



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)

**MEMORANDUM OF ARGUMENT OF THE RESPONDENTS SOLTERRA AND
CENTURA ON THE APPELLANT'S MOTION TO ADDUCE NEW EVIDENCE**

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MEMORANDUM OF ARGUMENT

1. This argument is filed in response to the appellant's motion to adduce new evidence on this appeal.
2. The respondents Solterra and Centura oppose the appellant's motion to adduce as fresh or new evidence the 6th Affidavit of Macario Reyes. This evidence does not meet the test for the admission of fresh or new evidence. The motion should be denied.
3. The appellant seeks to admit the affidavit of Mr. Reyes "to establish that the parameters of the 129 Refinancing are substantially the same as on June 8, 2021." The evidence addresses the "commercial realities that costs associated with the closing the 129 Refinancing continue to accrue and the payment amounts to CMLS, the interim Lender and with respect to the Administration Charge have increased."
4. The appellant purports not to be "attempting to demonstrate a change of the circumstances from what was before, or assumed by, the chambers judge." However, in his affidavit, Mr. Reyes attaches a new commitment letter from Domain to show that new loan fees have been paid to Domain and at least one of the conditions to funding has, since the leave to appeal application, been removed.
5. All of the evidence sought to be adduced is, in fact, an "update" of evidence given before the chambers judge. It did not exist prior the hearing and is, accordingly, new evidence.
6. The admissibility of fresh evidence is subject to the well established test in *Palmer v. The Queen*.¹ This test requires the appellant to demonstrate that the evidence (i) was not discoverable by reasonable diligence before the end of the trial; (ii) that the evidence is credible; (iii) that it would be practically conclusive of an issue before the court; and (iv) that if believed, the evidence could have affected the result of the trial.

¹ [\[1980\] 1 S.C.R. 759](#) at 775.

7. The test for the admission of new evidence is different. The *Palmer* test does not fully apply. As a matter of logic, the criterion of due diligence is inapplicable. The other considerations in *Palmer*, however, do have application: (i) reliability of the evidence, (ii) relevance of the evidence to a potentially decisive issue, and (iii) opportunity for the evidence to be determinative of an issue in the sense it could reasonably be expected to have affected the result when taken with the other evidence. The interests of justice are deeply engaged in the exercise of discretion to employ the limited opportunity to admit new evidence.² New evidence is admitted in “rare” or “exceptional” circumstances. This high standard is on account of the importance of certainty and finality in trial judgments.³

8. Regardless of the test used, the evidence sought to be admitted does not meet the requirements for the admission of evidence on appeal.

9. This is certainly not an example of a rare case where it is in the interests of justice to admit new evidence. The appellant simply seeks to supplement the record after the fact to put the best face on the 129 Refinancing. This evidence, whether applied offensively or defensively, is not material to whether the chambers judge erred in the exercise of her discretion or otherwise made an error of principle within her exercise of discretion.

10. The evidence also would not be determinative of any of the issues raised on appeal by the appellant; it is irrelevant to the question of whether the judge erred in finding the 129 Refinancing was not a redemption or failed to consider the Petitioners’ equity of redemption in the exercise of her discretion. It is irrelevant to the question of whether the judge erred by failing to compare the sale bids with the 129 Refinancing or by rejecting the 129 Refinancing even though it was a “better” offer if it came to fruition and closed. It is irrelevant to the question of whether *Cliffs* is wrongly decided and ought to be overturned. On this basis alone, the appellant’s motion fails to meet the relevance and decisiveness requirements of the *Palmer* test.

² *Ledwon v. Baines*, [2021 BCCA 239](#), paras. 51, 53.

³ *Barendregt v. Grebliunas*, [2021 BCCA 11](#), para. 32.

11. The only place where this evidence may be relevant is if the appellant's application is considered *de novo*—that is, if the appeal is allowed and the order of the chambers judge is set aside. This by definition means that the evidence should not be admitted on the appeal. Rather, the only appropriate forum for the new evidence is in the court below upon remission of the matter back to the chambers judge, as would be appropriate should the appeal is allowed.

12. This motion is simply another example of what the appellant has been doing both before the chambers judge and before this Court: continually changing its offer, qualifying the evidence regarding the conditions and prospects for its completion, and generally moving the goalposts on all the parties and the courts. This evidence was not before the chambers judge when she was called upon to exercise her discretion to approve the 129 Refinancing. It should not be before this Court as a means to improve 129's evidentiary record and, by extension, impugn the chambers judge's exercise of discretion. If an appeal could be launched and executed on this footing, the finality of any decision would be subject to a continually moving target, to the detriment of all parties and the proper administration of appeals.

13. The proper way to proceed is to consider the chambers judge's decision on the record that was before her. If the appeal is to be allowed, the chambers judge should be the one to consider any new, updated evidence in the normal course. The chambers judge has intimate knowledge of this proceeding and is best positioned to assess any new evidence regarding the 129 Refinancing and contextualize its significance to 129's application and the parties' positions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: September 13, 2021


Tom Posyniak for:
Kibben Jackson
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(2013) Ltd. and Solterra Acquisitions Corp.