COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.,* 2021 BCCA 319

Date: 20210820
Docket: CA47585

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 Compromise and Arrangement of Port Capital Development (EV) and Evergreen House Development Limited Partnership

Between:

Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

Respondents
(Petitioners/Applicants)

And

1296371 B.C. Ltd.

Appellant
(Respondent/Applicant)

And

Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.

Respondents
(Respondents)

Corrected Judgment: The text of the judgment was corrected at paragraph 1 on August 26, 2021.

Before: The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Voith
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated June 15, 2021 (*Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272, Vancouver Docket S-205095).

Oral Reasons for Judgment

Counsel for the Appellant:	J.D. Schultz E. Watson
Counsel for the Respondents, Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.:	K.M. Jackson T.A. Posyniak G.P. Nesbitt
Counsel for the Respondents, Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership:	D.E. Gruber
Counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company:	C.D. Brousson A.L. McCawley
Counsel for Ernst & Young Inc. in its capacity as the Monitor:	P. Bychawski
Counsel for Aviva Insurance Company of Canada:	W.L. Roberts
Place and Date of Hearing:	Vancouver, British Columbia August 17, 2021
Place and Date of Judgment:	Vancouver, British Columbia August 20, 2021

Summary:

The petitioners owned a commercial strata development that experienced financial difficulties when the construction lender stopped funding and demanded repayment of its secured debt. The petitioners sought and received an order under the Companies' Creditors Arrangement Act, staying proceedings against them and implementing a sales and investment solicitation plan. Several offers were forthcoming, including one by the appellant. The chambers judge rejected the appellant's offer but approved the project's acquisition by one of the respondents. The appellant seeks leave to appeal and a direction that the appeal be heard by a five-justice division to allow reconsideration of Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp., 2008 BCCA 327 [*Cliffs*]..

Held: Leave to appeal granted; appeal directed to be heard by a five-justice division. How the equity of redemption should be treated in an analysis under the Companies' Creditors Arrangement Act when faced with competing transactions and whether the intention to propose a plan of arrangement to creditors is a necessary precondition to relief were issues of significance. Whether the holding in Cliffs barred the appellant's proposal was highly relevant to the appeal. It was in the interests of justice for the division hearing the appeal to be able to reconsider the decision if necessary.

<u>INTRODUCTION</u>

[1] **GOEPEL J.A.** 1296371 B.C. Ltd. ("129") seeks leave pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] to appeal the June 15, 2021 orders of Justice Fitzpatrick, which dismissed 129's application to approve a proposed refinancing 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. ("Solterra") of the Terrace House Project (the "Project"), a residential strata development located in downtown Vancouver. The chambers judge's reasons are indexed at 2021 BCSC 1272. If leave is granted, 129 seeks a direction that the appeal be heard by a five-justice division to allow reconsideration of *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,* 2008 BCCA 327 [*Cliffs*].

[2] When the decision being challenged is based on binding authority from the court, a single justice cannot grant leave. In such circumstances, the leave application is heard by a division of the court and the division has the authority, in turn, to direct the appeal be heard by a five-justice division: *Sangha v. Reliance*

Investment Group Ltd., 2010 BCCA 340 (Chambers); *R. v. Zora,* 2018 BCCA 34 (Chambers); *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.). For this reason, this leave application was heard by a division of the Court rather than a single justice.

[3] There is some urgency attached to this proceeding. The sale of the Project approved by the chambers judge is scheduled to close on September 30, 2021. If leave is granted, the parties have arranged that the appeal will be heard on September 21, 2021.

BACKGROUND

[4] The Project is a proposed 19-storey high-rise luxury residential and commercial strata development located at 1250 West Hastings Street, Vancouver. The Project provides for 20 residential units and two commercial retail units above a three-level underground parking arcade. The Petitioners are the owners of the Project.

[5] The Petitioners entered into these *CCAA* proceedings to allow them to undertake a process towards resolution of their financial difficulties that would allow them to complete the Project. In her reasons, the chambers judge set out in detail the history of the Project and the *CCAA* proceedings leading up to the orders for which leave is now sought: at paras. 5–42. In these reasons, I will refer to that background information only to the extent necessary to give context to the issues arising on this application.

[6] In September 2017, presales of the units began. In late 2018, construction began. The construction lender is CMLS Financial Ltd. (“CMLS”), which holds a first mortgage against the Project. Aviva Insurance Company of Canada (“Aviva”) provided deposit protection insurance for the presale depositors in order to allow the Petitioners to use the deposit money for the Project. Aviva holds a second mortgage against the Project to secure any claims under the insurance.

[7] As of mid-2020, the parkade and structure for the first level of the building were substantially complete, and approximately 20% of the Project was finished. At that time, approximately $16 million in presale deposits was in place for 17 residential units and both commercial units. Approximately $8 million of the deposit money has been spent on the Project.

[8] In May 2020, CMLS stopped funding and demanded payment of its secured debt. In late May 2020, the Petitioners filed these *CCAA* proceedings, supported by the evidence of Macario Reyes, a director and officer of the Petitioners. At that 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”), which is owed $473,277.

[9] On May 29, 2020, the chambers judge granted the initial order in the *CCAA* proceedings. The initial order stayed all proceedings against the Petitioners, granted an Administration Charge of $250,000, and 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.

[10] On June 8, 2020, the chambers judge granted the Amended and Restated Initial Order, extending the stay and other relief granted under the initial order and authorizing interim financing of $1.25 million—now $1.8 million—(the “Interim Lending Facility”) from Desjardins Financial Security Life Assurance Company (“Desjardins”), a company affiliated with CMLS.

[11] Over the next several months, as detailed in the judge’s reasons, various offers were forthcoming. Ultimately, at the time of the June 8, 2021 hearing, the chambers judge had before her two offers from Solterra (“Solterra Offer #1” and “Solterra Backup Offer”), an offer from Landa Global Acquisitions Inc. (“Landa Offer

#3"), and an offer from 129 ("129 Revised Offer"). 129 is a company controlled by Mr. Reyes and was incorporated to facilitate the proposed refinancing.

[12] The Solterra and Landa offers were asset purchase agreements. The 129 proposal contemplated a complex refinancing of the Project that would repay the Administration Charge, the Interim Lending Facility, and CMLS in full and take an assignment of the CMLS security. 129 said that the transaction was designed to create an opportunity to secure new construction financing that would allow the Petitioners to ultimately repay the new loans, exit *CCAA* proceedings, and proceed with the Project as intended.

[13] The chambers judge said that the crux of the issues relating to the 129 Revised Offer lay in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the court. She summarized that relief as follows:

> [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:
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> 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 [1260780 B.C. Ltd. ("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.
>
> [Emphasis in original.]

[14] The Monitor reported that if the 129 Revised Offer completed, it would result in a materially better outcome for the stakeholders than either the Solterra or Landa offers.

[15] The chambers judge summarized the financial consequences to the major secured creditors of the various offers as follows:

> [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;
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> 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.

[16] 129 brought its application and rested its arguments on s. 11 of the *CCAA* as the jurisdictional basis upon which it asked the court to grant the relief sought. Section 11 allows the court broad discretion to grant relief that is "appropriate in the circumstances."

[17] At the hearing on June 8, the 129 application to approve the 129 Revised Offer was supported by CMLS and Aviva. CMLS' support was conditional on the

court approving either the Landa or Solterra offers as a backup in case the 129 Revised Offer did not complete. The Petitioners and the Monitor took no position on the 129 application. The 129 application was opposed by Centura and Solterra.

THE CHAMBERS JUDGE'S REASONS

[18] The chambers judge first considered whether she should approve the 129 Revised Offer. She found that the relief sought by 129 was not appropriate, including the stay and the refinancing approvals in 129's draft order. She declined to exercise her statutory discretion under s. 11 of the *CCAA* to grant the requested relief. In reaching this decision, she concluded, among other things:

a) the 129 refinancing was not a redemption of the CMLS mortgage;

b) comparing the 129 refinancing with the outcome if the Solterra or Landa offers were approved would be a "very unprincipled basis" upon which to argue the 129 financing was appropriate;

c) the 129 refinancing might not have been objectionable if it had been structured as a sale, whether via an outright sale or a reverse vesting order; and

d) the circumstances of this case were similar to those in *Cliffs*, and since there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, the 129 financing was not appropriate.

[19] Having found the 129 offer was not appropriate, the chambers judge then went on to consider the two competing cash offers. She found that the Solterra Backup Offer should be approved as reasonable and indicative of the fair market value of the Project. That offer would satisfy the priority debt, the professional charges, and the Interim Lending Facility—and provide almost full payment to CMLS. Aviva would face a shortfall of $8.6 million with limited prospect of any recovery. All other creditors would also be "out of the money."

GROUNDS OF APPEAL

[20] 129 now seeks leave to appeal. It submits the chambers judge erred:

a) in fact and law by concluding the 129 refinancing was not a redemption;

b) in fact and law by determining that it was not appropriate to grant the 129 application because there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, despite the application being on notice to all creditors and supported by the two senior secured creditors; and

c) in law by approving the Solterra offer in the face of the 129 refinancing, which would clearly result in a better outcome for all stakeholders and is consistent with the remedial purposes of the *CCAA*.

[21] Aviva supports the leave application. It is opposed by Centura, Solterra, CMLS, and Desjardins. The Monitor takes no position on the application. The Petitioners, notwithstanding that on July 30, 2021, they entered into a revised interim financing agreement with 129 and that they and 129 are controlled by Mr. Reyes, oppose the leave application. When questioned in regards to the contradictory nature of those positions, counsel for the Petitioners advised that in opposing the application for leave, he was acting on the Monitor's instructions. The Monitor acknowledged it had given such instructions but was unable to provide the basis on which it was entitled to do so.

POSITIONS OF THE PARTIES

A. 129

[22] 129 submits that the chambers judge erred in concluding that the 129 refinancing was not a redemption of the CMLS mortgage. In this regard, the chambers judge said:

> [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.

[23] While 129 does not quarrel with the broad proposition that the right of redemption allows only the subordinate mortgagee, not the mortgagor, to redeem, it submits that rule is subject to an exception that allows the mortgagor to redeem the first mortgage if it is done with the consent of the second mortgagee: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1225 at para. 43. In this case, Aviva consents to the redemption.

[24] 129 submits that an owner's right to redeem is a core principle of real estate law: *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge, Inc.,* 2020 ONSC 3659 at paras. 37–40. 129 submits it was an error in principle for the chambers judge not to consider the right of redemption in weighing whether it was appropriate to approve the 129 Revised Offer. 129 submits that if the chambers judge had correctly determined that the 129 offer was a redemption, the appropriateness analysis may have been significantly different.

[25] 129 further submits that the chambers judge erred in principle in concluding that the 129 refinancing was not appropriate. In this regard, she failed to consider all of the circumstances and instead focused her analysis on only one issue, namely, the lack of evidence of an intention to propose a plan of arrangement or compromise to all the creditors.

[26] 129 submits that the chambers judge's analysis is premised on the basis that *Cliffs* stands for the broad principle that a debtor must provide evidence of its

intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA.* In support of this submission, it points to the judge's comment at para. 77, where she said, "Crucially … 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."

[27] 129 submits that if the chambers judge is correct and that *Cliffs* stands for that broad principle, a five-justice division should reconsider *Cliffs*. In support of its submission that the remedial objectives of the *CCAA* are broader than articulated in *Cliffs*, 129 relies on the subsequent decisions of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 and *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10 [*Callidus*]. In the alternative, 129 submits that, if *Cliffs* does not stand for that broad proposition, the chambers judge erred in her interpretation of *Cliffs.*

[28] 129 submits, in the circumstances of this case, the chambers judge's concerns for the rights of creditors ranked below Aviva was misplaced because those creditors will not recover anything from either of the proposals. It submits the appropriateness analysis should have centred on the outcome for parties who stood to benefit from the 129 Revised Offer. In particular, it notes that under the 129 Revised Offer, CMLS will be paid in full, Aviva may escape any exposure, and the pre-purchasers will not lose their rights to purchase a unit in the Project.

[29] 129 says the chambers judge's error is clearly illustrated by her comments at para. 73:

> [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.

B. Aviva

[30] Aviva supports 129's application for leave and adopts its submissions. It submits the issues raised in the proposed appeal have merit and are significant to the parties and to the practice. Aviva submits it may not be necessary to reconsider *Cliffs*, as the chambers judge erred in law and fact by failing to recognize that *Cliffs* is distinguishable and further erred in law in her interpretation of *Cliffs* by failing to consider the expanded formulation of the *CCAA*'s remedial purpose in more recent and binding authorities. Aviva submits, however, that if this Court finds *Cliffs* is binding authority in British Columbia for the principle that a debtor must provide evidence of their intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA*, then Aviva agrees with 129 that *Cliffs* ought to be reconsidered by a five-justice division.

[31] Aviva submits that the chambers judge erred in her analysis by focusing on the structure of the 129 offer instead of its impact on the various stakeholders.

[32] Aviva submits the appeal is of particular significance to it. If the sale to Solterra completes, Aviva will immediately lose $8.6 million with limited prospects of recovery. This result may be avoided entirely if the 129 refinancing is approved.

[33] Aviva further submits that the chambers judge erred by failing to appreciate the two-staged nature of the 129 plan. In the first stage, CMLS would be paid in full, and the Project would remain in *CCAA* protection as it attempted to raise new construction financing that, if received, would allow the Project to be completed as originally contemplated. In those circumstances, Aviva and other creditors may have the chance of escaping unscathed.

[34] Aviva submits the judge failed to consider other countervailing factors in her appropriateness analysis, including Aviva's right to redeem and the Petitioners' right to compel an assignment of the CMLS mortgage. Aviva submits that the chambers judge's emphasis that the 129 offer does not deal with the claims of other creditors is misplaced. In that regard, Aviva points out that the concern for the creditors other

than CMLS and Aviva is artificial because those creditors will not recover anything under the approved Solterra offer.

C. Centura/Solterra

[35] Centura and Solterra are related companies. Solterra's offer to purchase the assets of the Project was approved subsequent to the judge dismissing the application of 129. Centura is a creditor who will receive nothing under either proposal. Notwithstanding their very different roles, they are represented by the same counsel.

[36] In their submissions before the chambers judge, Centura/Solterra opposed the 129 offer, and on this application, they oppose the granting of leave. On this application, they noted that leave is granted sparingly in *CCAA* proceedings. They submit that the appeal is without merit. They submit that the chambers judge was entitled to and did take note of the fact that there was no evidence of any intention on the part of 129 or the Petitioners to resolve or even address the claims of creditors affected by their proposed refinancing transaction, let alone seek approval of those transactions from affected creditors by proposing a plan on which the creditors could vote. They submit the judge was properly concerned about the commercial viability of the overall restructuring plan and found that the new construction financing 129 intended to secure at a later date was "speculative at best."

[37] Centura/Solterra submit that 129's arguments conveniently ignore the interest of all other stakeholders, including lienholders, which would be prejudiced by the order sought by 129. They submit that, in these circumstances, there is no basis on which one could suggest that 129 had found common ground amongst the stakeholders, notwithstanding that both CMLS and Aviva, the two parties directly affected by the proposals, were generally supportive of the 129 offer.

[38] Centura/Solterra submit that the proposed appeal raises no points of interest to the practice and that the judge's decision involved the exercise of her discretion with reference to established authorities. They submit there is no precedent for the

CCAA relief that 129 sought from the court and that the chambers judge did not err in refusing the application.

[39] Centura/Solterra put particular emphasis on the fact that the appeal will unduly hinder the progress of the action. They point out that the Solterra sale must close before the end of September 2021 and that if the appeal is allowed to go forward, there is a risk that either the Petitioners or Solterra may terminate the sales agreement. They submit leave, if granted, will create uncertainty as to the time of completion of the Solterra sale or whether it can be completed at all.

[40] Centura/Solterra also point out that there is no certainty that 129's plan will come to fruition, let alone in a timely fashion. In this regard, they note there is no assurance that anyone other than CMLS will make any recovery. In these circumstances, they submit that it is not in the interest of justice to grant leave.

[41] Centura/Solterra submit the Court should refuse the request for a five-justice division. In that regard, they submit that the judge could have exercised her discretion in the same way without reference to *Cliffs*. They further submit that *Cliffs* is not inconsistent with the subsequent Supreme Court of Canada authorities.

D. CMLS and Desjardins

[42] CMLS and Desjardins also oppose the request for leave. They do so because they doubt the ability of 129 to complete the proposed refinancing, notwithstanding that if the 129 financing completes, CMLS will be made whole. They submit that if leave is granted, it will unduly hinder the progress of the action. In this regard, they submit that if leave is granted and a five-justice division is allowed to hear the appeal, there is no certainty of a decision being reached before the September 30, 2021 closing date of the sale to Solterra. Even if a decision was reached in favour of 129 before September 30, 2021, the 129 refinancing is not set to fund until late October 2021. In these circumstances, CMLS submits there is jeopardy that the Solterra sale could be lost.

[43] In addition, CMLS submits that any delay will cause it significant prejudice. In that regard, it notes that priority funding ahead of CMLS includes payment of professional fees of the Monitor and its legal counsel as well as the Petitioners' counsel. The appeal will necessitate further payment to these groups of professionals, as well as CMLS and Desjardins incurring their own increased legal fees. These additional expenses will reduce the amount of funds available for recovery to CMLS if ultimately the appeal is dismissed or if the 129 Revised Offer is approved but 129 does not complete.

E. The Petitioners

[44] As noted, the Petitioners, although taking no position in the court below on this application, opposed leave on the basis it would unduly hinder the progress of the action. In this regard, it echoed the submissions of CMLS that the appeal would serve only to divert limited resources and also risk the closing of the Solterra transaction. The submissions of the Petitioners are, however, somewhat artificial. The Petitioners have entered into the interim financing agreement with 129. Mr. Reyes is a principal of both the Petitioners and 129. The Petitioners' submissions on this application were apparently dictated to them by the Monitor, which itself refused to take a position. In these circumstances, the weight to be given to these submissions is limited.

TEST FOR LEAVE

[45] The test to be applied in determining whether leave to appeal should be granted is set out in *Goldman, Sachs & Co. v. Sessions,* 2000 BCCA 326:

1. Is the point on appeal of significance to the practice?
2. Is the point raised of significance to the action itself?
3. Is the appeal *prima facie* meritorious or frivolous?
4. Will the appeal unduly hinder the progress of the action?

[46] The criteria for leave are “all considered under the rubric of the interests of justice”: *Vancouver (City) v. Zhang,* 2007 BCCA 280 at para. 10.

[47] Where leave is sought to appeal a discretionary order, the third factor requires an assessment of “whether there is an arguable case that the chambers judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed will result in an injustice”: *Hagwilneghl v. Canadian Forest Products Ltd.,* 2011 BCCA 478 at para. 31. The applicants must establish a reasonable possibility that a division of the Court of Appeal would grant the appeal on its merits: *Webb v. Canada (Attorney General),* 2019 BCCA 288 at para. 15.

[48] For reasons explained by Justice Tysoe in *Edgewater Casino Inc. (Re),* 2009 BCCA 40, leave to appeal from *CCAA* orders is given sparingly. This is because in most cases the orders are discretionary in nature, and if leave is granted, it might unduly disrupt the ongoing *CCAA* proceedings.

DISCUSSION

A. Is the appeal significant to the practice?

[49] I agree with the appellant that the questions concerning how the equity of redemption should be factored into an analysis under the *CCAA* when faced with competing transactions and whether an intention to propose a plan of arrangement or compromise to creditors is a necessary precondition to relief under the *CCAA* raise issues of significance to the practice. While I agree with Centura/Solterra that there is no precedent for some of the relief sought, that in itself is not a basis to deny leave. To paraphrase Justice Fitzpatrick in *Quest University Canada (Re),* 2020 BCSC 1883 at paras. 153–154, leave to appeal ref’d *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364, the history of *CCAA* jurisprudence under the court’s broad statutory discretion is littered with court approval of innovative solutions. The question is whether the particular solution meets the remedial objectives of the *CCAA*: *Callidus* at para. 49.

B. Is the point of significance to the action itself?

[50] The appeal is obviously of significance to the parties. On the one hand, Solterra is currently the approved purchaser of the Project. On the other hand, 129 seeks to refinance the Project and proceed with the Project for the benefit of all creditors. The appeal is of particular significance to Aviva. If leave is denied, it stands to lose $8.6 million with little hope of recovery.

C. Is the appeal *prima facie* meritorious or frivolous?

[51] The answer to this question requires a consideration of the grounds of appeal. In this case, the parties are not in agreement as to whether the orders were strictly discretionary. If the decision below is considered a purely discretionary order, there must be an arguable case that the chambers judge erred in principle, made an order that was not supported by the evidence, or made an order that would result in an injustice. Even if the order is considered to be discretionary, the appellant has raised an arguable case that the chambers judge erred in principle. In this regard, I refer to the submissions concerning the equity of redemption, *Cliffs,* and the failure to compare the competing offers. I find the appellant has established a reasonable possibility that a division of this Court would grant the appeal on its merits.

D. Will the appeal unduly hinder the action?

[52] As to whether an appeal would unduly hinder the progress of the action, I acknowledge and recognise the concerns of CMLS concerning its potential prejudice if the appeal is allowed to go forward. If the appeal is ultimately dismissed, CMLS will recover less money than at present. Its position will be further prejudiced if, for any reason, the Solterra offer is withdrawn. Balanced against this potential prejudice, there is, of course, the possibility that the appeal might succeed and, if the 129 offer is funded, CMLS will indeed end up in a better position than they are at present. The prejudice to CMLS has to be balanced against the prejudice to Aviva and the pre-purchasers. Aviva stands to lose $8.6 million if leave is denied, and the pre-purchasers will be denied the units they purchased.

[53] In my view, in the present circumstances, the appeal will not unduly hinder the action's progress. While under the terms of the Solterra Backup Offer, the closing of the sale is to take place September 30, 2021, the appeal itself is scheduled to be heard on September 21, 2021. Solterra and the Monitor can agree under the terms of the sale agreement to extend the date for closing. While there is no assurance they will do so, given that Solterra, in the course of the bidding process, significantly raised its offer, it seems highly unlikely that, less than two months later, it would now withdraw from the transaction.

[54] Given all of the above, I am satisfied that it is in the interests of justice to grant leave to appeal.

<u>FIVE-JUSTICE DIVISION</u>

[55] The chambers judge found that a crucial consideration was that 129 was seeking an extension of the stay of creditor's rights without any indication it would put forward a plan of arrangement or compromise upon which the Petitioners' creditors may vote. She accepted the argument of Centura that the circumstances were similar to those in *Cliffs.* She quoted Justice Tysoe's comment in *Cliffs* that:

> [38] … 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.

[56] Whether those comments in *Cliffs* extend to and effectively prohibit the proposal of 129 is a matter of general import. While I appreciate the division hearing the appeal could conclude that *Cliffs* is distinguishable, it may hold otherwise, in which case it would be important that the division have the power, if they considered it appropriate, to reconsider *Cliffs*. Accordingly, in my view, a five-justice division is appropriate.

<u>SUMMARY</u>

[57] In summary, therefore, I would grant leave to appeal and direct the appeal be heard by a five-justice division. The appeal will proceed on September 21, 2021. The

chambers judge's order with respect to the Solterra Backup Order is stayed pending the hearing of the appeal. It will be up to the division hearing the appeal to determine whether the stay should or should not be continued. 129 will, by consent, post $10,000 for security for Solterra's costs of the appeal.

[58] **VOITH J.A.**: I agree.

[59] **MARCHAND J.A.**: I agree.

[Discussion with counsel re: timing of payment of the security]

[60] **GOEPEL J.A.**: The posting of security for costs in the sum of $10,000 will coincide with the date when the appellant's factum is due (September 1, 2021). A term of the order should include that if the security for costs is not posted, the appeal will be stayed and the stay of the sale will be lifted. By consent, security for costs will be held in counsel's the trust account.

[Further discussion with counsel re: filing schedule]

[61] **GOEPEL J.A.**: I would propose the appeal record and appeal book be filed separately. The filing of the certificate of readiness is dispensed with. The appellant will file its factum, appeal record, and appeal book by September 1, 2021. All of the respondents will file their factums, individual appeal books, and condensed books by September 13, 2021. If there is to be a reply filed, it will be filed by September 17, 2021. Any further evidence to be filed by the parties should be filed by their respective factum filing date.

"The Honourable Mr. Justice Goepel"