Court of Appeal File No. CA47585

COURT OF APPEAL

ON APPEAL FROM the Order of the Honourable Madam Justice Fitzpatrick, of the Supreme Court of British Columbia, pronounced June 8, 2021

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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 APPELLANTS

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 THE RESPONDENTS CENTURA BUILDING SYSTEMS (2013) LTD. AND SOLTERRA ACQUISITIONS CORP.

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CHRONOLOGY

The respondents Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp. do not disagree with the substance of the appellant's chronology.

OPENING STATEMENT

On this appeal, the appellant ("**129**") seeks to distract from the substantive provisions of the orders it seeks, and the tenuous basis on which they are sought, by returning time and again to the fact that the refinancing for which it sought court approval provides a potentially better outcome for the debtors' two senior secured creditors (one of whom now opposes that relief). That, says the appellant, is in effect the only material consideration for the exercise of the court's discretion under sections 11 and 11.02 of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 *("**CCAA**")*.

The orders sought by the appellant are intended to facilitate the debtors' restructuring while affecting the civil and property rights of secured and unsecured creditors alike without any intention to deal with those creditors' claims. Such a result is antithetical to the *CCAA* regime and contrary to all relevant binding authorities. The relief, if granted, would have the effect of disenfranchising the debtors' general body of creditors. It would be anomalous in the context of Canadian *CCAA* jurisprudence and represent a sea change in *CCAA* practice.

The appellant itself describes the proposed refinancing transactions as a "Restructuring Plan". The chambers judge—an experienced *CCAA* judge—correctly held that in the circumstances of the case, it was necessary to show that the appellant had, at a minimum, a "kernel of a plan" for dealing with creditors' claims. As confirmed by the Supreme Court of Canada that decision by the chambers judge constituted an exercise of her discretion.

The appellant does not challenge that the chambers judge's decision constituted an exercise of discretion. Instead, the appellant attempts to cast the judge's exercise of discretion as being premised on an outdated decision of this Court which is no longer good law. Not only does this purposefully mischaracterize the chambers judge's discretionary exercise, it ignores the fact that Canadian authorities consistently hold that in the context of a restructuring process under the *CCAA*, a debtor must generally evidence a "kernel of a plan" in order to obtain discretionary relief, including an extension of a stay. Where, as in the present case, it is apparent that the debtor has no

(iv)

intention at all to address creditors' claims, orders sought in furtherance of a restructuring, including a stay of proceedings, ought not to be granted.

In the circumstances of the present case, the court's finding that it would be inappropriate to exercise its discretion to grant the relief sought by 129 is unassailable. There is no basis on which this Court ought to interfere with that decision.

PART 1 - STATEMENT OF FACTS

A. RESPONDENTS' POSITION ON THE APPELLANT'S STATEMENT OF FACTS

1. The respondents, Centura Building Systems (2013) Ltd. ("**Centura**") and Solterra Acquisitions Corp. ("**Solterra**"), generally accept the appellant's statement of facts, subject to the following additions and clarifications.[1]

(a) *The Solterra Backup Offer*

2. The appellant states that under the Solterra Backup Offer, which was approved by the court, the Petitioners would disclaim all $16 million of pre-sale agreements.[2] That is not correct. Under the Solterra Backup Offer, Solterra will retain the seven pre-sale agreements whose deposits remain in trust with Dentons Canada LLP.[3]

(b) *The 129 Refinancing*

3. While the appellant describes, at a high level, what the 129 Refinancing would accomplish,[4] it does not provide details or specify the orders sought to facilitate the various transactions. Among others, 129 sought the following orders, each of which is premised upon the exercise of the court's discretion under section 11 of the *CCAA*:[5]

A. approving a commitment letter issued by 1260780 ("**126**"), a company controlled by Mr. Reyes' mother, which grants 126 the "right, in its sole discretion" to convert its loan into limited partnership units that will be preferential to all classes of existing units in the limited partnership;

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[1] Capitalized terms used herein and not otherwise defined will have the meanings ascribed to them in the appellant's factum.

[2] Appellant's factum, para. 32.

[3] Monitor's Confidential Seventh Report, dated June 8, 2021 (the "**Confidential Seventh Report**"), Appendix C.

[4] Appellant's factum, para. 35.

[5] Appeal Record ("**AR**"), pp. 253-254, Reasons for Judgment of Fitzpatrick J. ("**Reasons**"), paras. 48-49.

B. authorizing the Petitioners to enter into agreements with the New Lenders to amend the loan and security documents assigned to them by CMLS so as to increase the principal amount secured thereunder by approximately $5 million and increase the interest rate up to as much as 24% per annum, compounding monthly;

C. creating a new, first-ranking court-ordered charge over all assets of the Petitioners to secure their obligations to Domain, 129, and 126 (collectively, the “**New Lenders**”); and

D. directing that no further steps be taken by the Petitioners in the *CCAA* proceedings without the consent of Domain.

4. The appellant also sought an order under section 11.02 of the *CCAA* extending the stay of proceedings for approximately six months.

5. The appellant incorrectly describes the 129 Refinancing with respect to the transactions concerning the CMLS Facility. The appellant says “the 129 Refinancing would… [r]epay the CMLS Facility in full, and assign the CLMS [*sic*] Security, including the CMLS Mortgage, to a company incorporated by Domain…”.[6]

6. In fact, it has never been suggested that the CMLS Facility would be repaid. The transaction was never described as a repayment or redemption. The transaction was exclusively referred to as the purchase and assignment of the CMLS Mortgage by and to the New Lenders. That part of the refinancing is described in the appellant’s own evidence and in its Notice of Application, including as follows:

A. “the purchase and assignment of the CMLS Facility and the CMLS Security by the New Lenders…”;[7]

B. “to provide funding to the Petitioner to allow it to repay the Interim Financing Facility, and <u>for the New Lenders to acquire the CMLS Facility and the CMLS Security</u>.”[8] [emphasis added]

[6] Appellant’s factum, para. 34(b).

[7] AR, p. 41, 129 Notice of Application (“**129 Application**”), para. 1(d).

C. requiring the “execution of a purchase and assignment agreement to allow the Applicant to acquire the loans made by CMLS and the Interim Lender”;[9] and

D. “the purposes of the [129 Refinancing] is to… [p]urchase and take and assignment of the loan and security held by CMLS.”[10]

7. The commitment letters issued by Domain at all times described the “loan type and purpose” as: “(ii) together with [129], the purchase and assignment of the existing loans and security… provided by CMLS…”.[11]

8. The appellant notes 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 offers.”[12] However, the Monitor actually confirms in the Confidential Seventh Report that the outcome is better only for CMLS, who would be paid in full, and Aviva, who obtains enhanced security and a prospect of some recovery, and that this “better” result arises only <u>if</u> the 129 Refinancing completes. The Monitor makes no comment on whether the 129 Refinancing is appropriate in the circumstances.[13]

9. At no point in the proceeding in the court below did the Monitor withdraw or qualify its recommendation that the court approve the first Solterra offer (which was improved upon by the Solterra Backup Offer).[14] The Monitor never recommended that the court approve the 129 Refinancing.

10. Of note, CMLS, which was anticipated to suffer a shortfall of approximately $575,000 under the Solterra Backup Offer, expressed concerns with respect to the 129 Refinancing, including its conditionality.[15] In the court below, CMLS submitted that if the

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[8] AR, p. 44, 129 Application, para. 17.
[9] AR, p. 45, 129 Application, para. 24(b).
[10] Appeal Book (“**AB**”), p. 6, Affidavit #2 of M. Reyes (“**Reyes #2**”), para. 14.
[11] AB, p. 58, Affidavit #3 of M. Reyes, Exhibit “A”.
[12] Appellant’s factum, para. 36.
[13] AR, pp. 260-261, Reasons, para. 70; Confidential Seventh Report dated, para. 21.
[14] AB, p. 169, Monitor’s Sixth Report, dated May 20, 2021, para. 71(c).
[15] Confidential Seventh Report, para. 16(b).

129 Refinancing was to be approved, it should be on the condition that Landa Offer #3 be approved as a backup offer. On the application for leave to appeal, CMLS confirmed that it supported the Solterra Backup Offer and argued against leave being granted.[16]

11. At the hearing in the court below, the appellant submitted that the 129 Refinancing appropriately disregarded the interests of creditors other than CMLS and Aviva, including lienholders, as they were "out of the money".[17]

(c) *Decision of the chambers judge*

12. In declining to exercise her discretion to grant the relief sought by the appellant, the chambers judge found that:

A. the 129 Refinancing did "not just refinance the existing debt with the existing priorities," but rather sought to "add millions of dollars of secured debt";[18]

B. the 129 Refinancing "significantly alters the commercial terms of the CMLS debt and security, including by substantially increasing the interest rate on the secured loan";[19]

C. "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. 250, ss. 1 (definitions of "charge" and "encumbrance") and 206(2)";[20] and

D. "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".[21]

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[16] Memorandum of Argument of CMLS dated August 9, 2021, paras. 5, 6, 8 and 9.
[17] AR, p. 261, Reasons, para. 73.
[18] AR, p. 259, Reasons, para. 63.
[19] AR, p. 259, Reasons, para. 64.
[20] AR, p. 259, Reasons, para. 64.
[21] AR, p. 265, Reasons, para. 88.

13. The chambers judge also had other concerns with the 129 Refinancing, which she weighed as part of the exercise of her discretion.[22] Regarding 129's self-described "Restructuring Plan", the judge found as follows:

> [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.
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> [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.

PART 2 - ISSUES ON APPEAL

14. The respondents submit that the central question is whether the chambers judge erred in the exercise of her discretion in holding that it was necessary that there be some evidence of an intention that the Petitioners put a plan to their creditors. The respondents submit that, given the nature of the relief sought by 129 and in the circumstances of the case, the judge made no error of principle or otherwise erred in the exercise of her discretion in refusing the relief sought by 129.

15. The respondents submit that the chambers judge: (a) made no error in finding that the 129 Refinancing was not a redemption and appropriately considered the Petitioners' interests in exercising her discretion; (b) properly exercised her discretion in holding that there had to be some evidence of a plan for the Petitioners to deal with their creditors as a condition of granting the relief sought by 129; and (c) properly considered the effect of the 129 Refinancing in exercising her discretion.

[22] AR, p. 266, Reasons, para. 89.

PART 3 - ARGUMENT

A. STANDARD OF REVIEW

16. The appellant's factum obscures rather than clarifies the applicable standard of review in respect of the three grounds of appeal. The appellant appears to suggest that each question engages a question of principle, but at other points concedes there are elements of fact finding and discretion. This framing is strategic and intended to avoid the fact that the essential exercise undertaken by the chambers judge was a discretionary one under sections 11 and 11.02 of the *CCAA*.

17. A *CCAA* judge's exercise of discretion is granted substantial deference by appellate courts, and this Court must be very cautious before interfering.[23] Appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably. Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's.[24] Further, "[a]n appellate court should not substitute its opinion in place of the opinion of the trial judge or chambers judge under the guise that the judge did not give sufficient weight to a relevant consideration. It is incumbent upon an appellant to demonstrate error on the part of the judge, and an appellate court should not interfere with the exercise of discretion by a judge simply because the judge failed to mention a relevant consideration".[25]

18. The respondents do agree that to the extent that the appellant challenges the correctness of this Court's decision in *Cliffs*, that issue raises a question reviewable on the correctness standard. However, for the reasons set out below, the respondents also say that issue does not alter the correctness of the chambers judge's decision.

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

[24] *9354-9186 Québec inc. v. Callidus Capital Corp*., 2020 SCC 10 ("***Callidus***"), para. 53.

[25] *Dhillon v. Pannu*, 2008 BCCA 514 ("***Dhillon***"), para. 28.

B. <u>OVERVIEW OF *CCAA*</u>

19. The Supreme Court of Canada's decision in *Century Services*[26] provides a concise overview of "the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence."[27] The Court explains the operation of the *CCAA* as follows:

> [14] There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership.

20. In the present case, there is no suggestion that the Petitioners' solvency will be restored. Accordingly, the remaining alternatives are: (i) liquidation of the Petitioners' assets (as would occur under the Solterra Backup Offer); or (ii) a restructuring in the form of a compromise or arrangement <u>that is accepted by the Petitioners' creditors</u>. It is the latter process which 129 purports to undertake, though without the support of all but one of the Petitioners' creditors.

21. In pursuing its "Restructuring Plan", 129 first seeks to implement the 129 Refinancing by obtaining new, first-ranking secured debt having a principal amount approximately $5 million, or 25%, more than the first-ranking secured debt in place at the inception of these *CCAA* proceedings. It seeks—and requires—orders of the court facilitating this. It also seeks a six-month extension of the stay of proceedings, during which time 129 proposes that the Petitioners will have "breathing room to secure new construction financing for the Terrace House Project."[28]

22. 129 seeks numerous substantive orders in order to undertake its restructuring, all premised on the exercise of the court's discretion under the *CCAA*, and all with "no true

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[26] *Century Services Inc. v. Canada,* <u>2010 SCC 60</u> ("***Century Services***").
[27] <u>*Century Services*</u>, para. 11.
[28] AB, p. 7, Reyes #2, para. 16.

intention" to put a plan to the Petitioners' many creditors or even evidence to indicate that any recovery by the general body of creditors might be possible.[29] As will be further explained below, what 129 is seeking is extraordinary and unprecedented in the context of a *CCAA* proceeding and is contrary to the fundamental purposes of the Act and the principles guiding the exercise of the court's discretion under it.

C. THE EXERCISE OF DISCRETION UNDER SECTIONS 11 AND 11.02 OF THE *CCAA*

23. The appellant sought multifarious orders, including a six-month extension of the stay of proceedings. The court's jurisdiction to make an order staying proceedings against the debtor company arises under in section 11.02 of the *CCAA*. The remainder of the relief sought by the appellant is premised on section 11 of the *CCAA*.

24. Orders made under both section 11 and section 11.02 of the *CCAA* are discretionary.[30] For 129 to obtain the relief it sought, the chambers judge would have had to exercise her discretion to: (i) extend the stay of proceedings for six months under section 11.02; and (ii) grant the remaining relief sought under section 11.

25. To succeed on this appeal, the appellant will have to convince this Court that the chambers judge's exercise of her multilayered discretion was, in each instance, based on an incorrect principle or exercised unreasonably.

(a) *The exercise of discretion under section 11.02 of the CCAA*

26. On any application under section 11.02 of the *CCAA* for an order granting or extending a stay of proceedings, it is incumbent on the applicant to satisfy the court that the granting of the stay is consistent with the fundamental purpose of the *CCAA*, being "to preserve the status quo while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned".[31]

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[29] AR, p. 265, Reasons, paras. 87-88.

[30] *Canada North*, para. 21; *Callidus*, paras. 47-48; *North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1382, para. 28.

[31] *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 ("***Asset Engineering***"), para. 26.

27. In *North American Tungsten*, the British Columbia Supreme Court held that it was necessary for the applicant to show that the stay "will advance the purpose of the *CCAA*."[32] In *Canada North Group Inc.*, the Alberta Queen's Bench observed that "[a]ppropriateness of an extension under the *CCAA* is assessed by inquiring into whether the order sought advances the policy objectives underlying the *CCAA*. A stay can be lifted if the reorganization is doomed to failure, but where the order sought realistically advances those objectives, a *CCAA* court has the discretion to grant it…".[33]

28. In this Court's decision in *Cliffs*,[34] this Court held that "the ability of the court to grant or continue a stay under [what was then] s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"... Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose."[35] The Court went on to qualify that "[t]he filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11 [citation omitted]. In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors."[36] [emphasis added.]

29. Accordingly, in the context of a restructuring process, while it is not in every case necessary to evidence a plan for creditors in order to obtain a stay of proceedings, where (as in the present case) it is clear there is in fact no intention whatsoever to propose such a plan, a stay should not be granted as doing so would not further the remedial purpose of the *CCAA*.

30. In seeking to have *Cliffs* overruled, the appellant suggests that the decision "does not comport with current *CCAA* practices."[37] That is incorrect. Canadian jurisprudence is

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[32] *North American Tungsten Corporation Ltd. (Re),* 2015 BCSC 1376 ("***North American***")*,* para. 26.

[33] *Re Canada North Group Inc.*, 2017 ABQB 508 ("***Canada North QB***"), para. 34.

[34] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital,* 2008 BCCA 327 ("***Cliffs***").

[35] *Cliffs*, paras. 26. See also paras. 27-30.

[36] *Cliffs*, para. 31.

[37] Appellant's Memorandum of Argument on Leave to Appeal, para. 83.

replete with authorities which hold that where a debtor company seeks a stay or an extension of stay under the *CCAA* in order to restructure, there is a requirement that the court be satisfied that the debtor has a "germ" or "kernel" of a plan to deal with creditors, or, at a minimum, an intention to do so.[38]

31. The reason for the consistency in the authorities is apparent: as noted in *Century Services*, in order to successfully restructure, a debtor company will require the consent of its creditors. Where, in furtherance of a restructuring, the debtor seeks to stay creditors' rights to pursue their ordinary remedies, those creditors and the courts are rightly entitled to be satisfied that the debtor has, at a minimum, a realistic intention to address creditors' claims. That plan need not be fully fleshed-out in the early stages of a proceeding; in each case and on each application the court has the discretion to decide whether the evidence of the plan is sufficient to justify a continuation of the stay.

(b) *The exercise of discretion under section 11*

32. Section 11 of the *CCAA* grants the court the authority to "make any order that it considers appropriate in the circumstances". The authority thus granted is broad, but not without limitations, including those set out in the *CCAA* and those considered appropriate by the relevant authorities and, ultimately, the supervising judge.

33. While it is acknowledged that section 11 has been relied on in numerous instances to grant relief in the form of creative solutions, the ability of a *CCAA* court to make orders facilitating such outcomes is not boundless.[39]

[38] *Re Inducon Development Corp.,* 1991 CarswellOnt 219, para. 14 (Ont. Ct. J. (Gen Div.)); *Callidus v. Carcap*, 2012 ONSC 163, ("***Carcap***") paras. 58-60; *Azure Dynamics Corp, Re*, 2012 BCSC 781, paras. 13-15, 22; *Alberta Treasury Branches v Tallgrass Energy Corp,* 2013 ABQB 432, para. 14; *Alexis Paragon Limited Partnership (Re),* 2014 ABQB 65, paras. 19-20; *North American,* paras. 25-26; *Canada North QB,* para. 35; *Industrial Properties Regina Limited v Copper Sands Land Corp*., 2018 SKCA 36, paras. 16, 20, 31-32; *Norcon Marine Services Ltd., (Re),* 2019 NLSC 238, paras. 16-17, 32, 35; *Quest University Canada (Re),* 2020 BCSC 318, paras. 30, 108. Other decisions cite *Cliffs* for this idea: *Worldspan Marine Inc. (Re),* 2011 BCSC 1758, paras. 17-20; *Pacific Shores Resort & Spa Ltd. (Re),* 2011 BCSC 1775, paras. 37-39; *Hayes Forest Services Ltd. (Re),* 2008 BCSC 1256, para. 10.

[39] *Quest University Canada (Re),* 2020 BCSC 1883, paras. 153-154; *Callidus*, para. 49.

34. The principles guiding the exercise of the court's discretion under section 11 are similar to those for section 11.02. In each case, the court must be satisfied that the applicant has acted in good faith and with due diligence and that the relief sought is appropriate. The consideration of appropriateness was described in *Century Services*:

> 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.[40][emphasis added.]

35. The appropriateness inquiry under section 11 concerns not only the purpose of the proposed orders, but also the means by which the orders will achieve that purpose. The *CCAA* takes procedural considerations very seriously. The Supreme Court of Canada expressly rejects the notion that so long as the ends are consistent with the purpose of the *CCAA*, the means are of no consequence.

36. In its factum, the appellant focusses solely on the question of whether the relief it is seeking will avoid "social and economic losses resulting from the liquidation" of the Petitioners. That is certainly a consideration, but the appellant fails to address the judge's concerns regarding the means by which the orders it sought would accomplish their purpose. According to *Century Services*, that is an equally pertinent consideration.

37. In considering any application under section 11, the supervising court must naturally consider, among other things, the effect of the orders sought on the various stakeholders. In each case, the court has the discretion to determine whether creditor approval of the relief sought (or the transactions or other arrangements underlying such relief) is required, or, at the very least, that there is evidence of a plan for dealing with those stakeholders.[41]

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[40] *Century Services*, para. 70. See also para. 77.

[41] *Callidus*, para. 102.

38. The decision as to whether the relief sought by an applicant requires creditor approval, or at least evidence of an intention to deal with the creditors, is a matter of discretion for the supervising judge.[42]

39. The appellant relies on *Callidus* for the proposition that subordinating secured creditors to a new, court-ordered financing charge does not constitute a compromise of their rights because it does not affect their claims against the Petitioners. With respect, that is not an accurate reflection of the Court's decision in *Callidus*.

40. The Court in *Callidus* was clear that the "Litigation Financing Charge" sought in that case was not converted into a plan of arrangement by virtue of the fact that it subordinated creditors' rights because "this result is expressly provided for in s. 11.2 of the *CCAA*. This 'subordination' does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2)."[43]

41. In *Callidus*, the Court cited with approval the decision of the Ontario Court of Appeal in *Crystallex* to the same effect. As in *Callidus*, in *Crystallex*, the Court was asked to approve a litigation financing charge under section 11.2.

42. Neither *Callidus* nor *Crystallex* considered the question which arose in this case, namely the subordination of secured creditors to a new, court-ordered charge in reliance on section 11 of the *CCAA* in furtherance of an overall refinancing as part of a restructuring (as distinct from interim financing in the context of ongoing *CCAA* proceedings). Interestingly, in both *Callidus* and *Crystallex*, the courts were quick to note that the debtors had evidenced an intention to put forward a plan of arrangement to their creditors should that be necessary.[44]

43. As the Court held in *Callidus*, the question of whether a plan is required a discretionary exercise for the supervising judge in the circumstances of the case. The

[42] *Callidus*, paras. 102, 103, 115.

[43] *Callidus*, para. 114.

[44] *Callidus*, para. 111, citing *Re Crystallex International Corporation*, 2012 ONSC 2125, and 2012 ONCA 404.

bright line in each case may be whether the applicant requires the exercise the court's statutory discretion under section 11 to affect creditors in a manner which the applicant could not outside of the *CCAA* proceeding.

44. In this case, 129 could not have effected the 129 Refinancing without the orders it was seeking. Among other things, as noted by the chambers judge, the modifications to the CMLS debt and security required by the New Lenders could not have affected secured creditors' (including lienholders) rights absent a court order so providing.[45]

(c) *The chambers judge's exercise of discretion*

45. In this case, the judge declined to exercise her discretion under sections 11 and 11.02 to grant the relief sought by the appellant. She found that while 129 was proposing to undertake the 129 Refinancing in furtherance of the Petitioners' restructuring, there was "no true intention" on the part of the 129 and the Petitioners' principal, Mr. Reyes, to address creditors' claims. In this context, the exercise of the judge's discretion accorded with the relevant principles and was manifestly reasonable.

46. In her reasons, the chambers judge cited the relevant authorities concerning sections 11 and 11.02, including *Century Services*, *Callidus,* and *Cliffs*. With respect to *Cliffs*, the judge said: "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…".[46] [emphasis added.]

47. It is noteworthy that the chambers judge considered the facilitation of a plan to be only one of the factors to be considered in relation to the exercise of her discretion. Having already extensively cited both *Century Services* and *Callidus* earlier in her reasons, the chambers judge was clearly aware of the other considerations, including the avoidance of the social and economic consequences of a liquidation.[47]

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[45] AR, p. 259, Reasons, para. 64.
[46] AR, p. 264, Reasons, para. 83.
[47] AR, p. 255, Reasons, paras. 52 and 53.

48. It is also abundantly clear that the chambers judge did not believe it was necessary that 129 evidence a "fully fleshed out plan of arrangement in order to justify a continuation of the stay in *CCAA* proceedings." Rather, the judge, citing *North American Tungsten*,[48] required evidence of at least a "kernel of a plan".[49]

49. The requirement for evidence of a plan was relevant in the context of the appellant's application for a six-month extension of the stay of proceedings as well as to the exercise of discretion under section 11.

50. The chambers judge found that the 129 Refinancing "significantly alters the commercial terms of the CMLS debt and security, including by substantially increasing the interest rate on the secured loan", which would, but for the orders sought, have no impact on secured creditors' (including lien-holders) rights, i.e. the orders would compromise those rights.[50]

51. In addition, the chambers judge noted the enhanced powers proposed to be given to the new secured lender, Domain, and the effect of the order on existing limited partnership unit holders in favour of 126.[51] In the circumstances, the chambers judge was satisfied that in seeking relief under section 11, it was necessary for 129 (or more precisely its principal, Mr. Reyes) to provide at least some evidence of an intention to put forward a plan to deal with affected stakeholders. That decision, i.e. to require some evidence of a plan, was discretionary and, in the circumstances, unassailable.

52. In exercising her discretion, the chambers judge was clearly aware of the alternatives before her and of the Court's comments in both *Century Services* and *Callidus* regarding the objective of the *CCAA* to avoid social and economic losses arising from a liquidation. However, the judge was also aware that: (a) the only creditors who might benefit from the 129 Refinancing were CMLS and, potentially, Aviva;[52] (b)

[48] *North American*, para. 26.
[49] AR, p. 265, Reasons, para. 86.
[50] AR, p. 259, Reasons, para. 64.
[51] AR, p. 254, Reasons, paras. 48 and 49.
[52] Confidential Seventh Report, para. 21.

there was no evidence that it was remotely possible to complete the Project while retaining all existing presale agreements;[53] and (c) the Petitioners have no employees.

53. In other words, the broad social and economic consequences with which a *CCAA* court might otherwise be concerned in relation to the liquidation of a going-concern business are entirely limited in the context of the present case.

54. Balanced against that consideration were the facts that 129 was seeking approval of a refinancing facilitated by multiple substantive orders as part of a restructuring which materially affected stakeholders whose interests were entirely disregarded. This proposed refinancing was advanced over a year after the *CCAA* proceedings were initiated, without any explanation as to why it could not have been done sooner. That a "kernel of a plan" to address creditors' claims might be required by that time is hardly surprising, let alone an improper exercise of the Court's discretion.

55. The chambers judge carefully reviewed each of Mr. Reyes' affidavits and found nothing "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." On the contrary, she found that there was "no true intention" to deal with creditors' claims. Accordingly, in keeping with the authorities concerning extensions of the stay under section 11.02, and consistent with the exercise of discretion under section 11, the chambers judge was correct to dismiss the appellant's application.

D. <u>COMPARING THE 129 REFINANCING TO A SALE</u>

56. The appellant rests its case, ultimately, on the fact that the 129 Refinancing would provide a better outcome for the two top-ranking secured creditors and—in theory at least—keeps alive the prospect of continuing construction on the Project. That, says 129, is consistent with the purpose of the *CCAA* to avoid the social and economic consequences of a liquidation. 129 argues that the result obtained through the 129 Refinancing is the only material consideration and permits the court to disregard the interests of all other creditors.[54]

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[53] AR, p. 266, Reasons, para. 89.
[54] AR, p. 262, Reasons, para. 73.

57. In her reasons, the chambers judge describes the appellant's position as "a very unprincipled basis upon which to argue that this "refinancing" is an "appropriate" outcome in the balancing exercise with regard to all stakeholders."[55] With respect, the chambers judge was entirely correct in that conclusion.

58. The *CCAA* does not contemplate a debtor company's restructuring without the engagement and, ultimately, consent of its creditors. As the Court held in *Callidus*, "the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime."[56] The Court does not distinguish between creditors who are "in the money" and those who are not in determining who is entitled to participate in decisions concerning the debtor's restructuring. That is not how the *CCAA* works. Yet that is what 129 urges upon this Court.

59. Consistent with the foregoing, 129 dismissed Centura's objections in the court below on the basis that Centura is out of the money in any event and would have its interests vested off in a sale. Accordingly, there would be no harm in granting the orders sought so as to allow the Petitioners additional time and money to try to restructure.

60. In *Callidus v. Carcap*, Mesbur J. observed as follows: "The respondents ask, what is the harm in letting them reorganize? While that is an interesting question, it is not the test."[57] The same applies in the present case. The test is not whether the 129 Refinancing is "better" than the alternative; the test is whether the appellant's relief is appropriate in the circumstances. The chambers judge determined it was not.

61. The core premise of 129's position is that the court must grant any order sought by a debtor (in this case through a related company) so long as the result is better than a liquidation. As long as the court is satisfied that at least one stakeholder stands to do better, the interests of subordinate stakeholders who are out of the money are irrelevant. That may be an attractive proposition from a purely practical point of view, but as Mesbur J. says, it is not the test. It also risks creating a dangerous precedent.

[55] AR, p. 262, Reasons, para. 73.

[56] *Callidus*, para. 69, headnote.

[57] *Carcap*, para. 57.

62. To the respondents' knowledge, there is no reported decision which grants relief similar to that sought by 129 on the basis of section 11. Any such decision would have far-reaching implications with concerning effect.

63. The most obvious implication is that *CCAA* restructurings would in many cases now amount to a simple analysis of whether the outcome propounded by the debtor is better than the outcome in a liquidation. So long as it can be shown that unsecured or subordinate secured creditors are likely to receive nothing in a liquidation, the court could grant any order sought by the debtor without regard for those stakeholders. The last vestige of creditors' rights would be stripped away. That is not the purpose of the *CCAA* and that is not how it is intended to operate.

64. Similarly, and not without consequence, the role of the monitor would likewise be denuded. Its mandate to consider and safeguard the rights of the general body of creditors would be all but eliminated. Its job would be confined to preparing liquidation analyses and reviewing and monitoring cashflows.

65. The chambers judge's decision was not, as suggested by the appellant, premised on a concern arising from lack of notice to affected stakeholders—that concern related to her analysis under section 11.2. Rather—and quite appropriately—The judge was of the view that it was legally unprincipled to justify the relief sought by 129 simply on a strict comparison of alternatives before the court.

66. The appellant suggests that it was an error in principle for the chambers judge not to balance the options available to her in the exercise of her discretion. The appellant does not identify which part of the chambers judge's analysis that balancing was to be considered in. With respect the balancing of alternatives is not relevant to the question of whether an extension of the stay should be granted under section 11.02. Further, to the extent that factor is relevant to the exercise of discretion under section 11, the chambers judge was aware of the Monitor's qualified comments on the effect of the 129 Refinancing[58] and undoubtedly took such comments into account in exercising her discretion to deny the relief sought.

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[58] AR, p. 50, Reasons, para. 40.

E. THE EQUITY OF REDEMPTION

67. The appellant submits that the "chambers judge erred in concluding that the 129 Refinancing was not a redemption of the CMLS Mortgage."[59] That assertion is unsustainable on the facts.

68. In her reasons, the chambers judge dedicated two paragraphs to the question of whether the 129 Refinancing was a redemption. She found that "[w]hile 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."

69. The chambers judge's findings are entirely supported by the evidence. In its Notice of Application and in the affidavit sworn by Mr. Reyes in support of the application, 129 consistently describes the transaction concerning the CMLS Mortgage as being the "purchase and assignment" or "acquisition" of the mortgage by the New Lenders. That is also the way the transaction is described in Domain's commitment letter. The appellant itself did not describe the transaction as a redemption in its application, and in submissions argued only that it was "effectively" a redemption. Specifically, it was never suggested that funds were to be advanced to the Petitioners for <u>them</u> to repay CMLS and require the assignment of the CMLS Mortgage.

70. As observed by the chambers judge, what 129 was seeking was more than the mere assignment of CMLS' debt and security. 129 sought to amend the terms of the loan and security documents to, among other things, increase the amount of secured debt and the interest rate.

71. In short, what 129 sought to accomplish was not a redemption. It could not have been done by way of redemption.

72. The respondents do not take issue with the appellant's summary of the law regarding redemption, and note that it is consistent with the judge's recitation of the law.

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[59] Appellant's factum, para. 54.

73. The appellant's argument regarding the Petitioners' right of redemption rests on what appears to be a calculated mischaracterization of the chambers judge's reasons. The judge held only that the transaction proposed by 129 was not a redemption of the CMLS Mortgage. There is nothing in the reasons to suggest that the chambers judge was unaware of the Petitioners' right to pay out the CMLS Mortgage or Aviva's right to redeem it. In fact, the chambers judge acknowledges that "Aviva consents to CMLS being paid out by 129/Domain and the assignment of the CMLS mortgage to Domain/Newco." That is clearly an express acknowledgement of the Petitioners and Aviva's rights of redemption.

74. 129 does not seem to seriously argue that the proposed transaction was, in fact, a redemption, other than to point out that the court ought not to have been concerned with the source of the funds to be paid to CMLS. The chambers judge noted only that neither the Petitioners nor Aviva were paying CMLS, which is relevant to her findings on the nature of the proposed transaction.[60]

75. To effect a redemption, payment must be made by or on behalf of the mortgagor or subsequent mortgagee. That is not what is proposed under the 129 Refinancing; it is an acquisition and payment by Domain. In *The Clover*,[61] the case relied upon by the appellant in support of its proposition that "[t]he source of the funds should not have impacted on the chambers judge's analysis",[62] the Court was quick to point out that the funder was advancing funds to the <u>debtor</u>, who was itself going to pay out the mortgage.

76. Ultimately, the appellant's argument has evolved to be that the chambers judge erred by failing to take into account the Petitioners' right of redemption in determining whether to exercise her discretion under section 11.

77. In fairness to the chambers judge, before whom this position was not argued, there is no indication that she was unaware of the Petitioners' right of redemption. Moreover, there is no basis on which to suggest she did not consider that right in the

[60] AR, p. 257, Reasons, para. 57.

[61] *BCIMC Construction Fund Corporation v. The Clover on Yonge Inc.*, <u>2020 ONSC 3659</u>, para. 19.

[62] Appellant's factum, para. 55.

context of her analysis as to whether the relief sought by 129 was appropriate. Indeed, it would be very surprising if a *CCAA* judge of the chambers judge's caliber did not have in mind the interests of the debtor at every turn of the proceeding. She clearly, and appropriately, did not find that that right outweighed the other considerations. That the chambers judge did not say so expressly is not an error.[63]

F. THE REQUIREMENT FOR AN INTENTION TO PRODUCE A PLAN

78. The appellant argues that *Cliffs* should be overruled, and that the chambers judge erred by relying on it for the proposition that it is "not appropriate to grant relief under s. 11 in the absence of an intention to propose a plan of arrangement or compromise to creditors." Alternatively, 129 argues that if *Cliffs* is good law, then the chambers judge erred in interpreting the case as not standing for a narrower proposition, namely that the lack of intention to propose a plan is only one factor to be considered on an application under section 11.02.[64]

79. The appellant's submission does not succeed for two reasons. First, the chamber's judge's decision does not turn on *Cliffs*. Second, and in any event, the appellant offers no compelling reason to overturn *Cliffs*.

(a) *This appeal does not turn on Cliffs*

80. The appellant's project to focus this case on the correctness of *Cliffs* ignores the fact that removing *Cliffs* would not change the chambers judge's exercise of discretion.

81. The chambers judge's decision was clearly based only in part on this Court's decision in *Cliffs*. Contrary to the appellant's submission, there is no indication in her reasons that the judge felt "bound" by *Cliffs*. She put *Cliffs* into context by noting its consistency with Supreme Court of Canada jurisprudence on the purposes of the *CCAA* and by noting other decisions of the Supreme Court which stood for the proposition that an applicant seeking to extend a stay and otherwise affect creditors rights must provide

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[63] *Dhillon,* para. 28; *Rain Coast Water v. British Columbia*, 2019 BCCA 201, para. 68.
[64] Appellant's factum, paras. 71, 94-95.

evidence of an intention to put a "kernel" plan to creditors.[65] The appellant does not argue that each of these decisions are wrongly decided, though that is the logical implication from their argument.

82. The appellant seems satisfied that *Cliffs*, and presumably the other authorities, should stand for a narrower proposition, i.e. that evidence of an intention to put a plan to creditors could be a factor, but not the only factor, in determining whether to extend a stay of proceedings under section 11.02 or grant relief under section 11. The appellant says that the judge erred by giving no weight to other relevant factors.

83. That is not what the judge did. The finding that Mr. Reyes had no intention to deal with creditors' claims was clearly an important factor in the exercise of her discretion.[66] However, the judge also identified other concerns in declining to exercise her discretion, including the effect of the proposed refinancing on lienholders and other stakeholders, along with the controls proposed to be given to Domain and 126.

(b) *Cliffs should not be overturned*

84. In its factum, the appellant argues there are four reasons *Cliffs* should be overturned. None of these reasons are well-founded or provide a convincing reason to isolate and overturn *Cliffs*.

(i) *Consistency with Supreme Court of Canada authorities*

85. The appellant says *Cliffs* should be overturned because it is premised on an articulation of the purposes of the *CCAA* that is narrower than expressed in subsequent Supreme Court of Canada authority. The Court in *Cliffs*, relying on older authorities, confirmed that an order made under section 11 to stay proceedings must be granted in furtherance of the *CCAA*'s fundamental purpose, which was "facilitate compromises and arrangements between companies and their creditors".[67]

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[65] AR, pp. 264-265, Reasons, paras, 83, 85.

[66] *Cliffs*, para. 35.

[67] *Cliffs*, paras. 28-29, citing *Re United Used Auto & Truck Parts Ltd*., 2000 BCCA 146; *Reference re Companies' Creditors Arrangement Act),* [1934] S.C.R. 659 ("***Re CCAA***"); *Hongkong Bank v. Chef Ready Foods*, 1990 CanLII 529 (BC CA).

86. The Supreme Court of Canada in *Century Services* did not cast doubt on Justice Tysoe's articulation of the *CCAA*'s purposes. Rather, the Court confirmed the wisdom of it, and added that those fundamental purposes include avoiding the effects of bankruptcy while a court-supervised attempt to reorganize the debtor company is made.[68] The expanded description of the purposes of the *CCAA* does not detract from that articulated in *Cliffs*. Indeed, the Court in *Century Services* was equally concerned with the process employed by court orders to achieve the remedial purpose of the *CCAA*, which is exactly the concern addressed by this Court in *Cliffs*. The protection of creditors in the context of an ongoing *CCAA* proceeding has been and remains an animating purpose of the Act, both before and after *Cliffs*.[69]

87. More recently, the Supreme Court of Canada in *Callidus* confirmed that the court's discretion under the *CCAA* should be exercised with the purposes of the legislation in mind, including facilitating "the reorganization and survival of the pre-filing debtor company in an operational state".[70] That also is not inconsistent with *Cliffs.*[71]

88. Ironically, the appellant's position runs contrary to the Supreme Court of Canada's description of the objectives of the *CCAA*. The thrust of the appellant's submissions is that there is only one overriding objective, i.e. to facilitate any proposed restructuring which provides a theoretically better financial result. That is plainly not correct. The Court is expressly concerned with the means proposed to be employed in order to meet the purpose of the *CCAA*, and is cautious to safeguard creditors' rights and interests, including their engagement in relation to any proposed restructuring.[72]

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[68] *Century Services*, paras. 58-59, 70.

[69] *Re CCAA,* pp. 661, 665; *Meridian Developments Inc. v. Toronto Dominion Bank*, 1984 CanLII 1176, para. 14 (AB QB); *Pacific National Lease Holding Corporation*, 1992 CanLII 427, para. 26 (BC CA); *Sun Indalex Finance, LLC v. United Steelworkers,* 2013 SCC 6, para. 205; *Callidus*, para. 42.

[70] *Callidus*, paras. 41-42.

[71] In fact, while the Court's comments in *Callidus* do not directly endorse *Cliffs*, in the context of that case, i.e. a consideration of whether a plan was a prerequisite to approving a litigation funding agreement, it is noteworthy that the Court mentioned *Cliffs* and made no comment which would cast doubt on the decision: *Callidus*, para. 111.

[72] *Callidus*, para. 42.

89. The appellant argues that *Cliffs* creates a "mandatory precondition" to section 11 relief that is inconsistent with the decision of this Court in *Asset Engineering*, and *Century Services*, both of which expressed preferences for outcomes which allowed a company to exit *CCAA* proceedings without compromising creditors' rights. That is true, except it ignores entirely the fact that this case does not contemplate any such exit. 129, like the debtor company in *Cliffs*, is instead proposing to undertake a restructuring facilitated by orders granted under the court's jurisdiction under section 11.

90. While *Century Services* says the best outcome is where a restructuring is not necessary, the Court is clear that in the context of a restructuring there is a requirement to ensure the means by which restructurings are achieved are fair to all stakeholders.[73] Where the supervising judge is satisfied that the relief sought by an applicant under section 11 requires creditor approval, or at least evidence of a plan to deal with creditors, the judge is vested with the discretionary authority to decline to grant the relief sought in the absence of such evidence.

91. The requirement for evidence of a plan for addressing creditors' claims in the context of a restructuring, as articulated in *Cliffs*, *North American Tungsten,* and other cases, is actually confirmed by this Court's decision in *Asset Engineering*: "The 'fundamental purpose' of the Act – to preserve the status quo while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the means contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary."[74] This Court granted the extension so that the debtor could put forward a "workable" plan.[75] It was only "if" a refinancing could be achieved without compromising creditors' rights that no plan would be necessary. Here, there was no expectation that creditors might be paid in full, and more than finding that there was no evidence of any plan, the chambers judge found that Mr. Reyes had "no true intention to address creditor claims in the future."[76]

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[73] *Century Services*, paras. 14, 60, 70.
[74] *Asset Engineering*, para. 26.
[75] *Asset Engineering*, para. 30.
[76] AR, p. 266, Reasons, para. 91.

(i) *CCAA proceedings often do not include plans*

92. The appellant asserts that "*CCAA* proceedings often do not include a plan of arrangement or compromise". In support of that proposition, the appellant points to section 36 of the *CCAA*, which authorizes liquidations of debtor company's assets with the approval of the court without the need for a plan.

93. It is not disputed that there is statutory authority for liquidating *CCAA*'s without a plan of arrangement. It is also true that a company can emerge from *CCAA* proceedings without a liquidation and without any plan, though of course it will in that case need to address creditors' claims if it is to survive. However—and not to belabour the point—this case and *Cliffs* both concern restructurings where discretionary relief was sought in furtherance of those restructurings.

94. The appellant's assertion ignores statements from the Supreme Court of Canada concerning the need for a plan of arrangement in some circumstances.[77] Even in cases where courts have distinguished *Cliffs*, they have done so on the basis that there was evidence of an intention to produce a plan or there was no pending compromise of creditor's rights. None dispute the general proposition from *Cliffs* or other cases.[78]

95. The appellant points to previous orders of the chambers judge extending the stay throughout the SISP as evidence that there is no requirement to show a "kernel" of a plan in order to obtain such relief. Not only were such orders made without opposition, they were made in furtherance of a process designed to elicit offers for a sale or investment. In other words, the initiation and completion of the SISP was, at those times, the very plan for dealing with the Petitioners and their stakeholders. It is also noteworthy that, on those applications, the only relief sought under sections 11 or 11.02 which affected creditors was the stay of proceedings.

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[77] *Century Services*, para. 14; *Callidus*, paras. 101-104, 111.

[78] *Callidus*, para. 111; *Re Crystallex International Corporation*, 2012 ONSC 2125, para. 48, affirmed 2012 ONCA 404, para. 89; *Asset Engineering*, paras. 26, 30. The only case that questions *Cliffs* is *Winnipeg Motor Express Inc. et al*., 2008 MBQB 297 ("***Winnipeg Motor***"), and only does so in *obiter*.

(i) *The effect of Cliffs on the court's discretion*

96. In *Cliffs*, this Court held where there was no evidence that the debtor "intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan", it would not be "appropriate for a stay to have been granted or extended under s. 11 of the CCAA".[79]

97. The appellant argues that the foregoing statement from *Cliffs* stifles the broad discretion of a supervising judge under section 11 of the *CCAA* and incorrectly narrows the appropriateness inquiry. This argument appears closely related to its submission that *Cliff*'s casts the purposes of the *CCAA* too narrowly.

98. This argument cannot succeed, in part as it takes the above-quoted portion of the Court's decision out of context. This Court found that it was necessary to have evidence of an intention to put a plan to the debtor company's creditors given its stated intention to embark on a restructuring, including by way of the interim financing being sought concurrently. The Court did not say it was necessary to provide such evidence in the abstract; only where the relief sought was in furtherance of a restructuring.

99. The appellant seeks to read into *Cliffs* an artificially rigid rule requiring evidence of a plan as a precondition to obtaining a stay of proceedings or any other relief. That is an unfair reading of the case, and is inconsistent with other authorities. In *Cliffs* this Court described the requirement to provide evidence of a plan as an "important factor".[80] Consistent with *Cliffs*, subsequent cases have confirmed that, in each case, it was up to the supervising judge to determine what constitutes sufficient evidence of a plan, or even if all but the barest indication of an intention to formulate a plan, is necessary, particularly in the early stages of the proceeding.

100. Notwithstanding the appellant's protestations, no subsequent appellate authority or academic commentary has criticized *Cliffs* as somehow constraining the court's broad discretion under section 11 of the *CCAA*. The case is simply one thread in the

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[79] *Cliffs*, para. 35.
[80] *Cliffs*, para. 35.

tapestry of cases in which the source, breadth, and guiding principles concerning the exercise of the courts' discretion under sections 11 and 11.02 are considered.

(i) *Cliffs provides an important procedural protection*

101. The appellant asserts that the law from *Cliffs* imposes an artificial evidentiary hurdle to provide some evidence of an intention to put a plan to creditors. It relies on comments from the Manitoba Court of Queen's Bench in *Winnipeg Motor* to this effect.[81]

102. This submission and the comments from *Winnipeg Motor* incorrectly trivialize the procedural protections for creditors arising from the requirement for evidence of at least some plan for dealing with creditors if the debtor's intention is to restructure. The powers of the Court under section 11 are broad. Where creditor's rights are to be impacted by a debtor's course of action, it is not a mere formality to require the debtor to give the Court confidence that in seeking extraordinary relief, the debtor intends to address creditors' claims in some fashion.

103. To reduce evidence of such an intention to a "magic incantation" does not do the *CCAA* courts' system justice. Any such evidence is, of course, under oath, and at all times, the court's officer (the monitor) is in a position to comment on the veracity and viability of any stated intention to advance a plan. In short, at any stage of a *CCAA* restructuring proceeding, which by its nature is transparent, the court is well-positioned to test whether a debtor has a *bona fide* intention to deal with creditors' claims.

104. The appellant's argument that it "was not in a position to provide the Court with admissible evidence with respect to the Petitioners' intentions"[82] is specious. Mr. Reyes is the principal of both 129 and the Petitioners. There is nothing, much less an order of the court below, precluding him from providing evidence as to the Petitioners' intentions in relation to the proposed restructuring. Mr. Reyes put together a complex refinancing proposal as part of an overall restructuring of the Petitioners, and even signed the Domain term sheet on behalf of the Petitioners. In doing so, he simply disregarded the interests of the Petitioners' general body of creditors.

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[81] *Winnipeg Motor*, paras. 41-44.
[82] Appellant's factum, para. 92.

G. <u>CONCLUSION</u>

(a) *The appeal should be dismissed*

105. The chambers judge appropriately exercised her discretion under sections 11.02 and 11 of the *CCAA*. She identified the correct principles governing the exercise of that discretion, including the foundational purposes of the *CCAA*. She followed the relevant authorities concerning applications to extend stays of proceedings under section 11.02 and likewise appropriately considered the relevant circumstances in determining that the relief sought by 129 under section 11 similarly required at least some evidence of an intention to address the claims of the Petitioners' creditors.

106. The core of the chambers judge's concern lay in the appellant's purported intention to pursue a non-viable restructuring with no intention to address the claims of creditors. In those circumstances, the chambers judge held as an exercise of her discretion that it was in appropriate to grant the far-reaching orders without any regard for the interests of the stakeholders they affected. That was an appropriate exercise of discretion by the supervising *CCAA* judge, and this Court ought not to interfere with it.

107. The appellant's thesis on appeal is that this Court should overturn the law expressed in *Cliffs* and numerous other cases in favour of an approach which boils down to an analysis of which proposed outcome might be theoretically better for "in the money" creditors, regardless of the means by which that proposal is to be achieved. That approach—of favouring the ends while disregarding the means—is inconsistent with established *CCAA* practice and appellate authority and problematic from a policy perspective. It should be rejected by this Court. The appeal should be dismissed.

(b) *If the appeal is allowed, the matter should be remitted*

108. If this Court allows the appeal, the respondents submit that it is in the interests of justice that appellant's application be remitted to the chambers judge. While the appeal can be resolved by a reconsideration of the 129 Refinancing by this Court, it is submitted that this Court is not as well positioned to exercise the discretion traditionally afforded the supervising *CCAA* judge who will have intimate knowledge of all the relevant circumstances which would weigh on such a decision.

109. The chambers judge has been managing this *CCAA* proceeding since its inception. She is familiar with the entire sale and investment solicitation process and the positions and interests of all of the stakeholders, not just those engaged in the appeal. The appellant asserts that this background is unnecessary because the only issue is the appropriateness of the 129 Refinancing. This submission should be rejected.

110. The knowledge of the supervising judge should not be lightly discarded both as a practical matter and as a legal one. The expertise of the supervising judge is linked to the purposes of the *CCAA*: "One of the principal means through which the CCAA achieves its objectives is by carving out a unique supervisory role for judges …From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties."[83] It is not consistent for the appellant to make the *cri de coeur* that orders made under the CCAA should flow from the objectives of the legislation and then propose to dispense with one of the primary means by which those objectives are met.

111. As a further consideration, the appellant has sought to advance substantial new evidence concerning its offer. That evidence has not been tested nor responded to. To the extent it would affect the exercise of discretion by the *CCAA* judge on a reconsideration of the application, it should be put to that judge and parties should have an opportunity to respond to it, including with responsive evidence, as necessary.

112. Lastly, it is no longer the case that the Solterra Backup Offer is subject to a deadline of September 30, 2021. The parties to the Solterra Backup Offer have consented to extend the time by which each party may terminate the agreement. As a result, there is no pressing time consideration before this Court requiring an immediate disposition. In effectively every *CCAA* proceeding, supervising judges are called upon to convene hearings on little notice; there is no reason that could not occur in this case.

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[83] *Callidus,* para. 47.

(c) *This Court should refuse to approve the 129 Refinancing*

113. If this Court decides that remitting 129's application is not in the interests of justice, the respondents submit the relief sought by 129 ought not to be granted.

114. The fact remains that 129 seeks to effect a restructuring premised on the court's discretion under section 11 of the *CCAA* without the engagement, let alone consent, of the Petitioners' creditors. The relief sought is extraordinary in any circumstances. Among other things, it seeks to amend existing debt and security agreements to add $5 million more debt at a higher interest rate, and create a court-ordered super-priority charge over all of the Petitioners' assets to secure that debt. The Petitioners could not carry out such refinancing in the ordinary course given the existing rights of subordinate secured creditors. 129 seeks to facilitate such financing by way of court orders in the *CCAA* proceedings without regard for those secured creditors' rights.

115. Mr. Reyes seeks to carry out what he describes as a "restructuring", beginning with the 129 Refinancing. He seeks to undertake this process over 15 months after these *CCAA* proceedings were initiated, and on the evidence there is no indication that if the relief sought is granted the Petitioners will be able to obtain further financing or complete the Project to permit any recovery by Aviva, let alone other creditors.[84]

116. Mr. Reyes' restructuring plan is best described as "hope and see". He is, in effect, attempting to pull a rabbit out of the hat. He asks the court to give him this opportunity by granting, among other things, a six month stay of proceedings and orders facilitating significant additional financing, all without any evidence that what he hopes to accomplish is even remotely feasible. As observed in *Marine Drive Properties*,[85] that is not an appropriate use of the *CCAA*.

117. Quite apart from the foregoing, Mr. Reyes seeks to pursue his proposed restructuring with "no true intention to address" the claims of the Petitioners' general body of creditors. As the Supreme Court of Canada has confirmed, a restructuring requires the consent of the debtor's creditors. To permit the debtor to embark on a

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[84] AR, p. 265, Reasons, para. 88.

[85] *Marine Drive Properties Ltd. (Re)*, 2009 BCSC 145, paras. 36-41.

restructuring process in the face of a finding that they have no intention to address creditors' claims is contrary to the *CCAA* regime.

118. Temporarily staving off a liquidation by staying and further subordinating creditors with the hope of later identifying further options is not consistent with the objectives of the *CCAA*. There are no broad social and economic consequences arising from the immediate sale of the Petitioners' assets. Aviva *may* stand to recover something under 129's proposed course of action, but the court below found that outcome unlikely. That is hardly a basis for entirely disregarding all other stakeholders.

119. There is a broader policy consideration at hand as well. Permitting debtors—or interlopers—to seek to avoid a sale of their assets at the conclusion of a sale process on the purported basis of a right of redemption and a faint hope plan to salvage their business would have a chilling effect on sales processes. It will be difficult for debtors and court officers to convince potential purchasers to engage in such a process.[86]

120. Ultimately, the broader group of stakeholders is better served by permitting a new developer to complete construction of the Project. This will result in an immediate payment to CMLS, who supports the Solterra Backup Offer. It will result in the reengagement of various trades, who have been described by Mr. Reyes as "specialists in mass timber construction and… essential to moving the [Project] forward."[87] It will facilitate the completion of seven of the existing presale agreements. In all of the circumstances, this Court ought not to grant the relief sought by the appellant.

PART 4 - NATURE OF ORDER SOUGHT

121. The respondents seek an order that the appeal be dismissed with costs.

All of which is respectfully submitted.

Dated at the City of Vancouver, British Columbia, this 13th day of September, 2021.

Tom Posyniak for:

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

[86] *Ron Handelman Investments v. Mass Properties Inc.*, 2009 CanLII 37930 (ONSC), para. 22; *BDBC v. Marlwood Golf & Country Club Inc.*, 2015 ONSC 3909, paras. 25-27.

[87] AB, p. 8, Reyes #2, para. 24.

APPENDIX: ENACTMENTS

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

5 Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(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.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

(8) If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the

agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

***Land Title Act*, R.S.B.C. 1996, c. 250**

1 In this Act:

"charge" means an estate or interest in land less than the fee simple and includes

(a) an estate or interest registered as a charge under section 179, and

(b) an encumbrance;

"encumbrance" includes

(a) a judgment, mortgage, lien, Crown debt or other claim to or on land created or given for any purpose, whether by the act of the parties or any Act or law, and whether voluntary or involuntary,

(b) in respect of Nisg̱a'a Lands, a judgment, mortgage, lien, debt owed to the Nisg̱a'a Nation or a Nisg̱a'a Village or other claim to or on Nisg̱a'a Lands created or given for any purpose by any Nisg̱a'a law, and whether voluntary or involuntary, and

(c) in respect of treaty lands, a judgment, mortgage, lien, debt owed to the treaty first nation or other claim to or on those treaty lands created or given for any purpose by a law of the treaty first nation, and whether voluntary or involuntary;

206 (1) On application being made for registration of a transfer, extension or modification of a charge, the registrar, on being satisfied that all necessary parties have joined in it, must register the transfer, extension or modification by endorsing it in the register as a separate entry or as a note against the original entry or both, using the number and date of the application for registration and an appropriate symbol or abbreviation indicating the nature and effect of the instrument registered.

(2) Unless he or she is a party to it, a modification of a charge does not affect the holder of a charge registered before the registration of the modification.

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