Court of Appeal File No. CA-47585

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 COMPROMISE 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/Applicants)

AND

1296371 B.C. LTD.

APPELLANT
(Respondent/Applicant)

AND

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

RESPONDENTS
(Respondents)

FACTUM OF ERNST & YOUNG INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR (the "MONITOR") OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

Counsel for the Monitor,
Ernst & Young Inc.

BLAKE, CASSELS & GRAYDON LLP
Suite 2600, 595 Burrard Street
Vancouver, BC V7X 1L3

Peter Bychawski
Peter L. Rubin

Counsel for the Appellant,
1296371 B.C. Ltd.

DENTONS CANADA LLP
20th Floor, 250 Howe Street
Vancouver, BC V6C 3R8

Jordan Schultz
Eamonn Watson

Counsel for the Respondents,
Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.

FASKEN MARTINEAU DUMOULIN LLP
Suite 2900, 550 Burrard Street
Vancouver, BC V6C 0A3

Kibben Jackson
Thomas Posyniak
Glen Nesbitt

Counsel for the Respondents,
Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

BENNETT JONES LLP
Suite 2500, 666 Burrard Street
Vancouver, BC V6C 2X8

David Gruber
Keely Cameron

Counsel for the Respondents,
CMLS Financial Ltd. and Desjardins Financial Security Life Insurance Company

DLA PIPER (CANADA) LLP
Suite 2800, 666 Burrard Street
Vancouver, BC V6C 2Z7

Colin D. Brousson
Alexandra McCawley

Counsel for the Respondent,
Aviva Insurance Company of Canada

LAWSON LUNDELL LLP
Suite 1600, 925 West Georgia Street
Vancouver, BC V6C 3L2

William Roberts

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CHRONOLOGY OF THE DATES RELEVANT TO THE APPEAL

The Monitor adopts the chronology of the dates relevant to the appeal as set out in the Appellant's Factum. Capitalized terms not otherwise defined in this Factum have the meanings ascribed to them in the Appellant's Factum.

OPENING STATEMENT

1. Pursuant to its expanded powers under the Amended and Restated Initial Order (the "**ARIO**") granted by the CCAA Judge, the Monitor was directed to implement a "dual track" Sale and Investment Solicitation Process (the "**SISP**") aimed at effecting the sale of Terrace House, or a going concern investment in the Petitioners' business. The Monitor implemented the SISP over the course of approximately twelve (12) months from June 2020 to June 2021, including during two extensions to the SISP procedures directed by the CCAA Judge on April 16, 2021 and May 25, 2021.

2. Between April 2021, when the Petitions (upon the Monitor's request and recommendation) filed an application for approval of Landa Offer #1, and the June 2021 approval of the Solterra Backup Offer, the CCAA Judge (a) presided over four (4) hearings with respect to the 129 Refinancing and Solterra and Landa offers; (b) considered five (5) reports from the Monitor; (c) reviewed three (3) affidavits sworn by Mr. Macario Reyes (the sole director of the Petitioners and 129, a company incorporated to give effect to the 129 Refinancing); and (d) heard extensive submissions from counsel for Mr. Reyes / 129, Solterra, Landa, and the Petitioners' primary secured creditors, CMLS and Aviva.

3. Ultimately, in what was in effect a court-supervised auction held on June 8 and June 10, 2021 (the "**Approval Hearing**"), the CCAA Judge dismissed 129's application for the suite of relief under the CCAA required to give effect to the 129 Refinancing, deciding to instead approve the Solterra Backup Offer on the grounds that it represented the best outcome for stakeholders in the circumstances.

4. The Monitor agreed with the parties' positions at the Approval Hearing that the CCAA Judge had the jurisdiction to approve any of the proposals before her, and that the issue was whether she <u>should</u> exercise her discretion to approve the 129 Refinancing instead of, or in conjunction with, one of the other options before her. In this context, the Monitor laid out a factual summary of the proposals before the CCAA Judge, the impact of the proposals on stakeholders, and the options available to the CCAA Judge, but did not take a position at the Approval Hearing, leaving the matter to the discretion of the CCAA Judge. The Monitor similarly takes no position on this appeal.

PART 1:
STATEMENT OF FACTS

5. The Monitor adopts the statement of fact set out in the Appellant's Factum subject to the following factual clarifications.

A. The Monitor's Position on the 129 Financing Before the CCAA Judge

6. The Appellant's Factum states that the Monitor "reported that the 129 Refinancing would result in a 'materially better' outcome for the stakeholders over any of the Solterra or Landa offer."[1]

7. The Monitor's full statement to the CCAA Judge on the 129 Refinancing, as set out in the Confidential Seventh Report of the Monitor dated June 8, 2021 (the "**Confidential 7th Report**"), was as follows:[2]

> The Monitor notes that if the Revised 129 Offer [i.e., the 129 Refinancing] completes it will result in a materially better outcome to the Petitioners' stakeholders than the Original Solterra PSA, the Third Landa PSA and the Backup Solterra PSA, when weighing all the factors and continued financial participation by stakeholders. This was previously noted by the Monitor at paragraph 16 of the Confidential Supplement to the Sixth Report of the Monitor dated May 24, 2021 with respect to the Original Solterra PSA. [Emphasis added]

8. The conditional nature of the Monitor's statement with respect to the relative benefit of the 129 Refinancing for the Petitioners and their stakeholders as compared to Solterra Offer #1, Landa Offer #3, and the Solterra Backup Offer was not a matter of

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[1] Appellant's Facum, at para. 36.

[2] Confidential 7th Report, Book of Confidential Documents, filed August 4, 2021 ("**Confidential Documents**"), at Tab 5, para. 21.

semantics. As noted in the Appellant's Factum, "the conditionality of the 129 Refinancing has been an ongoing question for stakeholders."[3]

9. In the Confidential Sixth Report of the Monitor dated May 24, 2021, the Monitor noted that if the iteration of the 129 Refinancing before the CCAA Judge at that time completed, then it would result in a better result for stakeholders than approval of Solterra Offer #1.[4] Nonetheless, the Monitor recommended to the CCAA Judge that she approve Solterra Offer #1 in preference to the 129 Refinancing.[5] The Monitor's opinion in this regard was consistent with the law that a court-officer administering a sale process "is entitled to prefer a bird in the hand to two in the bush", and to accept an unconditional offer rather than risk delay or jeopardize closing due to conditions which are beyond its control.[6]

10. As noted in the Confidential 7th Report, at the time of the Approval Hearing, the Monitor's view was that 129 had satisfied the "material" conditions to the 129 Refinancing.[7] However, CMLS remained concerned with the continued conditionality of the 129 Refinancing, noting that the 129 Refinancing (a) was not unconditional; (b) required further documentation to be finalized with Aviva and consents to be provided by Domain; (c) contained an insurance condition in circumstances in which the Monitor has had challenges in obtaining insurance coverage for Terrace House; and (d) did not contemplate a non-refundable deposit.[8]

11. In these circumstances, it was the Monitor's view that the CCAA Judge had four (4) options before her at the Approval Hearing:

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[3] Appellant's Factum, at para. 131(b).
[4] Confidential Sixth Report of the Monitor dated May 24, 2021 (the "**Confidential 6th Report**"), Confidential Documents, at Tab 3, para. 16.
[5] Sixth Report of the Monitor dated May 20, 2021, Appellant's Appeal Book, Tab 6, para. 71(c).
[6] *Skyepharma PLC v. Hyal Pharmaceutical Corp*. 1999 CanLII 15007 (ON SC).
[7] Confidential 7th Report, Confidential Documents, at Tab 5, para. 16(a).
[8] Confidential 7th Report, Confidential Documents, at Tab 5, para. 16(b).

(a) Approve the 129 Refinancing. This outcome was supported unconditionally only by Aviva. CMLS's support of this outcome was conditional on the CCAA Judge approving either the Landa or Solterra offers as "backups" to protect against the completion risk associated with the 129 Refinancing;

(b) Approve Solterra Offer #1 on the grounds that offers received by the Monitor after May 25, 2021, including Landa Offer #3 and the revised 129 Refinancing proposal, while promising better financial outcomes for stakeholders, should be disregarded. In other words, Solterra's position was that consideration of offers other than Solterra Offer #1 would run contrary to the object of ensuring that there is certainty and finality in court-approved sale processes;

(c) Approve the Solterra Backup Offer;

(d) Approve the 129 Refinancing in conjunction with Landa Offer #3 or either of the two Solterra offers. In this scenario, the Landa and Solterra sale proposals would serve as "backup" offers to protect stakeholders against the risk that 129 may not be able to satisfy the conditions to the completion of the 129 Refinancing. As noted above, CMLS was supportive of this outcome given its concerns about the conditionality of the 129 Refinancing. Landa was also supportive of Landa Offer #3 being utilized in this fashion. Solterra was not supportive of this option and did not agree to either of its offers being utilized as a backup.

12. As noted by the CCAA Judge, the Monitor did not express any specific recommendation to the Court in respect of which of these options should be approved, electing to remain "agnostic" as between the options open to the CCAA Judge (including in relation to the 129 Refinancing with or without a backup offer).[9]

13. The Monitor's neutral position on the options before the CCAA Judge was a recognition of the careful and delicate balancing of interests required to be undertaken

[9] *Chambers Reasons*, Appeal Record, Tab 14, page 270, at para. 109.

by the CCAA Judge. The Approval Hearing, held more than twelve (12) months into this CCAA proceeding and after the conclusion of the SISP and Final Sale Process, raised interconnected factual and legal issues pertaining to the objectives of efficacy and integrity of court-supervised sale processes, the interest of stakeholders in maximizing value, the right of “redemption” asserted by 129, the principle of “appropriateness” guiding a CCAA judge’s exercise of discretion under s. 11 of the CCAA, and the objectives of the CCAA more generally.

14. In this context, the CCAA Judge summarized in “broad strokes” the relative financial consequences of the options before her, as follows:[10]

(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 (e.g., 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 [i.e., the 129 Refinancing], the material benefits, as noted by the Monitor, were: (i) the Interim Lending Facility and CMLS would be paid in full; (ii) Aviva’s security position would be “improved” with the prospect of full or material recovery; and (iii) 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.

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[10] *Chambers Reasons*, Appeal Record, Tab 14, page 250, at para. 42.

15. Ultimately, having considered the options and issues before her, the CCAA Judge found that the "Solterra Backup Offer represents the best outcome for the stakeholders in all the circumstances."[11]

B. The Continued Conditionality of the 129 Refinancing

16. After the Approval Hearing, 129 submitted to this Court revised versions of the "**Domain Commitment Letter**" dated July 30, 2021[12] and September 1, 2021.[13]

17. The Monitor understands that under the current iteration of the Domain Commitment Letter the remaining conditions to the completion of the 129 Refinancing are the following:[14]

(a) Approval by this Court of 129's proposed form of Order on or before September 30, 2021 subject to a potential extension of the Loan Funding Date to a date that is no earlier than four (4) weeks following the granting of this Court's decision and provided that the Loan Funding Date is not later than December 15, 2021 (Sections 8 and 12(a));

(b) The existing DIP Financing to be fully paid out (Section 12(b));

(c) Review of the Monitor's budget through the term of the Loan (Section 12(c));

(d) The Administration Charge to be fully paid as of the Loan Funding Date and removed and replaced by the funding of the security to the Monitor or alternatively the Administration Charge being limited to an amount satisfactory to Domain (Section 12(d));

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[11] *Chambers Reasons*, Appeal Record, Tab 14, page 271, at para. 111.
[12] Third Revised Commitment Letter dated July 30, 2021, Exhibit "A" to Affidavit #5 of Macario Teodoro Reyes, sworn July 30, 2021.
[13] Amendment to Third Revised Commitment Letter dated September 1, 2021, Exhibit "B" to Affidavit #6 of Macario Teodoro Reyes, sworn September 1, 2021.
[14] Capitalized terms not otherwise defined in this paragraph have the meanings ascribed to them in the Domain Commitment Letter.

(e) Provision of a Payment Reserve to the Monitor (with a current estimate of $250,000, but subject to change), of which $100,000 is to be advanced to the Monitor on closing, to cover anticipated future costs of the Monitor and its counsel in the CCAA Proceedings (Section 12(e));

(f) Consent of Aviva to the transfer and assignment of the Existing Loan and Existing Security to the Lender and agreement to not seek a reverse vesting order or challenge the interest of the participants in the new ownership of the Existing Security or otherwise to seek to modify the registration of the Existing Loans and the Existing Security as a first-ranking charge registered on title to the Secured Property (Section 12(f));

(g) Approval by this Court of 129's proposed form of Order referred to in Section12(a) of the Domain Commitment Letter, to include the following provisions:

  (i) Carve out of the Existing Loans and the Existing Security from the stay of proceedings in connection with the CCAA Proceeding;

  (ii) Stays of proceedings to be extended to the term of the Loan (i.e., April 30, 2022 (the "**Stay Condition**");

  (iii) No further DIP financing without consent of the Lender;

  (iv) Monitor's powers to be reduced to allow Borroer(s) to complete the Project;

  (v) CCAA to go into "dormant status" for the term of the Loan, meaning that no further steps are to be taken in the CCAA Proceeding during the stay of proceedings without the consent of the Lender (Sections 12(a) and 12(g));

(h) Review and approval by Domain of the executed assignment and transfer agreement with respect to the purchase and assignment of the Existing Loans and the Existing Security, and all supporting documents including the commitment letter issued by CMLS as amended and its replacement by the Domain Commitment Letter. (Section 17.1(c));

(i) Verification of minimum of $9,196,000 of funds required to be contributed by the Borrower(s), the Covenantor(s), and/or by 129 to complete the refinance of the Existing Lenders and purchase and assignment of the Existing Loans and the Existing Security. (Section 17.1(d));

(j) Satisfactory review of and opinion with respect to the following by Lender's solicitor:

(i) Mortgage CA7337616 registered in the name of CMLS;

(ii) Assignment of rents CA7337617 registered in the name of CMLS and

(iii) Mortgage CA8277031 registered in the name of Desjardins (Section 17.1(e)).

This condition is satisfied subject to the form of order sought by this Court being consistent with the form of order placed before the CCAA Judge on May 25, June 8, and June 10, 2021 in 2021 BCSC 1272.

(k) Receipt of insurance policies, including confirmation of paid insurance premiums, satisfactory to the Lender and/or its solicitor. This condition has been satisfied, subject to the existing insurance policies in place issued by Marsh Canada Limited being extended to the term of the Loan and subject to Domain being added as a first loss payee under both policies (Section 17.2(a)) (the "**Insurance Condition**");

(l) Registered Loan Security satisfactory to Lender's solicitor. (Section 17.2(b))

(m) Loan documentation to be drawn by the Lender's solicitor using the Lender's specified forms. The full Loan amount to be advanced to the Borrower(s) only when the title to and all security in connection with the Loan and all other documents and matters with respect to the Loan being necessary or advisable to the Lender's solicitors are complete, satisfactory, and acceptable to the Lender's solicitors (Schedule A, paragraph 3); and

(n) Such other and further information, material or requirements that may be required by Domain, the Lender, or the Lender's solicitor. (Section 17.1(x) and 17.2(c)).

(together, the "**Existing Conditions**")

18. The Monitor remains of the view expressed in its Confidential 7th Report that as of the date of the Approval Hearing the Existing Conditions were customary funding conditions. Certain of the Existing Conditions are also such that by their terms they are intended to be discharged on closing. Nonetheless, the Monitor expected that, more than four (4) months after 129's initial execution of the Domain Commitment Letter, and approximately thirty (30) days after this Court granted 129 leave to appeal, the Existing Conditions would be satisfied or otherwise disposed of in the context of an insolvency transaction, and the 129 Refinancing would be subject to Court approval only.

19. With respect to the Insurance Condition, the Monitor advised the Service List for this proceeding on September 10, 2021 that it has been informed by the Petitioners' insurance broker that the current insurance provider for the Terrace House development will not provide an extension to the insurance currently in place beyond its scheduled September 30, 2021 expiry date.[15] While the Monitor continues to engage with the Petitioners' insurance broker and to consider other potential solutions to this issue, there is a significant risk that the Terrace House development will not have property insurance coverage after September 30, 2021.

20. With respect to the Stay Condition, while Mr. Reyes's affidavit indicates that the Petitioners will have funds sufficient to meet their near-term cash needs,[16] the

[15] Affidavit of Yiota Petrakis, sworn September 13, 2021, Exhibit "A".
[16] Affidavit #6 of Macario Teodoro Reyes, sworn September 1, 2021, para. 11.

Petitioners currently lack access to funds necessary to meet their anticipated financial needs through to the expiry of the stay extension required by the Stay Condition. While not unprecedented in CCAA proceedings, it is not customary for a CCAA stay period to extend beyond a date on which a debtor is anticipated to incur a cash shortfall. The Monitor understands that Mr. Reyes intends to raise further funds during the six (6) month stay extension period sought by 129 in order to cover the CCAA and related operational costs. If the stay period sought by 129 is granted, but further funds are not forthcoming, a hearing before the supervising CCAA Judge may be necessary to address the matter.

21. In addition to the foregoing, the Monitor understands that 129's ability to meet its payment commitments under the 129 Refinancing is itself conditional upon the closing of a further loan commitment by Domain in the principal amount of $1,675,000 (the "**Additional Domain Financing**") that was expected to close on or about September 10, 2021. To the Monitor's knowledge, the Additional Domain Financing did not close by September 10, 2021. While the Additional Domain Financing may close prior to the hearing of this appeal, and 129 may in fact have the funding required to meet its commitments under the proposed 129 Refinancing, at the present time that is an unknown.

C. The Petitioners' Ability to Advise of their Restructuring Plans

22. The Appellant's Factum takes the position that, without control of Terrace House, it was not possible for Mr. Reyes (the sole director of 129 and the Petitioners) to advance all aspects of a long-term restructuring or to provide the Court with admissible evidence with respect to the Petitioners' intentions.[17]

23. To the extent that the Appellant's position on this appeal is that the Monitor's "enhanced powers" preclude the Petitioners from advising the CCAA Judge or this Court of the Petitioners' intentions for restructuring the Petitioners' business, the Monitor must respectfully disagree.

[17] Appellant's Factum, para. 92.

24. Notwithstanding the Monitor's enhanced powers in this proceeding, paragraph 12 of the ARIO expressly authorizes the Petitioners to take certain actions, including by pursuing "all avenues of refinancing for their Business and Property, in whole or part," to permit the Petitioners to proceed with an orderly restructuring of their business.

25. The Monitor is not aware of any provision of the ARIO or the CCAA that would preclude the Petitioners and/or Mr. Reyes from advising the CCAA Judge or this Court of what steps they would propose to take to implement a restructuring plan on behalf of the Petitioners if the 129 Refinancing were to be approved.

PART 2:
ISSUES ON APPEAL

26. The Monitor takes no position on alleged errors in the Chambers Reasons as framed in Part 2 of the Appellant's Factum.

PART 3:
ARGUMENT

27. While the Monitor will not comment on the CCAA Judge's reasons for reaching the conclusion that the Solterra Backup Offer represented the best outcome for the stakeholders, it is of the view that this was a conclusion that it was open the CCAA Judge to reach in the circumstances.

PART 4:

NATURE OF ORDER SOUGHT

28. The Monitor takes no position on the nature of the order sought by 129.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Vancouver, Province of British Columbia this 13th day of September, 2021.

Peter Bychawski

APPENDIX: ENACTMENTS

[N/A]

LIST OF AUTHORITIES

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