en est ainsi, je ne vois pas comment la créancière hypothécaire pouvait améliorer sa position en procédant, sans permission, à une vente en vertu de l'hypothèque, alors qu'elle avait cristallisé ses recours dans un jugement conditionnel qui imposait un renvoi. Vendre dans de telles circonstances, sans ordre ni permission de la Cour, revient à méconnaître ce que la Cour a formellement ordonné.

La Cour d'appel a soutenu que la règle 460A de l'Ontario, mise en vigueur le 31 mai 1941, ainsi que les modifications corrélatives aux Règles de procédure ont modifié la position du débiteur hypothécaire en l'obligeant à déposer un avis exprimant son désir d'avoir l'occasion de racheter (couramment appelé D.O.R.) s'il n'entend pas présenter d'autre défense à l'action en forclusion. A défaut de cet avis (et à défaut de défense), le droit de rachat automatique qu'il avait antérieurement serait perdu. La règle 460A, qui est devenue la règle 465 dans la refonte des Règles de pratique de l'Ontario effectuée en 1960, et qui était en vigueur à l'époque des faits de l'espèce, se lit comme suit:

> [TRADUCTION] Le défendeur à une action en forclusion ou vente forcée qui désire avoir l'occasion de racheter les lieux hypothéqués mais ne désire pas présenter d'autre défense à l'action, doit, dans le délai de comparution, déposer et signifier une note portant l'intitulé de l'action et ayant la teneur suivante: «Je désire avoir une occasion de racheter les lieux hypothéqués», sur quoi il aura droit à un avis de quatre jours de l'établissement du compte du montant dû au demandeur et aura six mois à compter de cet établissement pour racheter les lieux hypothéqués.

Cette règle doit être lue avec la règle 467 qui indique clairement que le défaut de comparaître ou de déposer un D.O.R. habilite le demandeur à obtenir jugement en forclusion immédiate, sauf si un renvoi est exigé quant aux créanciers, et le demandeur aura droit à une ordonnance définitive de forclusion si, lors du renvoi, aucun créancier ne prouve son droit.

Les modifications apportées aux Règles ne semblent pas avoir touché le cas où, comme ici, un demandeur ne requiert pas un jugement définitif default by the mortgagor and on his failure to file a D.O.R., but instead seeks a judgment *nisi*. It is my opinion that such a judgment leaves open the equitable right to redeem, at least until judgment absolute is obtained, and that the plaintiff cannot sell under the power of sale without leave of the Court.

I return, too, to the observation previously made that the judgment *nisi* in this case does direct a reference, although the consequences thereof are not spelled out because of the deleted paragraph. The deletion is, however, mere form and the prevailing practice of allowing six months to redeem after the taking of accounts would be applicable.

Counsel for the appellant stressed the equities of the present case and, apart from the question of delay, they are clearly with the appellant. I refer to three matters; first, the property, mortgaged for $4,000, was sold to the respondents for $25,500; second, the solicitor, who was in complete charge of the dealings between the appellant and Alice Dale, acted on behalf of the latter to the detriment of the former; and third, there were existing subsequent encumbrancers of whom, apparently, no notice was taken by the solicitor and who were entitled to consideration in the foreclosure proceedings, and certainly, upon the reference directed by the judgment *nisi*.

I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the judgment of Moorhouse J. with costs to the appellant throughout.

JUDSON J. (*dissenting*)—The appellant Helga Petranik brought an action against Alice Dale, Frederick Parker and Eugene Berwick, claiming a declaration that a $5,000 mortgage on a house and lot known as 62 La Rose Avenue, Etobicoke, Ontario, which was purportedly executed by Mrs. Petranik in favour of Mrs. Dale, was null and void, and that Parker and Berwick, who purchased the property from Mrs. Dale under power of sale in the mortgage, held the property in trust for Mrs. Petranik. Mrs. Dale counterclaimed for the difference between the amount realized on the sale and

de forclusion sur défaut du débiteur hypothécaire de comparaître et de déposer un D.O.R., mais demande à la place un jugement conditionnel. A mon avis, un tel jugement laisse intact le droit de racheter en *equity*, tout au moins jusqu'à l'obtention du jugement définitif. Le demandeur ne peut exercer le pouvoir de vente sans permission de la cour.

Je rappelle également qu'en l'espèce, le jugement conditionnel ordonne expressément un renvoi, encore que les conséquences n'en soient pas précisées à cause du paragraphe supprimé. La suppression n'est cependant que pure forme et la pratique courante, qui consiste à accorder un délai de rachat de six mois après l'établissement des comptes, est applicable.

Les procureurs de l'appelante ont insisté sur les considérations d'équité dans la présente affaire et, mise à part la question du retard, elles sont nettement en faveur de l'appelante. J'en relève trois: d'abord, l'immeuble, hypothéqué pour $4,000, a été vendu $25,500 aux intimés; ensuite, l'avocat, qui était entièrement chargé des négociations entre l'appelante et Alice Dale, a agi au profit de celle-ci au détriment de celle-là; et enfin, il existait des créanciers subséquents dont, apparemment, l'avocat n'a tenu aucun compte et qui avaient le droit d'être pris en considération lors des procédures de forclusion et, en tout cas, lors du renvoi ordonné par le jugement conditionnel.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel de l'Ontario et de rétablir le jugement du juge Moorhouse, avec dépens en faveur de l'appelante dans toutes les cours.

LE JUGE JUDSON (*dissident*)—L'appelante Helga Petranik a intenté une action contre Alice Dale, Frederick Parker et Eugene Berwick, demandant qu'il soit déclaré qu'une hypothèque de $5,000 sur une maison et un lot situés au 62, avenue La Rose à Etobicoke, en Ontario, qui avait été censément consentie par M^{me} Petranik en faveur de M^{me} Dale, était nulle et que Parker et Berwick, qui avaient acheté l'immeuble de M^{me} Dale en vertu du pouvoir de vente attaché à l'hypothèque, le détenaient en fiducie pour le compte de M^{me} Petranik. Par demande reconventionnelle, the amount owing to her on the mortgage and for expenses incurred. Parker and Berwick counterclaimed for damages suffered when a notice of claim registered on title by Mrs. Petranik prevented them from selling 62 La Rose after they had built another home on other property.

Mme Dale a réclamé la différence entre le montant réalisé lors de la vente et le montant qui lui était dû en vertu de l'hypothèque, ainsi que le remboursement des dépenses engagées. Par demande reconventionnelle, Parker et Berwick ont réclamé des dommages-intérêts pour le préjudice qu'ils avaient subi lorsqu'un avis de réclamation enregistré contre le titre de propriété par Mme Petranik les avait empêchés de vendre le 62, La Rose après qu'ils ont construit une autre maison sur un autre terrain.

Moorhouse J., in a judgment dated June 3, 1971, found that the mortgage was valid to the extent of $4000, but that the sale to Parker and Berwick, which took place after Mrs. Dale had obtained judgment *nisi* in a foreclosure action of which Parker and Berwick had notice, was null and void. The defendants Parker and Berwick appealed to the Ontario Court of Appeal which, in a unanimous judgment written by Arnup J.A., reported at [1973] 2 O.R. 217, held that the exercise of the power of sale was not invalid since the mortgagor had not given notice that she desired an opportunity to redeem and the judgment *nisi* did not confer any rights on the mortgagor which could be defeated by a sale. The plaintiff appealed to this Court.

Le juge Moorhouse, dans un jugement du 3 juin 1971, a estimé que l'hypothèque était valide à concurrence de $4,000, mais que la vente à Parker et Berwick, qui avait eu lieu après que Mme Dale eut obtenu un jugement conditionnel dans une action en forclusion dont Parker et Berwick avaient été avisés, était nulle. Les défendeurs Parker et Berwick ont fait appel à la Cour d'appel de l'Ontario qui, dans un jugement unanime rédigé par le juge Arnup, publié dans [1973] 2 O.R. 217, a décidé que le pouvoir de vente n'avait pas été irrégulièrement exercé puisque la débitrice hypothécaire n'avait pas donné avis de son désir d'avoir une occasion de racheter et que le jugement conditionnel ne lui conférait aucun droit auquel une vente puisse faire échec. La demanderesse en a alors appelé à notre Cour.

Although the case involves *The Mortgages Act*, R.S.O. 1960, c. 245, and the Rules of Practice, R.R.O. 1960, Reg. 396, both of which have been substantially amended, it raises an issue which could affect other properties sold under power of sale within the limitation period of the last ten years: *The Limitations Act*, R.S.O. 1970, c. 246, s. 4.

Bien que *The Mortgages Act*, R.S.O. 1960, c. 245 et les Règles de pratique, R.R.O. 1960, R. 396, que cette affaire met en jeu, aient été toutes deux profondément modifiées depuis, cette affaire soulève une question qui peut viser d'autres immeubles vendus en vertu d'un pouvoir de vente durant la période de prescription des dix dernières années: *The Limitations Act*, R.S.O. 1970, c. 246, art. 4.

The issue is not merely one of practice, but, as in any mortgage action, one of equity. It is well established that even a final foreclosure order can be reopened if the circumstances warrant such action. It is thus important to inquire into the dealings of the parties though they are complex and reach back many years.

La question n'est pas seulement d'ordre procédural. C'est aussi, comme dans toute action hypothécaire, une question d'*equity*. Il est bien établi en effet que même une ordonnance définitive de forclusion peut être réouverte si les circonstances le justifient. Il est donc important d'examiner les relations entre les parties même si elles sont complexes et remontent à de nombreuses années.

The appellant Helga Petranik and her husband Ludwik came to Canada from Germany in 1949 and worked industriously to establish themselves. Mr. Petranik worked on the construction of houses, at first as a carpenter and then as a self-employed contractor. In 1951 the Petraniks built a triplex at 38 Beckett Avenue. They rented two units and lived in the other until 1957 when they moved into a house which Mr. Petranik had built on Hadrian Drive. They stayed there two months until the house was sold and then moved into a house which Mr. Petranik had built at 37 Beckett Avenue. Mrs. Petranik, on the recommendation of a friend at work, consulted Mr. G. A. Howell, a solicitor, about a by-law affecting 38 Beckett Avenue. Mr. Howell had clients willing to invest in mortgages, and the Petraniks came to rely on him for some of the financing for their growing construction business.

Unfortunately, the conduct of Mr. Howell's mortgage practice was, in the words of the trial judge, "irresponsible, incompetent or negligent". It appears that as Mr. Petranik needed money, Mr. Howell would have him or Mrs. Petranik execute a mortgage on one of their properties. There is reason for suspicion that some of these mortgages may have been executed in blank to be used as needed. The trial judge did not find that Mr. Howell had acted fraudulently, but he certainly acted improperly, not only on the mortgage transactions where he acted for both parties, but at trial where he represented Mrs. Dale against Mrs. Petranik.

One of the mortgages registered against 37 Beckett Avenue was a mortgage for $5,000 in favour of Mrs. Dale, a client of Mr. Howell and the 83 year old mother of Mr. Howell's secretary. On January 11, 1956, Mrs. Dale had advanced $4,000 to Mr. Howell by a cheque marked "Re: Petranik Loan". It was alleged, but not established, that in return she received an unregistered mortgage from the Petraniks on three houses on Hadrian Drive. On January 12, 1958, Mrs. Dale

Originaires d'Allemagne, Helga Petranik et son mari Ludwik arrivèrent au Canada en 1949 et travaillèrent assidûment à s'y établir. M. Petranik travailla dans la construction domiciliaire, d'abord comme charpentier, puis comme entrepreneur indépendant. En 1951, les Petranik construisirent un triplex au 38, avenue Beckett. Ils louèrent deux des logements et vécurent dans le troisième jusqu'en 1957, date à laquelle ils emménagèrent dans une maison que M. Petranik avait construite sur la promenade Hadrian. Ils y restèrent deux mois jusqu'à ce que la maison soit vendue et emménagèrent alors dans une maison que M. Petranik avait construite au 37, avenue Beckett. M^me^ Petranik, sur la recommandation d'une amie qui travaillait avec elle, consulta un avocat, M^e^ G. A. Howell, à propos d'un règlement qui visait le 38, avenue Beckett. M^e^ Howell avait des clients qui voulaient faire des placements hypothécaires et les Petranik s'en remirent à lui pour une partie du financement de leur entreprise de construction en expansion.

Malheureusement, M^e^ Howell menait sa pratique hypothécaire, selon les propres termes du juge de première instance, de façon [TRADUCTION] «irresponsable, incompétente ou négligente». M. Petranik ayant besoin d'argent, il semble que M^e^ Howell aurait amené M. Petranik ou M^me^ Petranik à consentir une hypothèque sur un de leurs immeubles. Il y a quelque raison de soupçonner que certaines de ces hypothèques aient pu être signées en blanc pour être utilisées au besoin. Le juge de première instance n'a pas considéré que M^e^ Howell avait agi frauduleusement mais qu'il avait certainement agi contre l'éthique professionnelle, non seulement en agissant pour les deux parties lors d'opérations hypothécaires mais en représentant M^me^ Dale au procès contre M^me^ Petranik.

L'une des hypothèques enregistrées sur le 37, avenue Beckett était une hypothèque de $5,000 en faveur de M^me^ Dale. Cliente de M^e^ Howell et mère de la secrétaire de celui-ci, elle était âgée de 83 ans. Le 11 janvier 1956, M^me^ Dale avait avancé $4,000 à M^e^ Howell avec un chèque portant l'inscription [TRADUCTION]: «Objet: prêt Petranik». Il a été allégué, mais non prouvé, qu'en retour elle avait obtenu des Petranik une hypothèque non enregistrée sur trois maisons de la promenade gave Mr. Petranik an additional $1,000 which was added to the mortgage principal. A $5,000 mortgage was then registered against 37 Beckett Avenue. The Petraniks claimed that the $1,000 was not a loan but was part payment for renovations which Mr. Petranik had completed for another client of Mr. Howell. The trial judge accepted this explanation, but since there was evidence that the Petraniks had made payments to Mrs. Dale for interest on a loan of $4,000, he rejected the Petraniks' claim that they had never borrowed money from Mrs. Dale.

In May 1958, Helga Petranik purchased municipal lots 62 and 64 La Rose Avenue for $12,800. She paid $3,500 cash and the vendor took back a mortgage for $9,800. Two months later, Mr. Petranik exchanged 37 Beckett Avenue for 50 acres of farmland in Chinguacousy Township. Mrs. Dale's mortgage on 37 Beckett was discharged before the exchange, and in its place Mrs. Petranik executed a mortgage on 62 La Rose in favour of Mrs. Dale for $5,000. This was dated July 12, 1958, but not registered until January 8, 1959. In the meantime, in order to finance the construction of a house on 62 La Rose, Mrs. Petranik arranged through Mr. Howell to mortgage the property to Mr. White for $16,000. This mortgage was executed November 1, 1958 and registered December 11, 1958. On March 10, 1959, a further mortgage was registered against both 62 and 64 La Rose Avenue to secure $3,000 which was purportedly advanced by Richard and Stella Graham, also clients of Mr. Howell. The first mortgage to the vendor was discharged on March 21, 1959, the discharge being registered on April 22, 1959. On September 23, 1960, White assigned part of his mortgage to May E. Wallace. Thus, in 1960, 62 La Rose was mortgaged to White and Wallace for $16,000, to Dale for $5,000, and to the Grahams for $3,000.

In July 1961 the Petraniks moved to Chatham, Ontario, where Mr. Petranik worked on a construction project. They rented 62 La Rose to Ivor Andrew who lived there with his family from July

Hadrian. Le 12 janvier 1958, M^me^ Dale remit à M. Petranik $1,000 supplémentaires qui furent ajoutés au principal de la dette hypothécaire. Une hypothèque de $5,000 fut alors enregistrée sur le 37, avenue Beckett. Les Petranik ont fait valoir que les $1,000 ne représentaient pas un prêt mais le paiement partiel de rénovations que M. Petranik avait effectuées pour un autre client de M^e^ Howell. Le juge de première instance a accepté cette explication, mais puisqu'il était prouvé que les Petranik avaient versé à M^me^ Dale des intérêts sur un prêt de $4,000, il a rejeté leur prétention selon laquelle ils n'avaient jamais emprunté d'argent à M^me^ Dale.

En mai 1958, Helga Petranik acheta des lots situés aux numéros 62 et 64 de l'avenue La Rose pour $12,800. Elle versa $3,500 comptant et le vendeur prit une hypothèque de $9,800. Deux mois plus tard, M. Petranik échangea le 37, avenue Beckett contre 50 acres de terre à culture dans le canton de Chinguacousy. L'hypothèque de M^me^ Dale sur le 37, avenue Beckett fut purgée avant l'échange et, à sa place, M^me^ Petranik consentit à M^me^ Dale une hypothèque de $5,000 sur le 62, avenue La Rose. Celle-ci était datée du 12 juillet 1958, mais elle ne fut enregistrée que le 8 janvier 1959. Entre-temps, pour financer la construction d'une maison au 62, avenue La Rose, M^me^ Petranik consentit, par l'intermédiaire de M^e^ Howell, une hypothèque de $16,000 sur l'immeuble à M. White. Cette hypothèque fut signée le 1^er^ novembre 1958 et enregistrée le 11 décembre 1958. Le 10 mars 1959, une autre hypothèque fut enregistrée sur les 62 et 64, avenue La Rose pour garantir $3,000 censément avancés par Richard et Stella Graham, également clients de M^e^ Howell. La première hypothèque du vendeur fut purgée le 21 mars 1959, la purge étant enregistrée le 22 avril 1959. Le 23 septembre 1960, White céda une partie de son hypothèque à May E. Wallace. Ainsi, en 1960, le 62, avenue La Rose était hypothéqué pour $16,000 en faveur de White et de Wallace, $5,000 en faveur de Dale, et $3,000 en faveur des Graham.

En juillet 1961, les Petranik déménagèrent à Chatham en Ontario, où M. Petranik travaillait dans un projet de construction. Ils louèrent le 62, avenue La Rose à Ivor Andrew qui vécut là avec sa

15, 1961 to December 31, 1961. After the Andrews moved out, the house was left vacant. The Petraniks returned from Chatham in the fall of 1961 when the contractor for the project went bankrupt. Since the Andrews were still occupying 62 La Rose, the Petraniks moved into one of the houses Mr. Petranik was building in Oakville.

famille du 15 juillet 1961 au 31 décembre 1961. Après le départ des Andrew, la maison demeura vacante. Les Petranik revinrent de Chatham en automne 1961 lorsque l'entrepreneur du projet fit faillite. Comme les Andrew occupaient encore le 62, avenue La Rose, les Petranik emménagèrent dans une des maisons que M. Petranik était en train de construire à Oakville.

The Petraniks were in a precarious financial position. One of the houses in Oakville was foreclosed and, according to Mrs. Petranik, they had to let it go because they could not afford to redeem it. Mrs. Petranik also volunteered that their cottage was being foreclosed and that she was served with a writ of possession with respect to another Oakville house. Writs of execution amounting to $8,082.81 were registered against the lands of Helga Petranik in 1960 and 1961. Taxes on 62 La Rose were not paid after 1959, no payments were made on the White mortgage after January 1960, and the Dale mortgage was also in default.

Les Petranik étaient dans une situation financière précaire. Une des maisons d'Oakville fut frappée de forclusion et, selon M^me^ Petranik, ils durent l'abandonner parce qu'ils n'avaient pas les moyens de la racheter. M^me^ Petranik a admis que leur chalet était en instance de forclusion et qu'un bref de possession concernant une autre maison d'Oakville lui avait été signifié. Des brefs d'exécution d'un montant de $8,082.81 furent enregistrés sur les biens-fonds d'Helga Petranik en 1960 et 1961. Les taxes du 62, avenue La Rose ne furent pas payées après 1959; aucun paiement ne fut effectué sur l'hypothèque White après janvier 1960 et l'hypothèque Dale était également en souffrance.

On May 26, 1961, Mr. Howell wrote to Mrs. Petranik that, because of the continuing default under the mortgages, he would require vacant possession of both 62 and 64 La Rose. The Dale mortgage provided for repayment of principal on July 12, 1961. On July 17, 1961, payments of the interest and principal were both in default and Mrs. Dale, through Mr. Howell, commenced a foreclosure action. Mrs. Petranik denied being served with the specially-endorsed writ, but the affidavit of a sheriff's officer, who had died before trial, indicates that it was served on February 2, 1962. The trial judge expressly made no finding as to service, but as Arnup J.A. pointed out in the Court of Appeal, Mrs. Petranik has no cause of action unless the writ was served. Arnup J.A. dealt with the case on the assumption of service and his doing so was not disputed in this Court. The writ provided as follows:

Le 26 mai 1961, M^e^ Howell écrivit à M^me^ Petranik qu'en raison du défaut persistant de paiement des hypothèques, il exigerait la pleine possession du 62 et du 64, avenue La Rose. L'hypothèque Dale prévoyait le remboursement du principal pour le 12 juillet 1961. Le 17 juillet 1961, le paiement des intérêts et du principal n'ayant pas été effectué, M^me^ Dale, par l'intermédiaire de M^e^ Howell, intenta une action en forclusion. M^me^ Petranik a nié que le bref à endossement spécial lui ait été signifié, mais la déclaration sous serment d'un fonctionnaire du bureau du shérif, décédé avant le procès, indique qu'il a été signifié le 2 février 1962. Le juge de première instance ne s'est pas prononcé expressément sur la signification mais, comme l'a souligné le juge Arnup en Cour d'appel, M^me^ Petranik n'a de cause d'action que si le bref lui a été signifié. Le juge Arnup a étudié l'affaire en présumant que la signification avait eu lieu et son attitude n'a pas été contestée devant notre Cour. Le bref était libellé en ces termes:

. . . and that the mortgage may be enforced by foreclosure. And to recover from you the defendant

[TRADUCTION] . . . et que l'hypothèque peut être exécutée par forclusion. Et pour recouvrer de vous la défendepayment of the amount due under a covenant by (you)

in that behalf contained in said Mortgage.

And take notice further that the plaintiff claims to be entitled to recover immediate possession of the mortgaged premises.

And take notice that the plaintiff claims that there is now due for principal money the sum of $5,000.00 and for interest the sum of $384.30 due the 12th day of July 1961.

And that you are liable to be charged with these sums with subsequent interest to be computed at the rate of ten per cent per annum, and costs in and by the judgment to be drawn up, *and that judgment for immediate foreclosure* of your interest in the mortgaged premises *may be entered* unless you desire an opportunity to redeem the mortgaged premises and before the expiration of the time allowed you for appearance you do file in the office within named and serve a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect: "I desire an opportunity to redeem the mortgaged premises", and give an address for service, in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff and in default of payment of the amount found due within six calendar months from the time of taking of the account and the drawing up of the judgment your interest in the mortgaged premises may be foreclosed.

Mrs. Petranik was thus given notice that if she desired to defend or to redeem she must take certain steps, as provided in Rule 465 (formerly R. 460A). Mrs. Petranik did not file an appearance or a notice desiring opportunity to redeem, and on March 23, 1962, the Assistant Registrar signed judgment, directed a reference with respect to subsequent encumbrancers, and ordered Mrs. Petranik to deliver up possession of the property. The form of judgment as first drafted provided as follows:

Judgment

Friday, the 23rd day of March, 1962.

UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and *no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed*;

resse paiement du montant dû en vertu d'un engagement souscrit par (vous)

contenu à cet effet dans ladite hypothèque.

Et soyez avisée en outre que la demanderesse prétend avoir le droit de recouvrer la possession immédiate des lieux hypothéqués.

Et soyez avisée que la demanderesse prétend qu'il lui est maintenant dû $5,000 en capital et $384.30 en intérêts échus au 12 juillet 1961.

Et que vous êtes susceptible d'être condamnée à ces sommes qui porteront intérêt au taux de dix pour cent par an, ainsi qu'aux frais du jugement qui doit être dressé à cet effet, *et qu'un jugement de forclusion immédiate* de vos droits sur les lieux hypothéqués *peut être inscrit* à moins que vous ne désiriez avoir l'occasion de racheter les lieux hypothéqués et qu'avant l'expiration du temps qui vous est accordé pour comparaître, vous ne déposiez au bureau désigné dans les présentes et ne signifiiez une note, portant l'intitulé de l'action, signée par vous-même ou votre avocat et ayant la teneur suivante: «Je désire avoir une occasion de racheter les lieux hypothéqués» et ne donniez une adresse en vue des significations, auquel cas vous aurez droit à un avis de quatre jours de l'établissement du compte du montant dû à la demanderesse et à défaut de paiement du montant trouvé dû dans les six mois à compter de la date de l'établissement du compte et de la rédaction du jugement, vos droits sur les lieux hypothéqués peuvent être forclos.

M^{me} Petranik fut ainsi avisée que si elle désirait se défendre ou racheter, elle devait prendre certaines mesures, prévues par la règle 465 (anciennement R. 460A). M^{me} Petranik ne comparut pas et ne déposa pas avis de son désir d'avoir l'occasion de racheter et, le 23 mars 1962, le registraire adjoint signa jugement, ordonna un renvoi en ce qui concernait les créanciers subséquents et ordonna à M^{me} Petranik de remettre l'immeuble. La première rédaction du jugement était la suivante:

[TRADUCTION] Jugement

le vendredi 23 mars 1962

VU le bref d'assignation délivré dans la présente action et l'attestation sous serment de la signification dudit bref, en l'absence de comparution et *aucun avis n'ayant été déposé exprimant le désir de la défenderesse d'avoir l'occasion de racheter les lieux hypothéqués*;

1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that, (subject to the provision of section 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.

3. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

In the judgment as issued, paragraph 2 was struck out and the remaining paragraphs renumber I and II. No explanation was given for this deletion, but it seems clear that it was designed to comply with the possible judgments set out in Rule 472 (formerly R. 467):

472. (1) In an action for foreclosure or sale where the writ has been duly endorsed and the defendant fails to appear or fails to file a notice that he desires an opportunity to redeem the mortgaged premises, the plaintiff may sign judgment for immediate sale or for immediate foreclosure unless a reference is desired as to encumbrancers (Form 104).

(2) If a reference is desired as to encumbrancers, the plaintiff is entitled to judgment with a reference, and, if no encumbrancer, shall prove any claim the Master so certifies, and, upon confirmation of the Master's report, a final order of sale or of foreclosure shall be made.

(3) If upon the reference a subsequent encumbrancer proves a claim, the usual period of redemption shall be granted, but, if the encumbrancer consents, a final order may be made at an earlier date.

(4) In the event of a notice being filed by the defendant desiring an opportunity to redeem the mortgaged premises and no reference as to encumbrancers being required, judgment may be signed and the officer signing it may in simple cases take the account on four days'

1. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés, les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* en la ville de Toronto.

2. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que, après dépôt du rapport du *Master*, la défenderesse paye immédiatement à la demanderesse ce qui lui sera trouvé dû en capital, intérêts et frais à la date dudit rapport et, sur paiement du montant qui lui est dû, que (sous réserve des dispositions de l'article 2 de *The Mortgages Act*) la demanderesse rétrocède les lieux hypothéqués et rende tous documents les concernant.

3. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que la défenderesse mette immédiatement la demanderesse, ou la personne qu'elle peut désigner, en possession des biens-fonds et lieux en question dans la présente cause ou de toute partie de ceux-ci qui peut être en la possession de ladite défenderesse.

Dans le jugement réellement rendu, le paragraphe 2 fut biffé et les paragraphes restants renumérotés I et II. Aucune explication de cette suppression n'a été fournie, mais il paraît clair qu'elle fut effectuée pour se conformer aux diverses possibilités de jugement envisagées par la règle 472 (anciennement R. 467):

[TRADUCTION] 472. (1) Lorsque dans une action en forclusion ou vente forcée, le bref a été régulièrement signifié et que le défendeur fait défaut de comparaître ou de déposer un avis de son désir d'avoir une occasion de racheter les lieux hypothéqués, le demandeur peut obtenir un jugement de vente immédiate ou de forclusion immédiate à moins qu'un renvoi concernant les créanciers ne soit désiré (Formule 104).

(2) Si un renvoi concernant les créanciers est désiré, le demandeur a droit à un jugement avec renvoi et, s'il n'y a pas de créancier, doit prouver toute créance que le *Master* certifie ainsi, et, sur confirmation du rapport du *Master*, une ordonnance définitive de vente ou de forclusion doit être prononcée.

(3) Si lors du renvoi un créancier subséquent prouve une créance, la période habituelle de rachat sera accordée mais, si le créancier y consent, une ordonnance définitive peut être prononcée dans un délai plus court.

(4) Au cas où un avis est déposé par le défendeur qui désire avoir une occasion de racheter les lieux hypothéqués et où aucun renvoi concernant les créanciers n'est requis, jugement peut être délivré et le fonctionnaire qui le délivre peut, dans les cas simples, dresser les comptes

notice to the defendant. His findings are subject to an appeal to a judge in chambers in the manner prescribed for appeals from the Master. In complicated cases a judgment shall issue directing a reference (Form 103).

(5) In the event of a notice being filed by the defendant desiring an opportunity to redeem the mortgaged premises and a reference being desired as to encumbrancers, judgment may be signed directing a reference, and the account shall be taken by the Master on four days' notice to the person filing the notice (Form 102).

(6) Where the writ has not been personally served, the claim of the plaintiff shall be duly verified by an affidavit which shall be filed with the officer taking the account. (467)

If there had been no subsequent encumbrancers, a final order of immediate foreclosure would have been signed on March 23, 1962 since the mortgagor had not indicated that she desired an opportunity to redeem. However, there were subsequent encumbrancers in this case: the Grahams held a $3,000 mortgage on 62 and 64 La Rose Avenue and there were two execution creditors. According to Mr. Howell, he had purchased the Graham mortgage in 1962 and discharged it insofar as it affected 62 La Rose, but neither the assignment nor the discharge had been registered. A reference was directed to enable the encumbrancers to prove their claims. By virtue of Rule 406 (formerly R. 403), Mrs. Petranik was not entitled to any notice of the reference. Her interest in the equity of redemption was already effectively foreclosed, but others with an interest in the equity were to be given their opportunity to redeem. If, like Mrs. Petranik, they took no further steps, a final order of foreclosure would be issued.

The Rules of Practice do not prevail over the principles of equity which govern mortgage actions, and the court retains jurisdiction to exercise its equitable discretion to allow a mortgagor to redeem his property even after a final order of foreclosure is made: Falconbridge, *The Law of Mortgages* (3rd ed., 1942), at pp. 450 ff. If Mrs. Petranik had, through inadvertence or otherwise, failed to file a notice desiring opportunity to redeem when in fact she did desire to redeem and had a substantial interest in the equity to protect, a

sur avis de quatre jours adressé au défendeur. Ses conclusions peuvent être portées en appel devant un juge en chambre en la manière prescrite pour les appels des décisions du *Master*. Dans les cas compliqués, un renvoi sera ordonné par jugement (Formule 103).

(5) Au cas où un avis est déposé par le défendeur qui désire avoir une occasion de racheter les lieux hypothéqués et où un renvoi concernant les créanciers est désiré, un jugement ordonnant un renvoi peut être délivré et les comptes seront dressés par le *Master* sur avis de quatre jours adressé à la personne qui dépose l'avis (Formule 102).

(6) Quand le bref n'a pas été signifié en personne, la créance du demandeur sera attestée par une déclaration sous serment remise au fonctionnaire qui dresse les comptes. (467)

S'il n'y avait pas eu de créanciers subséquents, une ordonnance définitive de forclusion immédiate aurait été rendue le 23 mars 1962 puisque la débitrice hypothécaire n'avait pas indiqué qu'elle désirait avoir une occasion de racheter. Mais dans cette affaire, il y en avait: les Graham détenaient une hypothèque de $3,000 sur le 62 et le 64, avenue La Rose et il y avait deux créanciers saisissants. Selon M[e] Howell, il avait acheté l'hypothèque des Graham en 1962 et l'avait purgée en ce qui concerne le 62, avenue La Rose, mais ni la cession ni la purge n'avaient été enregistrées. Un renvoi fut ordonné pour permettre aux créanciers de prouver leurs créances. En vertu de la règle 406 (anciennement R. 403), M[me] Petranik n'avait pas le droit d'être avisée du renvoi. Son droit de rachat était déjà effectivement forclos, mais il fallait donner une occasion de racheter aux autres personnes qui avaient un droit. Si, comme M[me] Petranik, ils ne se manifestaient pas, une ordonnance définitive de forclusion serait rendue.

Les Règles de pratique ne l'emportent pas sur les principes d'*equity* qui régissent les actions hypothécaires, et les tribunaux demeurent compétents en *equity* pour exercer leur pouvoir discrétionnaire et permettre à un débiteur hypothécaire de racheter sa propriété même après une ordonnance définitive de forclusion: Falconbridge, *The Law of Mortgages* (3[e] éd. 1942), pp. 450 et suiv. Si M[me] Petranik avait, par inadvertance ou autrement, omis de déposer un avis de son désir d'avoir l'occasion de racheter alors qu'elle voulait vrai-court might well have reopened the judgment and allowed her a redemption period. However, Mrs. Petranik at no time indicated a desire to redeem the property even after seeking legal advice about her rights. Her slight interest in the equity of redemption did not make it worth her while to redeem and she was not in a financial position to do so.

On the basis of the March 23, 1962 judgment, Mrs. Dale obtained a writ of possession, and in April 1962 the writ was executed. If Mrs. Petranik had not been aware of the foreclosure action, she certainly was aware that Mrs. Dale had taken possession. She immediately consulted a solicitor, but took no further action at that time.

Mrs. Dale did not proceed with a reference as to subsequent encumbrancers as ordered in the judgment. In May 1962, H. W. Anderson, a real estate broker who was looking for a house for the respondent Berwick, inquired whether 62 La Rose, which was vacant, was for sale. On May 15, 1962, Mr. Berwick offered $23,500 for the house. Mr. Howell's secretary (Mrs. Dale's daughter) advertised the house for sale in the Toronto Star on May 15-18, 1962. Mrs. Dale asked $26,800 for the property. On May 29, 1962, Mr. Berwick offered $25,500 subject to adjustments and conditional on the vendor agreeing to discharge any existing mortgages or encumbrances. Mrs. Dale accepted this offer. She sold the property by purported exercise of her power of sale under the mortgage which provided that after default of payment for two months she could sell without notice. Amendments to *The Mortgages Act* which provide that a power of sale under a mortgage cannot be exercised without 35 days' notice to the mortgagor and all subsequent encumbrancers did not come into effect until 1964 and thus Mrs. Dale was not required to give notice of the sale.

After adjustments, Mrs. Dale received $24,499.66 from Berwick and Parker, who took joint title. She paid $9,100.64 to Mr. White and $10,086.30 to May Wallace to whom White had

ment le faire et si elle avait eu vraiment un droit à protéger, un tribunal aurait fort bien pu rouvrir le jugement et lui accorder un délai de rachat. Cependant, à aucun moment M^me^ Petranik n'a manifesté le désir de racheter l'immeuble même après s'être renseignée sur ses droits auprès d'un avocat. Ce qu'elle pouvait retirer de son droit de rachat ne valait guère la peine de l'exercer et sa situation financière ne le lui permettait pas.

Se fondant sur le jugement du 23 mars 1962, M^me^ Dale obtint un bref de possession qui fut exécuté en avril 1962. Si M^me^ Petranik n'avait pas eu connaissance de l'action en forclusion, elle était certainement au courant de la prise de possession par M^me^ Dale. D'ailleurs, elle consulta immédiatement un avocat, mais ne prit pas d'autres mesures à l'époque.

M^me^ Dale ne fit pas procéder au renvoi concernant les créanciers subséquents, comme le jugement l'avait ordonné. En mai 1962, H. W. Anderson, courtier en immeubles qui cherchait une maison pour l'intimé Berwick, demanda si le 62, avenue La Rose, qui était vacant, était à vendre. Le 15 mai 1962, M. Berwick en offrit $23,500. La secrétaire de M^e^ Howell (fille de M^me^ Dale) fit paraître une annonce de maison à vendre dans le Toronto Star du 15 au 18 mai 1962. M^me^ Dale demandait $26,800 pour l'immeuble. Le 29 mai 1962, M. Berwick fit une offre de $25,500 sous réserve des ajustements et à condition que le vendeur s'engageât à purger toutes hypothèques ou charges existantes. M^me^ Dale accepta cette offre. Elle vendit l'immeuble, se réclamant de l'exercice de son pouvoir de vente attaché à l'hypothèque qui prévoyait qu'à défaut de paiement pendant deux mois, elle pouvait vendre sans préavis. Les modifications apportées à *The Mortgages Act*, qui disposent qu'un pouvoir de vente en vertu d'une hypothèque ne peut être exercé que 35 jours après en avoir avisé le débiteur hypothécaire et tous les créanciers subséquents, ne sont entrées en vigueur qu'en 1964 et M^me^ Dale n'était donc pas tenue de donner avis de la vente.

Après ajustements, M^me^ Dale reçut $24,499.66 de Berwick et Parker, qui devinrent copropriétaires. Elle paya $9,100.64 à M. White et $10,086.30 à May Wallace à qui White avait cédé une partie assigned part of his mortgage. After payment of various expenses associated with the sale, Mrs. Dale received a cheque for $2,250.39.

More than two years after the sale, on July 14, 1964, Mrs. Petranik issued a writ against Mrs. Dale, Mr. Berwick and Mr. Parker, claiming a declaration that the mortgage to Mrs. Dale was null and void and an accounting of the proceeds of the sale. Mrs. Petranik also claimed a declaration that Parker and Berwick hold the property in trust for her and filed a *lis pendens* against the lands. No further steps were taken, and on September 27, 1966, the action was dismissed by the Master for want of prosecution and the *lis pendens* vacated. Mrs. Petranik then filed a notice of claim against the property which, on May 30, 1968, Stewart J. ordered vacated. An application to set aside the order dismissing the action for want of prosecution was dismissed on April 9, 1969, but, on appeal from the order vacating the notice of claim, the Court of Appeal reinstated the notice pending commencement by Mrs. Petranik on or before February 3, 1969 of proceedings to reopen the action instituted by her in 1964 or to institute other proceedings. The Court further ordered that if no proceedings had been taken by February 3, 1969, Berwick and Parker could revive their application to vacate registration of the notice of claim. Mrs. Petranik issued the writ in this action on April 28, 1969. The defendants applied to vacate the notice of claim, and on May 28, 1969, Stark J. so ordered. In their statement of defence to this action, Parker and Berwick argued that the action should be dismissed because of the plaintiff's laches, but the trial judge dealt with the case on its merits. No argument was addressed either to the Court of Appeal or to this Court on the question of delay, but when assessing the equities, it is relevant to consider the plaintiff's delay in asserting her claim.

The refusal of Mrs. Petranik to remove the notice of claim registered on title prevented Parker and Berwick from selling the property. They had

de son hypothèque. Après paiement de diverses dépenses reliées à la vente, M^me^ Dale reçut un chèque de $2,250.39.

Plus de deux ans après la vente, le 14 juillet 1964, M^me^ Petranik se fit délivrer un bref contre M^me^ Dale, M. Berwick et M. Parker, par lequel elle demandait une déclaration de nullité de l'hypothèque consentie à M^me^ Dale ainsi qu'une reddition de compte des produits de la vente. M^me^ Petranik demandait également une déclaration selon laquelle Parker et Berwick détenaient l'immeuble en fiducie pour son compte et elle enregistra un avis de litispendance contre les biens-fonds. Aucune autre mesure ne fut prise et, le 27 septembre 1966, l'action fut rejetée par le *Master* pour absence de procédures et la litispendance annulée. M^me^ Petranik déposa alors un avis de réclamation contre l'immeuble, dont le juge Stewart ordonna l'annulation le 30 mai 1968. Une requête en révocation de l'ordonnance rejetant l'action pour absence de procédures fut rejetée le 9 avril 1969 mais, sur appel de l'ordonnance d'annulation de l'avis de réclamation, la Cour d'appel rétablit l'avis sous condition que, le 3 février 1969 au plus tard, M^me^ Petranik entamât des procédures pour rouvrir l'action qu'elle avait intentée en 1964 ou intentât d'autres procédures. La Cour ordonna au surplus que, si aucune procédure n'était intentée le 3 février 1969, Berwick et Parker pourraient renouveler leur demande d'annulation de l'enregistrement de l'avis de réclamation. Le bref dans la présente action fut délivré à M^me^ Petranik le 28 avril 1969. Les défendeurs demandèrent l'annulation de l'avis de réclamation et, le 28 mai 1969, le juge Stark prononça une ordonnance en ce sens. Dans leur défense à la présente action, Parker et Berwick ont prétendu que celle-ci devait être rejetée en raison des retards déraisonnables de la demanderesse, mais le juge de première instance examina l'affaire au fond. La question du retard n'a été plaidée ni devant la Cour d'appel ni devant cette Cour mais, s'agissant d'apprécier la situation en *equity*, il est à-propos d'examiner le retard de la demanderesse à faire valoir son droit.

Le refus de M^me^ Petranik de retirer l'avis de réclamation enregistré contre le titre empêcha Parker et Berwick de vendre la propriété. Ceux-ci built a house on 30 acres in Campbellville, and planned to sell 62 La Rose. In September 1968, they received an offer to purchase 62 La Rose for $44,000, but because of the notice of claim they could not satisfy the requisitions with respect to title. A subsequent offer from another party also fell through. Finally, Berwick and Parker sold the Campbellville property. They counterclaimed for damages for abuse of process and slander of title, but did not press their claim on appeal.

The principal ground on which Mrs. Petranik sought to set aside the sale of the property to Parker and Berwick was that she had not executed a mortgage in favour of Mrs. Dale and had received no consideration for such a mortgage. As indicated above, these allegations were rejected by the trial judge and were not pursued on appeal.

The issue on which the case turned at trial and on appeal was whether Mrs. Dale was entitled to sell the property under power of sale in the mortgage or whether this power was suspended by virtue of the judgment signed by the assistant registrar in the foreclosure action. At trial Moorhouse J., relying on a judgment of Farwell J. in *Stevens v. Theatres, Limited*[5], which has been followed in *DeBeck v. Canada Permanent Loan and Savings Co.*[6] and *Marshall et al v. Miles*[7], held that after Mrs. Dale had obtained judgment *nisi* for foreclosure, she could not exercise a power of sale without leave of the court. The trial judge declared that the deed from Dale to Parker and Berwick was invalid, directed that Dale or others may proceed with the reference directed by the judgment *nisi* and ordered that Mrs. Petranik be given notice of the reference. He made certain other declarations with respect to the interest of Parker and Berwick in the moneys they paid on the invalid sale and gave direction as to how accounts were to be taken at the reference. He

[5] (1903), 1 Ch. 857.

[6] (1907), 12 B.C.R. 409 (B.C.C.A.).

[7] (1970), 3 O.R. 394 (H. Ct.).

avaient construit une maison sur un terrain de 30 acres à Campbellville et fait le projet de vendre le 62, avenue La Rose. En septembre 1968, ils reçurent une offre d'achat de $44,000 pour le 62, avenue La Rose mais, à cause de l'avis de réclamation, ils ne purent satisfaire aux exigences concernant le titre. Une offre postérieure faite par une autre personne tomba également. Finalement, Berwick et Parker vendirent leur propriété de Campbellville. Ils agirent reconventionnellement en dommages-intérêts pour abus de procédures et fausse déclaration concernant un titre de propriété, mais abandonnèrent cette prétention en appel.

Le principal motif invoqué par M^me^ Petranik pour faire annuler la vente de l'immeuble à Parker et Berwick était qu'elle n'avait pas signé d'hypothèque en faveur de M^me^ Dale et qu'elle n'avait reçu aucune contrepartie pour une telle hypothèque. Comme on l'a déjà indiqué, ces allégations ont été rejetées par le juge de première instance et n'ont pas été reprises en appel.

La question sur laquelle a porté l'affaire en première instance et en appel était de savoir si M^me^ Dale avait le droit de vendre l'immeuble en vertu du pouvoir de vente attaché à l'hypothèque ou si ce pouvoir était suspendu par le jugement signé par le registraire adjoint dans l'action en forclusion. En première instance, le juge Moorhouse, se fondant sur un jugement du juge Farwell dans *Stevens v. Theatres, Limited*[5], qui a été suivi dans *DeBeck v. Canada Permanent Loan and Savings Co.*[6] et *Marshall et al. v. Miles*[7], a décidé qu'après l'obtention du jugement conditionnel de forclusion, M^me^ Dale ne pouvait plus exercer son pouvoir de vente sans permission de la Cour. Le juge de première instance a déclaré que l'acte intervenu entre Dale et Parker et Berwick était invalide et a ordonné que Dale ou d'autres personnes procèdent au renvoi prévu par le jugement conditionnel et qu'avis du renvoi soit donné à M^me^ Petranik. Il a fait certaines autres déclarations en ce qui concerne les droits de Parker et Berwick sur les sommes payées lors de la vente invalide et donna

[5] (1903), 1 Ch. 857.

[6] (1907), 12 B.C.R. 409 (B.C.C.A.).

[7] [1970] 3 O.R. 394 (H. Ct.).

dismissed both counterclaims without costs. On an appeal taken by Parker and Berwick, the Court of Appeal reversed the trial judgment and held that the sale was valid. In reasoning which I adopt, Arnup J.A. held that since the judgment *nisi* in the foreclosure action did not confer any rights on Mrs. Petranik, it did not operate to suspend Mrs. Dale's power of sale under the mortgage.

I agree with Arnup J.A. that, as a general principle, a mortgagee can pursue all the remedies available to him, concurrently or in succession. See Falconbridge, *The law of Mortgages*, *supra*, at pp. 687-88. There are exceptions to this principle, including that specified in what is now s. 40 of *The Mortgages Act*, R.S.O. 1970, c. 279, which provides that once a demand for payment or a notice of intention to exercise a power of sale has been given in accordance with a term of the mortgage, no other proceedings can be taken by a mortgagee without leave of the court before the time limited for payment or sale has expired. A complementary exception was formulated by Farwell J. in *Stevens v. Theatres, Limited*, *supra*. In that case a mortgagee had brought foreclosure proceedings and a judgment *nisi* had directed that accounts be taken and that the property be reconveyed to the mortgagor on payment of what was found owing. Without proceeding to accounts, the mortgagee sold the property under power of sale in the mortgage. Farwell J. held that the mortgagee was not entitled to sell since the judgment *nisi*, which directed reconveyance on payment, operated for the benefit of the mortgagor as well as the mortgagee. In these circumstances, the mortgagee could not get rid of his action *mero motu* after judgment and could not vary the form of that judgment by doing an act which would put it out of his power to perform that which the Court had directed him to do as a condition of getting the judgment (at pp. 860-61). As Arnup J.A. points out, the essence of this holding is concisely stated at p. 862 where

des instructions sur la façon dont les comptes devaient être dressés à l'occasion du renvoi. Il a rejeté les deux demandes reconventionnelles sans frais. Sur appel de Parker et Berwick, la Cour d'appel a renversé le jugement de première instance et jugé que la vente était valide. Pour des motifs que j'approuve, le juge Arnup a décidé que, puisque le jugement conditionnel de forclusion ne conférait aucun droit à M^{me} Petranik, il n'avait pas pour effet de suspendre le pouvoir de vente que M^{me} Dale possédait en vertu de l'hypothèque.

Je suis d'accord avec le juge Arnup qu'en principe, un créancier hypothécaire peut exercer tous les recours dont il dispose, concurremment ou successivement. Voir Falconbridge, *The Law of Mortgages*, précité, aux pp. 687 et 688. Il existe des exceptions à ce principe, notamment celle qui est prévue à l'actuel art. 40 de *The Mortgages Act*, R.S.O. 1970, c. 279, en vertu duquel une fois qu'une demande de paiement a été faite ou un avis d'intention d'exercer un pouvoir de vente adressé conformément à une clause hypothécaire, aucune autre procédure ne peut être intentée par un créancier hypothécaire sans autorisation judiciaire avant l'expiration du délai prescrit pour le paiement ou la vente. Une exception complémentaire a été formulée par le juge Farwell dans *Stevens v. Theatres, Limited*, précitée. Dans cette affaire, un créancier hypothécaire avait intenté une action en forclusion et un jugement conditionnel avait ordonné l'établissement des comptes et la rétrocession de l'immeuble au débiteur sur paiement de ce qui serait trouvé dû. Sans faire procéder aux comptes, le créancier hypothécaire avait vendu la propriété en vertu du pouvoir de vente attaché à l'hypothèque. Le juge Farwell décida que le créancier hypothécaire n'avait pas le droit de vendre puisque le jugement conditionnel, qui ordonnait la rétrocession sur paiement de la dette, jouait autant en faveur du débiteur hypothécaire que du créancier hypothécaire. Dans ces conditions, le créancier hypothécaire ne pouvait se défaire de son action *mero motu* après jugement et il ne pouvait modifier la forme de ce jugement en accomplissant un acte qui se situerait en dehors de son pouvoir d'exécuter ce que la Cour lui avait ordonné de faire comme condition d'obtention du jugement (aux pp. 860 et 861). Comme le juge Arnup le

Farwell J. said:

I hold, therefore, that the power of sale cannot be exercised after the judgment nisi without the leave of the Court, because it prejudices the rights given to the mortgagor under the direction to reconvey.

Farwell J. went on to hold that the power of sale is suspended after judgment *nisi* rather than extinguished and that, accordingly, if the property had been bought by a purchaser for value without notice, he could get a good title under the sale. As Arnup J.A. correctly states, at p. 224, Farwell J. did not suggest that, apart from the terms of the judgment, the mortgagee would be prohibited by law (i.e. in equity) from exercising the power of sale. He was entitled to pursue all his remedies concurrently. The ratio of *Stevens v. Theatres, Limited*, *supra*, is accurately stated by Falconbridge, *The Law of Mortgages*, *supra*, at p. 888:

... a mortgagee cannot, after the usual order nisi for foreclosure and before the foreclosure is made absolute, exercise his power of sale without the leave of the court, because a sale would prejudice the rights given to the mortgagor by the Court under the direction in the judgment for reconveyance on payment, but the power of sale is suspended only, not extinguished, and a purchaser in good faith without notice may get a good title.

In the case at bar, the purchasers, through their solicitor, had notice of the foreclosure judgment when they purchased the property. Whether they have good title thus depends on whether the sale prejudiced rights conferred on the mortgagor by the judgment.

It is a well-established principle, embodied in the Rules of Practice, that where a mortgagor desires an opportunity to redeem his property after default, a court of equity will exercise its discretion to enable him to do so, unless his conduct has been such that it would be inequitable to grant the relief he claims. In exercising its equitable jurisdiction a court will protect a mortgagor from harsh or

souligne, l'essence de cette décision se trouve exprimée avec concision à la p. 862, où le juge Farwell déclare:

[TRADUCTION] Je suis donc d'avis que le pouvoir de vente ne peut être exercé après le jugement conditionnel sans la permission de la cour, parce qu'il porte atteinte aux droits conférés au débiteur hypothécaire en vertu de l'ordonnance de rétrocession.

Le juge Farwell a ensuite décidé que le pouvoir de vente est suspendu plutôt qu'éteint après le jugement conditionnel et qu'en conséquence, si la propriété avait été achetée par un acquéreur à titre onéreux ignorant le jugement, la vente pouvait conférer un titre régulier à l'acheteur. Comme l'expose avec raison le juge Arnup, à la p. 224, le juge Farwell n'a pas laissé entendre que, les clauses du jugement mises à part, le créancier hypothécaire serait empêché en droit (c.-à-d. en *equity*) d'exercer le pouvoir de vente. Il avait le droit d'exercer tous ses recours concurremment. Le motif déterminant dans *Stevens v. Theatres, Limited*, précité, est exposé avec exactitude par Falconbridge, *The Law of Mortgages*, précité, à la p. 888:

[TRADUCTION] ... un créancier hypothécaire ne peut, après l'ordonnance conditionnelle habituelle de forclusion et avant qu'elle ne soit devenue définitive, exercer son pouvoir de vente sans la permission de la cour, parce qu'une vente porterait atteinte aux droits que la cour a conférés au débiteur en ordonnant dans son jugement la rétrocession sur paiement de la dette, mais le pouvoir de vente est seulement suspendu; il n'est pas éteint et un acheteur de bonne foi qui n'aurait pas eu connaissance du jugement pourrait acquérir un titre régulier.

Dans la présente espèce, les acheteurs, par l'intermédiaire de leur avocat, avaient connaissance du jugement de forclusion quand ils ont acheté la propriété. La régularité de leur titre de propriété dépend donc du point de savoir si la vente portait atteinte à des droits conférés à la débitrice hypothécaire par le jugement.

C'est un principe bien établi, incorporé dans les Règles de pratique, que lorsqu'un débiteur hypothécaire désire avoir une occasion de racheter son immeuble après défaut, une cour d'*equity* exercera son pouvoir discrétionnaire de façon à le lui permettre, à moins qu'il ne se soit conduit de façon telle qu'il serait inéquitable de lui accorder le remède qu'il réclame. En exerçant sa juridiction oppressive action by a mortgagee, and when a court has ordered that a mortgagor be given an opportunity to redeem, a mortgagee will not be allowed to circumvent this relief by selling the property under power of sale in the mortgage. Even where there has been no judgment conferring the right to redeem, a court will prevent a sale where the mortgagor genuinely desires to redeem: *Marshall et al. v. Miles, supra.* However, as Arnup J.A. points out, as a result of amendments to the Rules of Practice in 1941, a mortgagor in Ontario did not have an automatic right to redeem. On receipt of a writ in a foreclosure action he must file a notice desiring an opportunity to redeem, or, if he fails to file the notice, appeal to the court to exercise its equitable jurisdiction to allow him to redeem. If the mortgagor fails to take either of these steps, and the judgment *nisi* in the foreclosure action confers on the mortgagor no right to redeem or to obtain a reconveyance on payment of the amounts found owing, the mortgagor is not prejudiced by a sale of the property for a fair price under power of sale prior to a final order of foreclosure.

The only right of the mortgagor which is shortened by the sale is that accorded by Rule 491 (formerly R. 485) which enables the defendant in a foreclosure action to stay proceedings by paying the amount due for principal, interest and costs before the final order of foreclosure. The length of time available to the mortgagor in which to make such a payment depends on whether anyone with an interest in the equity of redemption claims an opportunity to redeem. As a practical matter, it is highly unlikely that any of the encumbrancers would have claimed this opportunity in this case since the value of the property did not exceed the amounts owing on the prior mortgages. There was no evidence that the sale price of the house, $25,500, was not a fair price in 1962 for a property on the outskirts of a metropolitan area, serviced by a well and septic tank. In any event, it is clear that Mrs. Petranik was not in a position to

d'*equity*, la cour protégera le débiteur hypothécaire contre toute action abusive ou accablante du créancier hypothécaire. Quand elle aura ordonné qu'une occasion de racheter soit donnée au débiteur, il ne sera pas permis au créancier hypothécaire de faire échec au remède accordé en vendant la propriété en vertu du pouvoir de vente attaché à l'hypothèque. Alors même qu'aucun jugement n'a accordé de droit de rachat, la cour empêchera la vente si le débiteur désire sincèrement procéder au rachat: *Marshall et al. v. Miles*, précité. Toutefois, comme le souligne le juge Arnup, les modifications apportées aux Règles de pratique en 1941 ont eu pour résultat que le débiteur hypothécaire n'a pas en Ontario un droit automatique de rachat. Sur réception d'un bref d'action en forclusion, il doit déposer un avis exprimant son désir d'avoir l'occasion de racheter ou, s'il omet de déposer l'avis, il doit demander à la cour d'exercer sa juridiction d'*equity* pour l'autoriser à racheter. Si le débiteur hypothécaire omet de prendre l'une ou l'autre de ces mesures et si le jugement conditionnel de forclusion ne lui confère aucun droit de rachat ni droit d'obtenir la rétrocession du bien sur paiement des montants trouvés dus, ses droits ne sont pas atteints par la vente de l'immeuble à un juste prix en vertu du pouvoir de vente avant l'ordonnance finale de forclusion.

Le seul droit du débiteur hypothécaire qui soit diminué par la vente est celui qui est accordé par la règle 491 (anciennement R. 485) qui permet au défendeur à une action en forclusion d'arrêter les procédures en payant le montant dû en capital, intérêts et frais avant l'ordonnance finale de forclusion. Le temps dont dispose le débiteur hypothécaire pour procéder au paiement dépend du point de savoir si quelqu'un ayant un droit de rachat demande d'avoir l'occasion de le faire. En pratique, il est très improbable que l'un quelconque des créanciers l'aurait demandé en l'espèce, puisque la valeur de la propriété ne dépassait pas les montants dus en vertu des hypothèques antérieures. Il n'existe aucune preuve que le prix de vente de la maison, soit $25,500, n'était pas un juste prix en 1962, pour une propriété située aux abords d'une grande agglomération et équipée d'un puits et d'une fosse septique. En tout cas, il take advantage of Rule 491 and does not allege that she was prevented from doing so.

It is true that the sale under power of sale could have prevented the subsequent encumbrancers from claiming in the reference and exercising a power to redeem. It was not until 1964 that *The Mortgages Act*, now s. 31 of R.S.O. 1970, c. 279, prevented such prejudice to subsequent encumbrancers by requiring that they be given notice of any sale under power, and not until 1969 that the Rules gave subsequent encumbrancers the same opportunity to redeem as is given to mortgagors. As already noted, however, it seems clear that the subsequent encumbrancers in this case would not have exercised a right to redeem the property, and they have not complained that they were precluded from doing so. Even if their rights were prejudiced, that does not provide grounds for a claim by Mrs. Petranik.

Mrs. Petranik was in default under the mortgages, and the property was completely pledged to or claimed by others. When foreclosure proceedings were instituted, Mrs. Petranik was not able nor did she indicate a desire to redeem the property. The judgment *nisi* in the foreclosure action effectively foreclosed her equity of redemption and directed a reference with respect to the interests of subsequent encumbrancers. Without proceeding with this reference, the second mortgagee sold the property under power of sale for a fair price which was sufficient to pay out the first mortgage, costs incurred and half of the second mortgage. The second mortgagee has not sued for the remainder owing except by way of counterclaim in this action which was not forcefully pursued. Looking at the situation as it existed in 1962 when this cause of action arose, it is difficult to see how Mrs. Petranik has been prejudiced. The property has now appreciated greatly and Mrs. Petranik may now be in a position to redeem, but there are no grounds to justify setting aside the sale which took place in 1962. The mortgagee was entitled to pursue alternative remedies. The fact that she had obtained judgment *nisi* in a foreclosure action did

est claire que M^me^ Petranik n'était pas en position de se prévaloir de la règle 491 et elle n'allègue pas qu'on l'en ait empêchée.

Il est vrai que la vente en vertu du pouvoir de vente aurait pu empêcher les créanciers subséquents de produire leurs créances lors du renvoi et d'exercer une faculté de rachat. Ce n'est qu'en 1964 que *The Mortgages Act*, art. 31 actuel, R.S.O. 1970, c. 279, a empêché que les créanciers subséquents soient ainsi frustrés de leurs droits, en exigeant qu'ils soient avisés de tout exercice du pouvoir de vente et ce n'est qu'en 1969 que les Règles de pratique ont donné aux créanciers subséquents la même occasion de racheter que celle qui est donnée aux débiteurs hypothécaires. Comme on l'a déjà souligné toutefois, il semble clair que les créanciers subséquents n'auraient pas exercé en l'espèce leur droit de racheter la propriété et ils ne se sont pas plaints d'en avoir été empêchés. Quand bien même il aurait été porté atteinte à leurs droits, la demande de M^me^ Petranik ne s'en trouve pas mieux fondée pour autant.

M^me^ Petranik avait cessé ses paiements hypothécaires et l'immeuble était complètement obéré. Au moment où les procédures de forclusion ont été intentées, M^me^ Petranik n'était pas à même de racheter la propriété et elle n'en a pas manifesté le désir. Le jugement conditionnel de forclusion a effectivement forclos son droit de rachat et ordonné un renvoi quant aux droits des créanciers subséquents. Sans faire procéder à ce renvoi, la seconde créancière hypothécaire a vendu la propriété en vertu de son pouvoir de vente à un juste prix qui a permis de rembourser la première hypothèque, les frais engagés et la moitié de la seconde hypothèque. La seconde créancière hypothécaire n'a pas poursuivi pour le solde, sauf par voie de demande reconventionnelle dans la présente action, demande qui n'a pas été poussée plus avant. Si l'on considère la situation qui existait en 1962 lorsque la cause d'action a pris naissance, il est difficile de découvrir le préjudice qu'a subi M^me^ Petranik. La propriété a pris maintenant beaucoup de valeur et il se peut que M^me^ Petranik soit maintenant à même de la racheter, mais rien ne justifie l'annulation de la vente intervenue en 1962. La créancière hypothécaire avait plusieurs moyens not preclude her from exercising her power of sale under the mortgage since the sale did not prejudice any rights asserted by or accorded to Mrs. Petranik in the foreclosure proceeding.

I agree completely with the reasons delivered in the Court of Appeal. I would dismiss the appeal with costs.

RITCHIE J. (*dissenting*)—Like my brother Judson, I agree with the reasons for judgment delivered by Mr. Justice Arnup on behalf of the Court of Appeal for Ontario and would dismiss this appeal with costs.

DICKSON J.—I would allow this appeal. In my view, Mrs. Petranik's equity of redemption in the subject property was not extinguished by either the foreclosure proceedings commenced by Mrs. Dale but not completed, or by the purported exercise of the power of sale contained in the mortgage. An equity of redemption is a right of property. Holdsworth (*A History of English Law*, vol. VI, at p. 663) says:

> We have seen that the relief given by equity to the mortgagor originally depended on principles similar to those which underlay the relief given in cases of the breach of a condition, and in cases of penalties; but that, the regularity with which this relief was given, had altered its basis, and caused it to depend, not upon the existence of any supposed hardship, but upon a right belonging as of course to a mortgagor. The result had been to make the mortgagor's equity to redeem a right of property. He had an equitable estate in the land; and, subject to the legal rights of the mortgagee, was, in equity, regarded as its owner.

In *Casborne v. Scarfe*[8] at p. 604-5, Lord Hardwicke said:

> First, an equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only but such an estate whereof there may be seisin; the

[8] (1737), 1 Atk. 603.

à sa disposition. Le fait qu'elle ait obtenu un jugement conditionnel de forclusion ne l'empêchait pas d'exercer son pouvoir de vente attaché à l'hypothèque puisque la vente ne portait atteinte à aucun droit reconnu ou conféré à M^me^ Petranik lors des procédures de forclusion.

Je suis en complet accord avec les motifs de l'arrêt de la Cour d'appel. Je rejetterais le pourvoi avec dépens.

LE JUGE RITCHIE (*dissident*)—Comme mon collègue Judson, je suis d'accord avec les motifs du jugement rendu par le juge Arnup au nom de la Cour d'appel de l'Ontario et je rejetterais ce pourvoi avec dépens.

LE JUGE DICKSON—Je suis d'avis d'accueillir ce pourvoi. A mon avis, le droit que M^me^ Petranik avait en *equity* de racheter la propriété litigieuse n'a été éteint ni par les procédures de forclusion que M^me^ Dale a entamées sans les mener à terme, ni par le prétendu exercice du pouvoir de vente attaché à l'hypothèque. Un droit de rachat est un droit réel. Holdsworth (*A History of English Law*, vol. VI, p. 663) écrit:

> [TRADUCTION] Nous avons vu que le recours que l'*equity* accordait au débiteur hypothécaire dépendait à l'origine de principes semblables à ceux qui sous-tendaient le recours accordé dans les cas de violation d'une condition et dans les cas de clauses pénales, mais que la régularité avec laquelle ce recours était accordé avait modifié son fondement et l'avait amené à dépendre non plus de l'existence de quelque grave iniquité supposée mais d'un droit appartenant, comme allant de soi, au débiteur hypothécaire. Le résultat avait été la transformation du privilège de rachat du débiteur hypothécaire en droit réel. Le débiteur avait un droit de tenure en *equity* sur le biens-fonds et il en était considéré, en *equity*, comme le propriétaire, sous réserve des droits que la *common law* donnait au créancier hypothécaire.

Dans *Casborne v. Scarfe*[8], aux pp. 604-605, lord Hardwicke déclarait:

> [TRADUCTION] En premier lieu, un droit de rachat a toujours été considéré comme droit de tenure sur le bien-fonds, car il peut être légué, donné ou grevé de substitutions auxquelles on peut faire échec par amiable composition et recouvrement, et il ne peut donc être considéré comme un simple droit mais comme un droit

[8] (1737), 1 Atk. 603.

person therefore intitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

In *Burgess v. Wheats*[9], at p. 225, Lord Mansfield said:

> In the eye of this court Lord Hardwicke thought the equity of redemption is the fee simple of the land.

In *Heath v. Pugh*[10], at p. 360, Lord Chancellor Selborne said that it was sufficient to quote the above passage on the point, and in *Tarn v. Turner*[11], at p. 460, Mr. Justice Kekewich said:

> The Court having decided that the mortgagor has that right to redeem, construes it as really an estate in the land. It is not a legal estate, but what is termed an equitable estate—as much an interest in the land as the real fee simple. It is a fee simple subject to a charge, and is vulgarly styled in legal language the equity of redemption.

An equity of redemption is an equitable estate, which can be sold or quit claimed, and which cannot be clogged or fettered.

In the case at bar, Mrs. Dale commenced a foreclosure action for the purpose of extinguishing the interest which, as owner of the equity of redemption, Mrs. Petranik held in the lands mortgaged to Mrs. Dale. Mrs. Dale issued a specially endorsed writ against Mrs. Petranik in the usual form of a writ of foreclosure. The prayer for relief stated that the plaintiff's claim was on the mortgage and continued with notice of a claim of entitlement to immediate possession and a claim for $5,000 principal money and interest. The prayer for relief also gave notice that:

> . . . judgment for immediate foreclosure of your interest in the mortgaged premises may be entered unless you desire an opportunity to redeem the mortgaged premises and before the expiration of the time allowed you for

[9] (1759) 1 Eden. 177.
[10] (1881), 6 Q.B.D. 345.
[11] (1888), 39 Ch. D. 456.

de tenure dont il peut y avoir saisine. La personne titulaire du droit de rachat est donc considérée comme propriétaire du bien-fonds et une hypothèque en fief est considérée comme des biens meubles.

Dans *Burgess v. Wheats*[9], à la p. 225, lord Mansfield déclarait:

> [TRADUCTION] De l'avis de cette cour, lord Hardwicke pensait que le droit de rachat est le droit de propriété absolue du bien-fonds.

Dans *Heath v. Pugh*[10], à la p. 360, le lord chancelier Selborne a déclaré qu'il suffisait, sur ce point, de citer le passage ci-dessus, et dans *Tarn v. Turner*[11], à la p. 460, le juge Kekewich déclarait:

> [TRADUCTION] Ayant décidé que le débiteur hypothécaire a le droit de racheter, la Cour voit celui-ci comme un véritable droit de tenure sur le bien-fonds. Ce n'est pas un droit de tenure légale, mais ce que l'on appelle un droit de tenure en *equity*—un droit réel tout autant que l'est le véritable droit de propriété absolue. C'est un droit de propriété absolue grevée d'une charge, que l'on appelle communément droit de rachat dans le langage juridique.

Un droit de rachat est un droit de tenure en *equity*, qui peut être vendu ou faire l'objet d'une renonciation et que rien ne peut entraver.

En l'espèce, M^me^ Dale a intenté une action en forclusion dans le but d'éteindre le droit que, en tant que propriétaire du droit de rachat, M^me^ Petranik détenait sur le bien-fonds hypothéqué en faveur de M^me^ Dale. M^me^ Dale a fait délivrer un bref à endossement spécial contre M^me^ Petranik en la forme habituelle d'un bref de forclusion. La demande de redressement exposait que la réclamation de la demanderesse portait sur l'hypothèque et se poursuivait avec un avis par lequel la demanderesse entendait se faire reconnaître le droit à la possession immédiate et réclamait le remboursement d'un capital de $5,000, avec les intérêts. La demande de redressement donnait également avis que:

> [TRADUCTION] . . . jugement de forclusion immédiate de vos droits sur les lieux hypothéqués peut être inscrit à moins que vous ne désiriez avoir l'occasion de racheter les lieux hypothéqués et qu'avant l'expiration du temps

[9] (1759), 1 Eden 177.
[10] (1881), 6 Q.B.D. 345.
[11] (1888), 39 Ch. D. 456.

appearance you do file in the office within named and serve a memorandum in writing entitled in this action and signed by yourself or your solicitor to the following effect: 'I desire an opportunity to redeem the mortgaged premises', and give an address for service, in which case you will be entitled to four days' notice of the taking of the account of the amount due to the plaintiff and in default of payment of the amount found due within six calendar months from the time of taking of the account and the drawing up of the judgment your interest in the mortgaged premises may be foreclosed.

Rule 465 (formerly Rule 460A) of the *Ontario Annual Practice* 1962 provided:

465. Where a defendant by writ in an action for foreclosure or sale desires an opportunity to redeem the mortgaged premises but does not otherwise desire to defend the action, he shall, within the time allowed for appearance, file and serve a memorandum entitled in the action to the following effect: 'I desire an opportunity to redeem the mortgaged premises', whereupon he is entitled to four days' notice of the taking of the account of the amount due to the plaintiff and has six calendar months from the time of the taking of the account to redeem the mortgaged premises.

Rule 472 (1) and (2) (formerly Rule 467 (1) and (2)) then goes on to provide:

472. (1) In an action for foreclosure or sale where the writ has been duly endorsed and the defendant fails to appear or fails to file a notice that he desires an opportunity to redeem the mortgaged premises, the plaintiff may sign judgment for immediate sale or for immediate foreclosure unless a reference is desired as to encumbrancers (Form 104).

(2) If a reference is desired as to encumbrancers, the plaintiff is entitled to judgment with a reference, and, if no encumbrancer, shall prove any claim the Master so certifies, and, upon confirmation of the Master's report, a final order of sale or of foreclosure shall be made.

Form 104, referred to above, is of particular interest. It reads:

FORM 104

Form of Judgment on Praecipe for Immediate Foreclosure or Sale and Orders for Immediate Payment and Delivery of Possession

(Rule 472)

qui vous est accordé pour comparaître, vous ne déposiez au bureau désigné dans les présentes et ne signifiiez une note écrite, portant l'intitulé de l'action, signée par vous-même ou votre avocat et ayant la teneur suivante: «Je désire avoir une occasion de racheter les lieux hypothéqués» et ne donniez une adresse en vue des significations, auquel cas vous aurez droit à un avis de quatre jours de l'établissement du compte du montant dû à la demanderesse et à défaut de paiement du montant trouvé dû dans les six mois à compter de la date d'établissement du compte et de la rédaction du jugement, vos droits sur les lieux hypothéqués peuvent être forclos.

La règle 465 (ancienne règle 460A) de l'*Ontario Annual Practice* de 1962 prévoit que:

[TRADUCTION] 465. Le défendeur à une action en forclusion ou vente forcée qui désire avoir l'occasion de racheter les lieux hypothéqués mais ne désire pas présenter d'autre défense à l'action, doit, dans le délai de comparution, déposer et signifier une note portant l'intitulé de l'action et ayant la teneur suivante: «Je désire avoir une occasion de racheter les lieux hypothéqués», sur quoi il aura droit à un avis de quatre jours de l'établissement du compte du montant dû au demandeur et aura six mois à compter de cet établissement pour racheter les lieux hypothéqués.

Le règle 472(1) et (2) (ancienne règle 467(1) et (2)) prévoit en outre que:

[TRADUCTION] 472. (1) Lorsque dans une action en forclusion ou vente forcée, le bref a été régulièrement signifié et que le défendeur fait défaut de comparaître ou de déposer un avis de son désir d'avoir une occasion de racheter les lieux hypothéqués, le demandeur peut obtenir un jugement de vente immédiate ou de forclusion immédiate à moins qu'un renvoi concernant les créanciers ne soit désiré (Formule 104).

(2) Si un renvoi concernant les créanciers est désiré, le demandeur a droit à un jugement avec renvoi et, s'il n'y a pas de créancier, doit prouver toute créance que le *Master* certifie ainsi, et, sur confirmation du rapport du *Master*, une ordonnance définitive de vente ou de forclusion doit être prononcée.

La formule 104, mentionnée ci-dessus, est particulièrement intéressante. Elle se lit ainsi:

[TRADUCTION] FORMULE 104

Formule de jugement sur réquisition écrite de forclusion immédiate ou de vente et d'ordonnances de paiement immédiat et de mise en possession

(Règle 472)

Upon reading the writ of summons issued in this action, and an affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed:

1. It is ordered and adjudged (*Where judgment is for foreclosure after* 'adjudged', *add*: 'that the said defendant do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged premises', *where judgment is for sale, then after the word* 'adjudged', *add* 'that the said premises be sold, with the approbation of the Master, at..').

2. (*If judgment is for foreclosure omit this clause.*) And it is further ordered and adjudged that the purchasers do pay their purchase money into Court to the credit of this action and that the same when so paid in be applied in payment of what is found to be due to the said plaintiff for principal money, interest and costs as computed and taxed by the said Master, and that the balance do abide the further order of the Court.

3. (*Where judgment is for immediate payment, add*: And it is further ordered and adjudged that the defendant..do forthwith pay to the plaintiff the sum of..being the amount due to him at the date hereof for principal money, interest and costs.)

4. (*Where judgment is for recovery of possession, add*: And it is further ordered and adjudged that the defendant..do forthwith deliver to the plaintiff..or to whom he may appoint, possession of the mortgaged premises, or of such part thereof as may be in the possession of the said defendant.)

Mrs. Petranik failed to appear and failed to give a notice that she desired an opportunity to redeem the mortgaged premises. Judgment was signed directing a reference and ordering Mrs. Petranik to deliver up possession of the property. A draft judgment was presented in the following form:

JUDGMENT

Friday, the 23rd day of March, 1962.

UPON reading the Writ of Summons issued in this action, and affidavit of service of the said writ and no appearance having been entered and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed;

1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed

Vu le bref d'assignation délivré dans la présente action et l'attestation sous serment de la signification dudit bref, en l'absence de comparution et aucun avis n'ayant été déposé exprimant le désir du défendeur d'avoir l'occasion de racheter les lieux hypothéqués:

1. Il est ordonné et décidé (*S'il s'agit d'un jugement de forclusion, après* «décidé», *ajouter*: «que ledit défendeur soit absolument déchu et forclos de tout droit, titre et faculté de rachat à l'égard des lieux hypothéqués»; *quand il s'agit d'un jugement de vente, après* «décidé», *ajouter alors*: «que lesdits lieux soient vendus, avec l'approbation du *Master*, à..»).

2. (*S'il s'agit d'un jugement de forclusion, omettez cette clause.*) Et il est en outre ordonné et décidé que les acheteurs consignent leur prix d'achat à la cour au crédit de la présente action et que l'argent ainsi consigné soit affecté au paiement de ce qui est trouvé dû audit demandeur en capital, intérêts et frais tels que calculés et taxés par ledit *Master* et qu'il soit disposé du solde selon ordonnance ultérieure de la cour.

3. (*S'il s'agit d'un jugement de paiement immédiat, ajouter*: Et il est en outre ordonné et décidé que le défendeur..paye immédiatement au demandeur la somme de..représentant ce qui lui est dû à cette date en capital, intérêts et frais.)

4. (*S'il s'agit d'un jugement de mise en possession, ajouter*: Et il est en outre ordonné et décidé que le défendeur..mette immédiatement le demandeur.., ou la personne qu'il peut désigner, en possession des lieux hypothéqués ou de toute partie de ceux-ci qui peut être en la possession dudit défendeur.)

M^me^ Petranik n'a pas comparu et n'a pas donné d'avis de son désir d'avoir l'occasion de racheter les lieux hypothéqués. Jugement a été rendu ordonnant un renvoi et ordonnant à M^me^ Petranik de remettre la propriété. Le projet de jugement se présentait sous la forme suivante:

[TRADUCTION] JUGEMENT

le vendredi 23 mars 1962

VU le bref d'assignation délivré dans la présente action et l'attestation sous serment de la signification dudit bref, en l'absence de comparution et aucun avis n'ayant été déposé exprimant le désir de la défenderesse d'avoir l'occasion de racheter les lieux hypothéqués;

1. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés,

and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

2. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due her for principal money, interest and costs at the date of the said report and upon payment of the amount due to her that (subject to the provision of section 2 of The Mortgages Act) the plaintiff do assign and convey the mortgaged premises, and deliver up all documents relating thereto.

3. AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom she may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

At the time of signing the judgment, the paragraph numbered "2" was struck out and the remaining paragraphs renumbered "I" and "II".

The first thing to observe about the judgment is that it is not a judgment for immediate foreclosure. Form 104 states that where judgment is for immediate foreclosure the order shall state "that the said defendant do stand absolutely debarred and foreclosed of and from all right, title and equity of redemption of, in and to the mortgaged premises". The form of the judgment which was entered contains no such language. Paragraph II of the judgment as entered directs the delivery of possession but in no way affects the equity of redemption. The taking of possession by a mortgagee does not extinguish the right of the mortgagor to redeem the mortgaged premises. If the judgment as signed had contained the paragraph numbered "2" in the draft, the case would without doubt fall within *Stevens v. Theatres, Limited*[12], but I do not think the question whether Mrs. Petranik retains an equity of redemption in the subject property depends upon the presence or absence of the expunged paragraph in the judgment entered. The crucial issue in this appeal is whether the estate or interest owned by Mrs. Petranik in the mortgaged land was extinguished and if so, when and in what manner. The judgment

[12] [1903] 1 Ch. 857.

les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* en la ville de Toronto.

2. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que, après dépôt du rapport du *Master*, la défenderesse paye immédiatement à la demanderesse ce qui lui sera trouvé dû en capital, intérêts et frais à la date dudit rapport et, sur paiement du montant qui lui est dû, que (sous réserve des dispositions de l'article 2 de *The Mortgages Act*) la demanderesse rétrocède les lieux hypothéqués et rende tous documents les concernant.

3. ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que la défenderesse mette immédiatement la demanderesse, ou la personne qu'elle peut désigner, en possession des biens-fonds et lieux en question dans la présente cause ou de toute partie de ceux-ci qui peuvent être en possession de ladite défenderesse.

Au moment de rendre le jugement, le paragraphe numéroté «2» a été biffé et les paragraphes restants ont été renumérotés «I» et «II».

La première chose à souligner à propos de ce jugement, c'est qu'il ne s'agit pas d'un jugement de forclusion immédiate. La formule 104 dispose que, lorsqu'il s'agit d'un jugement de forclusion immédiate, l'ordonnance doit indiquer [TRADUCTION] «que ledit défendeur soit absolument déchu et forclos de tout droit, titre et faculté de rachat à l'égard des lieux hypothéqués». La formulation du jugement rendu ne contient rien de tel. Le paragraphe II du jugement rendu ordonne la mise en possession, mais ne touche aucunement au droit de rachat. La prise de possession par un créancier hypothécaire n'éteint pas le droit du débiteur de racheter les lieux hypothéqués. Si le jugement rendu contenait le paragraphe numéroté «2» dans le projet, nul doute que la cause aurait relevé de *Stevens v. Theatres, Limited*[12], mais je ne pense pas que la question de savoir si M^{me} Petranik conserve un droit de rachat sur la propriété litigieuse dépende de la présence ou de l'absence du paragraphe supprimé dans le jugement rendu. La question cruciale dans le présent pourvoi est de savoir si la tenure ou droit réel de M^{me} Petranik sur le bien-fonds hypothéqué a été éteint et, dans l'affirmative, quant et comment. Le jugement

[12] [1903] 1 Ch. 857.

which was entered did not, nor did it purport to, extinguish that interest. Neither was that interest extinguished by Mrs. Petranik's failure to appear or her failure to give a notice that she desired an opportunity to redeem the mortgaged premises. The passage of Rule 460A and the amendment of Rule 467 (the forerunner of Rule 472), effected a major change in foreclosure practice and procedure in Ontario by authorizing the signing of final judgment for immediate foreclosure unless the defendant filed a memorandum stating that he wished to redeem the property in question. This altered the earlier practice which required the plaintiff to sign interlocutory, not final, judgment. That is the effect of the change. I do not think it can be said that Mrs. Petranik's failure to file such a memorandum extinguished her equity of redemption. The Rule does not say that such is the effect and I very much doubt that ownership of an estate in land can be swept away by a rule of practice. Rules of practice do not prevail over equitable estates. Counsel for the respondent Mrs. Dale, early in his argument submitted that the effect of the amendment to the Rules was to extinguish the right of the mortgagor to redeem upon failure to file a request for an opportunity to redeem. Before his argument concluded, however, he had altered his position and conceded that an attenuated right of redemption continued. I think the concession is correct. The judgment was not an order absolute. An equity of redemption is so intense that even after an order absolute the court on occasion has given the mortgagor the right to redeem: *Campbell v. Holyland*[13].

The Rules gave Mrs. Dale the right to enter judgment immediately for final order of foreclosure upon failure of Mrs. Petranik to appear or to give notice. Mrs. Dale did not avail herself of the opportunity to enter final judgment against Mrs. Petranik. She obtained an order for a reference because, no doubt, there were subsequent encumbrances, but whatever may have been her reason, Mrs. Dale obtained a judgment which left unextinguished Mrs. Petranik's equitable estate in the

[13] [1877] 7 Ch. D. 166.

rendu n'a pas éteint et n'avait d'ailleurs pas pour objet d'éteindre ce droit. Pas davantage ce droit n'a-t-il été éteint par le défaut de comparaître de M^me^ Petranik ou son défaut de donner avis de son désir d'avoir l'occasion de racheter les lieux hypothéqués. L'adoption de la règle 460A et la modification de la règle 467 (précurseur de la règle 472) ont opéré un changement majeur dans les procédures de forclusion en Ontario en autorisant le prononcé d'un jugement final de forclusion immédiate à moins que le défendeur ne dépose un mémoire indiquant son désir de racheter la propriété en question. Cela modifie la pratique antérieure qui obligeait le demandeur à obtenir un jugement interlocutoire et non pas final. Telle est la portée du changement. Je ne pense pas que l'on puisse dire que le défaut de M^me^ Petranik de déposer pareil mémoire a éteint son droit de rachat. La règle ne déclare pas que tel est son effet et je doute fort que la propriété d'un droit de tenure sur un bien-fonds puisse être écartée par une règle de pratique. Les Règles de pratique ne l'emportent pas sur les droits de tenure en *equity*. Au début de sa plaidoirie, le procureur de la défenderesse M^me^ Dale a prétendu que la modification apportée aux règles avait pour effet d'éteindre le droit de rachat du débiteur hypothécaire qui omet de demander une occasion de racheter. Il a toutefois modifié sa position avant de conclure sa plaidoirie et concédé qu'il subsistait un droit de rachat atténué. Je pense que cette concession est correcte. Le jugement n'était pas une ordonnance définitive. Le droit de rachat est si fort que, même après une ordonnance définitive, il est parfois arrivé aux tribunaux d'accorder au débiteur hypothécaire le droit de racheter: *Campbell v. Holyland*[13].

Les règles donnaient à M^me^ Dale le droit d'obtenir immédiatement un jugement final ordonnant la forclusion sur défaut de comparution ou de donner avis de M^me^ Petranik. M^me^ Dale ne s'est pas prévalue de sa faculté d'obtenir un jugement final contre cette dernière. Elle a obtenu une ordonnance de renvoi. Sans doute était-ce parce qu'il existait des créanciers subséquents mais, quelles qu'aient pu être ses raisons, M^me^ Dale a obtenu un jugement qui n'éteignait pas le droit de tenure en *equity* de

[13] [1877] 7 Ch. D. 166.

land. Mrs. Dale did not proceed with the reference before the Master; instead, she sold the property to Mr. Parker and Mr. Berwick, purporting to act under the power of sale contained in the mortgage. So far as giving notice of exercising power of sale to Mrs. Petranik, the trial judge, Moorhouse J., had this to say:

The sale was carried out with little if any notice, it being now alleged Helga [Mrs. Petranik] had abandoned the property, sale was purported to be made without notice.

It is contended that Mrs. Dale was entitled to pursue all remedies available to her, concurrently or in succession. Whether this is so in the present case depends, I think, upon the effect to be given to paragraph "I" of the judgment entered on behalf of Mrs. Dale which, it will be recalled, reads:

I. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at the City of Toronto.

The form of judgment entered on behalf of Mrs. Dale should be read against the form appearing in Marriott, *Practice in Mortgage Actions in Ontario* (2nd. ed.) (1955) at p. 322 which I would like to set out in full:

FORM 20

(Form 96, C.R.)

Form of Judgment on Praecipe for Foreclosure with Reference as to Encumbrancers, etc., where the Original Defendants do not File a Notice D. O. R., and Orders for Immediate Payment and Delivery of Possession

(Court and Cause)

........day the........day of........19....

Upon reading the writ of summons issued in this action, and the statement of claim (if any), and an affidavit of service of the said writ on the defendant, and no appearance having been entered, (or, and the defendant having made default in the delivery of the defence) and no notice that the defendant desires an opportunity to redeem the mortgaged premises having been filed:

1. IT IS ORDERED AND ADJUDGED that all necessary enquiries be made, accounts taken, costs taxed

M^{me} Petranik sur le bien-fonds. M^{me} Dale n'a pas fait procéder au renvoi devant le *Master*; au lieu de cela, elle a vendu la propriété à M. Parker et M. Berwick, prétendant agir en vertu du pouvoir de vente attaché à l'hypothèque. En ce qui concerne l'avis à donner à M^{me} Petranik de l'exercice du pouvoir de vente, le juge de première instance Moorhouse a fait remarquer ceci:

[TRADUCTION] La vente a été conclue avec peu ou pas d'avis, et comme il est maintenant allégué qu'Helga [M^{me} Petranik] avait abandonné la propriété, il semble qu'on ait entendu procéder à la vente sans avis.

Il est prétendu que M^{me} Dale avait le droit d'exercer tous les recours à sa disposition, concurremment ou successivement. Le point de savoir s'il en est ainsi en l'espèce dépend, je pense, de l'effet que l'on accorde au 1er paragraphe du jugement rendu en faveur de M^{me} Dale, paragraphe qui, rappelons-le, se lit comme suit:

[TRADUCTION] I. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés, les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* en la ville de Toronto.

La formulation du jugement rendu en faveur de M^{me} Dale doit être rapprochée de la formule que l'on trouve dans Marriott, *Practice in Mortgage Actions in Ontario* (2^{e} éd.) (1955), à la p. 322, que je reproduis en entier:

[TRADUCTION] FORMULE 20

(Formule 96, R.C.)

Formule de jugement sur réquisition écrite de forclusion avec renvoi quant aux créanciers, etc., quand les défendeurs originaires n'ont pas déposé d'avis de D. O. R., et d'ordonnance de paiement immédiat et de mise en possession

(Cour et cause)

Le.................................... 19....

Vu le bref d'assignation délivré dans la présente action, et la déclaration (le cas échéant), et une attestation sous serment de la signification dudit bref au défendeur, en l'absence de comparution (ou, le défendeur n'ayant pas produit de défense) et aucun avis n'ayant été déposé exprimant le désir du défendeur d'avoir l'occasion de racheter les lieux hypothéqués:

1. IL EST ORDONNÉ ET DÉCIDÉ que toutes les recherches nécessaires soient faites, les comptes dressés,

and proceedings had for redemption or foreclosure and that for these purposes this cause be referred to the Master at...........................

2. (*Where judgment is for immediate payment add:*) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant...............do forthwith pay to the plaintiff the sum of $...........being the amount due to him for principal money, interest and costs at the date hereof; and upon payment of the amount due to the plaintiff that (subject to the provisions of section 2 of *The Mortgages Act*) the plaintiff do asign (sic) and convey the mortgaged premises and deliver up all documents relating thereto.

2. (*Or where judgment is for the amount found due by the Master substitute this paragraph for the one above:*) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith after making of the Master's report pay to the plaintiff what shall be found due him for principal money, interest and costs at the date of the said report and upon payment of the amount due to him that, (subject to the provision of section 2 of *The Mortgages Act*) the plaintiff do assign and convey the mortgaged premises, and deliver up all the documents relating thereto.

3. (*Where judgment is for recovery of possession add:*) AND IT IS FURTHER ORDERED AND ADJUDGED that the defendant do forthwith deliver to the plaintiff, or to whom he may appoint, possession of the lands and premises in question in this cause, or of such part thereof as may be in the possession of the said defendant.

Judgment signed this........day of.................... 19....

REGISTRAR

The following points might be noted particularly (i) that the form of judgment in the instant case adopted, practically verbatim, the language of the recital and of paragraphs "1" and "3" of Form 20; (ii) that form 20 is a Form of Judgment for Foreclosure; (iii) that it is not a judgment for immediate foreclosure but in the nature of a judgment *nisi*; (iv) that the judgment entered on behalf of Mrs. Dale does not include paragraph "2" of Form 20 ordering immediate payment.

Marriott, *supra*, says at p. 76:

In a combined action for foreclosure, possession and payment, it should be kept in mind that in reality there

les frais taxés et les mesures prises en vue de rachat ou de forclusion et qu'à ces fins la présente cause soit renvoyée au *Master* à...........................

2. (*Quand il s'agit d'un jugement de paiement immédiat, ajouter:*) ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que le défendeur.................... paye immédiatement au demandeur la somme de $............... représentant le montant qui lui est dû en capital, intérêts et frais à cette date; et que, sur paiement du montant dû au demandeur (sous réserve des dispositions de l'article 2 de *The Mortgages Act*), le demandeur rétrocède les lieux hypothéqués et rende tous documents les concernant.

2. (*Ou s'il s'agit d'un jugement pour le montant établi par le Master, substituer le paragraphe suivant au précédent:*) ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que, après dépôt du rapport du *Master*, le défendeur paye immédiatement au demandeur ce qui lui sera trouvé dû en capital, intérêts et frais à la date dudit rapport et, sur paiement du montant qui lui est dû, que (sous réserve des dispositions de l'article 2 de *The Mortgages Act*) le demandeur rétrocède les lieux hypothéqués et rende tous documents les concernant.

3. (*S'il s'agit d'un jugement de mise en possession, ajouter:*) ET IL EST EN OUTRE ORDONNÉ ET DÉCIDÉ que le défendeur mette immédiatement le demandeur, ou la personne qu'il peut désigner, en possession des biend-fonds et lieux en question dans la présente cause, ou de toute partie de ceux-ci qui peuvent être en la possession dudit défendeur.

Jugement signé ce...........jour de............................... 19....

REGISTRAIRE

On peut relever notamment les points suivants: i) que la formulation du jugement rendu en l'espèce a repris, presque mot pour mot, les termes de l'exposé introductif et des paragraphes 1 et 3 de la formule 20; ii) que la formule 20 est une formule de jugement de forclusion; iii) qu'il ne s'agit pas d'un jugement de forclusion immédiate mais d'un jugement de nature conditionnelle; iv) que le jugement rendu en faveur de M[me] Dale ne contient pas le paragraphe 2 de la formule 20 ordonnant le paiement immédiat.

Marriott, précité, déclare à la p. 76:

[TRADUCTION] Dans une action combinée en forclusion, possession et paiement, il faut garder présent à are three actions and the judgment when entered gives three remedies. If no notice D. O. R. [desire opportunity to redeem] is filed in effect three judgments are obtained, one for immediate foreclosure, one for possession and another for payment.

Where a notice D. O. R. is filed and the defendant is given three months to redeem, or a reference is required as to encumbrancers, the foreclosure action is not concluded and the right to redeem is still outstanding until a final order is obtained. However, as the other two actions have been completed and the plaintiff has the right to pursue his remedies thereon without regard to the foreclosure action he may at once obtain an execution on the judgment for payment and issue a writ of possession and place them in the Sheriff's hands: *Euclid Avenue Trusts Co. v. Hohs* (1911) 24 O.L.R. 447 at 452.

[The emphasis is mine.]

The effect of the judgment taken out by Mrs. Dale on March 23, 1962 was (i) to leave outstanding Mrs. Petranik's right of redemption until a final order of foreclosure could be obtained; (ii) not to take judgment for immediate payment; (iii) to obtain the right of immediate possession.

It is contended on behalf of Mrs. Dale that the omission from the judgment of the order for immediate payment (which embodied an express obligation to reconvey on payment) served to distinguish this case from *Stevens v. Theatres, Ltd.*, *supra*, and that in consequence Mrs. Dale was free to disregard the judgment which had been obtained at her behest from the Supreme Court of Ontario ordering a reference to the Master, and free to sell the mortgaged lands by private sale without notice to Mrs. Petranik. With respect, I think that that is taking too narrow a view of what was said by Mr. Justice Farwell in the *Stevens* case. I do not regard *Stevens* as a technical rule. Once the court has given judgment in foreclosure proceedings the mortgagee's power of sale is suspended pending implementation of that judgment. Although there is language in *Stevens* which might suggest that the suspension of the exercise of the power of sale depended upon an obligation to reconvey being expressly set forth in the judgment *nisi*, there is other language which can be read

l'esprit qu'en réalité il y a trois actions et que le jugement, une fois inscrit, fournit trois remèdes. Si aucun avis de D. O. R. [désir d'occasion de racheter] n'est déposé, ce sont en fait trois jugements qui sont obtenus, un de forclusion immédiate, un de possession, et un autre de paiement.

Quand un avis de D. O. R. est déposé et que le défendeur se voit accorder trois mois pour racheter, ou quand un renvoi est exigé quant aux créanciers, l'action en forclusion n'est pas terminée et le droit de racheter subsiste encore jusqu'à l'obtention d'une ordonnance finale. Toutefois, comme les deux autres actions sont achevées et que le demandeur a le droit d'exercer les recours qu'elles lui ont ouverts sans égard à l'action en forclusion, il peut aussitôt obtenir un bref d'exécution en vertu du jugement de paiement et faire émettre un bref de possession et les mettre entre les mains du shérif: *Euclid Avenue Trusts Co. v. Hohs* (1911) 24 O.L.R. 447, p. 452.

[C'est moi qui souligne.]

L'effet du jugement obtenu par M^me^ Dale le 23 mars 1962 était i) de laisser subsister le droit de rachat de M^me^ Petranik jusqu'à ce qu'une ordonnance finale de forclusion puisse être obtenue; ii) de ne pas obtenir jugement de paiement immédiat; iii) d'obtenir un droit de possession immédiate.

On a prétendu, en faveur de M^me^ Dale, que l'omission dans le jugement, de l'ordonnance de paiement immédiat (à laquelle était incorporée une obligation expresse de rétrocession sur paiement) permettait de distinguer la présente affaire de *Stevens v. Theatres, Ltd.*, précité. En conséquence, M^me^ Dale était libre de ne pas tenir compte du jugement prononcé à sa demande par la Cour suprême de l'Ontario, ordonnant un renvoi au *Master*, et de vendre privément les biens-fonds hypothéqués sans en aviser M^me^ Petranik. Avec égards, je pense que c'est interpréter trop étroitement les déclarations du juge Farwell dans *Stevens*. Je ne vois pas la règle *Stevens* comme une règle de procédure. Dès lors qu'un tribunal a prononcé jugement dans des procédures de forclusion, le pouvoir de vente du créancier hypothécaire est suspendu tant que l'exécution du jugement est elle-même pendante. Bien qu'il y ait, dans *Stevens*, certains passages qui pourraient laisser entendre que la suspension de l'exercice du pouvoir de vente est subordonnée à la présence, dans le jugement more broadly and as being apposite in the case at bar. I have in mind, for example, the following:

> When the parties have once taken the judgment of the Court neither party, in my opinion, is entitled without the leave of the Court to put it out of his own power, by any act of his own, to obey the judgment of the Court.

Whatever may be the reach of the *Stevens* decision, I am in no doubt that when a mortgagee seeks the aid of the court in the enforcement of a remedy against a mortgagor and engages the court system to the extent of obtaining a judgment of the nature of that obtained by Mrs. Dale, the mortgagee must carry out that judgment or obtain leave of the court to do otherwise. Having resorted to the Queen's justice, he can not resort to his own.

I conclude by reiterating that an equity of redemption is an interest in land, which the mortgagor can convey, devise, settle, lease or mortgage like any other interest in land (Megarry and Wade, *The Law of Real Property* (3rd ed.) at p. 885, and Cheshire's *Modern Real Property* (10th ed.) at p. 568) and that equity has always jealously guarded the mortgagor's right to redeem.

I would allow the appeal, set aside the judgment of the Ontario Court of Appeal and restore the judgment of Moorhouse J. with costs to the appellant throughout.

Appeal allowed with costs, JUDSON *and* RITCHIE JJ. *dissenting.*

Solicitors for the appellant: Black, Osborne, Black & Bassel, Toronto.

Solicitor for the respondents, Parker and Berwick: George T. Walsh, Toronto.

Solicitor for the respondent, Dale: G. L. Howell, Toronto.

conditionnel, d'une obligation expresse de rétrocession, il en est d'autres qui peuvent être considérés comme plus larges et applicables à la présente espèce. Je pense, par exemple, à celui-ci:

> [TRADUCTION] Une fois que les parties ont obtenu jugement de la cour, aucune d'elles, à mon avis, n'a le droit, sans permission de celle-ci et par quelque acte unilatéral, de se mettre hors de mesure d'obéir audit jugement.

Quelle que puisse être la portée de *Stevens*, je n'ai aucun doute que, lorsqu'un créancier hypothécaire s'adresse à la cour pour obtenir un redressement contre un débiteur hypothécaire et engage le système judiciaire au point d'obtenir un jugement de la nature de celui qu'a obtenu M^{me} Dale, il a la stricte obligation d'exécuter ce jugement ou d'obtenir de la cour la permission d'agir autrement. Ayant eu recours à la justice de la Reine, il ne peut se faire justice lui-même.

Je conclus en répétant qu'un droit de rachat est un droit réel immobilier, que le débiteur hypothécaire peut céder, léguer, attribuer, louer ou hypothéquer comme n'importe quel autre droit réel immobilier (Megarry et Wade, *The Law of Real Property* (3^{e} éd.), p. 885 et Cheshire's *Modern Real Property* (10^{e} éd.), p. 568) et que l'*equity* a toujours jalousement protégé le droit de rachat du débiteur hypothécaire.

Je suis d'avis d'accueillir le pourvoi, d'infirmer l'arrêt de la Cour d'appel de l'Ontario et de rétablir le jugement du juge Moorhouse avec dépens en faveur de l'appelante dans toutes les cours.

Pourvoi accueilli avec dépens, les juges JUDSON *et* RITCHIE *dissidents.*

Procureurs de l'appelante: Black, Osborne, Black & Bassel, Toronto.

Procureur des intimés, Parker et Berwick: George T. Walsh, Toronto.

Procureur de l'intimée, Dale: G. L. Howell, Toronto.

TAB 22

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Port Capital Development (EV) Inc. (Re),* 2021 BCSC 1272

Date: 20210630
Docket: S205095
Registry: Vancouver

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

- and -

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

- and -

In the Matter of a Plan of Compromise and Arrangement of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	D. Gruber K. Cameron
Counsel for the Monitor, Ernst & Young Inc.:	P. Rubin
Counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company:	C. Brousson
Counsel for 1296371 B.C. Ltd. and Marcario Reyes:	J. Schultz E. Watson
Counsel for Aviva Insurance Company of Canada:	W. Roberts
Counsel for Landa Global Acquisition Ltd.:	S.A. Turner

Counsel for Solterra Acquisitions Corp. and Centura Building Systems (2013) Ltd.:	K. Jackson G. Nesbitt
Counsel for Domain Mortgage Corp.:	A. Frydenlund, Q.C.
Place and Date of Hearing:	Vancouver, B.C. May 25, June 8 and 10, 2021
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. June 15, 2021
Place and Date of Written Reasons:	Vancouver, B.C. June 30, 2021

INTRODUCTION

[1] The Petitioners are owners of an uncompleted residential tower in downtown Vancouver, British Columbia, known as the “Terrace House Project”.

[2] The Petitioners entered into these *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”) proceedings to allow them to undertake a process toward a resolution of their financial difficulties that would allow them to complete the Project. That overall objective is no longer feasible.

[3] However, numerous parties have now advanced offers or bids to acquire the Project. The Court’s task is to consider these offers or bids and, if appropriate, decide which one should be approved.

[4] On June 15, 2021, I granted an order approving the acquisition of the project by Solterra Acquisitions Corp. (“Solterra”) dated June 4, 2021, with reasons to follow. These are my reasons.

BACKGROUND FACTS

[5] The Petitioners are subsidiaries of the Port Capital Group, which is in the business of real estate development and management in British Columbia and Ontario. Port Capital Development (EV) Inc. is the General Partner (GP) of the Limited Partnership.

[6] The “Terrace House Project” is a 19-storey high-rise luxury residential and commercial strata development located at 1250 West Hastings Street, Vancouver, British Columbia (the “Project”). The intention was to provide for 20 residential units and 2 commercial retail units above a 3-level underground parkade. The Project is unique in that its primary structural material is timber.

[7] In September 2017, pre-sales of the units began. In late 2018, construction began. The construction lender is CMLS Financial Ltd. (“CMLS”), who holds a first mortgage against the Project. Aviva Insurance Company of Canada (“Aviva”) provided deposit protection insurance for the pre-sale depositors in order to allow

the Petitioners to use the deposit monies for the Project. Aviva holds a second mortgage against the Project to secure any claims under the insurance.

[8] As of mid-2020, the parkade and structure for the first level of the building were substantially complete; approximately 20% of the Project was finished. At that time, approximately $16 million of pre-sales were in place for 17 residential units and both commercial units.

[9] In May 2020, CMLS stopped funding and demanded payment of its secured debt.

[10] In late May 2020, the Petitioners filed these *CCAA* proceedings, supported by the evidence of Macario Reyes, a director and officer of the Port Capital Group and Port Capital Development (EV) Inc. At the time, the evidence was that the Petitioners owed approximately $34.8 million secured debt and $8 million unsecured and lien debt. One of the lienholders is Centura Building Systems (2013) Ltd. ("Centura"), who is owed $473,277. Centura is related to Solterra.

[11] At the start of these proceedings, Mr. Reyes was of the opinion that there was sufficient security in the value of the Project such that a restructuring might be achieved, perhaps either by an equity investment or liquidation of the assets. Mr. Reyes faces considerable personal exposure from the failure of the Project, as he is a covenantor of the CMLS debt and a guarantor of the Aviva debt.

[12] On May 29, 2020, I granted the Initial Order. In that Order, I granted an Administration Charge ($250,000). I also appointed Ernst & Young Inc. as monitor (the "Monitor") with enhanced powers to assume control of the Petitioners and the Project. Specifically, the Monitor was directed to implement a sales and investment solicitation plan ("SISP") with input from CMLS and Aviva. The SISP sought a "dual track" process to either produce bids or offers for a sale of the Project or an investment in the Petitioners on a going concern basis, such as in the form of a restructuring, reorganization or refinancing of the Project.

[13] On June 8, 2020, I granted the Amended and Restated Initial Order ("ARIO") extending the stay and other relief under the Initial Order and authorizing interim financing of $1.25 million (now $1.8 million) from Desjardins Financial Security Life Assurance Company, a company affiliated with CMLS (the "Interim Lending Facility").

[14] In June 2020, the SISP began with high hopes. Unfortunately, for many reasons, the results of the SISP were disappointing and there was considerable delay in advancing the process. The reasons included the complexity of the Project and the various stakeholder interests at play, some of which are in conflict and only potentially resolved though litigation.

[15] By late 2020, the SISP had produced a number of offers. The Monitor received proposed asset purchases from Solterra, Landa Global Acquisitions Inc. ("Landa") and Bosa Properties (OC) Inc. ("Bosa"). In addition, the SISP produced a bid from the Port Capital Group (fronted by Mr. Reyes) toward a refinance or restructuring in conjunction with the approval of a plan of arrangement to the unsecured creditors.

[16] In its Third Report dated November 27, 2020, the Monitor recommended acceptance of Bosa's offer as the best viable option, despite the fact that the offer was highly conditional.

[17] On December 1, 2020, I approved Bosa's offer, including a $100,000 Break Fee payable if another offer was court approved in its place. By February 2021, Bosa had satisfied certain pre-conditions and put forward a revised offer; however, that revised offer was not acceptable to CMLS and the offer collapsed.

[18] The Monitor returned to the drawing board.

[19] At some point, Landa became aware that Bosa's offer had collapsed. Given Landa' continued interest in the Project, on March 25, 2021, Landa and the Monitor executed a purchase and sale agreement ("Landa Offer #1").

[20] Landa Offer #1 was in the form of an asset purchase, although the parties allowed for the possibility of completion pursuant to a Reverse Vesting Order (“RVO”). That scenario was seen as beneficial in order to allow the existing Petitioners to continue under Landa’s ownership and control while preserving existing contractual rights, such as the building permit (but not the pre-sale contracts). The RVO structure also avoided payment of substantial property transfer tax.

[21] Under either an outright sale or an RVO, all parties were aware that the net sale proceeds under Landa Offer #1 were insufficient to repay the Interim Lending Facility and the CMLS indebtedness (approximately $21.1 million).

[22] On April 16, 2021, I approved Landa Offer #1 and a Break Fee. Various aspects of Landa Offer #1 were not made public at the time, despite Mr. Reyes’ initial opposition (later withdrawn) and Aviva’s opposition. I sealed Landa Offer #1 to remove the purchase price and amount of the Break Fee.

[23] In approving Landa Offer #1, I accepted the Monitor and Landa’s stated intentions (per Landa Offer #1) that the Monitor would have a short period of time (15 days) to re-activate the SISP and obtain any other superior offers that might be available from a party other than Landa.

[24] Landa Offer #1 specifically provided:

> **1.1** … “**Bona Fide Offer**” means a binding offer to purchase all or part of the Purchased Assets from a Prospective Purchaser, which offer contains no conditions that are not capable of being satisfied or waived by the parties within fifteen (15) Business Days or less of the date on which such offer is accepted by both parties …
>
> **8.7** **Satisfaction and Waiver of Vendor’s Conditions**. Notwithstanding anything to the contrary set out herein, from the date of issuance of the [April 16, 2021 Order] until the Final Offer Date, the Vendor … may engage in further marketing of and negotiations in connection with the Purchased Assets for the purpose of soliciting Bona Fide Offers from prospective purchasers that are not party to this Agreement (each, a “**Prospective Purchaser**”). In the event that the Vendor receives one or more Bona Fide Offers from Prospective Purchasers which provide for a superior offer to that of the Purchaser under this Agreement (a “**Superior Offer**”), the Vendor shall notify the Purchaser in writing….

[25] Accordingly, if no other “Superior Offers” arose, the Monitor expected to return to Court to seek either a Vesting Order or RVO to implement Landa Offer #1. A tentative Court hearing date of May 25, 2021 was booked. If one or more “Superior Offers” arose, and accepted by the Monitor, Landa Offer #1 became null and void, the deposit was to be returned to Landa and the Break Fee paid. In its report, the Monitor stated that, in that latter event, it would determine a process to select the transaction (i.e. the “Superior Offer”) that would be brought before the Court for approval.

[26] In its Fifth Report, the Monitor described this later sales process as “akin to a final sealed bid process”. In its Sixth Report dated May 20, 2021, the Monitor confirmed the unique features of this last effort to obtain bids, describing it as a “hybrid between a Stalking Horse procedure and Sealed Bid procedure”. This was all indicative of the intention (at least initially) to maintain confidentiality of the purchase price in the Landa Offer #1 and any later bids.

THE “SUPERIOR OFFERS”

[27] The Monitor’s return to the market to solicit offers for the Project was successful.

[28] Before the new bid deadline of May 7, 2021, the Monitor received two offers, both for consideration higher than that of Landa Offer #1. These offers were outlined in the Monitor’s Sixth Report:

a) An unconditional cash offer from Solterra (“Solterra Offer #1”); and

b) A highly conditional offer from 1296371 B.C. Ltd. (“129”), a company controlled by Mr. Reyes which was incorporated to facilitate the proposed transaction. 129 proposed to repay the Interim Lending Facility and refinance and take an assignment of the CMLS debt (the “129 Offer”). This refinancing was to arise from new advances from Domain Mortgage Company (“Domain”), use of the approximate $8 million in cash deposits held and a loan from 1260780 B.C. Ltd. (“126”), a company owned by Mr. Reyes' mother, Luz Consuelo Reyes. Essentially, the 129 Offer was to allow the Petitioners to continue in the *CCAA* proceedings, but without the Monitor's enhanced powers and with control provisions in favour of Domain.

[29] In its Sixth Report, the Monitor outlined that it considered Solterra Offer #1 to be a "Superior Offer" to Landa Offer #1; CMLS also supported this offer. The Monitor did not consider the 129 Offer as a "Superior Offer" since it remained conditional (and would continue to be so until after the deadline for conditions being satisfied/waived — May 31 — under Landa Offer #1). CMLS did not support the 129 Offer.

[30] On May 14, 2021, the Monitor and Solterra signed a purchase and sale agreement. The Monitor then began the process of preparing the necessary application materials to have the Court approve the Solterra Offer #1 at the hearing scheduled for May 25, 2021.

[31] However, just days after the execution of Solterra Offer #1, the confidentiality aspects of the Monitor's unique sales process began to unravel.

[32] On May 17, 2021, the Monitor advised Landa as to the purchase price under Solterra Offer #1 ($21 million). This was an unfortunate disclosure from Solterra's point of view; however, it was done based on the Monitor's reasonable understanding that Landa did not intend to further participate in the sales process. Indeed, that intention is arguably evident from the Landa Offer #1 itself, particularly clause 8.7 above (about offers from *other parties*) and the fact the Court approved a Break Fee for Landa.

[33] In fact, Landa was still interested in increasing its offer for the Project and it immediately enquired as to whether it could submit yet another bid to the Monitor. The Monitor advised that it contractually obliged to put Solterra Offer #1 before the Court; however, any further offer from Landa would also be put before the Court, if received.

[34] On May 24, 2021, the Monitor provided a Confidential Supplement to the Sixth Report. The Monitor outlined that Landa had submitted a revised offer ($21.5 million) (“Landa Offer #2”). This was an increase from the price under Landa Offer #1 ($19 million). In addition, the Monitor indicated that the 129 Offer contemplated total consideration of approximately $22.5 million, assuming the various pre-conditions still outstanding could be satisfied.

[35] On May 25, 2021, the application to approve Solterra Offer #1 came before the Court. At that time, there was considerable controversy as to how to proceed. Solterra was not represented at the hearing by legal counsel although principals of Solterra who attended stated that it would be unfair to consider further unconditional cash offers, including Landa Offer #2. Landa wanted a further bidding process, stating that Landa Offer #2 would realize a better return of about $850,000 above Solterra Offer #1.

[36] In addition, at the May 25, 2021 hearing, 129 still expressed interest in acquiring the Project. On May 25, 2021, 129 filed its own application seeking Court approval of the 129 Offer together with Mr. Reyes’ Affidavit #2 sworn May 21, 2021.

[37] At the conclusion of the May 25, 2021 hearing, I adjourned the matter until June 8, 2021. The Monitor, with the concurrence of CMLS and Aviva, supported such a result. In part, the adjournment was necessary because there had been minimal notice of the application to approve Solterra Offer #1. At the time, I indicated to the array of bidders that I was not directing any further process to allow for new bids; however, if any party wished to submit further offers, those offers should be received by the Monitor by noon June 4, 2021.

PRE-HEARING BIDS / OFFERS

[38] The Monitor did receive new offers or bids.

[39] At the June 8, 2021 hearing, the Monitor provided its Confidential Seventh Report. The Monitor indicated that, on June 4, 2021, it received two additional cash offers:

a) Landa submitted a third revised offer ($22 million) ("Landa Offer #3"); and

b) Solterra submitted a second "backup" revised offer on a "without prejudice" basis (the "Solterra Backup Offer"). This rider was in relation to Solterra's argument that the Court should have approved Solterra Offer #1 on May 25, 2021. The Solterra Backup Offer was sealed and not publicly made available, save to CMLS and Aviva. However, the Monitor advised all stakeholders that the Solterra Backup Offer was superior in value to Landa Offer #3.

[40] In addition, on June 4, 2021, the Monitor received a revised offer from 129 (the "129 Revised Offer"). In support, Mr. Reyes provided his Affidavits #3 and #4 sworn June 4 and 7, 2021, essentially referring to revisions to the 129 Offer and the removal of further conditions, as I will describe in greater detail below. In the Seventh Report, the Monitor reported that the 129 Revised Offer would result in a "materially better" outcome for the stakeholders than both Solterra Offers and Landa Offer #3.

[41] At the hearing, Landa conceded that Landa Offer #3 should not be approved in the face of the 129 Revised Offer. Landa proposed that Landa Offer #3 should stand as a backup offer in the event that the 129 Revised Offer was court approved, but failed to close for any reason.

[42] In broad strokes, as of June 8, 2021, the financial consequences to the two major secured creditors of the various offers before the Court were as follows:

a) Under the Solterra and Landa cash offers, the Interim Lending Facility and priority professional fees would be paid. In addition, CMLS would suffer a shortfall to varying degrees: Solterra Offer #1 — $3.2 million shortfall; Landa Offer #3 — $1.7 million shortfall; and Solterra Backup Offer — a shortfall in excess of $500,000;

b) Under any of the cash offers, the Petitioners would disclaim the $16 million of pre-sale agreements. Aviva would immediately crystalize its exposure (estimated at $8.6 million). Both CMLS and Aviva hold security against the $8 million cash deposits. CMLS/Aviva would then potentially advance arguments that these pre-sale purchasers had forfeited the right to a return of those cash deposits such that CMLS/Aviva could claim those amounts toward satisfaction of their loans; and

c) Under the 129 Revised Offer, the material benefits, as noted by the Monitor were: 1) the Interim Lending Facility and CMLS would be paid in full; 2) Aviva's security position would be "improved" with the prospect of full or material recovery; and 3) the parties would avoid litigation with respect to the $8 million in pre-sale cash deposits by converting them into a secured position against the Project.

ISSUES

[43] The parties agree that the issues to be decided are:

a) Should the Court approve the 129 Revised Offer?

b) If the 129 Revised Offer is not approved, which Offer should be considered and/or approved as between Solterra and Landa?

THE 129 REVISED OFFER

Description of the 129 Revised Offer

[44] It is important at the outset to emphasize that the Petitioners do not put 129's offers forward; rather, Mr. Reyes presents them through 129, a new company specifically formed by him for this proposed transaction.

[45] The salient details of the 129 Revised Offer are as follows:

a) $24.96 million would be raised, as follows:

   i. $14.7 million from Domain;

   ii. $8 million in pre-sale deposits (including a $2.8 million deposit held for Ms. Reyes) to be released and advanced to 129;

   iii. $2.15 million to be loaned from 126 (Ms. Reyes) to 129;

   iv. 129, as the Junior Lender, then loans these amounts to “Newco”, a company to be incorporated by Domain to hold the CMLS security;

   v. Pre-payments to Domain ($105,000),

b) $24.96 million would be used, as follows:

   i. Payment in full of the Interim Lending Facility ($1.3 million) and *CCAA* secured professional fees ($507,000);

   ii. Purchase and assignment of the CMLS loan and security ($21.3 million) to Newco, thus saving Mr. Reyes from his covenant;

   iii. Fees and various holdbacks ($1.5 million), including a six-month interest reserve for Domain ($851,250); and

   iv. Payment of Break Fee/Expense Reimbursement to Landa and Solterra (total $250,000).

[46] It is quite apparent that the 129 Offer has evolved substantially since May 7, 2021 until its current iteration on June 4, 2021 under the 129 Revised Offer (including by an increased consideration amount). The Monitor confirms that most of the conditions relating to the 129 Revised Offer have now been satisfied, save for customary funding conditions. That was not the case as of May 25, 2021 and, indeed, some conditions were only satisfied on the eve of this hearing.

[47] There are some unique features under the 129 Revised Offer relevant to the existing stakeholder interests:

a) The $16 million in pre-sale contracts are to remain intact (unlike the Landa and Solterra Offers);

b) Subordinate security interests after Domain in first ranking position are: second, 129 as the Junior Lender to hold security in respect of the pre-sale deposits in a sharing arrangement with Aviva; third, Aviva for any balance owed; fourth, 126 for the $2.15 million loan; and fifth, 129 for the balance owed to it. Effectively, this allows Aviva to maintain some hope of recovery under its secured loan as opposed to an immediate exposure of $8.6 million (subject to any recovery against the $8 million cash deposits held) under the Landa/Solterra Offers. Mr. Reyes benefits from this potential reduction or elimination of his personal exposure to Aviva; Ms. Reyes avoids litigation with Aviva over her pre-sale deposit;

c) The proposed structure will not leave the Petitioners with any excess cash. Accordingly, 129 proposes to have 126 advance a further unsecured convertible loan to the Petitioners of up to $750,000 as "working capital", to be converted into some new equity structure of the Petitioners. The Monitor has prepared a cash flow forecast for the next six months to December 2021 indicating funding requirements of approximately $600,000; and

d) Mr. Reyes says that this later conversion of 126's working capital loan will "likely" require the creation of new limited partner units that would have preferential rights over the existing limited partners.

[48] The crux of the issues relating to the 129 Revised Offer lies in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the Court. They seek the following Court approval and orders, said to be necessary to implement the 129 Revised Offer:

a) an extension of the stay of proceedings to December 11, 2021;

b) Authorization to release the pre-sale deposits to 129 to allow 129 to pay $8 million to CMLS for the purchase and assignment of the CMLS security, to stand as an advance by 129 to the Petitioners secured by the

CMLS security. All of these pre-sale purchasers consent to the release of the deposits;

c) Authorization to borrow up to $750,000 from 126 for the "working capital" loan and approval of the terms of the commitment letter. Contrary to Mr. Reyes' statement that this would "likely" require a restructuring of the partnership interests, the Court is being asked to bless the commitment letter to seemingly grant 126 the "right, in its sole discretion" to convert the debt into limited partnership units that *will be* preferential to all classes of existing units in the limited partnership;

d) The "Refinancing Transaction" involves granting Court approval to the Petitioners to borrow money from Domain to fund the Interim Lending Facility and repay CMLS in full and take an assignment of the CMLS security, up to $25 million. This "Refinancing" or "New Loan Facility" is to be documented in the usual fashion, with the significant proviso that the Petitioners are authorized to agree to amendments so as to provide that the CMLS security would secure *all obligations* of the Petitioners to both Domain, 126 and 129 (i.e. about $25 million) and stand as a first secured charge on the Project.

[49] In addition, the proposed order sought by Mr. Reyes and 129 would provide significant controls in this *CCAA* proceeding to Domain. Domain may act on its secured loan upon default and without Court approval or oversight; Domain is to be unaffected by any plan of arrangement or proposal; no order can be granted approving interim financing in priority to the New Loan Facility (essentially, the CMLS security, as amended); the Monitor's enhanced powers are removed; and:

> 15. While the New Loan Facility remains outstanding, no further step shall be taken by the Petitioners in these proceedings without the consent of Domain.

[50] 129 says that the transaction is designed to create an opportunity to secure new construction financing that will allow the Petitioners to repay the New Loan Facility, exit *CCAA* proceedings and ultimately proceed with the Project as intended.

Section 11 of the *CCAA*

[51] 129 brings its application and rests its arguments on s. 11 of the *CCAA* as the jurisdictional basis upon which it asks the Court to grant the relief sought. Section 11 allows the Court a broad discretion to grant relief that is "appropriate in the circumstances." The jurisprudence that assists the Court in addressing the exercise of its discretion under s. 11 is not in dispute.

[52] The court must exercise its discretion with a view to the statutory objectives and remedial purposes of the *CCAA*: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70:

> …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 liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[53] The parameters of the Court's discretion were recently discussed in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 [*Callidus*]. At that time, the Court confirmed the fundamental principle that a *CCAA* court must always exercise that discretion toward the statutory policy objectives and that the ability of a court to be innovative and creative in that respect is not "boundless":

> [49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the

circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

[50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness “is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*” (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

…

[65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon “to sanction measures for which there is no explicit authority in the *CCAA*” (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a “hierarchical” approach to determining whether jurisdiction exists to sanction a proposed measure: “courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding” (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient “to ground measures necessary to achieve its objectives” (para. 65).

…

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the “broad reading of *CCAA* authority developed by the jurisprudence” (*Century Services*, at para. 68). . . .

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be “appropriate in the circumstances”.

[68] Where a party seeks an order relating to a matter that falls within the supervising judge’s purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 “for the most part supplants the need to resort to inherent jurisdiction” in the *CCAA* context (para. 36).

…

[70] . . . The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an “improper purpose” — the supervising judge has the discretion to bar that creditor from voting.

…

[76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the

> *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.
>
> [Underline emphasis added; italic emphasis in original.]

[54] No person appearing on this application disputes that I have the jurisdiction under s. 11 to grant the relief sought by 129. The issue raised by Centura, as a creditor, lienholder and stakeholder of the Petitioners, is whether I *should* exercise that discretion.

[55] Before turning to an analysis under s. 11 of the *CCAA* in relation to what the 129 Revised Offer is, I will first address what the 129 Revised Offer is not.

The 129 Revised Offer is not a redemption

[56] 129 describes the transaction in its application materials as a "redemption financing" and counsel submits that it is "effectively" a redemption of the CMLS mortgage. Centura refers to well-settled law that the right of redemption in these circumstances allows the subordinate mortgagee (Aviva), not the mortgagor (the Petitioners), to redeem the CMLS mortgage by paying it out and taking an assignment of the security: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.*, 2017 BCSC 1100 at paras. 13-16.

[57] This transaction is not a redemption of the CMLS mortgage. The Petitioners are not paying CMLS. Aviva is not paying CMLS, although I acknowledge that Aviva consents to CMLS being paid out by 129/Domain and the assignment of the CMLS mortgage to Domain/Newco. While there are features of this transaction that one might see in a redemption scenario, this is well beyond a redemption by which the CMLS security is simply assigned to Domain. In fact, Domain is not content with the existing terms of the CMLS security; it requires that the terms of the CMLS security be amended.

The 129 Revised Offer is not brought as Interim financing

[58] The proposed transaction is described by Mr. Reyes as a “refinancing”. 129 argues that the “refinancing” allows the Petitioners further “breathing room” to continue their restructuring efforts.

[59] Financing issues in the midst of *CCAA* proceedings are not new and are commonplace. The Court in *Callidus* described the rationale behind interim financing in *CCAA* proceedings:

> [85] Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as “refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process” (*Rescue! The Companies’ Creditors Arrangement Act*, at p. 197). Interim financing used in this way — sometimes referred to as “debtor-in-possession” financing — protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues [Case citation omitted]. That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor’s assets.

[60] Centura, citing *Callidus,* argues that the proposed transaction is a restructuring that confiscates the rights of subsequent encumbrancers’ (ie. lien holders) and is therefore a “plan of arrangement” which requires approval by the requisite majorities of creditors’. 129 says that the transaction does not seek to compromise any other claims against the Petitioners and argues that the alternative transactions result in a greater shortfall to CMLS and no recovery for any subsequent stakeholders.

[61] In *Callidus*, there was considerable discussion as to whether the imposition of a litigation financing charge to support a litigation funding agreement (LFA) was a plan of arrangement compromising creditors’ rights (requiring a creditor vote) or whether it could be justified as a financing mechanism (para. 102). The Court held that, although the litigation financing charge had the effect of placing certain secured creditors behind the litigation funder, the LFA was not a plan of

arrangement because it did not propose any compromise of the creditors' rights. At para. 111, the Court stated:

> We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure — that is, in the event of any litigation or settlement — the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577).

[62] Having found that the LFA was not a plan of arrangement, the Court held that the supervising judge had the authority to approve those charges without a creditors' vote pursuant to s. 11.2 (para. 114).

[63] 129 (in place of the Petitioners) seeks to authorize the Petitioners to not just refinance the existing debt with the existing priorities, but increase that secured debt against the Project. The net effect of the "refinancing" is to convert the debt under the Interim Lending Facility and the professional fees into the CMLS secured charge and also add millions of dollars of secured debt on the Project (to be accommodated within the increased limit of $25 million).

[64] The New Loan Facility also significantly alters the commercial terms of the CMLS debt and security, including by substantially increasing the interest rate on the secured loan. Without a court order, any modifications to the CMLS security have no effect on existing charges: *Land Title Act*, R.S.B.C. 1996, c. 25, ss. 1 (definitions of "charge" and "encumbrance") and 206(2).

[65] In my view, it is not necessary to make a finding in relation to Centura's arguments that the proposed transaction under the 129 Revised Offer

compromises the rights of the creditors including Centura and goes beyond a "refinancing". Even if the 129 Revised Offer could be characterized as a "refinancing" in these *CCAA* proceedings, another issue arises.

[66] 129 does not seek court approval pursuant to s. 11.2 of the *CCAA*, being the express statutory provision that allows this Court to approve interim financing in *CCAA* proceedings and grant priority over existing secured creditors, such as 129 (on behalf of the Petitioners) proposes here. Further, the Petitioners are not the entities arranging this refinancing and seeking court approval of it. This is an outside party (129) that seeks to refinance the debt. Section 11.2(1) specifically provides that the debtor company may apply for interim financing.

[67] 129 refers to my decision in *League Assets Corp. (Re)*, 2014 BCSC 2589 as authority to approve this complex transaction. That decision involved a complex tax-driven restructuring transaction that had both sale and refinancing aspects. In my view, 129's reliance on this decision is misplaced, as this transaction is quite different. In any event, I would note that I considered the "financing" piece of the *League Assets* transaction and approved it within the context of s. 11.2 of the *CCAA*.

[68] In *Callidus,* as previously noted, the Court upheld the supervising judge's approval of the litigation financing charge pursuant to s. 11.2 (para. 114).

[69] Accordingly, in the event that 129 is correct that this transaction does not compromise Centura's rights and is akin to an interim financing, the requirements of s. 11.2 of the *CCAA* must be considered.

[70] 129, either directly or through the Petitioners, does not make any effort to specifically address and provide a proper evidentiary foundation for the Court's consideration of the various factors under s. 11.2(4) of the *CCAA*. Under s. 11.2(4)(d), the court is to consider "whether the loan would enhance the prospects of a viable compromise or arrangement being made" by the Petitioners. As I will discuss below, no evidence exists that would support a consideration of

this factor. Further, under s. 11.2(4)(g), the court is to consider the Monitor's views. The Monitor outlines the terms of the 129 Revised Offer and its benefits, but does not provide any specific recommendations on the "financing aspects" of it.

[71] In addition, any application under s. 11.2 must be on notice to "secured creditors" who are likely to be affected. I am not aware that proper notice has been given to all of the secured creditors who might be affected by the proposed transaction. Without notice and the opportunity to make submissions, it is difficult to properly assess whether any creditor would be materially prejudiced in consideration of s. 11.2(4)(f). Centura alleges "material" prejudice, noting that despite being presently "out of the money" under its lien, the lien claimants may have a preference that a new developer acquire the Project. Centura argues that, in some instances, suppliers can have leverage aside from their lien claims, including because they are required to sign off on completion for engineering reports and permits, or because their work is sufficiently advanced that hiring a replacement is economically impractical.

[72] I would digress at this point to note that similar difficulties arise with respect to the proposed court approval of the working capital loan to endorse the granting of rights to 126 in relation to the rights of the existing limited partners. I see no basis upon which I might make such an order, under s. 11 or otherwise. I am not aware that notice has been given to these limited partners and they have not agreed to such a provision, such as in a plan of arrangement or compromise that they might have considered and voted upon: *Calpine Canada Energy Limited (Re)*, 2007 ABQB 504 at para. 41.

[73] Again, as already stated, 129 does not seek relief under s. 11.2 of the *CCAA*. 129's counsel only suggests that its "refinancing" is appropriate in disregarding the interests of the other creditors, including the lienholders, since they are currently "out of the money". I agree with 129's counsel's assessment of the likely current monetary value of the other creditor's interests. However, in my

view, that is a very unprincipled basis upon which to argue that this “refinancing” is an “appropriate” outcome in the balancing exercise with regard to all stakeholders.

The 129 Revised Offer is not a sale

[74] The transaction under the 129 Revised Offer is also not described as a sale, akin to what to what Landa and Solterra propose.

[75] As a commercial transaction toward assuming control and effective ownership of the Project, there is nothing objectionable about the business aims under the 129 Revised Offer. Mr. Reyes could have used 129 as a corporate vehicle to purchase the Project — just as Landa and Solterra wish to do — via an outright sale or a RVO structure. In doing so, 129 could have arranged for the Domain financing, by either refinancing the CMLS security or simply paying it out and placing new security on title. In that event, Mr. Reyes could proceed with his vision of completing the Project, just as any other developer might do. That could include keeping the pre-sales in place if he wished and implementing this hopeful side deal with Aviva and the pre-sale purchasers to see if those interests could be resolved in the fullness of time. Mr. Reyes could have advanced a cash offer — given the Domain financing and the use of the pre-sale deposits with the consents — to compete with the offers of Landa and Solterra.

[76] If that had taken place, I cannot see that anyone would quarrel with the structure of the transaction. In essence, Mr. Reyes would be assuming control of the Project and proceeding with his commercial gambit, just as Landa and Solterra propose to do.

[77] However, Mr. Reyes has not put forward the 129 Revised Offer as a “sale” of the Project. Instead, as noted, 129 seeks a suite of relief under the *CCAA*, including approval of an increase of the secured debt against the Project, which will rank in priority over the other encumbrances. Further, 129 seeks to alter the commercial terms of the existing CMLS debt and security including increasing the interest rate on the secured loan. Crucially, as I will explain below, 129 also seeks an extension on the stay of creditors' rights without any indication that it will put

forward a plan of arrangement or compromise on which the Petitioners' creditors may vote.

Is the 129 Revised Offer appropriate in the circumstances?

[78] The anchor on which Mr. Reyes argues that the 129 Revised Offer and extended stay of proceedings is appropriate is the suggestion that it will allow the Petitioners to secure new construction financing to repay the New Loan Facility and proceed with the Project as intended. Mr. Reyes suggests in argument that there is a "realistic prospect" in the future that 129 will be able to secure new construction financing to permit some, or potentially full, recovery by the "Other Creditors".

[79] 129's proposed "Restructuring Plan" is set out in its Notice of Application:

> 27. [129's] offer is a refinancing, it is not seeking to terminate any pre-sale contracts or vest off or compromise any claims against the Petitioners.
>
> 28. <u>The transaction is designed to create an opportunity to secure new construction financing that will allow the Petitioners to repay the New Loan Facility and exit *CCAA* proceedings</u>. As a result, [129's] offer is coupled with an extension to the Stay of Proceedings to allow the Petitioners time to secure new construction financing.
>
> 29. [129] is confident that, following refinancing, the Petitioners will secure new construction financing. The Petitioners are in advanced discussions with at least one lender. Additional lenders have conducted extensive due diligence.
>
> 30. These *CCAA* proceedings have, to date, been focused on repayment of the CLMS Facility. The New Loan Facility, along with cooperation from Domain, will provide the opportunity to shift the focus to a long-term restructuring.
>
> 31. Securing new construction financing requires interim steps that are predicated on having control of the Terrace House Project. The steps include:
>
>> (a) Review of all trades and consultants. This includes confirm drawings and specifications with lead consultants, architects and engineers; updating contracts with existing trades and consultants; and replacing contracts as necessary;
>>
>> (b) Confirm construction schedule and budget;
>>
>> (c) Renew and extend permits; and
>>
>> (d) Review and continue pre-sale program. This includes reviewing the existing contracts; engaging new marketing partners

> and sales group, and may require re-drafting the disclosure statement and updated purchase contracts.
>
> 32. Interim working capital will be funded by existing limited partners and new third party investors. This working capital is expected to be in the range of $3 to $5 million, which will be sourced, externally and will not encumber the Lands or other assets.
>
> 33. With control of the Terrace House Project and the breathing room provided by the New Loan Facility, it is estimated that completing the interim steps outlined above and finalizing a term sheet a new construction lender will take 30 to 60 days.
>
> [Emphasis added.]

[80] In essence, 129's plan is to use the proposed six-month stay extension to secure construction financing with the intention then of exiting these *CCAA* proceedings and completing the Project. This makes sense from a business point of view — that way, Mr. Reyes satisfies his obligations to Aviva by allowing the pre-sale purchasers to obtain their units by crediting their deposits, thus avoiding a call on Aviva's deposit insurance.

[81] Centura argues that 129 seeks to implement this "restructuring" transaction without the consent of the affected creditors. Further, Centura says that there is no indication that any party intends to put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote.

[82] Centura says the present circumstances are similar to those considered in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327. I agree. In that case, the debtor had obtained a *CCAA* stay of proceeding and approval of interim financing to continue to pursue development of a real estate project. There was no suggestion that the debtor intended to propose a plan of arrangement to the creditors (para. 35).

[83] Consistent with the comments in *Callidus* 12 years later, Justice Tysoe emphasized that the imposition of the stay must be consistent with the fundamental statutory objectives of the *CCAA,* including "to facilitate compromises and arrangements between companies and their creditors" as expressed in the statute's long title: *Cliffs Over Maple Bay* at paras. 26-29.

[84] Tysoe J.A. held that a stay was not appropriate in those circumstances, stating:

> [38] … What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.
>
> [Emphasis added.]

[85] In *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376, this Court stated:

> [26] When granting an extension, it is a prerequisite for the petitioner to provide evidence of what it intends to do in order to demonstrate to the court and stakeholders that extending the proceedings will advance the purpose of the *CCAA*. The debtor company must show that it has at least "a kernel of a plan": *Azure Dynamics Corporation (Re)*, 2012 BCSC 781.

[86] I agree that it is not necessary for a debtor to put forward a fully fleshed out plan of arrangement in order to justify a continuation of the stay in *CCAA* proceedings. What will constitute a "kernel of a plan" will depend on the overall circumstances, including the status of the proceedings.

[87] Centura emphasizes that there is no suggestion — let alone a "kernel of a plan" — anywhere in Mr. Reyes' Affidavits #2, #3 or #4 to support that 129, the Petitioners or any other party intend to put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote. Having reviewed those affidavits carefully, I agree. All Mr. Reyes speaks of is securing the new construction financing and then restructuring the limited partnership interests.

[88] Specifically, there is no evidentiary foundation in Mr. Reyes' Affidavits to support the statement at para. 34 of 129's notice of application that 129 will use the "breathing space" under a further stay of proceedings to "permit some, or potentially full, recovery by Aviva and the Other Creditors".

[89] Centura also points to other issues arising from the feasibility of completing the Project with the pre-sale purchase contracts intact. Centura notes that, even if the "new construction financing" is obtainable, which is speculative at best, Mr. Reyes will also have to solve his liability problems with Aviva in that context. It is anyone's guess that the completion of the Project is still feasible while also allowing for a full credit of over $16 million from the pre-sale deposits (which would reduce sale revenues). There is no evidence as to how that might be addressed.

[90] It is apparent from the entire circumstances here that Mr. Reyes is only seeking to allow *himself* some "breathing space" by borrowing money against the Project, by satisfying or keeping the secured creditors at bay while he seeks a better overall resolution than an outright sale that would crystallize his exposure to CMLS and Aviva. He seemingly requires that this Court assist him in freezing the rights of the Petitioners' creditors while he seeks to do so. There is nothing to suggest that Mr. Reyes is seeking to obtain relief from this Court for the purposes of resolving the current creditor claims against the Petitioners within the context of these *CCAA* proceedings.

[91] In other words, Mr. Reyes seeks the benefit of these proceedings — including the continuation of a stay against all creditors and with the potential for further relief, with the consent of Domain – with no true intention to address those creditor claims in the future.

[92] In all of these circumstances, and for the above reasons, I conclude that the relief sought by 129 is not appropriate, including the stay and the refinancing approvals in 129's draft order. I decline to exercise my statutory discretion under s. 11 of the *CCAA* to grant the requested relief.

WHICH OFFER SHOULD BE APPROVED?

[93] Without the 129 Revised Offer, the remaining issue is what other offers should be considered by the Court and, if appropriate, approved.

[94] Solterra takes the position that the Court should disregard the offers received after May 25, 2021 and that the Court should approve Solterra Offer #1 ($21 million). Solterra argues that it adhered to the sales process implemented by the Monitor and that it would be unfair if the Court approved any other offer. Solterra particularly objects to Landa Offer #2, arguing that Landa Offer #1 essentially stood as a stalking horse bid. Solterra refers to Landa Offer #2 as only slightly "beating" Solterra Offer #1 (about 4%), having had the benefit of disclosure of the price under Solterra Offer #1.

[95] The authority of this Court to approve a sale is found in s. 36 of the *CCAA*. Section 36(3) sets out a list of non-exhaustive factors to be considered by the court:

> a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> d) the extent to which the creditors were consulted;
>
> e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[96] In addition, the parties refer to the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (O.N.C.A.) as helpful in considering whether to approve a sale:

> 1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
>
> 2. The interests of all parties;
>
> 3. The efficacy and integrity of the process by which offers were obtained; and
>
> 4. Whether there has been any unfairness in the sales process.

[97] Various authorities support that, in considering the test under s. 36 of the *CCAA*, the *Soundair* principles remain relevant and indeed overlap with some of the specific s. 36(3) factors: *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at paras. 22-25; *8450025 Canada Inc. and Teliphone Data Centers Inc. (Re)*, 2017 BCSC 1291 at paras. 9-13.

[98] The tension that exists at this hearing, as commonly arises, is between the twin objectives of 1) fairness in the process and 2) outcome or price with regard to the interests of the Petitioners' stakeholders. In framing the issue in this way, I do not mean to suggest that the test is a simple one to apply. The issues here require a consideration of all the s. 36 factors in these unique and unusual circumstances.

[99] Solterra refers to *Cox v. Seymour Village Management Inc.*, 2015 BCSC 275 and *Bank of Montreal v. Renuka Properties Inc.*, 2015 BCSC 2058.

[100] In *Cox*, I was addressing a sales process in partition and sale proceedings. Solterra in particular relies on my statements concerning the fairness of the process. In that case, an early participant in the sales process had advanced a late bid, said by Solterra to be similar to what it describes as Landa's unfair attempt to re-enter the sales process at a late stage: *Cox* at para. 27-28. At para. 29 in *Cox*, I remarked that late offers may be considered by the Court where the price has been substantially increased such that it is likely "indicative of the fact that the sales process did not work…"

[101] Similarly, in *Renuka*, in a receivership, the Court was considering the results of a sales process and a late bid with a substantially increased offer price. I adopt Justice Blok's statement of two of the general principles arising from *Soundair* that were in issue:

> 4. late offers may be considered by the Court on an application to approve a sale only for the limited purpose of considering whether the price obtained by the receiver was a reasonable one. In some cases a disparity may be so great as to call into question the adequacy of the sale process: *Soundair* at paras. 26 and 30.
>
> 5. the primary interest to be considered by the Court is that of the creditors, and to see that the best possible price is obtained, though the interests of all

> parties, including the debtor and the receiver's recommended purchaser, must also be considered: *Soundair* at paras. 39-40. While the primary concern is the interests of the creditors, as noted earlier a secondary but still important consideration is the integrity of the process. Integrity of the process includes the object of reasonably ensuring that there is certainty and finality in sales by receivers: *Soundair* at paras 42-46.

[102] I would begin by stating that the Monitor's fashioning of the sales process was reasonable in all the circumstances. The SISP had many challenges and the collapse of the Bosa transaction was disappointing indeed. I accept that the Monitor intended that Landa Offer #1 would essentially stand as a stalking horse bid, intended to flush out any further cash offers for the Project. The Monitor's disclosure of Solterra Offer #1 was completely understandable give that it considered that Landa had made its best and final offer in Landa Offer #1.

[103] The Monitor properly brought Landa Offer #2 to the attention of the Court at the May 25, 2021 hearing. However, Landa's submission of Landa Offer #2 certainly has the hallmarks of wanting a "second kick at the can". In my view, Solterra's objection to Landa's approach being unfair has some merit.

[104] However, Solterra's submissions in this respect rests on the proposition that the Court should have approved Solterra Offer #1 on May 25, 2021. I agree that, if on that date, the Court had proceeded to consider both Solterra Offer #1 and Landa Offer #2, the result would likely have been approval of Solterra Offer #1. However, that is not what happened. As I have said, the May 25 date was scheduled for the approval of Landa Offer #1 and an adjournment was required in order to give the parties sufficient time after service of the application materials. In addition, the 129 application was then extant and needed to be addressed in relation to the 129 Offer.

[105] On the issue of fairness, Solterra itself acknowledged in Solterra Offer #1 that there was some chance in the later court approval process that the Court might proceed otherwise than to simply approve that offer. That risk is one taken by every participant in a court approved sale process where the possibility of late bids can arise: *Cox* at para. 25. Solterra very much recognized the risk that its offer

might not be accepted. Solterra would have been aware that the Court may have approved another offer or even directed a continuation of the sales process, perhaps with further sealed bidding. In fact, Solterra Offer #1 provided in clause 8.5 that, if the Court approved another bid, it would be reimbursed for its costs up to $50,000.

[106] Needless to say, the landscape changed quite significantly in the two-week period leading up June 4, 2021. Leaving aside the 129 Revised Offer with its ongoing improvements and removal of subjects, there was further jockeying between Landa and Solterra with their June 4, 2021 offers. In short, the submission of Landa Offer #3 and the Solterra Backup Offer to the Monitor are matters that, in my view, the Court should not ignore in terms of considering the various offers.

[107] I have concluded that, although there has been some unfairness in the sales process in relation to Solterra, it is not appropriate that I approve Solterra Offer #1 at this time. Faced with the substantial interest and increasingly higher bids from both Landa and Solterra leading to May 25, 2021, I may have been inclined to order one last round of sealed bids for Landa and Solterra. However, by and large, Landa and Solterra embarked themselves upon a further sealed bid process leading to the June 8, 2021 hearing.

[108] The Monitor emphasizes in its Confidential Seventh Report that the price under Solterra Backup Offer was increased by a significant sum, in the millions of dollars and well above that of Landa Offer #3. It will satisfy the priority debt - the professional charges and the Interim Lending Facility - and provide almost full payment to CMLS.

[109] The Monitor has not expressed any specific recommendation to the Court in respect of which bids should be considered, or approved, choosing to remain agnostic as between the options open to the Court (including in relation to the 129 Revised Offer with or without a backup offer).

[110] I appreciate that this sales process has charted a very long and crooked path, through no fault of anyone. This is a complex asset and the stakeholder interests are equally complex.

[111] The time has come to end the process. I am satisfied that the Monitor has now explored all available options. Those options have been put before the stakeholders and now the Court. I am also satisfied that Solterra Backup Offer should now be approved as reasonable and indicative of the fair market value of the Project. It is unfortunately a result that does not see any immediate recovery for Aviva, although neither did the 129 Revised Offer. In my view, Solterra Backup Offer represents the best outcome for the stakeholders in all the circumstances.

CONCLUSION

[112] Solterra Backup Offer is approved.

[113] I am also satisfied Solterra Backup Offer should be approved with the RVO structure. No person objected to the sale being completed in this fashion. This is not surprising as it is evident that the RVO structure will garner significant benefits to the stakeholders: *Quest University Canada (Re)*, 2020 BCSC 1883; leave denied *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

“Fitzpatrick, J”

TAB 23

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Quest University Canada (Re),* 2020 BCSC 1883

Date: 20201202
Docket: S200586
Registry: Vancouver

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of the *SEA TO SKY UNIVERSITY ACT*, S.B.C. 2002, c. 54

- and -

In the Matter of A PLAN OF COMPROMISE AND ARRANGEMENT OF QUEST UNIVERSITY CANADA

Petitioner

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment
(Sale Approval)

Counsel for the Petitioner:	J.R. Sandrelli V. Cross
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Counsel for Primacorp Ventures Inc.:	P. Rubin G. Umbach
Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd.:	K. Jackson G. Nesbitt
Counsel for Southern Star Developments Ltd.:	P. Reardon K. Strong
Counsel for Vanchorverve Foundation:	C.D. Brousson
Counsel for Dana Hospitality LP:	D.V. Bateman

Counsel for Halladay Education Group:	D. Lawrenson
Counsel for Capilano University:	K. Mak
Counsel for Landrex Ventures Inc.:	J. D. West
Counsel for Quest University Faculty Union:	J. Sanders S. Rogers
Counsel for Bank of Montreal:	K. Davies
Counsel for Her Majesty The Queen In Right of Province of British Columbia and the Ministry of Advanced Education Skills and Training:	A. Welch
Counsel for 1114586 B.C. Ltd.:	K.E. Siddall
Counsel for Association for the Advancement of Scholarship:	L. Hiebert
Place and Date of Hearing:	Vancouver, B.C. November 12-13, 16, 2020
Place and Date of Decision with Written Reasons to Follow:	Vancouver, B.C. November 16, 2020
Place and Date of Written Reasons:	Vancouver, B.C. December 2, 2020

INTRODUCTION

[1] On November 3, 2020, the petitioner, Quest University Canada ("Quest"), applied for various orders in these *Companies' Creditors Arrangement Act,* R.S.C. 1985 c. C-36 ("*CCAA*") proceedings. Orders sought by Quest included approval of a sale transaction with Primacorp Ventures Inc. ("Primacorp") and orders necessary to facilitate that transaction, namely allowing Quest to implement a claims process and calling a meeting to consider its plan of arrangement.

[2] On November 3, 2020, I granted the Claims Process Order and a Meeting Order to allow the creditors to consider Quest's plan of arrangement dated November 1, 2020 (the "Plan"). I also approved Quest's agreement to pay Primacorp a Break Up Fee and granted a charge to secure that amount: *Quest University Canada (Re)*, 2020 BCSC 1845.

[3] I adjourned Quest's application for a Transaction Approval and Vesting Order (TAVO) to approve the Primacorp transaction to these hearing dates to allow opposing parties to consider the matter further and prepare necessary materials.

[4] Southern Star Developments Ltd. ("Southern Star") has since formalized its opposition to the granting of the TAVO. Indeed, its opposition has since increased in force because Quest and Primacorp have now changed the relief sought to approve the Primacopr transaction within the context of a "reverse vesting order" ("RVO"), as explained below. Southern Star also now applies for an order prohibiting Quest from disclaiming certain subleases, as is required in order for the Primacorp transaction to proceed.

[5] In the meantime, other parties have joined in opposing the approval of the Primacorp transaction for a variety of reasons, including those advanced by Southern Star in relation to the RVO.

[6] At the conclusion of this hearing, I granted the RVO and dismissed Southern Star's application, with written reasons to follow. These are my reasons for those orders.

BACKGROUND FACTS

[7] This *CCAA* proceeding has been underway for almost ten months, after the granting of the Initial Order on January 16, 2020.

[8] Since that time, the Court has extended the stay of proceedings a number of times, to allow Quest to undertake efforts to find a restructuring solution to its financial difficulties that would allow it to continue its educational endeavours. Many stakeholders have been actively involved in these proceedings, including secured creditors who, collectively, will be owed approximately $30.7 million by the end of December 2020.

[9] I have also approved interim financing to allow Quest to continue its operations while in this proceeding, with that debt now approaching $11 million.

[10] Quest's assets include lands in Squamish, BC, being Lot 1, on which the campus is located (the "Campus Lands"), as well as the surrounding 38 acres (the "Development Lands".) Lot 1 is encumbered by various charges, liens, interests, mortgages and assignments of rent, including a mortgage held by Capilano University ("CapU"). In addition, CapU holds various rights of first refusal, including a right of first refusal to purchase, a right of first refusal to lease and rights of first refusal to acquire the charges of Quest's major secured creditor, Vanchorverve Foundation ("VF") (collectively, the "ROFR").

[11] Quest is also the registered owner of five real property lots (Lots A-E), four of which are the sites of its university residences (on Lots A-D) (collectively, the "Residences").

[12] One of the significant flashpoints in this proceeding has been, and continues to be, in relation to the Residences that Quest leases from Southern Star. After the Residences became vacant in March 2020 following the onset of the COVID-19 pandemic, Quest attempted to defer payment of the substantial lease payments owed to Southern Star. On June 19, 2020, I denied that relief: *Quest University Canada (Re)*, 2020 BCSC 921 (the "Rent Deferral Reasons").

[13] Quest's principal focus in these proceedings has been toward identifying a partner/investor to purchase its land assets and/or identifying an academic partner/investor that would permit Quest to continue as a post-secondary institution.

[14] Since January 2020, Quest's Board of Governors and its Restructuring Committee have been working with a private educational consultant, Halladay Education Group Inc. to find a prospective academic partner. In addition, since March 2020, Quest has been working with Colliers Macaulay Nicolls Inc. to find prospective purchasers for Quest's real property assets.

[15] There is no dispute that the sale and partner search process (SISP) has been extensive, as confirmed by the Monitor. Quest submits, and I accept that its management, the Restructuring Committee, and the Board analyzed all proposals based on a number of factors, including:

a) Creditor recovery from the purchase price or other consideration under the proposal;

b) That the proposal would result in a completed transaction;

c) That the proposal offered allowed for Quest's long-term continuation as a post-secondary academic institution; and

d) That the proposal would lead to the continuation of a school on Quest's lands that aligned with Quest's current vision and academic quality.

[16] The SISP resulted in a number of academic and real estate organizations approaching Quest to express interest in pursuing a transaction. Quest engaged with a number of potential purchasers or partners from Canada, the United States and other countries. Some parties executed Non-Disclosure Agreements (NDAs) and Quest received numerous Letters of Intent (LOIs) and other proposals.

[17] On May 28, 2020, this Court granted an extension of the stay of proceedings. At that time, Quest stated that there was a realistic potential of a transaction with the

party identified as the “Academic Partner”. Unfortunately, that transaction did not proceed.

[18] On August 7, 2020, this Court granted a further extension of the stay of proceedings to December 24, 2020 to allow Quest to continue seeking proposals towards a transaction by that deadline and to allow Quest to offer the fall term to its students. Quest was still in discussions with various interested parties at that time. By then, Quest had received LOIs, including one from Primacorp (identified as “Academic Partner #2) as of July 29, 2020.

[19] Since August 7, 2020, Quest and Primacorp have worked extensively to negotiate the definitive documents toward completing a transaction. On September 16, 2020, Quest and Primacorp executed a Purchase and Sale Agreement (the “Primacorp PSA”).

[20] The Primacorp transaction, as originally presented, provided for:

a) Sufficient funds to pay Quest’s secured creditors’ claims, including claims secured by the *CCAA* charges;

b) Funding for a plan of arrangement to be voted on by Quest’s unsecured creditors;

c) Funds for these insolvency proceedings; and

d) A working capital facility, and marketing and recruiting support to permit Quest to become self-sustaining as a post-secondary institution.

[21] The main and subsidiary agreements executed between Quest and Primacorp in September/October 2020 are complex. They were complete by October 28, 2020 and included, as defined in the Monitor’s Fourth Report, the Primacorp PSA, the Campus Lease, an Operating Loan Agreement and an Operating Agreement. Significant terms included:

a) Primacorp will purchase substantially all of Quest's lands and related assets, including the Campus Lands, the Development Lands, the residence Lands (Lots A-E; four of which involve Southern Star's subleases), chattels and vehicles;

b) Primacorp will lease specific Campus Lands back to Quest under a long-term lease arrangement;

c) Primacorp will provide marketing and recruiting expertise to support Quest as a university;

d) The Purchase Price will satisfy all of Quest's secured lenders and any commissions on sales;

e) Primacorp will fund sufficient monies to pay the lesser of the Unsecured Creditor Claims and $1.35 million under Quest's Plan; and

f) Primacorp will provide Quest with a $20 million secured working capital facility to support its operations.

[22] The Primacorp transaction was subject to a number of significant conditions:

a) Quest's disclaimer of the four Southern Star subleases of the Residences or an agreement with Southern Star. On October 23, 2020, Quest disclaimed those subleases;

b) Court approval of the Primacorp transaction including approval of a Break Up Fee and Break Up Fee Charge to secure Primacorp's costs. On November 3, 2020, I approved the Break Up Fee and granted a charge to secure this amount;

c) Creditor approval of Quest's Plan under the *CCAA*. On November 3, 2020, I granted the Meeting Order to allow Quest to present the Plan, after having completed a claims process under the Claims Process Order, also granted on that date; and

d) Court approval of the Plan under the *CCAA*.

[23] On November 3, 2020, when Quest sought the TAVO (which was adjourned), Quest asserted that the Primacorp transaction was beneficial in many respects. Quest argued that it maximized the value of Quest's assets, offered the greatest benefit to stakeholders, had a high likelihood of completing, provided a recovery for secured and unsecured creditors, and had the highest likelihood that Quest will continue to operate within its current academic model.

[24] The Monitor concurred. In its Fourth Report dated November 2, 2020, the Monitor referred to the fact that there were only two viable proposals, with Primacorp's offer being the superior one. The Monitor's Supplemental and Confidential Report dated November 2, 2020 (the "Confidential Report") is also before the Court, although filed under seal. That Confidential Report referred to four other proposals received by Quest that were "not currently at a stage such that they are capable of being accepted by Quest".

[25] Quest and Primacorp both see the closing of the Primacorp transaction as very time sensitive. Pursuant to agreements with the Interim Lender, Quest was required to enter into a transaction by October 30, 2020 with an anticipated closing of November 30, 2020. The Interim Lender has since agreed to amend that requirement to extend the necessary closing date to December 24, 2020 in accordance with the Primacorp transaction.

[26] In addition to satisfying increasing pressure to repay its secured creditors, Quest seeks to exit these *CCAA* proceedings as soon as possible to allow it to recruit and plan for the upcoming 2021/22 academic year. Finally, there are other more financially driven and critical concerns. The Interim Lender has indicated that it will not fund its loan past December 2020. Without funding of some sort, Quest has no liquidity or financial ability after that time to continue operations.

ISSUES

[27] The paramount issue for consideration is, of course, whether the Court should approve the Primacorp transaction under s. 36 of the *CCAA*. A number of subsidiary issues also emerged at this hearing, as a result of submissions from various stakeholders:

a) Lot E: Southern Star objects to the TAVO (now RVO), as vesting off any interest it may have under an unregistered lease of Lot E;

b) ROFR: CapU objects to the sale to Primacorp, asserting that Quest is ignoring its rights under the ROFR that allows CapU to purchase/lease Quest's lands;

c) Other Offer: Landrex Ventures Inc. ("Landrex"), together with CapU, assert that they should be given further time to finalize their offer for Quest's assets;

d) Disclaimers: Southern Star, supported by its secured creditor, Bank of Montreal (BMO), applies for an order that the subleases of the Residences not be disclaimed by Quest; and

e) RVO: Southern Star and another unsecured creditor, Dana Hospitality LP ("Dana"), object to the TAVO (now RVO), as being inappropriate and unfair in the circumstances and contrary to the spirit of the *CCAA*.

[28] I will address the subsidiary issues in the first instance, before turning to an overall assessment of the Primacorp transaction and whether the Court should approve that transaction.

Lot E

[29] As I described in the Rent Deferral Reasons (at para. 62), Quest, Southern Star and other parties are involved in a complex suite of agreements concerning the Residences that were built some time ago.

[30] Quest is the limited partner in a limited partnership agreement with Southern Star, who is the General Partner (GP). They formed the Southern Star Developments Limited Partnership (the “LP”) to build the Residences. Quest, as the owner of Lots A-D, leases those lands under Ground Leases to Southern Star (as the GP of the LP). The ground leases are at a nominal rate. In turn, Southern Star (the GP), as landlord, and Quest, as tenant, entered into Subleases for the Residences, once they were built.

[31] The initial arrangements between Quest and Southern Star anticipated that a fifth student residence would be built on Lot E, the lot adjacent to Lot D.

[32] In September 2017, as part of those arrangements, Quest and Southern Star executed certain Land Title documents (Form C Charges) attaching a Ground Lease and a Sublease with respect to Lot E. When the parties executed the Form C Charges, the Ground Lease was incomplete in many respects; it did not include any legal description because Lot E was created after the execution of the Form C Charges; and, it did not specify the applicable dates of the 99-year term. Finally, the Schedules to the Ground Lease included various documents between Quest, Southern Star and Southern Star’s lender intended to be later executed once the Ground Lease, the Sublease and the mortgage were finalized and registered at the Land Title Office.

[33] The parties delivered to Form C Charges to a law firm to be held in escrow pending the commencement of construction of the Lot E residence. Only recently, in response to this application, did a lawyer of the law firm complete the legal description for Lot E. Quest authorized this addition some time ago and I do not consider that matter as determinative of Southern Star’s rights, if any, under the Lot E Ground Lease.

[34] At present, Quest’s title to Lot E remains clear of any registration relating to Southern Star’s Ground Lease so there is no need for Quest to obtain a vesting order to remove it from the title. However, Quest and Primacorp seek an order that any claims that arise from the yet incomplete and unregistered Ground Lease on

Lot E shall not attach to Quest's assets that are to be vested in Primacorp. They also seek an order permanently enjoining Southern Star from registering the Lot E Ground Lease against title to Lot E.

[35] Southern Star objects to the RVO as vesting off any interest it may have in the unregistered Lot E Ground Lease, arguing:

a) This Court has no jurisdiction to do so under the *CCAA*. Southern Star argues that this is simply a disguised disclaimer of the Ground Lease that the *CCAA* expressly prohibits. Disclaimers are allowed pursuant to s. 32 of the *CCAA*, however, limits are imposed by s. 32(9)(d) which provides that disclaimers can not be made:

> . . . in respect of real property or of an immovable if the company is the lessor.

b) If such jurisdiction exists under the *CCAA*, the relief sought is not fair and equitable in the circumstances.

[36] I will begin by discussing the nature of any interest held by Southern Star in relation to the Lot E Ground Lease.

[37] In my view, no "lease" *per se* is yet in existence and valid and enforceable between Quest and Southern Star. Although the parties executed the Form C Charges relating to the Lot E Ground Lease, Southern Star's principal, Michael Hutchison, acknowledges that they were not to be registered until construction had commenced. I conclude that the parties did not intend that the Ground Lease would be valid and effective between them until that time, in conjunction with the registration of the Sublease and the execution and registration of Southern Star's mortgage that would allow construction to begin.

[38] Southern Star does not argue that it has acquired any legal or beneficial interest in Lot E. At its highest, I conclude that Southern Star's rights to Lot E are purely contractual; Quest agreed that it would grant the Lot E Ground Lease in the future and it would become effective upon certain conditions being satisfied – in

essence, an agreement to agree. Those conditions included that Quest would decide to build a residence building on Lot E and that Southern Star would arrange financing to construct the building. In these circumstances, I readily conclude that this condition has not been satisfied and will never be satisfied by Quest given Quest's insolvency.

[39] Further, even assuming that this is a "disguised" disclaimer, I conclude that Quest is not a "lessor" as that term is used in s. 32(9)(d) of the *CCAA*. Quest agreed that, if certain conditions were satisfied, it would become a "lessor" under the Ground Lease; however, that has not come to pass.

[40] I conclude that I have the jurisdiction under s. 11 of the *CCAA* to grant the order sought by Quest to ensure that Southern Star does not assert any rights under the Lot E Ground Lease at a future date. In addition, I rely on s. 36(6) of the *CCAA* that allows the Court to exercise its jurisdiction to vest off "other restrictions".

[41] The exercise of the Court's jurisdiction under s. 11 and 36 of the *CCAA* requires that the relief sought be "appropriate". This is in the sense that it accords with the statutory objectives of the *CCAA*, not only in terms of what the order will achieve, but the means by which it employs to that end: *Century Services Ltd. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.

[42] In this respect, the parties have advanced arguments as to equitable considerations in terms of whether such relief is appropriate in the circumstances, while taking into account the respective positions of the parties. While in the receivership context, Quest has referred to various authorities that discuss the balancing of interests in similar situations where leases (in these cases effective and enforceable) were vested off title: *Meridian Credit Union Ltd. v. 984 Bay Street Inc*., [2006] O.J. No. 3169 (Ont. S.C.J.) at paras. 19-23, citing *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154; *Romspen Investments Corp. v. Woods Property Development Inc*., 2011 ONSC 3648 at para. 66; rev'd other grounds *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817 at para. 25.

[43] Southern Star argues that the equities favour it, not Quest, in these circumstances.

[44] Southern Star contends that neither Quest nor Primacorp have made any attempt to negotiate with it concerning its interest in Lot E. I would not accede to this argument. While the negotiations between Quest, Primacorp and Southern Star were not fruitful, it remains the case that Quest has made good faith efforts to address Southern Star's interests, although its ability in that respect were hampered by Primacorp's willingness to accommodate those interests.

[45] Southern Star also argues that it will be prejudiced if its contractual right is vested off in that Quest and Primacorp are not offering compensation for the loss of that interest. Southern Star focusses on what it says is the "status *quo*", arguing that it has the "right" to build a residence on Lot E. However, any such "right" is illusory at best, since Quest has no present ability to occupy the Residences, let alone the financial capability to participate in the construction of a fifth one on Lot E. Nor is there any realistic prospect that Quest will be in a position to do so in the future.

[46] Southern Star's argument in relation to Lot E is an attempt to gain leverage more than anything else. If Southern Star's argument succeeds and the relief sought is refused, Southern Star would be in the same position—facing a sale of Lot E and a likely order vesting off any rights or interests it may have. It is a condition of the Primacorp transaction that Lot E be transferred to it without any further involvement with Southern Star. Without an order rejecting Southern Star's claim in respect of the escrowed Ground Lease on Lot E, the likely result would be the end of these proceedings and the commencement of realization proceedings by the Interim Lender and other secured creditors.

[47] The Ground Lease is not effective and enforceable; the Ground Lease is not registered on title to Lot E. Given the circumstances, Quest has no ability to build a residence on Lot E and there is no reasonable prospect of that happening, given its insolvency and the need to dispose of its assets, including Lot E.

[48] While I acknowledge the negative impact on Southern Star arising from this relief, that impact must be balanced in the context of Quest's restructuring efforts in this proceeding. Those efforts are intended to address not only Southern Star's interests, but also the myriad interests held by other stakeholders. The sale of Lot E to Primacorp will allow Quest to realize on its interest in Lot E to the benefit of the stakeholders as a whole.

[49] I conclude that the relief sought by Quest in the RVO in relation to Lot E is appropriate and it is granted.

CapU ROFR

[50] Lot 1 and Lots A-E are subject to various charges in favour of CapU.

[51] In March 2019, Quest granted mortgage security in favour of CapU in connection with a loan made to Quest. As part of these agreements, in April 2019, Quest also granted the ROFR in favour of CapU. CapU registered the ROFR against these lands. Under the Primacorp transaction, Quest is required to obtain title to Lot 1 and Lots A-E without reference to the ROFR.

[52] Pursuant to s. 9 of the *Property Law Act*, R.S.B.C. 1996, c. 377, a right of first refusal to land is an equitable interest in land.

[53] CapU has referred to two non-*CCAA* cases that discuss ROFRs generally.

[54] In *Adesa Auctions of Canada Corp. v. Southern Railway of B.C.*, 2001 BCSC 1421 at paras. 26-30, the Court found that the contractual terms were to be strictly enforced and that the rights under the ROFR could not be defeated or circumvented by an offer that included other lands not covered by the ROFR. To similar effect, *Alim Holdings Ltd. v. Tom Howe Holdings Ltd.*, 2016 BCCA 84 at para. 41 states, following *Adesa*, that a ROFR will be triggered by a package sale that includes the subject property, subject to contrary language in the ROFR.

[55] It is common ground, however, that different considerations may also apply in the *CCAA* context. Having said that, there is little case authority on the ability of a court in *CCAA* proceedings to vest off a ROFR, whether triggered or not.

[56] In “Rights of First Refusal and Options to Purchase in Insolvency Proceedings” (2019) 8 J.I.I.C. 103 (the “ROFR Article”), the authors Virginie Gauthier, David Sieradzki and Hugo Margoc extensively review the issue, including in relation to Options to Purchase (OTPs). At 106, the authors state:

> . . . Section 11 of the *CCAA* grants courts the right to "make any order that it considers appropriate in the circumstances" except as limited by the CCAA. As such, the *CCAA* court is well equipped to approve the sale of an OTP- or ROFR-encumbered asset to a party other than the rights-holder and without having first complied with the restrictive covenants if the transaction is in the best interests of the creditors at large, provided that the interest of the OTP or ROFR-holders is taken into account. The court will consider, *inter alia,* the monitor's views on these issues before making any such approvals.

[57] At 118-119, the authors conclude that:

> While jurisprudence on this matter is not conclusive, it appears that a *CCAA* court would likely only vest out a valid and unexpired OTP that runs with the land in exceptional circumstances such as in the context of a going-concern restructuring where obtaining the highest possible price for the encumbered asset is paramount to support the restructuring efforts of the debtor company, and where the OTP rights-holders are also creditors in the proceeding and could seek compensation for any loss incurred due to the removal of the OTP right.
>
> . . .
>
> In summary, common law *CCAA* courts may vest out valid or unexpired ROFRs and OPTs in a case where the equities favour such an order or on consent.

[58] Quest has referred to *Bear Hills Pork Producers Ltd. (Re),* 2004 SKQB 213*,* additional reasons 2004 SKQB 216. In that *CCAA* proceeding, the debtors sought approval of a sale of bundled assets relating to a hog farm, in the face of a ROFR that applied to the land only. Justice Kyle referred to the overall security affecting the assets; the court also commented that a withdrawal of the lands from the sale would not allow the proposed sale to complete, leading possibly to a liquidation (at paras. 4-5).

[59] However, in *Bear Hills*, Kyle J. relied on authorities that have since been questioned in *Alim Holdings* (see paras. 38-41). Justice Kyle's conclusion at para. 10 that the ROFR was not triggered runs contrary to the court's conclusion in *Alim Holdings* at para. 41.

[60] I have no doubt that courts across Canada have vested off ROFRs in the context of assets sales approved in *CCAA* proceedings. For example, Quest refers to *Artic Glacier Income Fund (Re)*, [2012] M.J. No. 451 (Q.B.) where a ROFR was vested off title, although the circumstances under which that *CCAA* relief was granted is not clear.

[61] Similarly, in *Great Slave Helicopters Ltd. v. Gwichin Development Corp*. (November 23, 2018), CV-18-604434-00CL (Ont. S.C.J.), Justice Hainey's endorsement directed that a purchaser of aggregated assets in a *CCAA* proceeding provide certain information to the holder of the ROFR with respect to the purchase price allocation. The ROFR Article, which discusses the circumstances before the court in *Great Slave Helicopters* at 108-109, indicates that the issue of the exercise of the ROFR was ultimately resolved consensually.

[62] Fortunately, in this case, there is no dispute concerning the Court's jurisdiction to address CapU's rights arising under the ROFR. Both Quest and CapU agree that the Court has jurisdiction under the *CCAA* to vest off the ROFR, subject to a consideration of the equities as between the parties.

[63] For the following reasons, I conclude that a balancing of the equities favours vesting off CapU's ROFR to allow the Primacorp transaction to proceed:

a) Since January 2020, Quest has been pursuing a going concern restructuring that will permit it to remain as a university and employer in the Squamish area. CapU has been involved in this proceeding from the outset and was well aware of the opportunity to participate in that pursuit;

b) There is a significant issue as to whether the ROFR has even been triggered by delivery of the Primacorp PSA. The definition provided in the ROFR of “Bona Fide Offer to Purchase” means, in part, an offer that is:

> (iii) only for the entirety of the Property [the lands] and all chattels thereto and <u>no other property, rights or assets</u>
>
> [Emphasis added.]

The definition of “Purchased Assets” in the Primacorp PSA is broad and refers not only to lands and chattels, but a variety of other assets (for example, contracts, plans, permits, vehicles and intellectual property). This express language is what the court in *Alim Holdings*, at para. 41, described could indicate an intention that any such aggregated offer would *not* trigger the ROFR;

c) The term of the ROFR expires in March 2024. The ROFR appears to contemplate that, even if CapU does not exercise the ROFR, the purchaser of the lands must still agree to grant CapU a ROFR on the same terms. Similarly, “change of control” provisions are potentially effective that would allow CapU to later acquire control of Quest in place of anyone else. This would frustrate Primacorp’s expectation under the Primacorp PSA that it would have the right to nominate the board of governors for Quest after closing;

Primacorp does not agree to assume these restrictions. In addition, every other offer for Quest’s assets required that the ROFR be vested off title to the lands. It is difficult to see that any purchaser would agree to take title to purchased assets with such significant restrictions. If the ROFR is effective, this would give rise to a severe “chilling effect” on the market, with potentially disastrous results for Quest’s restructuring efforts;

d) The 60-day period within which CapU is entitled to consider any "Bona Fide Offer to Purchase" is simply unworkable in these circumstances. This is not a matter of expediency, without regard to any rights held by CapU. Quest will have no funds to continue its operations past December 2020 and, if realizations by the secured creditors ensue, CapU's ROFR rights will be illusory at best;

e) CapU complains that it received the redacted Primacorp PSA only recently, on October 29, 2020. CapU then requested an unredacted copy, which Quest agreed to do upon CapU executing an NDA. CapU refused to sign the NDA, stating that it would hamper its ability to participate in its own offer. Again, CapU has had months to formulate its own offer;

f) Quest asserts that CapU has no intention to or ability to make its own offer for all of Quest's assets in competition to the Primacorp transaction. CapU has not put forward any evidence at this hearing to confirm such intention or ability. Similarly, there is no evidence that CapU truly wishes to or is able to exercise any rights under the ROFR to purchase Quest's lands and chattels;

g) I consider that the evidence conclusively supports that CapU advances its arguments under the ROFR simply as a tactic to oppose the Primacorp transaction and delay the matter so that it and Landrex can seek to advance their own joint competing offer;

h) As I will discuss below, the terms of the joint Landrex/CapU proposal is only semi-formed at this point and Quest has indicated that some major terms are not acceptable. As such, it is highly questionable that this joint offer is, as CapU asserts, a "better, higher offer";

i) I conclude that Quest has given proper regard to and has not ignored CapU's rights under the ROFR in the context of these proceedings.

CapU has had sufficient information even from the redacted Primacorp PSA to discern the substance of the Primacorp transaction in terms of advancing any competing offer or exercising the ROFR;

j) Given the above circumstances, including CapU's involvement in Quest's lengthy efforts to restructure, I cannot conclude that CapU will suffer significant prejudice if the ROFR is vested off. Quest has indicated that CapU will have the opportunity to file a proof of claim in respect of any loss alleged to arise because of the vesting off of the ROFR. Of course, the value of any such claim would be questionable unless CapU can establish that its rights were triggered by the Primacorp transaction and that it had the ability to complete under the ROFR; and

k) The Monitor supports the Primacorp sale, as maximizing the value of Quest's assets for the stakeholders and allowing a successful restructuring of Quest's business.

[64] If CapU has rights under the ROFR, allowing CapU to assert those rights would delay the Primacorp sale and potentially negate it, all with potentially devastating effect on the broader stakeholder group. The Primacorp sale is the only sale that is before the Court that would result in a restructuring of Quest for the benefit of the stakeholders. Clearly, within that context, the rights of all affected stakeholders must be balanced in respect of any rights held by CapU.

[65] In *Bear Hills,* similar considerations were before the court. The Saskatchewan Court of Queen's Bench approved a bundled sale of assets, without first requiring compliance with a ROFR. In part, the prospective purchaser would only consider purchasing the complete bundle of properties for an aggregate purchase price and did not allocate value on a property-by-property basis.

[66] As I have sought to do here, the court in *Bear Hills* (at para. 9) was attuned to the overarching and remedial statutory purpose and objective of the *CCAA* to avoid

the “social and economic losses resulting from liquidation of an insolvent company”: *Century Services* at para. 70 and *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 40-41. This objective is not to be achieved simply in the most expedient manner and without due regard to interests of stakeholders that are affected in that process. As the Court further stated in *Century Services* at para. 70, any restructuring is best achieved when “all stakeholders are treated as advantageously and fairly as the circumstances permit”.

[67] I am satisfied that it is appropriate, in the context of the Primacorp transaction, to vest off the ROFR held by CapU. In that regard, I have also considered the factors set out in s. 36(3) of the *CCAA* in terms of assessing any rights of CapU under the ROFR in that context.

Landrex / CapU Offer

[68] Landrex, supported by CapU, opposes approval of the Primacorp transaction. Landrex argues that they should be given further time to present an offer for Quest’s assets in competition with the Primacorp transaction.

[69] As with CapU, Landrex has been fully engaged in discussions with Quest for some time now, having been alerted to the possibility of a transaction as long ago as fall 2019. Landrex’s interest in Quest has always been in conjunction with securing an academic partner, namely, CapU.

[70] In June 2020, Landrex and Quest entered into an agreement for a sale; however, the conditions lapsed.

[71] On October 8, 2020, Landrex and Quest executed a further purchase and sale agreement (the “Landrex PSA”) providing for a purchase price of $51 million for most of Quest’s assets (Lot 1 only and excluding Lots A-E: obviating any need for disclaimers of the Southern Star Subleases or vesting off any of Southern Star’s rights under the Lot E Ground Lease). The closing date under the Landrex PSA is December 23, 2020.

[72] By the start of this hearing, significant conditions precedent in respect of the Landrex PSA were still outstanding. Those included the financing condition in favour of Landrex and the mutual condition by which “another party” (CapU) was to have secured a sublease with Quest after Landrex had granted CapU a lease in the first instance.

[73] Landrex suggests that Quest is contractually bound to honour the Landrex PSA by allowing it further time to remove the conditions precedent, citing the good faith organizing principle discussed in *Bhasin v. Hrynew*, 2014 SCC 71. Further, Landrex argues that Quest has a duty to take all reasonable steps to satisfy the conditions precedent: *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978] 2 S.C.R. 1072.

[74] Further discussions and negotiations continued between Landrex and Quest beyond October 8, 2020; however, matters under the Landrex PSA were not advanced.

[75] By late October 2020, Quest was under significant pressure, if not a legal requirement from the Interim Lender, to conclude a transaction. At that time, only two potentially viable proposals were on the table, one being from Primacorp. As above, where the Monitor noted in its Confidential Report that other proposals were “not currently at a stage such that they are capable of being accepted by Quest”, those “other proposals” included the Landrex PSA.

[76] By the time the Landrex PSA was executed on October 8, 2020, Landrex was not aware that Quest had already signed the Primacorp PSA. However, I agree with Quest’s counsel that Landrex had not secured any rights of exclusivity in terms of advancing its offer. The Landrex PSA provided:

> 20.2 Notwithstanding anything else contained herein, Landrex acknowledges and agrees that, following from date of the acceptance of this Offer by the Vendor until the date that the Vendor waives or declares satisfied the Vendor’s Condition, the Vendor will be authorized to negotiate with or offer the Property for sale to any third party (including the entering into of any agreement by the Vendor with any third party). . . .

[77] Under the Landrex PSA, Quest's Vendor's Condition was approval from its Board of Governors. Quest never obtained that approval because Quest's Board of Governors did not agree to certain deal terms under the Landrex PSA.

[78] By October 29, 2020, Landrex would have been fully aware that its offer was not going to be advanced by Quest any further since, by then, Quest had chosen Primacorp.

[79] On November 2, 2020, Landrex made a further offer for $53.5 million. The only other significant change to their offer was to describe the requirement for a lease/sublease arrangement between Landrex, "another party" (intended to be CapU) and Quest as Landrex's condition precedent, not a mutual condition precedent. Quest did not accept this offer.

[80] In any event, by that time, Landrex's financing condition was far from being satisfied. On November 9, 2020, TD Asset Management ("TD"), Landrex's lender, provided a letter simply stating that it was continuing to work with Landrex and CapU to provide that financing.

[81] I acknowledge that, since the initial hearing date of November 3, 2020, Landrex has moved to finalize its offer but it has only done so to some extent.

[82] On November 13, 2020, Landrex secured a letter from TD that referred to a term sheet being in place after a final financing structure was negotiated (no documents were disclosed). However, TD's commitment is clearly conditional upon CapU's board approving the lease between Landrex and CapU at a meeting that is not scheduled to take place until November 24, 2020. There is no evidence as to what those lease terms are and whether there is a reasonable likelihood that CapU's board will approve it. Further, this whole arrangement continues to hinge on a negotiated sublease between CapU and Quest, which is not in place.

[83] On November 16, 2020, Landrex's counsel advised of yet further developments: (i) removal of its financing condition; (ii) an LOI with Southern Star by

which it would take over the Residences but not require disclaimer of the Subleases; and, (iii) agreement with CapU to remove the ROFR.

[84] Despite these developments, Quest advised that it was still not agreeable to the terms of the Landrex transaction. In addition, the Monitor continues to support approval of the Primacorp transaction, noting the uncertainty and potential delay of CapU obtaining ministerial approval to allow its participation in the Landrex transaction.

[85] The s. 36(3) factors continue to provide a useful structure for consideration of the Landrex transaction, and these late breaking developments.

[86] I am satisfied that Landrex was given a reasonable opportunity to participate in the SISP and that it has been aware of this opportunity for many months, even before it officially began. The fact that the cash consideration under the Landrex transaction exceeds that of Primacorp is deserving of consideration. However, other considerations arise, including that the Primacorp transaction involves significant other benefits to Quest in terms of its future operations, including the working capital facility of $20 million.

[87] Both Quest and the Monitor continue to be of the view that the Primacorp transaction is more beneficial to the creditors. I agree with this, particularly considering the continuing uncertainty and risk associated with the Landrex/CapU transaction that is yet to be resolved, leaving aside that Quest has unequivocally stated that it has no intention to pursue it. Even if the further negotiations required under the Landrex sale were advanced in an expeditious manner, it seems unlikely to be finalized by the end of the year. To the contrary, the Primacorp transaction has been finalized after weeks of complex negotiations and Quest and Primacorp are ready to close without further delay. I agree that time is of the essence at this stage of the proceedings, for the reasons already noted above.

[88] In the overall circumstances here, I see no reason to delay, if not risk, the "bird in hand" transaction that arose through a reasonable sales process, in the hope that a more uncertain transaction may be finalized, such as with Landrex.

Southern Star Disclaimers

[89] On October 23, 2020, and with the approval of the Monitor, Quest issued notices of disclaimer (the "Disclaimers") to Southern Star relating to the Subleases on Lots A-D by which Southern Star leases those lands and the Residences to Quest.

[90] A condition precedent of the Primacorp transaction is that either Quest will disclaim the Subleases or Primacorp will have entered into an agreement with Southern Star to its satisfaction. The evidence discloses that negotiations did take place between the parties but they did not reach a mutually acceptable agreement.

[91] Quest's rent payments to Southern Star under the Subleases for the Residences on Lots A-D total approximately $236,218 per month.

[92] Very recently, on November 15, 2020, before the conclusion of this hearing, Quest voluntarily withdrew the Disclaimers with respect to Lots A-B. Accordingly, failing an agreement between Primacorp and Southern Star, it remains a condition of the Primacorp transaction that Quest's Disclaimers of the Subleases in relation to Lots C-D be upheld.

[93] The Ground Leases are registered against Lots A-D. BMO's security is registered against Southern Star's interest under the Ground Leases; in addition, Fivestone Capital Corp. ("Fivestone"), a company controlled by Mr. Hutchison, has registered security against the Grounds Leases. Quest does not seek any relief in respect of the Ground Leases; unlike Lot E, those documents are fully effective and enforceable and have been the basis upon which the parties have developed those properties.

[94] What remains to be addressed is Southern Star's application pursuant to s. 32(2) of the *CCAA*, supported by BMO, for an order disallowing any disclaimer by Quest of the Subleases of the Residences on Lots C-D. Section 32(4) of the *CCAA* lists various non-exhaustive factors that the court is to consider in relation to disputes over disclaimers:

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

[95] In *League Assets Corp. (Re)*, 2016 BCSC 2262, I discussed the significance of disclaimers in *CCAA* proceedings, both from the point of view of the counterparty and that of the entire stakeholder group:

> [49] These *CCAA* provisions are not inconsequential in the face of this type of proceedings. At this point, the matter is no longer between the debtor company and a counterparty. There are other stakeholders involved and the statutory provisions, and the provisions of court orders such as the Initial Order, are meant to protect the stakeholder group as a whole, while also allowing a certain amount of flexibility for the debtor company. A disclaimer of a contract has consequences not only to the debtor company, but the estate generally. Such an action can substantially increase the debt being faced by the estate or divest the debtor of a substantial benefit that might be realized for the benefit of the creditors. It is in that context that the *CCAA* requires that certain procedures be followed by the debtor company, with the necessary oversight by the Court's officer, the Monitor, as to whether any disclaimer will be approved or not.

[96] The factor under s. 32(4)(b) of the *CCAA* as to enhancing the prospects of a viable restructuring applies equally in respect of disclaimers in the context of a sales process by which the business is to continue as a going concern: *Timminco Ltd. (Re)*, 2012 ONSC 4471 at paras. 51-52 and *Aveos Fleet Performance Inc. (Re)*, 2012 QCCS 6796 at paras. 48-50. In addition, the disclaimer need not be proven as "essential", only "advantageous and beneficial": *Timminco* at para. 54.

[97] Quest asserts that the Disclaimers are necessary to pursue and complete the Primacorp transaction, which it considers the best possible outcome for Quest and its stakeholders, including students, faculty, staff, secured and unsecured creditors, suppliers and vendors. In its letter dated October 28, 2020 to Southern Star, Quest also refers to its liquidity crisis and that amounts owing to its secured creditors became due some time ago.

[98] In its Fourth Report dated November 2, 2020, the Monitor confirmed its approval of the Disclaimers, based on:

> 2.8.1 The residences are not currently being used by Quest (other than two units being used by staff members and some limited use by a film crew recently) given on-line learning format being employed as a result of COVID 19;
>
> 2.8.2 It is a term of the Primacorp Agreement that the subleases be disclaimed; and,
>
> 2.8.3 The Monitor noted that the two most promising alternative parties in discussions with Quest also required the Southern Star subleases to be disclaimed.

[99] Southern Star advances a number of arguments in relation to the Disclaimers.

[100] Firstly, it argues that the Disclaimers will not result in a viable compromise or arrangement. Southern Star argues that there is no indication that Quest and Primacorp do not wish to continue to have the Residences as part of the student experience for those attending Quest.

[101] I agree that, in the Rent Deferral Reasons, many of my comments (at paras. 23-26, 90) were confirmatory of the importance of the Residences to Quest in respect of its future operations. However, that was then and this is now. The pandemic continues in full force and Quest is necessarily required to make decisions in the face of current circumstances. I agree that it is likely that Quest will seek to continue the student residence experience once the pandemic has receded, however, when that might happen is anyone’s guess.

[102] In the meantime, Quest, under the Primacorp transaction, must make decisions as to its financial capabilities going forward. Maintaining two empty

Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances. It was Primacorp, an arms length purchaser, who has imposed this condition.

[103] Further, the Monitor agrees with Quest that the Disclaimers are necessary to enhance the prospects of Quest making a viable compromise or arrangement in these proceedings. There is no reason to question the Monitor's view as it is apparent that the Monitor has considered all relevant matters.

[104] I agree that the Disclaimers will enhance the prospects of Quest making a viable compromise or arrangement. The Monitor overwhelmingly agrees after a consideration of all the circumstances including those particularly faced by Southern Star as a result.

[105] Secondly, Southern Star argues that Quest delivered the Disclaimers simply to secure a bargaining advantage for Quest and Primacorp toward a re-visitation of the rent deferral issue or to attempt to reduce the rent. I agree that there is some indication that Quest and Primacorp had that in mind; however, that is often the reality that arises after a debtor concludes that it is no longer viable to abide by those contractual commitments and that a disclaimer is appropriate. If it were possible to come to an amicable resolution with Southern Star in the context of the Primacorp transaction, I expect Quest would have done so.

[106] Southern Star refers to the statements in *Allarco Entertainment Inc. (Re)*, 2009 ABQB 503 at para. 59, where Justice Veit considered whether certain contracts should be terminated. She was attuned to whether the termination was fair, appropriate and reasonable and whether it arose after good faith negotiations. In this case, there is no evidence to suggest that the parties did not approach the negotiations in good faith. Clearly, it is not my role on this application to assess the reasonableness of the respective positions of Quest, Primacorp and Southern Star in those negotiations. It does appear, however, that Quest and Primacorp have moved toward a middle ground by the withdrawal of the Disclaimers in relation to Lots A-B.

[107] Thirdly, Southern Star places great emphasis on what it says will be the significant hardship it will suffer if the Disclaimers are upheld. Southern Star says that it has spent approximately $41.7 million to construct the Residences.

[108] The monthly mortgage payments to BMO and Fivestone are approximately $220,000. The outstanding balance of the BMO loan facility is $34.4 million. Mr. Hutchison indicates that, without payment of rent by Quest, Southern Star will not be able to make its mortgage payments to BMO. In that event, BMO will be in a position to foreclose on the Ground Leases. Mr. Hutchison has guaranteed the BMO debt, as has another of Mr. Hutchison's companies.

[109] As noted by Quest, any financial consequences to Southern Star will largely depend on what mitigating measures are undertaken. Those could include a re-letting of the Residences or a sale of its interests under the Ground Leases. At present, with no clear indication as to how those matters might evolve, I am unable to conclude with certainty that any hardship suffered by Southern Star would be "significant".

[110] Regardless of any hardship faced by Southern Star, the reality is that Quest has only one viable means by which to advance the restructuring at this time – the Primacorp transaction. Within the confines of that transaction, Primacorp sees no merit in maintaining the Subleases on these two Residences. Apparently, no other interested party expressed an interest in maintaining the Subleases besides Landrex. In light of Landrex's submissions at the conclusion of this hearing on November 16, 2020, I have considered that the Landrex/CapU transaction may have presented a more palatable resolution of the Subleases given the recent LOI between Landrex and Southern Star. However, I conclude that delaying the Primacorp sale, on the prospect that the Landrex/CapU transaction will come about, is not a viable option for the reasons discussed above.

[111] I agree that this decision will visit hardship, even arguably significant hardship, upon Southern Star. However, it is difficult to see that preventing delivery of the Disclaimers would avoid that result in any event. If the Primacorp transaction

does not proceed, there is no transaction and Quest has no financial means to continue past December 2020. The Interim Lender has indicated that it will not advance funds to Quest beyond that date, and specifically, that it has no interest in funding continued rent payments to Southern Star.

[112] In that event, Southern Star will be in the same position post December 2020, with Quest unable to pay the rent for the Residences at that time: see *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 27-28.

[113] As the court noted in *Target Canada* at paras. 24-25, the court must give due consideration to the stakeholder group as a whole in assessing whether the Disclaimers are fair and reasonable: *Doman Industries Ltd. (Re)*, 2004 BCSC 733 at para. 33. The price of setting aside the Disclaimers is that the Primacorp transaction will not proceed and a receivership at the behest of the Interim Lender will likely follow. In my view, this is not in the best interests of that larger stakeholder group which, in my view, has primacy here even in the face of the hardship and prejudice caused to Southern Star.

[114] I dismiss Southern Star's application for order that the Subleases of the Residences on Lots C-D not be disclaimed by Quest.

RVO

[115] At the November 3, 2020 hearing, when Quest originally sought the TAVO, Quest was seeking to uphold the Disclaimers of the Subleases. At that time, Southern Star's evidence and submissions were to the effect that, if the Court upheld the Disclaimers, it would have a substantial unsecured claim against the estate. As indicated above, the amount of any claim that Southern Star might advance in the estate is far from clear, given possible mitigation, although there is potential for a significant claim.

[116] This position did not come as a surprise to Quest; however, it appears that Quest did not appreciate the potential magnitude of Southern Star's claim. More importantly, Quest has not fully appreciated that a very unhappy claimant – Southern

Star under the Disclaimers – was not likely to vote in favour of the Plan and that the value of its claim could swamp the class votes to prevent any approval by the creditors. Again, creditor approval of the Plan is a requirement of the Primacorp Transaction.

[117] In early November 2020, known unsecured creditor's claims were estimated at approximately $2.3 million. "Restructuring Claims" (which will include any claim of Southern Star under the Disclaimers) were yet unknown.

[118] Initially, Primacorp agreed to fund Quest's Plan in the amount of the lesser of 50% of the claims or $1.35 million. The Monitor now states that there is a "high probability" that Southern Star's claim will be large enough such that Southern Star will control the value of the votes at the creditors meeting. Other major unsecured creditor claims have also since emerged, being that of Dana (estimated $1 million) and the Association for the Advancement of Scholarship (estimated $5 million).

[119] As the Monitor notes, any of these claims could effectively veto the Plan.

[120] Quest and Primacorp were then facing a dilemma. They determined that, while they might succeed on the Disclaimer issue, they could not likely obtain approval of the Plan, a further requirement of the Primacorp PSA, if Southern Star carried through with its suggested negative vote. While Quest could raise arguments in relation to the value of any claim advanced by Southern Star, uncertain and lengthy litigation would likely result; even if Quest was successful, it would be too late to factor into this restructuring.

[121] Quest, with Primacorp's approval, solved this dilemma by revising the TAVO to an RVO. In addition, the Primacorp PSA was amended to delete the conditions precedent requiring creditor and court approval of the Plan. Accordingly, the only condition precedent that remains before closing of the Primacorp transaction is the granting of the RVO.

[122] The Monitor supports this change as necessary in the circumstances in order to allow Quest to complete the Primacorp transaction. The Monitor supports the granting of the RVO.

[123] In its Fifth Report dated November 10, 2020, the Monitor describes the characteristics of the new structure and steps under the RVO, which involves Quest's subsidiary, Guardian Properties Ltd. ("Guardian"):

> RVO Structure & Impact
>
> 2.6 The RVO provides for the following to occur in sequential order on the closing of the Primacorp Transaction:
>
> 2.6.1 A wholly owned subsidiary of Quest, Quest Guardian Properties Ltd. ("Guardian") shall be added as a Petitioner in these CCAA proceedings. Guardian was incorporated on January 25, 2018 and has never carried on any business and has never held any assets or liabilities;
>
> 2.6.2 All of Quest's right, title and interest in and to the Excluded Assets (as defined in the Primacorp PSA and the RVO) shall be transferred to and vested in Guardian;
>
> 2.6.3 All Contracts (other than Approved Contracts), Claims and Liabilities of Quest shall be transferred to Guardian and Quest shall be released from and in respect of all obligations in respect of such Contracts, Claims and Liabilities;
>
> 2.6.4 Primacorp will pay the Purchase Price to the Monitor to the extent of the Secured Charges and all the Secured Claims and the Secured Charges shall be extinguished and cancelled. The Purchase Price will stand in the place of the Purchased Assets;
>
> 2.6.5 All of Quests right, title and interest in the Purchased Assets shall vest in Primacorp free and clear of any security interests, Claims and Liabilities; and,
>
> 2.6.6 Quest will cease to be a Petitioner in these CCAA proceedings leaving Guardian as the sole Petitioner.
>
> 2.7 The RVO contains release provisions similar to those contained in the Plan. Quest, its employees, legal advisors and other representatives, Quest's Governors and Officers, and the Monitor and its legal counsel shall be released from any and all demands and claims relating to, arising out of, or in connection with these CCAA Proceedings. The releases do not apply in the case of wilful misconduct or fraud.
>
> 2.8 As a result of the amendments to the Primacorp Transaction and the RVO, if the RVO is granted:
>
> 2.8.1 There will be no uncertainty as to whether the Primacorp Transaction can close and the condition precedent for the

approval of the Plan is no longer applicable. As a result, there will be certainty for the go-forward operations of Quest, thereby creating security for the Quest students, faculty and staff leading into the critical enrolment period for the winter term;

2.8.2 Guardian will become responsible for the obligations under the Southern Star subleases should they not be disclaimed. As Guardian will not have the financial resources to meet those obligations, it is expected that Guardian would default on the Southern Star subleases in January 2021; and

2.8.3 The Plan, which will now compromise the debts of Guardian, will be funded through the Primacorp Transaction and therefore this aspect of the Primacorp Transaction and the Plan has not changed.

[124] As I will discuss below, the effect and substance of the RVO is to achieve what Quest has originally sought by way of a restructuring in these proceedings; namely, a sale of certain assets to Primacorp and, importantly, Quest continuing as a going concern as an academic institution, in partnership with Primacorp. The only aspect now missing is that, under the RVO, Quest will avoid having to obtain creditor or Court approval of the Plan.

[125] The intention is that the amounts that Primacorp was to fund under the Plan will now be transferred to Guardian to be distributed under Guardian's plan in relation to the Quest's liabilities that are to be transferred to Guardian. Effectively, Guardian will be funded just as it was originally intended that Quest's Plan was to have been funded to resolve those claims.

[126] Southern Star and Dana, as unsecured creditors of Quest, object to the granting of an RVO, contending that it effectively and unfairly negates their right to vote on Quest's Plan under s. 6 of the *CCAA*. They object to the transfer of their claims to Guardian. They say that, although they will have the ability to vote on Guardian's plan, it will effectively mean that they cannot vote to block Quest's restructuring to enable it to continue as a going concern within the context of the Primacorp transaction.

RVO Jurisdiction and Authorities

[127] There is no dispute between the parties that this Court has authority to grant the RVO under its general statutory jurisdiction found in s. 11 of the *CCAA*.

[128] Quest has referred me to a number of decisions across Canada where courts have exercised that jurisdiction to grant an RVO in the context of sale approvals considered under s. 36 of the *CCAA*. I will review those decisions in some detail below to highlight the relevant circumstances.

[129] In *Re T. Eaton Co.* 2000 CarswellOnt 4502, 26 C.C.P.B. 295, the Ontario court granted such an order under its *CCAA* proceedings. There are no written reasons discussing the circumstances in that case. The only brief reference to that structure is found in Claims Officer Houlden's decision in *Eaton's* that addressed an unrelated issue. The agreed statement of facts before the Claims Officer provided:

> 5. The *CCAA* Plan contemplated that all of the assets of Eaton's which were not being retained by Eaton's under the Sears Agreement would be transferred to a new corporation, Distributionco Inc. ("Distributionco"). These assets would then be liquidated by Richter & Partners Inc. ("Richter") in its capacity as court-appointed liquidator of the estate and effects of Distributionco. Richter would then distribute the assets of Distributionco to unsecured creditors and others in accordance with priorities set out in the *CCAA* Plan.
>
> 6. Under the *CCAA* Plan, unsecured creditor claims against Eaton's are converted into a right to participate in distributions in the liquidation of Distributionco based on the amount of the creditor's claim against Eaton's. Accordingly, a critical initial step in the liquidation of Distributionco is the determination of the validity and amount of claims asserted against Eaton's. For this purpose the *CCAA* Plan establishes a Claims Procedure for the resolution of such claims, of which the parties to this matter are aware.

[130] It is unclear as to the basis upon which the court approved this structure in *Eaton's* although, as Southern Star notes, it was a transaction approved within the context of a *CCAA* Plan.

[131] More recently, this structure was approved in *Plasco Energy* (July 17, 2015), Toronto CV-15-10869-00C (Ont. S.C.J. [Comm. List]). In those *CCAA* proceedings,

an agreement was approved that "effectively" transferred current tax losses and intellectual property to a purchaser. Justice Wilton-Siegel's endorsement stated:

> The Global Settlement contemplates implementation of a corporate reorganization by which the shares of Plasco will be transferred to an acquisition corporation owned by NSPG and CWP and the remaining assets of the applicants will be held by a new corporation, referred to as "New Plasco", which will assume all of the liabilities and obligations of Plasco. I am satisfied that the Court has authority under section 11 of the *CCAA* to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the *CCAA* insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise. For this purpose, I consider that the Global Settlement is analogous to such a plan in the context of these particular proceedings. …

[132] Justice Gouin granted an RVO in the *CCAA* proceedings of *Stornoway Diamond Corporation* (October 7, 2019), Montreal 500-11-057094-191 (Q.C.S.C. [Comm. Div.]). There are no written reasons from the court; however, the motion materials disclose that, under the transaction, the purchasers acquired substantially all the debtor's assets by purchasing 100% of the shares of one debtor company (SDCI, which held the acquired assets). In consideration, the purchaser released certain liabilities owed by the debtors and agreed to assume others.

[133] In *Stornoway Diamond*, to ensure the purchaser acquired the assets free and clear of all encumbrances, the debtors incorporated a new subsidiary (Newco), added Newco as an applicant in the *CCAA* proceedings, and transferred all liabilities, obligations, and unacquired assets of SDCI to Newco. The debtor's motion referred to this transaction as the only viable alternative to preserve the going concern value of the debtor. The debtor noted that the equity and "non-operational related unsecured claims" had no value. As in the RVO sought here, the court's order included familiar aspects found in sanction orders, including releases.

[134] An RVO was also approved in the *CCAA* proceedings of *Wayland Group Corp.* (April 21, 2020), Toronto CV-19-00632079-00CL (Ont. S.C.J. [Comm. List]). Approval was sought in the context of preserving valuable cannabis licenses. Justice Hainey's brief endorsement indicates that the relief was unopposed. The court

approved a sale of substantially all of the debtor's assets to the successful bidder under a share purchase agreement after a sales and investment solicitation process.

[135] Other information before me regarding the *Wayland Group* transaction is found in the applicant's factum. The factum refers to both *Plasco Energy* and *Stornoway Diamond*, while also referring to ss. 11 and 36(3) of the *CCAA* as the jurisdictional basis for the relief. The applicants argued that transferring certain assets and liabilities of the debtors into a "newco" would ensure that the purchaser acquired the underlying assets of the target company free and clear of all claims and encumbrances and allow the business to continue as a going-concern. They asserted that this was the "only way" to complete the sale to realize the value in the assets; it was also argued that this transaction was in the best interests of stakeholders and did not prejudice major creditors. In *Wayland Group*, the transaction value was only sufficient to repay the interim lender and perhaps some amount for the first secured creditor.

[136] The Ontario court again approved a similar RVO transaction in the *CCAA* proceedings of *Comark Holdings Inc.* (July 13, 2020), Toronto CV-20-00642013-00CL (Ont. S.C.J. [Comm. List]). Justice Hainey granted the RVO while again indicating in a brief endorsement that the relief was unopposed. The share sale preserved the tax attributes of the debtor, which the purchaser viewed as critical for the success of the future business. The purchaser was a related party who was making a credit bid for the assets.

[137] In *Comark Holdings*, the purchaser acquired all the issued and outstanding shares of the primary *CCAA* debtor and agreed to pay out all the secured debt and priority claims. The excluded assets, agreements, liabilities and encumbrances were transferred to another entity that became a debtor in the *CCAA* proceedings, with the result that the *CCAA* debtor held its assets free and clear of all claims and encumbrances and was then removed from the *CCAA* proceedings. The purchaser and the primary *CCAA* debtor then amalgamated. The new *CCAA* debtor (Newco) was authorized to make an assignment into bankruptcy. The monitor, along with the

principal secured creditors, including the interim lender, supported the transactions. As in *Plasco Energy*, *Stornoway Diamond* and *Wayland Group*, the debtors in *Comark Holdings* argued that this was the "only option" to preserve the business, that the value in that business would be lost in a liquidation and that the transaction was in the best interests of the stakeholders generally.

[138] Justice Conway granted an RVO in the *CCAA* proceedings of *Beleave Inc.* (September 18, 2020), Toronto, CV-20-00642097-00CL (Ont. S.C.J. [Comm. List]). As in *Wayland Group*, the preservation of valuable cannabis licenses were at stake. The motion was supported by the monitor and unopposed. Justice Conway stated in her brief endorsement:

> The Applicants seek approval of the transaction whereby . . . (the Purchaser) will acquire the operating business of the Applicants. The structure of the transaction is partly by share sale and partly by asset sale. The reason for the structure is to accommodate the licensing requirements of Health Canada. The order is structured as a reverse vesting order, in which excluded liabilities and assets will be transferred to "Residualco", which will then become one of the Applicants in the *CCAA* proceedings. Reverse vesting orders have been approved by the courts in other cases: see *Re Stornoway Diamond Corporation* . . . and *Re Wayland Group Corp*. . . .
>
> The transaction is the culmination of a stalking horse sales process approved by the court. The motion is unopposed. The Monitor recommends and supports the transaction in its Fourth Report. In particular, the Monitor states that the proposed transaction is economically superior to the estimated liquidation value of the Beleave Group's assets and operations, will allow the Purchaser to maintain operations and use of the Cannabis licenses and will provide for continued employment for a majority of the existing employees. In my view, the transaction satisfies s. 36(3) of the *CCAA* and the *Soundair* test and should be approved.

[139] In *Beleave*, the RVO included releases of claims similar to that granted in other RVO decisions. These provisions were also consistent generally with sanction orders and are similar to the relief sought by Quest here.

[140] Even more recently, the Alberta court approved an RVO structure in the *CCAA* proceedings of *JMB Crushing Systems Inc.* (October 16, 2020), Calgary 2001-05482 (A.B.Q.B.). Justice Eidsvik approved the RVO structure as part of a sale approval. No written reasons of the court are available, however, the monitor's bench brief discloses the relevant facts.

[141] As in the above cases, the transaction addressed in *JMB Crushing* arose from a sale and investment solicitation process that yielded only one offer, with the RVO described as a critical component. The underlying intention was to preserve the value of the paid up capital and regulatory permits in the *CCAA* debtor.

[142] In *JMB Crushing*, the monitor relied on the orders granted in *Plasco Energy*, *Stornoway Diamond*, *Wayland Group* and *Beleave*, arguing that the RVO structure was justified in those circumstances:

> 24. In recent *CCAA* proceedings, where it was not practical to compromise amounts owed to creditors through a traditional plan of compromise and arrangement, but it was critical to the viability of a transaction to "cleanse" the debtor company, such that a prospective purchaser may: (i) utilize non-transferrable regulatory licenses (by way of amalgamation or the purchase of the shares of the debtor company); or, (ii) make use of tax attributes of the debtor company, such as [paid up capital], Courts have recently approved and utilized reverse vesting orders to achieve such objectives.
>
> 25. The purpose of a reverse vesting order is to transfer and vest all of the assets and liabilities of a debtor company, which are not subject to a sale, to another company within the same *CCAA* proceedings. The cleansed debtor company is then able to: (i) be utilized by a purchaser as a go-forward vehicle, without any concern regarding creditors and obligations that may otherwise be "laying in the weeds"; and, (ii) allow the purchaser to make use of the debtor company's tax attributes and non-transferrable regulatory licenses. This approach is necessary in situations where the parties would otherwise be unable to preserve the value of significant assets that are subject to restraints on alienation and to provide a corresponding realizable benefit for creditors and stakeholders.

[143] In *JMB Crushing*, the monitor further justified the RVO structure in asserting that the debtor's secured creditors would suffer a shortfall even with such measures. The monitor stated that the unsecured creditors had no economic interest in the transaction and there was no reasonable prospect of any recovery to them. The debtor did not intend to undertake a claims process or present a plan to its unsecured creditors.

[144] By pure coincidence, another and perhaps more compelling authority came to the attention of the parties during this hearing.

[145] On November 11, 2020, the Québec Court of Appeal dismissed an application for leave to appeal the granting of an RVO by Gouin J. of the Québec Superior Court on October 15, 2020: *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCS 3218; leave to appeal denied *Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488. The Court of Appeal's decision is in English; Gouin J.'s decision is in French and no English translation was available. As such, all references to *Nemaska Lithium* will be to the QCCA.

[146] All counsel agree that Gouin J.'s decision in *Nemaska Lithium* is the first time a Canadian court has granted an RVO in contested *CCAA* proceedings.

[147] In *Nemaska Lithium* (at para. 5), the court stated that the RVO allowed the purchaser to carry on the operations of the Nemaska Lithium entitles (mining in James Bay) by maintaining existing permits, licenses and authorizations. This goal was accomplished via a credit bid for the shares in Nemaska Lithium in return for assumption of the secured debt. At para. 22, the court refers to the intention of the "residual companies" to later present a plan of arrangement to the "remaining creditors", but the details are not disclosed.

[148] In denying leave to appeal in *Nemaska Lithium*, the court stated that an appeal would hinder the progress of the proceedings. More relevant to this application were the court's comments on the legitimacy of the position of the only objecting creditor, Cantore, and the court's rejection that it was appropriate to allow Cantore to exercise a veto in the restructuring:

> [38] As it turns out, the value of the Cantore provable claims (setting aside the later debate regarding his potential real rights) stands at $8,160 million out of a total value of provable claims of $200 million. Thus, Cantore's provable claims represent at this point in time 4% of the total value of unsecured creditors'' claims as determined by the Monitor. Yet, Cantore is the only creditor having voiced an objection to the RVO approval. This begs the question: whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?
>
> [39] In these circumstances, I am simply not convinced that the arguments that are advanced by Cantore are anything but a "bargaining tool", while he pursues multidirectional attacks on the RVO with the same arguments that were dismissed in the first instance.

[149] Similar to Cantore's position in the *Nemaska Lithium* restructuring, Southern Star and Dana's objections to the RVO are grounded in the assertion it will negate their effective veto on the Plan (and hence the Primacorp transaction) by which they seek to leverage further concessions. For obvious reasons, those concessions can only come about at a cost to other stakeholders, whose interests remain to be addressed.

Discussion

[150] Quest, with the support of the Monitor, submits that the Primacorp transaction satisfies s. 36 of the *CCAA* and that the Court should grant the RVO pursuant to ss. 11 and 36 of the *CCAA*.

[151] As with the structures approved in the above *CCAA* proceedings, the RVO has certain aspects that Southern Star says are objectionable. Those include primarily: (i) the addition of Guardian as a petitioner in the *CCAA* proceeding; (ii) the vesting of the Excluded Liabilities and Excluded Contracts in Guardian; (iii) Quest's exit from this *CCAA* proceeding; and (iv) the release of Quest in respect of the Excluded Liabilities and Excluded Contracts.

[152] Essentially, unsecured claims against Quest and minor assets are transferred to Guardian and Quest continues as a going concern after having transferred the bulk of its assets to Primacorp free and clear of any encumbrances (save for certain Retained Liabilities). Quest no longer requires approval of the Plan by the creditors and the Court to complete the Primacorp transaction.

[153] At para. 19, the QCCA in *Nemaska Lithium* referred to Gouin J.'s comment that s. 36 of the *CCAA* allows the court a broad discretion to consider and, if appropriate, grant relief that represents an innovative solution to any challenges in a proceeding. Justice Gouin considered that approving an RVO structure was such an innovative solution. Indeed, this is the history of *CCAA* jurisprudence under the court's broad statutory discretion and court approval of innovative solutions continues to this time.

[154] That said, the ability of a *CCAA* court to be innovative and creative is not boundless; as always, the court must exercise its discretion with a view to the statutory objectives and purposes of the *CCAA*: *Century Services*.

[155] I find further support for Quest's position in the recent comments of the Court in *Callidus.* The Court was there addressing a different issue – whether a *CCAA* judge has jurisdiction under s. 11 to bar a creditor from voting where the creditor is "acting for an improper purpose" – but the Court's comments on the exercise of jurisdiction under the *CCAA* ring true in relation to the RVO structure:

> [49] The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).
>
> [50] The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:
>
> > Good faith
> >
> > 18.6(1) Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
> >
> > Good faith — powers of court
> >
> > (2) If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
> >
> > (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)
>
> . . .
>
> [65] There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, <u>*CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction</u>

a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

. . .

[67] Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). . . .

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

[68] Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

. . .

[70] . . . The exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives — that is, acting for an "improper purpose" — the supervising judge has the discretion to bar that creditor from voting.

. . .

[75] We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation . . . . *If the CCAA is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute*.

> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))
>
> In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.
>
> [76] Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.
>
> [Underline emphasis added; italic emphasis in original.]

[156] Quest is not seeking to bar Southern Star or Dana from voting on the Plan. It is seeking approval of a structure that would result in Guardian submitting its own plan to the unsecured creditors, which would include Southern Star and Dana, at which time they are generally free to vote their "self-interest" subject to any relevant constraint (for example, if the court finds that they are voting for an improper purpose): *Callidus* at para. 24 and 56.

[157] There is no provision in the *CCAA* that prohibits an RVO structure. As is usually the case in *CCAA* matters, the court must ensure that any relief is "appropriate" in the circumstances and that all stakeholders are treated as fairly and reasonably "as the circumstances permit": *Century Services* at para. 70.

[158] As with the sales considered in most of the above RVO cases, including *Nemaska Lithium*, this is the *only* transaction that has emerged to resolve the financial affairs of Quest. No other options are before the stakeholders and the Court that would suggest another path forward. As was noted by Gouin J. in *Nemaska Lithium* (at para. 12), it is not up to the Court to dictate the terms and conditions that are included in an offer. Primacorp has presumably made the best offer that it is prepared to make in the circumstances – that is the offer the Court must consider.

[159] I agree with the Monitor that, without the RVO structure, the Primacorp transaction is in jeopardy. The only other likely path forward for Quest is

receivership, liquidation and bankruptcy, a future that looms in early 2021 if the transaction is not approved.

[160] Many of the RVO cases cited above involve a sale of an ongoing business with a purchaser. The RVO structure was crafted to allow those businesses to continue through the debtor company, since it was that corporate vehicle who owned the valuable “assets” that could be not transferred.

[161] Akin to the tax losses, permits and licences that could not be transferred in those RVO cases, is Quest’s ability to confer degrees under its statutory authority under s. 4(2) of the *Sea to Sky Act*, S.B.C. 2002, c. 54 (the "*Sea to Sky Act*"). Quest cannot sell its ability to grant degrees under s. 4(2) of the *Sea to Sky Act*. Nor can any purchaser acquire the right to grant degrees indirectly through a purchase of the shares in Quest. Pursuant to s. 2 of the *Sea to Sky Act*, Quest is a corporation “composed of the members of the board” and no shareholders exist. Pursuant to s. 1 of the *Sea to Sky Act*, the “board” means the board of governors of the university.

[162] It is a critical requirement under the Primacorp transaction that Quest remain a viable entity to continue its operations and, in particular, continue to grant degrees. That is a significant component of the Primacorp transaction and the value that Primacorp is prepared to pay under the transaction reflects that component. In other words, the stakeholders are receiving a benefit from this transaction by which Primacorp ensures that Quest continues after exiting these *CCAA* proceedings.

[163] At para. 38, the court in *Nemaska Lithium* asked:

> . . . whose interest is being served by the proposed appeal? What would be the true impact of the Cantore vote on the RVO transaction if it were made subject to prior approval on the part of the creditors as he suggests?

[164] I acknowledge the negative consequences that arise particularly for Southern Star if the Primacorp transaction is approved, although there is significant uncertainty about the extent of any loss that may be suffered. Dana’s unsecured claim has little, if any value, outside of the benefits of the Primacorp transaction.

[165] In that light, I would ask Southern Star and Dana a similar question to that of the QCCA—to what end is your veto if Quest's Plan is put presented for creditor approval?

[166] Both creditors potentially hold the sword of Damocles over the head of the significant broad stakeholder group who stand to benefit from the Primacorp transaction. Recently, Southern Star has secured further benefits by the withdrawal of two of the Disclaimers. Both objecting creditors have nothing to lose at this point in this dangerous game of chicken with Primacorp, with only the oversight of this Court to oversee this strategy. By any stretch, no one is blinking at this point, while significant other interests hang in the balance.

[167] The Monitor's comments in its Fifth Report as to the jeopardy to those other interests are apt:

> 2.15 The Monitor has considered the competing interests of Southern Star and the interests of Quest's other stakeholders. In the Monitor's view, the Primacorp Transaction should not be jeopardized by the lack of agreement between Southern Star and Primacorp. Southern Star can mitigate its financial hardship by entering into an agreement with Primacorp for use of some or all of the residences. By contrast, Quest's other stakeholders have no ability to mitigate their potential losses in the event that the Primacorp Transaction does not close. They are reliant on the completion of the Primacorp Transaction or face significant losses themselves should it not complete.

[168] In my view, in the vein of the Court's discussion in *Callidus*, these are unique and exceptional circumstances where the Court may grant the relief by allowing Quest to employ the RVO structure within the context of this sale transaction.

[169] Southern Star and Dana seek to effectively block the only reasonable outcome here by insisting that they must approve of Quest's Plan in conjunction with the sale. However, creditor approval of a sale is not required under s. 36 of the *CCAA*.

[170] The granting of the RVO in these circumstances is in accordance with the remedial purposes of the *CCAA*. To use the words of Dr. Sarra, quoted above in

Callidus, I conclude that Southern Star and Dana are working actively against the goals of the *CCAA* by their opposition to the RVO.

[171] I do not consider that an RVO structure would be generally employed or approved in a *CCAA* restructuring to simply rid a debtor of a recalcitrant creditor who may seek to exert leverage through its vote on a plan while furthering its own interests. Clearly, every situation must be considered based on its own facts; different circumstances may dictate different results. A debtor should not seek an RVO structure simply to expedite their desired result without regard to the remedial objectives of the *CCAA*.

[172] Here, in these complex and unique circumstances, I conclude that it is appropriate to exercise my discretion to allow the RVO structure. Quest seeks this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. I have considered the balance between the competing interests at play. This transaction is unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group, a group that includes Southern Star and Dana.

[173] The structure also allows Quest to continue its operations in partnership with Primacorp, a result that will avoid the devastating social and economic consequences that will be visited upon the stakeholders if this transaction is not approved. Ironically, the continuation of Quest's operations will also benefit Southern Star in the future through the continued payment of rent for two of the Residences. Other potential benefits may also arise if Southern Star and Quest are later able to come to terms once the pandemic has receded and students return to campus.

THE PRIMACORP TRANSACTION

[174] Quest applies for the granting of the RVO in favour of Primacorp pursuant to s. 36(1) of the *CCAA*.

[175] Section 36(1) of the CCAA allows the court to authorize the sale of a debtor company's assets out of the ordinary course of business. Section 36(3) of the *CCAA* lists the relevant non-exhaustive factors to be considered:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[176] The well-known considerations identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are consistent with and overlap many of the s. 36(3) factors: see *Veris Gold Corp. (Re)*, 2015 BCSC 1204 at para. 25, referring to various authorities such as *Canwest Publishing Inc. (Re)*, 2010 ONSC 2870 at para. 13. Those considerations include: (i) whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained; and, (iv) whether there has been any unfairness in the sales process.

[177] More generally, in analyzing whether a transaction should be approved, taking into consideration the s. 36(3) and *Soundair* factors, a court is to consider the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable: *Veris Gold* at para. 23.

[178] I conclude that the s. 36(3) and *Soundair* factors all favour approving the Primacorp transaction and granting the RVO. Specifically:

a) The process leading to the Primacorp transaction has been lengthy and exhaustive. The Monitor has overseen that entire process;

b) Quest ‘s Restructuring committee and its Board of Governors have sought and obtained professional advice throughout the *CCAA* process toward finding a suitable academic partner and/or a purchaser/developer for Quest’s lands;

c) No stakeholder objects to the proposition that the sales process was conducted in an appropriate, fair and reasonable manner;

d) The Primacorp transaction will see the repayment of Quest’s secured creditors, now totalling approximately $42.2 million in what has been an increasingly pressurized environment to do so after long standing defaults;

e) Since August 7, 2020, the Interim Lender and VF, Quest’s major secured creditors, have been kept apprised of developments. They both support the Primacorp transaction. In addition, other secured creditors have been involved throughout these proceedings and support the transaction;

f) There has been significant community and stakeholder involvement throughout the sales process;

g) The Primacorp transaction will ensure that Quest continues as a going concern, by continuing operations as a post-secondary institution in Squamish. This will result in continuing benefits to the broad stakeholder group. This includes faculty, staff, students, secured and unsecured creditors, suppliers, landlords and the community generally;

h) The broader stakeholder interests must be balanced against those who will be negatively affected by the transaction, such as Southern Star under the Disclaimers, although no viable offer has emerged that does not include the Disclaimers;

i) Quest's Board of Governors have exercised their business judgment and determined that the Primacorp transaction is the best option to fulfil the goals of Quest's restructuring;

j) The Primacorp transaction will fund a Plan for unsecured creditors;

k) The Primacorp transaction provides Quest with significant benefits in terms of its future operations. These include the $20 million working capital facility and Primacorp support for Quest's marketing, recruiting and operations to allow it to continue as a post-secondary institution into the future;

l) No other or better offer or proposal has emerged that can be considered superior to the Primacorp transaction;

m) The Monitor is satisfied that the consideration to be received from Primacorp is reasonable and fair, taking into account the market value of the assets and the other unique factors of these proceedings;

n) The Monitor is of the view that this transaction will yield a greater benefit to the stakeholders than might be achieved in a liquidation or bankruptcy;

o) Any delay of approval is likely to lead to ruinous consequences after December 2020, when Quest will be out of funds and the Interim Lender will be in a position to commence a receivership and liquidation of Quest's assets; and

p) Simply, Quest has run out of time to find a restructuring solution and the Primacorp transaction presently stands as the *only* viable option to avoid the devastating social and economic consequences to its stakeholders if a liquidation results.

CONCLUSIONS

[179] I grant the RVO as sought by Quest, and as supported by the Monitor.

[180] The Primacorp transaction is the best option available that maximizes recovery for Quest’s creditors and preserves Quest’s university operations. Allowing Quest to continue as a university will benefit all stakeholders, including Quest’s current and former employees, current and future students of Quest and the community generally. The RVO structure is an appropriate means to accomplish this result in these unique and exceptional circumstances.

“Fitzpatrick J.”

TAB 24

CITATION: Re Crystallex International Corporation, 2012 ONSC 2125
COURT FILE NO.: CV-11-9532-00CL
DATE: 20120416

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

IN MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, 1985, c.C-36 AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CRYSTALLEX INTERNATIONAL CORPORATION

BEFORE: Newbould J.

COUNSEL: Markus Koehnen, Andrew J.F. Kent and Jeffrey Levine, for Crystallex International Corporation

Richard B. Swan, S. Richard Orzy and Emrys Davis, for Computershare Trust Company of Canada

David R. Byers and Maria Konyukhova, for Ernst & Young Inc., Monitor

Shayne Kukulowicz, for Tenor Special Situations Fund LP

John T. Porter, for Juan Antonio Reyes

Robert Frank, for Forbes & Manhattan Inc. and Aberdeen International Inc.

DATE HEARD: April 5, 2012

ENDORSEMENT

[1] Crystallex moves for four orders, the first being an order approving DIP financing pursuant to a credit agreement between Crystallex and Tenor Special Situation I, LLC ("Tenor"), the second being an order extending the stay referred to in paragraph 16 of the Initial Order dated

December 23, 2011 until July 16, 2012 or such further date as may be ordered, the third being an order approving a Management Incentive Plan (“MIP”) and a Retention Advance Agreement in favour of Robert Fung and the fourth being an order to approve the actions of the Monitor referred to in the second and third reports of the Monitor.

[2] The noteholders of Crystallex[1] oppose the Tenor DIP facility. They propose a DIP loan which they would make for a smaller amount and for a shorter term than the Tenor DIP facility. They also oppose the MIP. In order to preserve any appeal rights they may have and may want to assert, they do not consent to an order approving the actions of the Monitor in the second and third reports, but take no position in opposition to the order sought.

[3] A shareholder, Mr. J.A. Reyes appeared on the motion to support the Tenor DIP facility and in principle the MIP, but has some concerns regarding the terms of the MIP.

[4] Forbes & Manhattan Inc. and Aberdeen International Inc., creditors owed approximately $2.5 million by Crystallex, oppose the Tenor DIP facility and the MIP.

Background to the Financing

[5] The history of the business of Crystallex and its mining project in Venezuela has been the subject of prior decisions in cases brought by the Noteholders. The evidence on the record before me indicates in summary as follows.

[6] The principal asset of Crystallex was its right to develop the Las Cristinas gold project in Venezuela. Las Cristinas is one of the largest undeveloped gold deposits in the world containing measured and indicated gold resources of approximately 20.76 million ounces.

[7] In September 2002 Crystallex obtained the right to mine the Las Cristinas project through a Mining Operation Contract (the “MOC”) with the Corporacion Venezolana de Guayana (the “CVG”), a state-owned Venezuelan corporation. Crystallex complied with all of its obligations

[1] The noteholders in question are hedge funds that represent approximately 77% of the outstanding notes. It is they who have caused Computershare to take action on their behalf in the prior actions against Crystallex and in this CCAA proceeding.

under the MOC. Neither the CVG nor the Government of Venezuela raised any material concerns about lack of compliance. The CVG confirmed on several occasions that the MOC was in good standing and that Crystallex was in compliance with it.

[8] The Ministry of the Environment advised Crystallex in writing in April 2007 that Crystallex had completed all steps necessary to obtain the required environmental permit. Crystallex was shown a draft of the permit and was told that it would obtain the permit as soon as it had paid certain stamp duties and posted an insurance bond. Crystallex paid the duties, negotiated the bond with the Ministry and posted the bond.

[9] On February 3, 2011, despite confirming on several occasions that Crystallex's right to mine the Las Cristinas property continued unchallenged, CVG purported to "unilaterally rescind" the MOC.

[10] CVG rationalized its termination of the contract for reasons of "expediency and convenience" and because Crystallex had allegedly "ceased activities for over a year" on the project. Crystallex did not cease activities. It was maintaining the mining site in a shovel-ready state and was awaiting receipt of an environmental permit. Because of Venezuela's refusal to allow Crystallex to exploit Las Cristinas, Crystallex became unable to pay its debts as they became due effective December 23, 2011.

[11] Crystallex has a number of liabilities, the most of significant of which is a liability of approximately $100 million in senior unsecured notes that were issued pursuant to a Trust Indenture dated December 23, 2004. The notes were due on December 23, 2011. In addition, Crystallex has other liabilities of approximately CAD$1.2 million and approximately US$8 million.

[12] The principal asset of Crystallex is its arbitration claim of US$3.4 billion against Venezuela. In addition, Crystallex has mining equipment with a book value of approximately $10.1 million and cash of approximately $2 million.

[13] Crystallex asserts that the insolvency in which it finds itself is not attributable to poor business judgment by Crystallex but to the illegal conduct of the Venezuelan government in refusing to let Crystallex develop Las Cristina, even though Crystallex had the undisputed contractual right to do so.

Arbitration proceedings

[14] On February 16, 2011 Crystallex filed a Request for Arbitration with the International Centre for the Settlement of Investment Disputes ("ICSID") against Venezuela pursuant to a Bilateral Investment Treaty between Canada and Venezuela. ICSID is a mechanism through which private investors can seek legal redress against a foreign government for conduct that might be otherwise immune from suit. In the arbitration, Crystallex seeks compensation of $3.4 billion plus interest as full compensation for the loss of its investment.

[15] The Arbitration Tribunal held its first procedural meeting on December 1, 2011 in Washington, DC. At that hearing, the Tribunal established Washington, DC as the seat of the arbitration proceeding, and established a timetable for the arbitration. Pursuant to the timetable, Crystallex delivered its written case on February 10, 2012. Crystallex's written case comprises fourteen volumes of detailed witness statements, expert's reports, exhibits, law and argument. Its memorial summarizing the evidence, law and argument extends to 226 pages. Venezuela is required to respond to Crystallex's case by August 31, 2012. The hearing of the arbitration is scheduled for two weeks beginning on November 11, 2013.

[16] The valuation evidence Crystallex submitted with its ICSID case claims damages of $3.4 billion plus interest. While the result of the arbitration is unknown, if it is successful, and the award is collected, there will be far more available than necessary to pay the outstanding debts of Crystallex. It is also clear that any meaningful recovery for the creditors and possibly shareholders will require some success in the arbitration, either by a collectible award or a settlement.

DIP financing selection process

[17] In accordance with paragraph 12 of the Initial Order, Crystallex, with the assistance of its counsel and its financial advisor, commenced a process to seek DIP financing of $35 million with a term of December 13, 2014.

[18] With the approval of the Monitor, Crystallex hired a financial advisor, Skatoff & Company, LLC based in New York City. Mr. Skatoff is an independent financial advisory firm focused on debt advisory services, financial restructuring advisory services, financing advisory services and M&A services.

[19] Crystallex, in consultation with Mr. Skatoff and on its recommendation, prepared a set of bid procedures to govern the solicitation of bids to provide DIP financing to Crystallex. The bid procedures were approved by the Monitor. The bid procedures are referred to in some detail in my endorsement of January 25, 2012. They included a provision whereby the DIP lender could obtain a "back-end entitlement" of up to 49% of the arbitration proceeds.

[20] The bid procedures provided that Crystallex would only consider bids from qualified bidders. A qualified bidder was one who, among other things, complied with certain participation requirements including the submission of a participation package.

[21] As a result of the DIP financing auction, a small number of qualified bidders ultimately submitted proposals for the DIP financing. Among the bidders were the three hedge funds that hold approximately 77% of Crystallex's senior unsecured notes.

[22] Ultimately Mr. Skatoff recommended, and the board of Crystallex agreed, to accept the terms of the Tenor DIP financing now before the court for approval.

Proposed Tenor DIP financing

[23] The Tenor DIP facility contains the following material financial terms:

(a) Tenor will advance $36 million to Crystallex due and payable on December 31, 2016. This period for the loan is based on Crystallex's arbitration counsel's assessment of the likely timing of a decision from the arbitral tribunal and collection of the award.

(b) The advances will be in four tranches, being $9 million upon execution of the loan documentation and approval of the facility by court order in Ontario, the second being $12 million upon any appeal of the Ontario court order approving the facility being dismissed and upon a U.S court order approving the facility, the third being $10 million when Crystallex has less than $2.5 million in cash and the fourth being $5 million when Crystallex again has less than $2.5 million in cash.

(c) The loans are to be used to (i) repay an interim bridge loan of $3.25 million advanced by Tenor with court approval of January 20, 2012 and payable on April 16, 2012, (ii) fees and expenses in connection with the facility, (iii) general corporate expenses of Crystallex including expenses of the restructuring proceedings and of the arbitration in accordance with cash flow statements and budgets of Crystallex approved by Tenor from time to time.

(d) Crystallex will pay Tenor a $1 million commitment fee.

(e) $35 million of the loan amount will bear PIK interest (payment in kind, meaning it is capitalized and payable only upon maturity of the loan or upon receipt of the proceeds of the arbitration) at the rate of 10% per annum compounded semi-annually.

(f) Tenor will receive additional compensation equal to 35% of the net proceeds of any arbitral award or settlement, conditional upon the second tranche of the loan being advanced. Net proceeds of the award or settlement is defined as the amount remaining after payment of principal and interest on the DIP loan, taxes and proven and allowed unsecured claims against Crystallex, including the noteholders, the latter of which will have a special charge for the unsecured amounts owing. Alternatively, Tenor can convert the right to additional compensation to 35% of the common shares of Crystallex. This conversion right is apparently driven by tax considerations.

[24] The Tenor DIP facility also provides for the governance of Crystallex to be changed to give Tenor a substantial say in the governance of Crystallex. More particularly:

(a) Crystallex shall have a reduced five person board of directors, being two current Crystallex directors, two nominees of Tenor and an independent director selected by agreement of Crystallex and Tenor.

(b) The independent director shall be chair of the board of directors and shall not have a second-casting or tie-breaking vote.

(c) The independent director shall be appointed a special managing director and shall have all the powers of the board of directors to (i) the conduct of the reorganization proceedings in Canada and in the U.S. and the efforts of Crystallex to reorganize the pre-filing claims of the unsecured creditors, (ii) any matters relating to the rights of Crystallex and Tenor as against the other under the facility, (iii) the administration of the MIP to the extent not otherwise delegated to the bonus pool committee under the MIP, and (iv) to retain any advisor in respect of these matters. The special manager shall first consult with a non-board advisory panel, consisting of the three Crystallex directors who will step down from the board, and consider in good faith their recommendations.

(d) With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval. If the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation.

[25] The Tenor DIP facility contains proscribed rights of Tenor in the event of default. Tenor may seize and sell assets other than the arbitration proceeding (i.e. any cash and unsold mining

equipment). It may not sell the arbitration claim. If there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. If such application were not granted, Tenor would be entitled to exercise the rights and remedies of a secured creditor pursuant to an order, the loan documentation or otherwise at law.

Proposed Noteholders DIP Loan and Plan

[26] The noteholders propose a DIP loan of $10 million with a simple interest rate of 1% repayable on October 15, 2012. This was essentially the same as the interim bridge loan of $10 million with simple interest of 1% proposed by the noteholders that would have been repaid on April 16, 2012 that was not accepted by Crystallex. It is quite clear that the interest rate is far below market in the circumstances of Crystallex, and it is referred to in the noteholders factum as "exceptionally favourable".

[27] During the process to find a DIP lender satisfactory to Crystallex and its advisors, the noteholders were asked to increase their proposed loan to $35 million but they refused. However, in his affidavit Mr. Mattoni on behalf of the noteholders stated that the noteholders would in the future be prepared under certain circumstances, if required by the court, to advance a DIP loan on the same terms as the Tenor DIP facility. He stated that the noteholders would do so in the event that prior to October 1, 2012, the court orders that such long-term financing is appropriate and necessary. The noteholders would reserve their ability as creditors to continue to oppose the need for such a loan and any stay extensions or attempts to secure such long-term financing outside of a plan of compromise. The $10 million which they provided in interim financing would be repaid from this financing such that the net effect of the financing would be the same as that of the Tenor DIP facility. During argument on this motion, Mr. Swan said that the noteholders were not prepared to agree to such a $35 million facility at this time but only at some future time as the $10 million facility they now proposed became due.

[28] The noteholders have also now proposed a restructuring plan, said to be in response to the Tenor DIP and the MIP. This was first proposed by Mr. Mattoni in his affidavit of March 27, 2012 as a proposal of the noteholders. At that time, he did not have any internal authority from

the QVT fund of which he is the investment manager, or from any of the other noteholders, to make such proposal. This was shored up as indicated in his further affidavit of April 4, 2012 served just before the hearing of this motion. The noteholders do not ask for approval of this plan on this motion, but put it forward as indicating a good faith intention to bargain for a plan. The noteholders plan would:

a) provide $10 million at 1% interest in a single-draw to meet Crystallex’s funding needs over the next several months while a plan is negotiated;

b) provide $35 million to the Company in a straight exchange for 22.9% of Crystallex's equity;

c) exchange all outstanding debt for equity;

d) secure approximately 14% of the remaining equity for existing shareholders; and

e) provide incentives to management at a lesser level than the MIP. It would be up to the post-emergence board to ensure that management is properly incentivized, which could involve other compensation as well.

Management Incentive Plan

[29] In addition to approval of the DIP, Crystallex seeks approval of a Management Incentive Plan (“MIP”) for certain of its key employees. The fundamental terms of the MIP are as follows:

(a) An amount equal to up to 10% of the first $700 million in net proceeds of the arbitration award and an amount equal to up to 2% of the net proceeds in excess of $700 million will be reserved as a retention pool for key management employees.

(b) The amount to be retained in this pool is the amount remaining after payment of the outstanding principal and interest on the DIP loan, outstanding operating and professional expenses, the unpaid claims of noteholders and other stayed unsecured creditors, together with post-filing interest and all taxes payable by the company on the award.

(c) The size of the pool shall not exceed 10% of the net proceeds of the arbitral award or one quarter of the amount that is available to shareholders of Crystallex after satisfaction of any additional compensation owing to Tenor under the loan agreement.

(d) A compensation committee consisting of three persons who are currently independent directors of Crystallex and who are expected to retire from the board in accordance with the governance provisions of the Tenor DIP facility, will determine the retention payment paid to each beneficiary of the MIP. The compensation committee will be entitled to distribute as much or as little of the retention pool as they see fit. Amounts remaining unpaid from the retention pool will be returned to Crystallex.

[30] Crystallex also proposes that there be a MIP charge to secure the payments, the charge to be subordinate to the Administration Charge, the DIP Charge, the Directors' Charge and the Pre-filing Unsecured Creditors Charge.

[31] Also sought for approval is a retention agreement for Mr. Fung which provides that at the end of each calendar quarter during 2012 and 2013 the board of Crystallex will pay a retention advance of $125,000 per quarter to Mr. Fung. The making of each payment will be at the discretion of the board but only to the extent that he remains properly engaged in the arbitration. Those payments are to be treated as if they were pre-payments of any payments that would otherwise be awarded to Mr. Fung from the retention pool under the MIP and therefore reduce any such amount he may receive from the retention pool.

DIP loan approval analysis

[32] Section 11.2 of the CCAA provides that a court may provide security in favour of an interim or DIP lender who agrees to lend to the debtor company having regard to its cash-flow statement. Section 11.2 (4) provides:

(4) In deciding whether to make an order, the court is to consider, among other things,

(*a*) the period during which the company is expected to be subject to proceedings under this Act;

(*b*) how the company's business and financial affairs are to be managed during the proceedings;

(*c*) whether the company's management has the confidence of its major creditors;

(*d*) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(*e*) the nature and value of the company's property;

(*f*) whether any creditor would be materially prejudiced as a result of the security or charge; and

(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

[33] Crystallex relies on the business judgment rule to support the decision of its board of directors to accept the Tenor DIP facility. It is clear that the business judgment rule can apply to a debtor in CCAA proceedings. In *Re Stelco*, (2009), 9 C.B.R. (5^{th}) 135 (Ont. C.A.), Blair J.A. stated in that CCAA proceeding:

> 65. …It is well-established that judges supervising restructuring proceedings - and courts in general - will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples, supra*, at para. 67:
>
> > Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

[34] The noteholders point to *Kerr v. Danier Leather Inc*, [2007] 3 S.C.R. 331 per Binnie J. at para. 54 in which he stated that the business judgment rule could not be used to qualify or undermine the duty of disclosure required by the *Securities Act* and *Bennett v. Bennett Environmental Inc.* 2009 ONCA 198 per Lang. J.A. in which she held that whether a director could be indemnified depended on the application of section 123(4) of the CBCA and not the business judgment rule.

[35] I accept that in considering whether security under a DIP loan should be ordered, a court cannot ignore the factors directed to be considered in section 11.2 (4) of the CCAA and could not

order such security if a consideration of those factors led to an opposite conclusion. But in my view those factors are not the only factors that can be considered, as section 11.2(4) directs a court to consider the listed factors “among other things”. One of the considerations that in my view can be taken into account is the exercise or lack thereof of business judgment by the board of directors of a debtor corporation in considering DIP financing.

(i) Consideration of the Tenor DIP facility

[36] In this case, the Crystallex board took legal advice from its solicitors McMillan LLP and financial advice from Mr. Skatoff. I am satisfied that they carefully considered the relevant matters leading to the decision to accept the terms of the Tenor DIP financing, including giving consideration to the noteholders’ proposed DIP financing of $10 million to October, 2012, and that they acted on an informed basis and in good faith with a view to the best interests of Crystallex and its stakeholders. See the affidavits of Mr. Fung at paras. 52 to 67 and the reply affidavit of Mr. van’t Hof at paras. 9 to 12. That being said, I must consider the contentions of the parties and the factors as set out in section 11.2 (4).

[37] The noteholders have made a number of objections to the Tenor DIP financing.

[38] They contend that Crystallex should have sought sufficient financing to pay the noteholders in full, as was attempted prior to the CCAA filing. The evidence indicates, however, that Mr. Skatoff attempted to do so with the market but the message he received back consistently was that the market had no interest in paying out existing noteholders at 100 cents on the dollar in a context where the notes were trading at a significant discount to par. Mr. Mattoni himself said on cross-examination that he did not believe it would be possible to raise sufficient money on the market to pay out the noteholders, as did the noteholder’s financial expert witness Mr. Glenn Sauntry.

[39] Mr. Mattoni in his affidavit states that the Tenor DIP facility was a pre-ordained coronation rather than the result of a competitive bidding process. There is no evidentiary basis for this suggestion. It is clear from the evidence of Mr. Skatoff, Mr. Fung and Mr. van't Hof and from the Monitor's report that there was a robust competitive bidding process and that full consideration right up to the last minute was given to other bidders. The Monitor stated it its report that from its observation of the process, it saw no evidence that Tenor was afforded preferential treatment over other participants in the process. It is also clear that the noteholders' $10 million bid was considered by the board of Crystallex and, based on advice from its advisors, not accepted. Thus any complaint from the noteholders on this score could only be that the Tenor bid was higher than market pricing for the facility. They had no such evidence and on cross-examination their financial expert Mr. Sauntry acknowledged that he could not say that the Tenor bid was not reflective of market pricing.

[40] The noteholders also complain that Mr. Skatoff did not undertake a valuation of Crystallex. The response of Crystallex is that it was not Mr. Skatoff's job to do that. In light of the fact that the main asset of Crystallex is the arbitration claim, Mr. Skatoff in my view would be in a poor position to value Crystallex.

[41] Mr. Sauntry in his report attempted to value the arbitration claim in different ways. He is not a lawyer and has no knowledge of the treaties involved or of the merits of the arbitration claim. He made assumptions in his cash flow analysis that, based on the reply expert report of Mr. Dellepiane, which I have no reason to doubt as he was intimately involved in the preparation of the arbitration claim, indicate Mr. Sauntry's lack of knowledge of the basis of the claim. Regarding Mr. Sauntry's analysis in (i) implying a value to the arbitration claim from an analysis of the Tenor DIP proposal and stating that in substance that proposal is a sale of a percentage of Crystallex's assets to Tenor and (ii) using the market value of Crystallex's securities as a proxy for enterprise value, I accept the reply affidavit of Mr. Skatoff, and in particular paragraphs 34 to 41, as reason to doubt Mr. Sauntry's analysis. As well, Mr. Sauntry's evidence on cross-examination, and in particular that referred to in paragraphs 8 to 12 of the Summary of Key Points From Cross-examinations, indicates little reliability should be placed on Mr. Sauntry's evidence.

[42] In any event, in light of the lack of evidence from the noteholders that the Tenor bid was not above market, the contention that Mr. Skatoff did not undertake a valuation of Crystallex or of the arbitration claim is of little moment.

[43] The noteholders also contend that whereas the bid process spelled out terms that must not be contained in a bid and provided that some terms were to be discouraged, the Tenor bid in the end contained some such terms. In those circumstances, the noteholders contend that Crystallex should have re-canvassed the market. Mr. Skatoff's evidence is that other bidders presented loan terms that would have resulted in similarly extensive changes to the loan document that accompanied the bid packages. The world of restructuring is not a perfect world. A company seeking DIP financing can tell the market what it wants, but cannot dictate its terms if the market tells it otherwise. The alternative is to walk away from the market. Regarding the changes sought by the market, the Monitor in its report states:

> 50. During the negotiations, all bidders requested amendments to the template version of the loan agreement posted on the Monitor's website as part of the CCAA Financing Procedures. The Monitor is of the view that such requests are typical in any bidding or investment raising process. The Monitor observed that all parties were provided with the template loan agreement and, as is common in processes such as the CCAA Financing Procedures, the final forms of the selected commitment letter and senior credit agreement deviate from the template agreement.

[44] The noteholders take a fundamental objection to the Tenor DIP facility on the basis that it is inconsistent with the purposes of the CCAA and case law dealing with DIP loans. The noteholders say that it is not interim financing but a forced restructuring plan prejudicial to them and that it should not proceed without a vote as required by the CCAA for a plan of arrangement or compromise.

[45] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, (2008), 46 C.B.R. (5th) 7 (B.C.C.A.) is authority for the proposition that a stay under the CCAA should not be continued if the debtor company does not intend to propose a compromise or arrangement to its creditors, and DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. In that

case, the debtor wanted to obtain financing to complete the construction of a golf course development without proposing an arrangement or compromise with its creditors.

[46] The noteholders seize upon a statement made by Mr. Fung in his affidavit filed on the initial application leading to the Initial Order in which he said:

> Crystallex strongly desires to pursue the arbitration and have stayed all claims against it until the arbitration has been settled or Crystallex has realized on an arbitration award, at which point Crystallex expects that all creditors would be paid in full to the extent of their proven claims.

[47] While there is no doubt that Mr. Fung made that statement, I think it needs to be considered in light of the reality agreed by the parties that the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration. This would be the case whether a plan of arrangement could be agreed or not. Also Mr. Mattoni agreed on cross-examination that Crystallex's goal of pursuing the arbitration and using the proceeds to pay creditors in full did not prevent Crystallex from giving creditors some additional benefit in a plan of arrangement.

[48] Moreover, often statements are made in CCAA proceedings about the intention of a party that later change. Mr. Koehnen made clear in argument that Crystallex has every intention to attempt to negotiate a plan of arrangement with the noteholders and that this has already been going on now on a without prejudice basis. He said the purpose of the stay to July 16, 2012 is to negotiate a compromise with the noteholders during that time period. I accept that statement. The situation is not the same as in *Cliffs Over Maple Bay*.

[49] Is the Tenor DIP facility a plan of arrangement or compromise requiring a vote? In my view it is not.

[50] A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility.

The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.

[51] I note that in this case the practical exercise of the rights of the noteholders is very problematical because of issues raised in Mr. Fung's confidential affidavit no. 2.

[52] The noteholders contend that giving Tenor 35% of the arbitration proceedings will take away from Crystallex a substantial amount of equity making a compromise more difficult and less available for the unsecured creditors.

[53] In *Re Calpine Canada Energy Inc*. (2007) 35 C.B.R. (5th) 1 (Alta. Q.B.), leave to appeal denied (2007) 35 C.B.R. (5th) 27, it was contended that a settlement of several claims in a complex cross-border restructuring constituted a plan of arrangement or compromise and thus required a vote under the CCAA by the creditors affected. It was contended that the settlement left less assets available for the Canadian unsecured creditors. In rejecting this contention, Romaine J. stated the following:

> 12. The primary objection is that the GSA [global settlement agreement] amounts to a plan of arrangement and, therefore, requires a vote by the Canadian creditors. The Opposing Creditors support their submissions by isolating particular elements of the GSA and characterizing them as either a compromise of their rights or claims or as examples of imprudent concessions made by the CCAA Debtors in the negotiation of the GSA. These specific objections will be analyzed in the next part of these reasons, but, taken together, they fail to establish that the GSA is a compromise of the rights of the Opposing Creditors for two major reasons:
>
> > (b) the Opposing Creditors blur the distinction between compromises validly reached among the parties to the GSA and the effect of those compromises on creditors who are not parties to the GSA. … If rights to a judicial determination of an outstanding issue have not been terminated by the GSA, which instead provides a mechanism for their efficient and timely resolution, those rights are not compromised.

> 19 … While settlements made in the course of insolvency proceedings may, in practical terms, result in a diminution of the pool of assets remaining for division, this is not equivalent to a compromise of substantive rights.
>
> 51. The GSA is not linked to or subject to a plan of arrangement. I have found that it does not compromise the rights of creditors that are not parties to it or have not consented to it, and it certainly does not have the effect of unilaterally depriving creditors of contractual rights without their participation in the GSA.
>
> 55. I am satisfied that the GSA is not a plan of compromise or arrangement with creditors. Under its terms, as agreed among the CCAA Debtors, the U.S. Debtors and the ULC1 Trustee, certain claims of those participating parties are compromised and settled by agreement. Claims of creditors who are not parties to the GSA either will be paid in full (and thus not compromised) as a result of the operation of the GSA, or will continue as claims against the same CCAA Debtor entity as had been claimed previously.

[54] In refusing leave to appeal from the decision of Romaine J., O'Brien J.A. stated:

> 34. … The GSA does not change its status as a creditor of those companies, nor does it bar the applicant from any existing claims against those companies.
>
> 35. … the fact that the GSA impacts upon the assets of the debtor companies, against which the applicant may ultimately have a claim for any shortfall experienced by it, is a common feature of any settlement agreement and as earlier explained, does not automatically result in a vote by the creditors. The further fact that one of the affected assets of the debtor companies is a cause of action, or perhaps, more correctly, a possible cause of action, does not abrogate the rights of a creditor albeit there may be less monies to be realized at the end of the day.

[55] While this case is not binding on me, it is persuasive and makes sense. It is also consistent with authorities in Ontario that a sale of assets or a settlement in a CCAA before a plan of compromise is put forward may be authorized even if there will be insufficient assets to retire the creditor claims in full. See *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299.

[56] In this case, it cannot be said that there will be insufficient assets coming from the arbitration to repay all of the outstanding notes in full, which at present is approximately $115 million. Even the valuation of Mr. Sauntry, which I do not accept as reliable, indicates far more than that as a possible outcome of the arbitration. While the outcome of the claim cannot be

known at this stage, it is a claim for $3.4 billion dollars in circumstances in which Crystallex spent approximately $500 million on the development of the mine.

[57] The fundamental purpose of the CCAA is well established, and indicates that flexibility is required in dealing with any particular case. In *A.G. Can. v. A.G. Que. (sub. nom. Reference re Companies' Creditors Arrangement Act),* [1934] S.C.R. 659, the following was stated:

> ... the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[58] Since 1934, of course, there has been wide experience in dealing with the CCAA, and it has been an evolving experience. In *Re Canadian Red Cross,* Blair J. (as he then was) approved the sale of the assets of the debtor that would result in the estate having less than sufficient money to pay all of its creditors in full, and before a plan of compromise was put forward. He discussed the flexibility involved in these terms:

> 45. It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. ... The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J. said in *Dylex, supra* (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Re Lehndorff General Partner* (1993), 17 C.B.R. (3d) 24, at p. 31, which I adopt:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[59] In that case, Blair J. considered the factors in *Soundair* in deciding whether to approve of the sale, being whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; to consider the interests of the parties, to consider the efficacy and integrity of the process by which offers are obtained and to consider whether there has been unfairness in the working out of the process. Those factors are consistent with the factors to be taken into account in considering whether security for a DIP loan should be approved, and as the Tenor DIP facility involves a grant of a financial interest in part of the assets of Crystallex, being a percentage of the arbitration award, it seems to me that they can be looked at in this case.

[60] It was contended by the noteholders that the size of a loan of $36 million, an amount calculated to complete and collect the arbitration, was not in accordance with the purposes of a DIP loan as it would take Crystallex beyond what is required before any reorganization. However this complaint regarding the size of the loan was not strenuously pursued in argument, no doubt because of the new position of the noteholders that it would fund that amount on the terms of the Tenor DIP loan if later required and because of the provision in the proposed plan of arrangement put forward by the noteholders that it would provide $36 million in funding in return for an equity stake in Crystallex. There seems no doubt that the parties agree that at least $36 million is required to pursue the arbitration.

[61] The noteholders also contend that the term of the loan by Tenor is far too long and that it indicates an attempt by Crystallex to do an end run around the need to propose a plan of arrangement as the term would extend beyond the date of an anticipated award. I have already dealt with the issue of Crystallex proposing a plan of arrangement. The noteholders contend that the DIP loan, at least initially, should not extend beyond October, 2012 as by then a plan should have been negotiated. However, both sides agree that the only way that any substantial cash will be available to Crystallex or its creditors will be from the arbitration and that it will be necessary to prosecute the arbitration long after October, 2012. The proposed plan of the noteholders recognizes this as it proposes a $36 million injection for the purposes of prosecuting the arbitration. The $36 million figure is based on a projection of expenditures going far beyond 2012. That is, both sides agree that it will be necessary to have financing for the arbitration that will continue after October, 2012. The term of the Tenor DIP loan as to when the loan becomes due in itself is not an impediment to a restructuring.

[62] In my view, the term of the loan is not the substantive issue, so long as Crystallex intends to negotiate if possible an acceptable plan of arrangement or compromise, which it has indicated it intends to do. One of the factors required to be considered under section 11.2(4) is the time during which Crystallex is expected to be subject to the CCAA proceedings. Like many cases, it is not clear when these proceedings may be over. However, as the $36 million financing is going to be required whether Crystallex is out from under the CCAA in a short or longer period, and as the expenditures are to last for a few years, this factor of the time during which Crystallex is expected to be subject to the CCAA proceeding is not a determinative factor.

[63] The noteholders also contend that Tenor has been given control over Crystallex and the restructuring process by reason of the changes in the corporate governance required by the Tenor DIP facility. There is no doubt that Tenor has been given substantial governance rights, including the right to name two of the five directors and the right to agree on who the independent director shall be. An issue is whether the governance provisions are too intrusive for a DIP loan, which according to case law relied on by the noteholders should not be excessive or inappropriate. I note that there is no prohibition in the CCAA against the board of directors changing at the hands

of the debtor. There is a provision allowing the court to remove directors, which I shall later discuss.

[64] Any DIP lender wants to obtain as much control as possible over the affairs of the debtor during the term of the DIP financing, and terms are often imposed to that end. In this case, given the extreme hostility of the noteholders to the board and management of Crystallex over its actions over the few years prior to the arbitration being commenced, it is not surprising that Tenor has demanded what it has. The fact that Tenor at the last minute changed the governance terms that it was prepared to live with, and that the Crystallex board was not happy with the change, does not in itself mean that those terms should not be approved.

[65] To put up the financing and have it subject to change by the noteholders or Crystallex would make no economic sense to Tenor or to any other DIP lender in the circumstances of this case. Like the noteholders and shareholders, Tenor will only be able to have its loan repaid from the proceeds of the arbitration, and it has bargained for what it perceives to be necessary protection for that. I agree with the noteholders that the CCAA is not about protecting new DIP lenders. However, the issue is whether the protections negotiated in order to obtain the DIP loan from Tenor are reasonable or excessive.

[66] Even if there were a prospect of money being raised by Crystallex in some fashion to pay out the noteholders prior to an arbitration award or settlement, which on the evidence I have referred to is not the case, including the issues referred to in Mr. Fung's confidential affidavit no. 2, and the opinion of Freshfields, as a practical matter this is not a case in which the noteholders have any realistic steps to try to cash out now before the arbitration claim is dealt with.[2] A restructuring under the CCAA, or any bankruptcy of Crystallex, is not going to change that. The market cap of Crystallex is far too small to repay the noteholders, even if they were given 100% of the equity of Crystallex.

[67] The terms of the Tenor Dip facility give Tenor no right to conduct the reorganization proceedings in Canada and in the U.S. or interfere with the efforts of Crystallex to reorganize the

[2] The fact that the noteholders have an opinion questioning some of what Freshfields says does not change that.

pre-filing claims of the unsecured creditors. That will be in the hands of the independent/special managing director who will be required to consult with the non-board advisory panel consisting of the three directors of Crystallex who will step down from the board. With respect to matters that may not at law be delegable to the special managing director, he will be required to obtain board approval and if the Tenor nominees use their votes to block that approval, Tenor will forfeit its 35% additional compensation. Tenor is obviously not going to want to put itself in that position.

[68] Tenor recognizes that it cannot conduct the arbitration proceeding. Under the terms of the Tenor DIP facility, if there is a default before any arbitration award, Tenor would have the right to apply to court to have the Monitor or a Canadian receiver and manager appointed to take control of the arbitration proceedings. Whether it would make such an application is a question mark, and likely would depend on whether Crystallex were put into bankruptcy. There would likely be no other reason for wanting someone other than the Crystallex board to have control over the conduct of the arbitration.

[69] As a practical matter, the conduct of the arbitration will no doubt be in the hands of Freshfields who have the knowledge and expertise. Mr. Mattoni in his affidavit filed on behalf of the noteholders agreed that the arbitration is really in the hands of litigation counsel. As well, the management personnel of Crystallex that have been involved in the claim in presenting evidence and instructing counsel regarding the evidentiary issues are going to have to continue to be involved in order to prosecute the claim. Their failure to do so would compromise the claim.

[70] If any director, whether nominees of Crystallex or of Tenor, is unreasonably impairing the possibility of a viable compromise, the court under s. 11.5(1) of the CCAA has the power to remove such director. That section provides:

> 11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances.

[71] The noteholders point out that section 8.1(t) of the DIP facility makes it an event of default of the DIP loan if a Tenor nominee director is removed from the board without the consent of Tenor except "by reason of misconduct" of the director, and assert that "misconduct" is a considerably different standard from "unreasonably impairing" in section 11.5(1) of the CCAA, thus restricting a court's ability to remove a director for unreasonably impairing a compromise or arrangement. Of course, any application under the section would turn on the particular facts, but it would certainly be arguable that if a director were unreasonably impairing a compromise or arrangement, that could constitute misconduct, particularly as the purpose of a CCAA proceeding is to encourage a consensual compromise or arrangement.

[72] One of the factors required to be considered under section 11.2(4) is whether Crystallex's management has the confidence of its major creditors. There is no doubt from the prior litigation that the noteholders expressed extreme displeasure at the steps taken by its board and management to try to come to some accommodation with Venezuela to maintain the rights to the Las Cristinas mine project. The noteholders maintained that Crystallex should stop spending money and commence the arbitration. That of course is now water under the bridge and the only business of Crystallex is the arbitration that has been commenced. The noteholders did not previously take the position that the management should not be involved in the arbitration, nor do they now raise any such objection. The Monitor notes in its report that the noteholders' proposed plan contemplates keeping existing management. It is clear that the management who have been involved in the arbitration are going to be needed further, and this is not a situation in which the noteholders could want to insert themselves instead of management in the conduct of the arbitration. As Mr. Mattoni said, that is something in the hands of arbitration counsel.

[73] Another factor to be considered under section 11.4(2) is how the company's business and financial affairs are to be managed during the proceedings. In my view, the management of the business and affairs of Crystallex under the provisions discussed, being the conduct of the arbitration and paying for it, are a reasonable compromise between Crystallex and Tenor designed to protect the interests of the stakeholders, including the noteholders. The Monitor, of course, will continue to have an important role to play as well in the oversight of matters. If the

noteholders are unhappy with the expenditures for the arbitration claim being incurred in the future, and there is no indication so far that they are, they have the ability in the CCAA process to object to them.

[74] The noteholders also contend that because a term of default of the Tenor loan is a refusal of the court to extend the section 11 stay, that term ties the court's hands on any stay extension application, thus creating an incentive for Crystallex not to bargain towards a consensual resolution. I do not accept that the court's hands will be tied in any way. One would expect in any CCAA case that on a refusal to extend the stay, a DIP lender's loan would become payable. This provision in the Tenor loan is not remarkable.

[75] The noteholders make the same point about it being a term of default of the Tenor loan if the CCAA case is converted to a receivership, a proposal in bankruptcy or bankruptcy proceeding. Again, one would expect a DIP loan to become payable in these events. This is a normal provision in a DIP loan, as conceded by Mr. Swan in argument. If bankruptcy were appropriate, this provision would not prevent it.

[76] The noteholders contend that the right of Tenor to 35% of the proceeds of the arbitration, convertible into equity at Tenor's discretion, should not occur as it will hamper any ability to reach any restructuring resolution. In the bid procedures approved by the Monitor, the market was told that any "back-end entitlement" could not exceed 49% of the equity of Crystallex. 35% is a very large block of the arbitration proceeds and obviously Crystallex would not have been happy to give that up. It eats into any recovery for the shareholders who are entitled to receive any proceeds of the arbitration only after the noteholders have been paid in full. However, 35% on the record does not appear excessive. The process undertaken by Mr. Skatoff indicates that the terms of the Tenor bid were the result of a reasonable market search. Mr. Sauntry, the financial expert for the noteholders, could not say that the Tenor bid did not reflect market pricing. He also said on cross-examination that a return of 10% PIK interest would not be a reasonable return for DIP lender in this case because of the uncertainty of getting anything because of the arbitration risk and risk of collecting on any award, and that a lender would require some additional amount such as the 35% to make it a reasonable deal.

[77] The noteholders propose in their proposed plan that they receive 23% of equity for their infusion of the $36 million needed for the arbitration claim. There is no evidence as to how that 23% figure was arrived at. However, the plan also provides for the noteholders to be given approximately 58% of the equity in return for giving up their notes. Together this amounts to 81% of the equity, and it is artificial to say that the 23% for the $36 million infusion reflects a market indication of the value of the infusion. I realize that the plan of the noteholders is only a proposal, but it does reflect a recognition that someone financing the arbitration would require a considerable amount of any arbitration award in order to take the risk of financing it. If the 35% figure in the Tenor DIP facility is used by the noteholders for the $36 million infusion (which the noteholders say they would be prepared to lend for 35% of the equity if later required), the amount of equity to the noteholders in their plan in return for their notes would be 46% rather than 58%, indicating an interest in receiving that amount of equity for their notes. If the Tenor DIP facility is accepted, it would leave 65% of the equity available, less 10% if the MIP is approved, more than the noteholders propose in their plan.

[78] The noteholders also rely on a statement in Mr. Sauntry's expert report that the Tenor DIP proposal will prevent any plan of arrangement. He states:

> The Tenor DIP Proposal will prevent any plan of arrangement. In fact, it is the logical conclusion of a negotiation between the Company, which has stated that it does not want a CCAA plan prior to an Award or settlement arising from the Arbitration Claim, and Tenor, which may benefit from the Company's near-complete lack of flexibility, if future amendments are required.

[79] Much of Mr. Sauntry's report is little more than legal argument in the guise of an expert's opinion. I view a good deal of his report in much the same light as Farley J. did of an expert report of Mr. Dennis Belcher in *Re Royal Oak Mines Inc*. (1999) 7 C.B.R. (4th) 293, in which he stated "Mr. Belcher has set forth in essence his view of the CCAA situation; he should be regarded as a powerful advocate..." I see Mr. Sauntry being an advocate for the noteholders.

[80] Some things fundamental to Mr. Sauntry's report are wrong. For example, he states that "This is a situation where a material asset could be sold to provide a significant recovery for creditors" and "It is demonstrably possible to sell a significant interest in the Company's

business (i.e. the Arbitration Claim) for material proceeds." On cross-examination he acknowledged his understanding that the claim is not assignable. I have earlier referred to problems I have with Mr. Sauntry's attempts to value the arbitration claim.

[81] I do not see the Tenor DIP facility preventing a plan of arrangement. The noteholders have no right to keep Crystallex's assets and equity static for the purposes of a plan of arrangement, so long as the DIP loan meets the criteria required for approval. The provisions in the Tenor DIP facility complained of are the result of market forces, and unless there is some other preferable DIP available, which for reasons I will deal with is not the case, the question is whether the Tenor DIP facility should be approved.

[82] Reliance is placed by the noteholders on provisions of section 7.19 of the Tenor bid. It provides that Crystallex shall not without the consent of Tenor enter into an agreement with the noteholders that contains certain provisions, including:

(a) Paying any money to pre-filing creditors before Crystallex pays Tenor. The noteholders contend that this eliminated any realistic possibility of Crystallex being refinanced prior to the collection of an arbitral award or settlement. However, this is a normal provision in any DIP financing. Moreover, there is no realistic possibility of Crystallex being refinanced before an arbitration award or settlement, as previously discussed.

(b) Increasing interest payable to the pre-filing creditors above 15%. The reason for this provision was because under the Tenor bid, any post-filing interest to be paid to creditors is to be paid before the additional compensation of 35% is paid to Tenor, and Tenor negotiated to limit this amount. It perhaps is to be noted that on any bankruptcy of Crystallex, interest to the noteholders would be limited to 5%.

(c) Issuing any equity containing anti-dilution provisions, which the noteholders contend means that any new equity proposed to be issued as a compromise exchange for debt could immediately thereafter be completely devalued at the next moment. I am not clear why this was negotiated by Tenor. In reply Mr. Kent contended that the problem could be taken care of by issuing shares to the noteholders with a coupon or agreement that

> would lock in their right to a percentage of the arbitration award. As the equity in Crystallex is essentially the same as the proceeds of the arbitration, presumably this is something that could be taken care of in a plan. Whether Crystallex would ever attempt to later issue equity to a third party is of course completely unknown and speculative, but it were to be contemplated during the course of the CCAA proceedings, presumably the Monitor would be aware of it and it would become known to the noteholders who would be able to apply to court for any appropriate relief.

[83] I have previously discussed much of what is to be considered under s. 11.4 of the CCAA. Regarding (d), whether the loan would enhance the prospects of a viable compromise or arrangement, in my view it would. Crystallex requires additional financing to pay its expenses and continue the arbitration. A DIP loan allows the company to have the arbitration financed, which if it were not at this stage would impair the arbitration and perhaps the attitude of Venezuela towards the arbitration claim, and as such enhances the viability of a CCAA plan. I have not accepted the argument of the noteholders that the loan would prevent a plan of arrangement.

[84] Regarding (f), whether any creditor would be materially prejudiced by the security, the noteholders are unhappy with the Tenor bid and say they are materially prejudiced, for the reasons that I have discussed and largely rejected. I think their complaints have to be looked at in the context of what the market is demanding for a DIP loan. There was a sufficient arm's length and open effort by Crystallex with the assistance of the Monitor to get the best pricing and terms for the loan and the process was carried out with integrity and fairness. The noteholders were asked during the process to increase their proposal but refused to do so. When at the last moment they indicated they would if later required lend on the same terms as the Tenor DIP facility, they made clear they would not agree to do so at this time. That, of course, is their choice. In all of the circumstances, I would not find that they have been materially prejudiced.

(ii) Consideration of the noteholders' proposed DIP facility

[85] The noteholders' proposed DIP loan is for $10 million at 1% interest repayable on October 15, 2012. The term is said to give sufficient time to work out a plan of arrangement or

compromise. Mr. Swan said in argument that the noteholders were not being altruistic in this proposal, but merely wanted to maintain the status quo while a plan is being negotiated.

[86] The problem that the board of Crystallex had with this proposal was based on the advice of Mr. Skatoff. He advised the board that if Crystallex needed additional financing in October 2012, it would be difficult to return to the market for financing because there was only so much time and energy that bidders were willing to devote to a transaction. Having devoted the time and failed, bidders would be highly reluctant to spend additional time again. In his affidavit, Mr. Skatoff stated that if Crystallex accepted the $10 million DIP financing it would be highly challenged if not entirely impeded in any subsequent exercise to raise additional financing from parties other than the noteholders.

[87] The noteholders contend that Mr. Skatoff's views on the difficulty of any future financing if the noteholders' proposed DIP loan is approved is "complete puffery" as he said on cross-examination that the parties with whom he negotiated never told him that they would absolutely not participate in a financing in the fall of 2012 if it were necessary. I think this is oversimplification and I do not accept it. Mr. Skatoff also said on cross-examination-

> I know what the facts are in terms of the financing market and how it views Crystallex. …I believe that the company, if it were to accept a $10,000,000 financing, would need to go to the market in the very near term to start to address what happens if that $10,000,000 needed to be refinanced when… we reached October of 2012. And I believe in the construct of my experience with this situation over the last three months that if the company were to accept that $10,000,000, we would need to go back out to the market in the very near term to raise capital to possibly refinance that money in the event that $10,000,000 couldn't be extended, that the company would have a very difficult time in convincing potential financing parties to undertake to spend additional time and resources in evaluating potential financing, as we have been able to convince them to do over the last couple months.

[88] I accept that evidence as reliable. Common sense would indicate that persons who spent time and energy on pursuing a $36 million facility for a three year term only to see a 6 month

facility for $10 million being accepted would be very reluctant to go through the process again in the next few months.

[89] This is particularly the case, in my view, when the proposed interest rate by the noteholders is only 1%, clearly below the market rate.[3] The market would see that rate, as would any reasonable observer, as being used for some purpose to further the ends of the noteholders. Hedge funds are not in the business of lending money at less than market rates. The rate no doubt was proposed to assist an argument that the court should accept the noteholders' proposed loan. Why would the noteholders propose that? The answer, I believe, is that it would assist in removing, or seriously eroding, the chance of Crystallex going to the market in time for a new loan by October and thus further make Crystallex beholden to the noteholders in October, as stated by Mr. van't Hof and Mr. Skatoff. I do not view the noteholders proposed loan as being a *bona fide* loan at market rates but rather a loan to gain tactical advantage.

[90] Thus, I do not see the noteholders proposed $10 million 1% six month facility as maintaining the status quo. I accept the evidence of Mr. Skatoff that it would seriously erode the chances of Crystallex obtaining any third party financing in October.

[91] Had the noteholders been prepared to lend now on the basis of the terms of the Tenor DIP facility, that would have been a preferable outcome, even if it was not made within the terms of the bid process approved by the Monitor, as it would not have involved the insertion of any third party into the process. Unfortunately, it was made clear during argument that the noteholders were not prepared at this time to do so. The uncertainty of a short six month loan when it is clear that financing for a much longer term is required by Crystallex to prosecute the arbitration is something to be avoided.

(iii) Position of the Monitor

[92] I have previously referred to portions of the Monitor's report. The Monitor concludes that on the basis that Crystallex, with assistance of Mr. Skatoff, conducted a canvas of the market and determined that the Tenor Bid was the best available bid generated out of the process to meet its

[3] The Monitor calculates the savings in interest over the Tenor loan to October 15, 2012 to be approximately $300,000.

objectives, the Monitor supports approval of the Tenor DIP Loan. This position of the Monitor is subject to this court's determination of the validity of the noteholders' legal arguments, on which the Monitor expresses no view as these are legal issues to be determined by the Court.

[93] It is the case, as the Monitor points out, that the introduction of a third party, Tenor, with consent rights to certain actions will add complexity to the negotiation of a CCAA plan. I entirely agree with the Monitor that a mutually acceptable CCAA plan is preferable to continued expensive and protracted legal disputes between the Noteholders and Crystallex. However, in spite of the encouragement of the Monitor and of the court over the last while to see if a settlement could be reached, that has unfortunately not occurred.

(iv) Conclusion on DIP loan

[94] Taking into account all of the forgoing, I approve the Tenor DIP facility.

(v) Request for stay

[95] The noteholders ask that in the event that the Tenor DIP facility is approved, the order should be stayed pending an appeal to the Court of Appeal. The parties have already had discussion through the Monitor with the Court of Appeal which has agreed as I understand it to move as expeditiously as possible with any appeal from my decision.

[96] A judge whose decision is to be appealed can stay the order on such terms as are just. On motions for stays, courts apply the *RJR Macdonald* test and will order stays in restructuring and insolvency proceedings to allow sufficient to for consideration of an appeal.

[97] At first blush during the argument, I was inclined to agree with the noteholders that a stay would be appropriate pending an appeal, assuming that it could be dealt with expeditiously. However, argument from Crystallex gave me pause, particularly when the cash flow needs of Crystallex are considered. The cash flow projections as shown in the Monitor's report indicate that as of the end of the week ending April 13, 2012, Crystallex had only $346,000, and that during the following week, it had cash requirements of approximately $6 million, including

repayment of the bridge loan due on April 16. Crystallex does not have the luxury of waiting for the conclusion of a successful appeal.

[98] The answer of the noteholders to this was that the problem would be solved if the court approved its $10 million DIP proposal rather than the Tenor bid. I understand that the noteholders would be prepared to lend the $10 million if an appeal to the Court of Appeal from an order approving the Tenor DIP facility were successful.

[99] Under the Tenor DIP facility, the right of Tenor to the additional compensation of 35% of the proceeds of the arbitration does not arise until the second tranche of the loan of $12 million has been advanced, and this is not due until after any appeal to the Court of Appeal has been completed. As to concerns of the noteholders that Tenor might pre-pay the second tranche in order to fix its right to the additional compensation, I was advised during argument that Tenor has undertaken not to do so and Crystallex has undertaken as well not to draw on the second tranche without two weeks' notice to the noteholders.

[100] Crystallex, and I assume Tenor as well, has agreed that pending the completion of an appeal to the Court of Appeal, the right of Tenor to convert its rights to 35% of the arbitration proceeds and the governance provisions for Crystallex would also be stayed.

[101] In my view, and assuming that the first test of *RJR Macdonald* has been met, there should be no stay of my order approving the Tenor DIP facility, and this can be done in a manner that will protect the interests of the parties on the following basis:

(i) The order approving the Tenor DIP facility shall be subject to the undertakings and agreements of Crystallex and Tenor as referred to.

(ii) The Tenor DIP facility is approved on condition that in the event that the appeal to the Court of Appeal is successful, and the order approving the Tenor DIP facility is set aside in its entirety, the money advanced by Tenor on the first tranche shall be immediately repayable with interest at 1% per annum, in which case the Tenor DIP facility shall be terminated. Tenor shall have no right in that case to any commitment fee which, if already paid, shall be deducted from the repayment of the loan to Tenor.

(iii) The noteholders shall in that event fund the repayment to Tenor by loan to Crystallex with interest at $1% per annum repayable on October 15, 2012 or at some other date as may be agreed or ordered by this court.

Management Incentive Plan (MIP)

[102] The terms of the MIP are set out above. In sum, a pool of money, consisting of up to 10% of the net proceeds of the arbitration up to $700 million and 2% of any further net proceeds, after all costs and charges, including the amounts owing to noteholders, is to be set aside and money in this pool may be paid to the beneficiaries of the MIP, depending on the determination of an independent committee. The amounts to be allocated to participants by the compensation committee are discretionary and could be nil. No one will be entitled to any particular amount. Members of the compensation committee will not be eligible for any payments.

[103] In exercising its discretion to consider whether and in what amount a payment should be made, the compensation committee will take the following factors into account:

(a) The amount of money recovered by Crystallex in the arbitration.

(b) The risks affecting the size of the retention pool including the quantum of the priority payments and the fact that others have influence on discussions relating to the settlement of the claim

(c) How quickly the funds are recovered.

(d) The impact the premature resignation of the individual from Crystallex would or could have had upon the results of the arbitration.

(e) The amount of time and energy spent by the individual on the arbitration.

(f) [Certain matters confidential to the parties.]

(g) The scale and scope of the balance of the compensation package provided by Crystallex to the individual.

(h) The opportunity cost to the individual in staying with Crystallex in terms of professional experience, money and the development of new opportunities.

(i) The amount of any severance payments the employee would receive on termination if such termination is reasonably foreseeable and will be accompanied by a severance payment.

(j) The extent to which the arbitration cost more than anticipated to prosecute and the degree to which it may be appropriate to reduce the bonus pool as a result.

(k) Any other relevant matter.

[104] The noteholders disagree with Crystallex on the quantum and method for providing an incentive to management. They have also expressed concerns as to the timing of the MIP approval motion and inclusion of some MIP participants in the MIP. Under their proposed plan, management would receive 5% through an equity participation in any after tax award.

[105] The Tenor DIP loan is conditional on the approval of a management incentive program acceptable to both Tenor and Crystallex. Tenor has not voiced any objection to the MIP proposal of Crystallex and I take it is in agreement with it. The requirement for a management incentive program acceptable to Tenor is a reflection, obviously, of the need to ensure the participation of the people necessary to pursue the arbitration to a satisfactory conclusion.

[106] The reasons for the MIP are set out in the affidavit of Mr. van't Hof. See paras. 4 to 10 and 14 to 23 of his affidavit. In the circumstances of this arbitration, these reasons appear legitimate. They were considered so by the independent directors of Crystallex constituting the compensation committee and by Mr. Jay Swartz of Davies Ward Phillips & Vineberg LLP.

[107] Mr. van't Hof states in his affidavit that because in past litigation the noteholders have criticized the independent directors of Crystallex as not being sufficiently independent because of prior business relationships with Robert Fung or companies with which Mr. Fung was associated, Crystallex retained Jay Swartz, a partner of Davies Phillips Vineberg, to determine, from the perspective of an independent director, what an appropriate MIP would be. In coming to that determination, Mr. Swartz was told he could retain such advisors as he saw fit and take such steps as he saw fit. Mr. Swartz' opinion of March 14, 2012 states that he was engaged on June 6, 2011 to negotiate the terms on which directors and members of management will be compensated for their ongoing duties. With the consent of Crystallex, Mr. Swartz retained Hugessen Consulting Inc., an independent national executive compensation consulting firm to provide expert advice with respect to compensation issues and to provide background information regarding compensation standards in circumstances which were analogous to the issues facing Crystallex. Mr. Swartz reviewed extensive documentation and carried out extensive discussions with various persons including the solicitors for Crystallex, counsel for the board and with Freshfields who are arbitration counsel.

[108] Mr. Swartz concluded that the overall compensation proposal for the establishment of the bonus pool for the benefit of management of Crystallex was reasonable in the circumstances, for reasons expressed in his opinion. Included in his reasons was the following:

> The current members of the Compensation Committee are granted substantial discretion to allocate, or not allocate, the bonus Pool and can do so in their discretion having regard to what actually occurs over time and the relative and absolute contributions of each party. In doing so, they are subject to fiduciary duties to Crystallex. In this regard, I note that there may be circumstances when the absolute amount of the bonus Pool may be very substantial in light of all of the factors to be considered by the Compensation Committee. In such circumstances, the Compensation Committee may have to carefully consider the absolute amounts to be paid to each member of a Management Group in order to satisfy its fiduciary duties.

[109] Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the

CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis*, West Law, 2009, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress.

[110] In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis -- Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. ... Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly.

[111] In *Re Grant Forest Products Inc*. (2009), 57 C.B.R. (5th) 128, I accepted these statements as generally being applicable to motions to approve key employee retention plans. See also *Re Canwest Global Communications Corp*. (2009), 59 C.B.R. (5th) 72, *Re Nortel Networks Corporation*, [2009] O.J. No. 1044, *Re Canwest Publishing Inc*., (2010), 63 C.B.R. (5th) 115 and *Re Timminco Ltd*. [2012] O.J. No. 472.

[112] I see no reason why the business judgment rule is not applicable, particularly when the provisions of the MIP have been approved by an independent committee of the board. See my comments in *Grant Forest Products*, in which the payments in question were approved by an independent committee of the board of the debtor, in which I said that the business judgment of the directors should rarely be ignored. See also Morawetz J. in *Re Timminco.*

[113] In this case, the qualifications of the independent board members, Messrs. Brown, Near and van’t Hof, are impressive, and these people are non-conflicted as they will not

participate in the MIP. They acted on advice from Mr. Swartz and had market information from Mr. Skatoff as noted in paras. 10 and 33 of Mr. van't Hof's affidavit. Their judgment was informed and I am in no position to say it was unreasonable.

[114] There is no question that the judgment of Mr. Swartz is independent and informed, and I would not lightly ignore it without good reason.

[115] The noteholders contend that the MIP is something that should await the negotiations of a plan. I can understand the logic of that position, particularly when as here the MIP is to be funded from the proceeds of the arbitration, which is the "asset" that will be the subject of the negotiations of a plan, whether that asset is called the proceeds of the arbitration or equity. However, I am hesitant to have the uncertainty of such a situation hanging over the heads of the people meant to be protected by the MIP. In *Grant Forest Products,* over the objection of a substantial creditor, and in *Canwest Global*, *Canwest Publishing* and *Timminco*, employee retention plans were approved prior to any plan being negotiated, and it appears to be the practice today that these types of plans are generally approved at the time of the initial orders.

[116] The noteholders do not contend that there should not be any MIP. As the Monitor's report notes, under the noteholders' proposed plan, management would receive 5% through an equity participation in any after tax award. While the numbers between the Crystallex MIP (a pool of up to 10% of an award up to $700 million and 2% over that) and the noteholders plan (5%) are different, it is possible that the end result would not be different depending on what the independent compensation committee decided to allocate after the results of the arbitration were known.

[117] The noteholders contend that there are participants in the MIP that should not belong. That is a matter of judgment, and the independent committee has exercised its judgment on the matter. The participants were also known to Mr. Swartz who opined as to the reasonableness of the principles of the MIP. Having reviewed the evidence, including the affidavit of Mr. van't Hof and of Ms. Kwinter, I cannot say that any of the persons included in the MIP should not be there.

[118] Mr. Tony Reyes is a shareholder of Crystallex. He in principle is supportive of the MIP. He raises two concerns regarding the MIP.

[119] The first is the fact that some of the persons who may benefit already have stock options and it is not clear that the proposed MIP will replace and cancel those options. Thus, these persons could end up with more than the MIP proposes. In response to this, Crystallex advises that it will amend the MIP to provide that the value of any existing stock options ultimately realized by participants of the MIP will be deducted from the amount of any bonus awarded under the MIP on a tax neutral basis.

[120] The second relates to the method of calculating the bonus pool. It is described by the Monitor as follows:

> 83. Mr. Reyes also raises a concern that the MIP treats the creation of and payment out of the MIP Pool as a secured debt and not an equity distribution. The MIP Pool is to be protected by a Court-ordered charge and will be created out of the net proceeds of the Arbitration Proceedings but before any payment to shareholders. Value to shareholders is after the repayment of the additional compensation to Tenor and the MIP, while the MIP is calculated based on the gross award before repayment of additional compensation. He notes that the method of calculating the MIP Pool also serves to increase the potential effective "equity participation" of the pool participants well above the rate of 10% relative to the participation rate of existing shareholders, to an effective rate of 18% or more. This is due to the dilutive effect of Tenor's additional compensation on existing shareholders.

[121] The first sentence regarding this concern is not correct. The MIP is triggered by a receipt of funds, and the charge over that pool does not give any priority to the participants in the MIP. Regarding the remainder of the concern, it seems to me that this is something that could be taken into account by the compensation committee in determining what, if any, amount should be allocated to any particular person.

[122] The Monitor has reviewed the MIP and the noteholders proposal. The Monitor does not expressly state that it supports the MIP as proposed by Crystallex being approved, but clearly does not oppose it. Monitor concludes:

> 130. The MIP is ancillary to the Tenor DIP Loan and approval of a management incentive program is a condition of the Tenors DIP Loan. The Noteholders and Mr. Reyes appear to accept the Company's position that a substantial incentive plan is appropriate in these unique circumstances. Mr Swartz, from the perspective of the independent director with advice from Hugessen Consulting Inc., concludes that the Applicant's proposed MIP is "reasonable in the circumstances". The Noteholders and Mr. Reyes' position, however, is that the terms of any incentive plan should be less favourable to the participants than the MIP proposed by Crystallex.
>
> 131. Although the percentage amounts and debt structure provide the potential for compensation to management that could be substantial, both relative to the recoveries of other stakeholders and in absolute dollar terms, it is subject to the discretion of the independent directors who have fiduciary duties that will provide a measure of balance in the implementation of the MIP.

[123] Like the DIP issue, it is unfortunate that Crystallex and the noteholders have not been able to come to some agreement on an MIP. It would have been far more preferable for that to have occurred. However there has been no agreement and it falls for decision by the court.

[124] In all of the circumstances, as discussed, I approve the MIP proposed by Crystallex with the changes regarding the stock options agreed to by Crystallex.

Approval of Monitor's reports

[125] Approval is sought of the actions of the Monitor as disclosed in its second and third report. I have no hesitation in approving these actions. A Monitor plays a crucial role in any CCAA restructuring, and this is particularly so in this case. The Monitor is to be commended for the way in which it has participated and in its efforts to bring a consensual resolution of matters as they have arisen. This assistance is invaluable. I approve the actions of the Monitor as set out in its second and third report.

Continuation of the stay

[126] Crystallex seeks a continuation of the stay until July 16, 2012 or such further date as may be ordered. No one opposes the stay to that date, and it is supported by the Monitor who

recommends the continuation. Due to holiday considerations, I continue the stay to July 30, 2012.

Newbould J.

DATE: April 16, 2012

TAB 25

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

> contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)
I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

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

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

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

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

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

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

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

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB 26

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Sangha v. Reliance Investment Group Ltd.,*
2010 BCCA 340

Date: 20100628
Docket: CA038049

Between:

Gurdial Singh Sangha

Appellant
(Plaintiff)

And

**Reliance Investment Group Ltd., Kharak Singh Sangha,
Dalbir Singh Sangha, Kewal Singh Sangha,
396964 Alberta Inc., and Baldev Johal**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Frankel
(In Chambers)

On appeal from: Supreme Court of British Columbia, March 19, 2010
(*Sangha v. Reliance Investment Group Ltd.*, Vancouver Registry No. L053157)

Oral Reasons for Judgment

Counsel for the Appellant:	A.J. Winstanley
Counsel for the Respondents K.S. Sangha, D.S. Sangha, K.S. Sangha, and B. Johal:	J. Christiansen
Place and Date of Hearing:	Vancouver, British Columbia June 23, 2010
Place and Date of Judgment:	Vancouver, British Columbia June 28, 2010

(application for leave to appeal)

[1] **FRANKEL J.A.**: Gurdial Sangha (whom I shall refer to as "Mr. Sangha") seeks leave to appeal the March 19, 2010 order of Mr. Justice Leask of the Supreme Court of British Columbia, dismissing his application to amend his statement of claim and to add a party defendant. The chambers judge has been case-managing this action since May 2007. Mr. Sangha's present counsel was retained in January 2010. At that time the trial was scheduled to begin in March. On January 14, 2010, Mr. Sangha, over the objections of the defendants, obtained an adjournment of the trial. It is now set to commence on September 20, 2010, for 12 weeks.

[2] The chambers judge did not give formal oral or written reasons for his decisions. Rather, his rulings were made informally during the course of a two-day hearing at which numerous issues were canvassed. A formal order giving effect to those rulings has been entered.

[3] In March 2007, Mr. Sangha commenced an action against the two corporate and four individual defendants. He seeks numerous forms of relief, all relating to the business affairs of the two corporate defendants.

[4] Reliance Investment Group Ltd. is a closely held, family corporation. The four shareholders are Kharak Sangha and his three sons, Mr. Sangha, Dalbir Sangha, and Kewal Sangha. Each son owns 25 shares in the company and, according to Mr. Sangha, his father holds the last 25 shares in trust equally for the sons. Baldev Johal is Kharak Sangha's son-in-law.

[5] Reliance owns and operates a hotel, a bar and restaurant, and an apartment building in Quesnel, British Columbia. It also holds undeveloped property.

[6] The Alberta Company is another closely held, family corporation. Mr. Sangha owns 43 shares, Dalbir Sangha owns 42 shares, and Baldev Johal owns 15 shares. According to Mr. Sangha, Dalbir Sangha holds his shares in trust for him.

[7] Julie Lembke is the person Mr. Sangha seeks to add as a party. At the material times, she was the manager/bookkeeper of Reliance, and the unofficial bookkeeper of the Alberta Company.

[8] Mr. Sangha claims that he is the beneficial owner of the majority shares in both Reliance and the Alberta Company because he and his wholly owned corporations were the sources of the assets held by those companies. The other family members dispute this and allege that the companies and other assets are beneficially owned by them.

[9] Mr. Sangha alleges that since 2003, the individual defendants have managed Reliance and the Alberta Company for their own personal benefit, and in a way that is prejudicial to Mr. Sangha's interests. He claims that they have withheld business information and documents from him; conducted meetings without him and without his knowledge; withdrawn money from the companies without due process or consent; blocked his access to business premises; directed staff to disobey him; forged his signature on company resolutions; forged his son's signature to endorse certain cheques; and generally carried on business in a manner that is secretive and arbitrary, without his knowledge and consent, contrary to the best interests of the companies.

[10] Mr. Sangha further alleges that in a series of meetings, conducted without adequate notice, and in his absence, his father and brothers resolved that any two directors could sign cheques for Reliance; that his shares in the Alberta Company be transferred to the three others in equal shares; and that Kewal Sangha would be a director. Mr. Sangha further alleges that at a fictitious meeting supposedly held in June 2006, the shareholders and directors of Reliance increased the salaries of Ms. Lembke and Kewal Sangha, and resolved to repay Kewal Sangha's shareholders loan in the amount of $250,000.00. Mr. Sangha alleges no such loan existed.

[11] Mr. Sangha also alleges that at a meeting of the Alberta Company in January 2007, he was removed as a signatory on the company's accounts. At the same meeting, a monthly wage for Baldev Johal was approved and Kharak Sangha was appointed a director. Finally, Mr. Sangha alleges that his father and brothers have

advanced frivolous claims against his personal bank accounts and have communicated with third parties to deprive him of access to his own funds.

[12] Mr. Sangha claims that the conduct he alleges is oppressive and unfairly prejudicial. He seeks damages and a variety of orders, including the auditing of the companies and the removal of directors.

[13] The contentious amendments concern, firstly, the addition of Ms. Lembke as a party and the factual allegations relating to her. The amended statement of claim alleges that the misconduct of the other individual defendants occurred with Ms. Lembke's knowing assistance. A second amendment seeks to add an allegation that the individual defendants used the defendant companies' funds to acquire a corporate opportunity for themselves, namely the opportunity to purchase a hotel in Yakima, Washington. Mr. Sangha seeks to link Ms. Lembke to this allegation.

[14] The finally contentious amendment concerns Mr. Sangha's desire to add the tort of spoliation—the destruction of evidence—as a new cause of action. He alleges that, with knowledge of the on-going litigation, the individual defendants, again with Ms. Lembke's knowing assistance, destroyed or suppressed documents, trust agreements, minute books, business records, and documents required to establish that he was the ultimate source of investment funds for the defendant companies.

[15] With respect to the amendments relating to Ms. Lembke and the Yakima hotel allegation, the chambers judge said this:

> All right. On those matters, I'm dismissing the application by the plaintiff on the basis that it is not just and convenient to add that party and that issue or issues to this litigation. I'm concerned about prejudice to the defendants and I'm very concerned about the ability to maintain the currently scheduled trial date of September the 20th, 2010. This is the principal reason why I'm declining to grant the plaintiff's application.
>
> For greater clarity, I want to say this. Should the trial be adjourned for any reason, this application or these two applications can be renewed.

[16] With respect to spoliation, the chamber judge stated that he was bound by this Court's decision in *Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R.

(3d) 90 (C.A.), which holds that spoliation is not an independent tort. Although the Supreme Court of Canada granted leave to appeal in *Endean* ([1998] 3 S.C.R. vi]), that appeal was later discontinued.

[17] Mr. Sangha submits that the proposed appeal is important because this is the ideal case to decide whether spoliation is a free-standing tort in Canada. On the utility of the proposed appeal to the parties, he submits that the addition of Ms. Lembke as a party would avoid the need for parallel proceedings. also submits that the ability to argue the events surrounding the Yakima hotel acquisition would avoid confusion.

[18] As for the prospects of success, Mr. Sangha states that a full consideration of the law of spoliation would make the appeal a success whether he won or lost. Regarding the other amendments, he argues that the appeal would be successful because the chambers judge should not have exercised his discretion in the way he did given that no limitation periods had expired and there was no evidence that the amendments would result in delay.

[19] The defendants essentially rely upon the high standard for granting leave to appeal from a discretionary order made by a case-management judge. They say that the chambers judge properly applied the "just and convenient" test and, based on *Endean*, was correct in refusing to allow Mr. Sangha to advance spoliation as a cause of action.

[20] The criteria applicable to an application for leave to appeal are well known. They are conveniently set out in the recent judgment of Madam Justice Smith in *Movassaghi v. Aghtai*, 2010 BCCA 175 (Chambers):

> [22] The well known criteria for leave to appeal are (i) whether the point on appeal is of significance to the practice; (ii) whether the point raised is of significance to the action itself; (iii) whether the appeal is *prima facie* meritorious or frivolous; and (iv) whether the appeal will unduly hinder the progress of the action. See *Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.), and *Hollinger Inc. v. Radler,* 2006 BCCA 539. The overarching concern is the interests of justice and the four criteria are "all considered under the rubric of the interests of justice": *Hanlon v. Nanaimo (Regional District),* 2007 BCCA 538 at para. 2 (Chambers), and *Vancouver (City) v. Zhang,* 2007 BCCA 280 (Chambers).

> [23] Leave to appeal is rarely granted for discretionary orders unless the order is clearly wrong, or it is demonstrated that the judge did not exercise his or her discretion judiciously or relied upon a wrong legal principle that would result in a serious injustice if leave was not granted. See *Silver Standard Resources Inc. v. Joint Stock Co. Geolog,* [1998] B.C.J. No. 2298 (C.A.) (Chambers), and *Strata Plan LMS 2019 v. Green,* 2001 BCCA 286 (Chambers).

These criteria are applied more stringently when what is sought to be appealed is a decision made by a case-management judge: *Robak Industries Ltd. v. Gardner*, 2006 BCCA 395, 57 B.C.L.R. (4th) 23 at paras. 12, 13 (Chambers).

[21] With respect to the amendments relating to Ms. Lembke and the Yakima hotel, it is apparent from the transcript that the chambers judge was very much concerned about the possibility that allowing those amendments would bring about another adjournment of the trial. This was a factor he was entitled to take into consideration in exercising his discretion. Given that what is sought to be appealed is a highly fact-specific decision made in the course of case-managing this particular litigation, it is most unlikely that a division of this Court would intervene. I accordingly, would not grant leave to appeal the refusal of those amendments.

[22] Turning to spoliation, the chambers judge was correct in refusing that amendment on the basis that such a cause of action is not known to the law in British Columbia. Although, as discussed in *obiter* by Madam Justice Rowles in *Holland v. Marshall*, 2008 BCCA 468, 85 B.C.L.R. (4th) 199 at paras. 67-73, differing views have been expressed with respect to whether spoliation should be recognized as an independent tort, *Endean* remains the governing authority in this jurisdiction. Until that decision is overruled by either the Supreme Court of Canada or this Court itself, it is as binding on me as it is on the judges of the trial courts of this province: See, for example, *Pro-Sys Consultants Ltd. v. Microsoft*, 2006 BCSC 1047, 57 B.C.L.R. (4th) 323 at paras. 94-99, wherein Mr. Justice Tysoe, as he then was, stuck out the portions of a statement of claim that pleaded spoliation as a cause of action.

[23] Whether this Court will depart from one of its previous decisions is subject to the following “guidelines”, recently re-affirmed in *Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385, 96 B.C.L.R. (4th) 342 at para. 62:

> (1) that a *three-judge division* should not overrule a previous decision of a three-judge division unless the previous decision is manifestly wrong, or should no longer be followed, because, for example, the previous decision failed to consider applicable legislation or binding authorities, or, if followed, would result in a severe injustice;
>
> (2) that a *five-judge division* of the court may overrule the decision of a three-judge division if the five-judge division decides either that the earlier decision was wrong, or that for any other reason, the earlier decision ought to be overruled.

[24] The procedure to be followed in requesting to have an appeal heard by a five-judge division is set out in a practice directive of December 12, 2005, entitled “Five Justice Divisions”:

> When counsel wish to have a five-justice panel convened to hear an appeal, reasons for the request shall be set out in writing, addressed to the Registrar, after the factums have been filed. Opposing counsel shall state their position on the request, also in writing, addressed to the Registrar. This should be done within a week of the original request. The request will be forwarded to the Chief Justice, for consideration by the Chief Justice in consultation with the Court.

In addition, as occurred in both the *Inmet Mining Corp.* case and *Skidmore v. Blackmore*, (1995), 2 B.C.L.R. (3d) 201 at para. 13 (C.A.), a three-judge division can direct that an appeal be heard by five judges, if it is of the view that a prior decision of the Court warrants reconsideration.

[25] In my view, a single judge of this Court cannot grant leave to appeal when the decision being challenged is based on, and in accord with, binding authority from the Court. If leave is to be granted, then such an order can only be made by a division of the Court. I would expect that on such an application, the applicant would have to satisfy the division that there is good reason for the Court to reconsider one of its prior decisions.

[26] In the result, this application for leave to appeal is dismissed.

“The Honourable Mr. Justice Frankel”