Court of Appeal File No. CA47585

COURT OF APPEAL

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 THE PLAN OF COMPRMOSIE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

BETWEEN:

PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

RESPONDENTS
(PETITIONERS)

AND:

1296371 B.C. LTD.

APPELLANT
(RESPONDENT)

AND:

CENTURA BUILDING SYSTEMS (2013) LTD. and
SOLTERRA ACQUISITIONS CORP.

RESPONDENTS
(RESPONDENTS)

REPLY BOOK FOR LEAVE TO APPEAL
AND REPLY BOOK FOR STAY OF PROCEEDINGS
OF PORT CAPITAL RESPONDENTS

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IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. AND EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

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UPDATED: June 7, 2021

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MEMORANDUM OF ARGUMENT
TABLE OF CONTENTS

I. OVERVIEW

1. 1296371 B.C. Ltd. ("**129**") seeks leave to appeal the June 15, 2021 Orders of Madam Justice Fitzpatrick ("**Fitzpatrick J.**") of the Supreme Court of British Columbia which dismissed the competing application of 129 to approve a refinancing transaction and granted the application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (together the "**Petitioners**") for the sale to Solterra Acquisition Corp. (the "**Purchaser**" or "**Solterra**") of the Terrace House Project which consists of a high-rise luxury residential strata development under construction in the Coal Harbour neighbourhood, located at 1250 W Hastings St., Vancouver.

2. The Petitioners submit that this Honourable Court should deny leave to appeal.

3. The approval of the sale to the Purchaser follows an extensive sales process and results from the exercise of discretion decision by Fitzpatrick J., the supervising judge who was intimately familiar with the Petitioners proceedings under the *Companies' Creditors Arrangement Act,* RSC 1985, c. C-36 ("**CCAA**"). Madam Justice Fitzpatrick is a very experienced CCAA judge who had already overseen this proceeding for over 12 months and made numerous previous orders in relation thereto.

4. The exercise of a supervising judge's discretion is to be afforded substantial deference. The Supreme Court of Canada has recently confirmed that appellate courts should exercise particular caution before interfering with orders made in accordance with that discretion.[1] The exercise of her discretion, must stand unless she "proceeded arbitrarily or on a wrong principle, or failed to consider or properly apply the applicable test".[2]

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[1] *Canada v. Canada North Group Inc.,* 2021 SCC 30 **["Canada North"]** at para. 21-22; *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364 **["Quest"]** at para. 32.

[2] *Edmonton (City) v. Alvarez & Marsal Canada Inc.,* 2019 ABCA 109 at para. 1; *Quest* at para. 24.

5. Although the Petitioners did not take a position regarding 129's application in the Court below, and will not address here the specific insolvency doctrines that 129 wishes to have reviewed by this Court, they say that given the Orders under appeal were discretionary and that it is undisputed they were within the jurisdiction of Fitzpatrick J. to grant or refuse, there can in any event be no *prima facie* merit to the proposed appeal.

6. The Petitioners further say that even if there were *prima facie* merit, 129 cannot satisfy the other tests for leave to appeal from CCAA orders. The proposed appeal is of significance only to certain parties, not the proceeding as a whole. It does not raise any issue of significance for insolvency practice. And granting leave could unduly hinder resolution of the CCAA proceeding.

II. FACTUAL BACKGROUND

7. The Petitioners adopt the facts as set out in the Memorandum of Argument of 129 with the following clarifications:

(a) 129's application sought a plethora of orders, including with regard to use of deposits held in trust, approving the proposed new loan, approving the purchase and assignment of the CMLS debt and security, amending the CMLS security to ensure the additional funds proposed to be borrowed were secured, extending the stay of proceedings and curtailing the powers of the Monitor;

(b) At paragraph 24 of 129's Memorandum, 129 states that its application to refinance was supported by CMLS and Aviva. The Solterra offer was also supported by the stakeholders of the Petitioners. Specifically, the entering into the purchase and sale agreement with Solterra was supported by the mortgage lenders, the DIP Lender, and CMLS;[3] and

(c) The Petitioners have relied upon interim financing to support the CCAA process ("**DIP Financing**") having required an increase to the DIP Financing

[3] Petitioner's Notice of Application

amount as recently as June 16, 2021. While 129 submits that its refinancing would pay amounts owing under the Administration Charge in full, it does not account for potential increases in DIP Financing required should this matter drag on.[4]

III. ISSUE

8. The issue before the Court is whether 129 should be granted leave to appeal.

IV. LEGAL BASIS AND ARGUMENT

9. A four part test must be met for leave to be granted: (a) whether the appeal is *prima facie* meritorious; (b) whether the point of appeal is of significance to the practice; (c) whether the point raised is of significance to the proceeding itself; and, (d) whether the appeal will unduly hinder the progress of the action.[5] Even where all four criteria are met, leave may be denied if the proposed appeal is not in the interests of justice.[6]

There is no Prima Facie Merit to the Appeal

10. The first factor is whether the appeal is prima facie meritorious.

11. The orders at issue in this application involve the exercise of broad discretion afforded to Fitzpatrick J., the supervising judge who has heard substantially all of the applications in these proceedings. 129 does not challenge that Fitzpatrick J. had the discretion to deny its application under section 11 of the CCAA – the specific provision under which 129's application was explicitly brought – but rather takes issue with a subset of the reasons provided. Specifically, 129 takes issue with Fitzpatrick J.'s finding that the proposed 129 refinancing proposal is not a redemption and that there was no evidence

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[4] Reasons for Judgment of Fitzpatrick J. indexed as *Port Capital Development (EV) Inc., (Re),* 2021 BCSC 1272 **["Reasons"]** at para. 47(c). Note that the cash flow projection referred to in that paragraph does not include the costs of the application for leave to appeal, nor an appeal itself if leave were granted.

[5] *Quest* at para. 22.

[6] *Movassaghi v. Aghtai,* 2010 BCCA 175 (CanLII), at para. 22 and 27.

of an intention to propose a plan of arrangement or a compromise. Further, 129 suggests that Fitzpatrick J. erred in not accepting 129's proposal which it argues was superior to the offer from Solterra.

12. It is well-established that section 11 of the CCAA provides the supervising court with broad discretion to "make any order that it considers appropriate in the circumstances". This discretion is only constrained by the restrictions set out in the CCAA and requirements of appropriateness, good faith and due diligence.[7]

13. Orders made by a judge exercising a supervisory function under the CCAA require careful and delicate balancing of a variety of interests and problems; appellate proceedings may upset that balance and frustrate the process under the CCAA.[8] In deciding whether to grant leave, regard should be had to the nature of CCAA proceedings, which requires a supervising CCAA judge to attempt to balance the interests of various stakeholders, and which often requires the supervising judge to make quick decisions in complicated circumstances.[9] The effect upon all parties concerned is an important consideration in deciding whether leave ought to be granted.[10]

14. The decision of Fitzpatrick J. demonstrates a balancing of the interests of various stakeholders, not only upholding the integrity of the process but also approving a sale which will provide certainty for the proceedings.

15. Fitzpatrick J. noted that 129's proposal involved using a proposed six-month stay extension to try to secure construction financing with the intention of exiting the CCAA proceedings and completing the Project.[11] This is contrasted with the Solterra

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[7] *Canada North, supra* at para. 21.

[8] *Ibid* at ¶37.

[9] *Re Edgewater Casino Inc.,* 2009 BCCA 40, at ¶20 ["***Edgewater***"].

[10] *National Lease*, *supra*, ¶37.

[11] Reasons at para. 80.

Transaction which represents the highest bid received and would enable the Terrance House Project to exit CCAA proceedings on or before September 30, 2021.

16. While 129 asserts that its proposal was superior and that Fitzpatrick J. erred in not selecting it, such a position ignores that the Court is not obligated to select the "best offer"[12] nor is it obligated to select the offer preferred by the creditors.[13] Further, it was open to Fitzpatrick J. to conclude that 129's proposal did not even represent the best offer given that there remained the risk it might not close and there was no certainty about what would happen later in the proceeding if it did close.

17. For the above reasons, regardless of the treatment of Fitzpatrick J. of the issue of whether 129's offer should have been treated as a redemption or whether the authority of this Court's decision in *Cliff's Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*[14] has been superseded by subsequent jurisprudence or legislative amendments, there is no *prima facie* merit to the leave to appeal application. There is no doubt that Fitzpatrick J. understood the facts and did not misapprehend the evidence. The decisions were clearly made within the discretion afforded Fitzpatrick J. under sections 11 and 36 of the CCAA, and entitled to significant deference.

The Points on Appeal are not of Significance to the Bankruptcy Practice

18. There is no significance to the practice in Fitzpatrick J. exercising her broad discretion to consider competing transactions and select the Solterra Transaction over the conditional refinancing transaction. Such discretion is exercised routinely in CCAA proceedings.

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[12] *White Birch Paper Holding Company (Arrangement relatif à),* 2010 QCCS 4915

[13] *Royal Bank of Canada v. Soundair Corp.,* 1991 CanLII 2727 (ON CA) ; *Quest University (Re),* 2020 BCSC 1883 at para. 169.

[14] 2008 BCCA 327 **["*Cliffs*"]**

19. In considering this aspect of the test for leave, courts have considered whether the issue will settle the law on a substantive or procedural point, or clarify two irreconcilable lines of authority.[15]

20. 129 does not identify any unsettled law or irreconcilable lines of authority. Rather, it seeks to justify there being significance to insolvency practice through the proposed revisiting of *Cliffs*. However, in the 13 years since *Cliffs* was decided, insolvency practice has not demonstrably been troubled by that decision. *Cliffs* has been distinguished, and other than standing for the basic principle that granting a stay under the CCAA must further the statute's purpose, may have little application beyond particular fact patterns.[16]

21. Similarly, the result of any appellate decision in the present case would be so highly fact-specific that it could not ultimately be of significance to insolvency practice in general.

The Point is Not of Significance to the Action Itself

22. This element of the test requires a proposed appellant to demonstrate not that the appeal is of significance to itself as a party, but rather that the appeal has significance to the outcome of the proceedings as a whole.[17]

23. The leave to appeal application takes issue with a discrete subset of reasons provided by Fitzpatrick J. The reasons are only of significance to 129.

24. While the effect of the Orders may be of significance to other parties beyond 129, the proposed appeal cannot be shown to have significance to the outcome of the proceedings as a whole.

25. Reversing the decision of Fitzpatrick J. and permitting 129's proposed financing to proceed (assuming that would close), and granting all the other various orders 129 seeks, would continue to leave the Petitioners insolvent and there would be no guarantee that

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[15] *Wolseley Canada Inc. v. Emco Corporation*, 2007 BCSC 1929, at ¶12 and ¶13.

[16] See e.g. *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 17-21

[17] *Wells Fargo Securities Canada Ltd. v. Sanjel Corporation*, 2017 ABCA 120 at para. 10

any subsequent restructuring would materialize. It cannot be said that the proceeding would end up with a materially different outcome.

The Appeal Would Unduly Hinder the Progress of the Action

26. If this appeal is allowed to proceed, it will unduly hinder the progress of the action. Not only is the appeal a distraction that will serve only to divert limited resources, but the appeal also risks the closing of the Solterra Transaction as while 129 advises that it is seeking to have the appeal heard on September 21, 2021 should leave be granted, there is no guarantee that a decision will be issued prior to September 30, 2021.

27. Under the Solterra PSA, the Purchaser may terminate the agreement if the transaction is not completed on or before September 30, 2021. Therefore there is a risk that the Solterra Transaction may not close, creating uncertainty for the Petitioners and their stakeholders.

28. Additionally, these proceedings are being funded by way of the DIP Financing and any delay may risk the Petitioners restructuring given cash constraints which would require further borrowing.

V. CONCLUSION

10. For the foregoing reasons, the application for leave to appeal should be dismissed.

ALL OF WHICH IS RESPECTUFLLY SUBMITTED,

August 10, 2021	BENNETT JONES LLP Per: ______________________ David Gruber and Keely Cameron, counsel for the Respondents