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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 CMLS FINANCIAL LTD. AND DESJARDINS FINANCIAL SECURITY LIFE ASSURANCE COMPANY

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CHRONOLOGY

CMLS Financial Ltd. (“**CMLS**”) and Desjardins Financial Security Life Assurance Company (“**Desjardins**”) do not disagree with the substance of the appellant’s chronology.

OPENING STATEMENT

CMLS, as the senior secured creditor over the Petitioners' real estate development project called the "**Terrace House Project**", opposes the appeal of 129637 B.C. ("**129**"). The Chambers Judge, who oversaw these insolvency proceedings from the outset (over a period of over 15 months at a cost well in excess of $1.8 million) reasonably and properly exercised her statutory discretion in dismissing the application of 129 to approve 129's offer to refinance the Terrace House Project (the "**129 Refinancing**").

The Chambers Judge carefully considered evidence on whether the 129 Refinancing was appropriate in the specific circumstances as well as the objective of providing for a timely and efficient resolution of a debtor's insolvency, and after a "very long and crooked path", Her Ladyship decided that "the time has come to end the process."[1]

CMLS submits that the Chambers Judge concluded that the 129 Refinancing was not appropriate in the circumstances in part because she was skeptical that 129 had the ability to complete the 129 Refinancing, and because, even if it did complete, there was no evidence of even a kernel of a plan, or a likelihood of a positive outcome for any stakeholders in what would be ongoing insolvency proceedings even after the 129 Refinancing.

CMLS shares in the Chambers Judge's skepticism. Indeed, recent developments show that the Chambers Judge's decision was prescient. In particular, this factum will highlight the following most notable developments:

1. an additional $900,000.00 is required to complete the 129 Refinancing (the "**Required Additional Funding**") since the original hearing on June 8, 2021;[2]

2. 129 intended to obtain the Required Additional Funding via a loan which was scheduled to close on September 10, 2021, but it failed to do so;[3]

[1] *Port Capital Development (EV) Inc. (Re),* 2021 BCSC 1272 ("***Chambers Reasons***") at para. 110, Appeal Record, Tab 14.
[2] Affidavit #6 of Macario Teodoro Reyes made on September 1, 2021 ("**Reyes Affidavit #6**") at para. 10.
[3] *Ibid.*

(iv)

3. there is a significant risk that the Terrace House Project will not be insured after September 30, 2021; and

4. obtaining insurance is a condition precedent to the $14.7 million loan which anchors the 129 Refinancing being advanced.[4]

[4] *Reyes Affidavit #6, supra* note 2 at Exhibit B.

PART 2 - STATEMENT OF FACTS

5. CMLS, as the senior secured creditor over the Terrace House Project, generally accepts the Appellant's statement of facts.[5]

6. CMLS adopts the Reply Factum of the Respondents Centura Building Systems (2013) Ltd. ("**Centura**") and Solterra Acquisitions Corp. ("**Solterra**") (the "**Respondent Factum**"), including the Respondent Factum's additions and clarifications to the Appellant's statement of facts.

7. CMLS also specifically clarifies the following facts:

   a) The Appellant's Factum incorrectly suggests that CMLS has unconditionally supported the 129 Refinancing;[6]

   b) This Court in reasons from 129's leave application ("**Leave to Appeal Reasons**") accurately characterized CMLS' position on the 129 Refinancing:

   > "At the hearing on June 8, the 129 application to approve the 129 [Refinancing] was supported by CMLS and Aviva. CMLS' support was conditional on the court approving either the Landa or Solterra offers as a backup in case the 129 [Refinancing] did not complete."[7]

   c) CMLS took this position in the original application because it doubted the ability of 129 to complete the proposed 129 Refinancing and wanted to be sure to preserve the "bird in hand" cash offers, which

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[5] Capitalized terms used herein and not otherwise defined will have the meanings ascribed to them in the Factum of the Appellant 1296371 B.C. Ltd. (the "**Appellant Factum**").

[6] Appellant Factum, supra note 5 at para. 117; Monitor's Confidential Seventh Report, dated June 8, 2021 (the "**Confidential Seventh Report**"), Appendix C; Memorandum of Argument of CMLS dated August 9, 2021 ("**CMLS Memorandum of Argument**") at paras. 5, 6, 8, and 9; *Port Capital Development (EV) Inc. v 1296371 B.C. Ltd.*, 2021 BCCA 319 ("**Leave to Appeal Reasons**") at para. 42.

[7] *Leave to Appeal Reasons, supra* note 6 at para. 17.

were obtained by the Monitor under the SISP only after a "very long and crooked path" was followed;[8]

d) CMLS opposed 129's application for leave to appeal, and it now opposes the orders sought by 129 on this appeal in part because CMLS doubts the ability of 129 to complete the proposed 129 Refinancing;

e) Developments as recent as September 10, 2021, have further amplified CMLS' concern, notably including the following:[9]

I. The Monitor provided 129 with updated payouts for various parties - including CMLS - as at October 22, 2021, showing that an additional $900,000.00 is required to complete the 129 Refinancing (the "**Required Additional Funding**")[10];

II. 129 has submitted that it is attempting to obtain a new loan of $1,675,000.00 from Domain to 129 (the "**New Domain Loan**")[11] whereby of the monies advanced by Domain $1,117,706.00 will be paid to Domain to repay (unspecified) existing debt; $75,000.00 will be paid to Domain to pay certain fees and interest reserves; and the remaining $480,000.00 (approximately) will be pledged toward the Required Additional Funding.[12]

III. According to 129, the New Domain Loan was expected to complete on September 10, 2021, but it has not completed as at the filing of this factum.[13]

IV. The 129 Refinancing primarily relies on funding pledged by Domain Mortgage Company ("**Domain**") through a commitment

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[8] *Chambers Reasons*, supra note 1 at para. 110.
[9] *Reyes Affidavit #6*, *supra* note 2 at para. 10.
[10] *Reyes Affidavit #6, supra* note 2 at paras. 6 and 7 and Exhibit C.
[11] *Reyes Affidavit #6, supra* note 2 at paras. 6 and 7 and Exhibit C.
[12] *Reyes Affidavit #6, supra* note 2 at para. 10.
[13] *Reyes Affidavit #6, supra* note 2 at paras. 6 and 7 and Exhibit C.

letter for approximately $14,700,000.00 (as amended or otherwise modified, the "**Main Domain Loan**").

V. A condition precedent of the Main Domain Loan requires that (1) the existing two property insurance policies provided by Marsh Canada Limited (the "**Existing Insurance Policies**") are extended for the term of the Main Domain Loan (approximately six months); and (2) Domain to be added as first loss payee under both of the Existing Policies (the "**Insurance Condition Precedent**");[14]

VI. On September 10, 2021, the Monitor informed the parties that:

(i) Marsh Canada Limited has declined to extend the Existing Insurance Polices beyond the current September 30, 2021, expiry date; and

(ii) the Monitor has faced significant difficulties in attempting to secure alternative property insurance, partly due to the increased risks specific to the insolvency of the Terrace House Project; and

(iii) to date, the Monitor has not secured alternative property insurance and there is significant risk insurance will not be obtained;

f) Based upon an Amendment to the Solterra Offer, executed by Solterra and the Petitioners on or about September 11, 2021, if the 129 appeal is granted, Solterra would be in a position to walk away from the Solterra Offer.

g) The funding date on the Main Domain Loan has been pushed back significantly from the original loan funding date of June 30, 2021[15] and

[14] *Reyes Affidavit #6, supra* note 2 at Exhibit B.
[15] Affidavit #3 of Macario Teodoro Reyes made on June 4, 2021 ("***Reyes Affidavit #3***").

subsequent to its leave application, 129 further revised components of the Main Domain Loan commitment such that the funding date can be pushed back to December 15, 2021, at the reasonable request of Domain (the "**Extended 129 Funding Date**");[16]

h) If 129's appeal is granted and the Extended Funding Date is utilized, but the 129 Refinancing does not complete in the end, it will result in:

I. continued interest accrual on the CMLS loan, substantial increase in costs and professional fees of CMLS and Desjardins and the professional fees subject to the Administration Charge which rank in priority to CMLS; and

II. a potential loss of the Solterra Offer and substantial increase in the resulting shortfall to CMLS on its outstanding loan.

PART 3 - ISSUES ON APPEAL

8. CMLS adopts the Respondent Factum.

PART 4 - ARGUMENT

9. CMLS adopts the Respondent Factum.

A. Standard of Review

10. CMLS agrees with the Respondent Factum that the orders of the Chambers Judge were made under sections 11 and 11.02 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "***CCAA***"), and were therefore purely discretionary.[17] Accordingly, appellate intervention is only justified if the supervising judge erred in principle or exercised their discretion unreasonably.[18]

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[16] *Reyes Affidavit # 6, supra* note 2 at Exhibit B.
[17] *9354-9186 Québec Inc. v Callidus Capital Corp.*, 2020 SCC 10 ("***Callidus***") at para. 48.
[18] *Callidus, supra* note 17 at para. 53; *Leave to Appeal Reasons, supra* note 6 at para. 51.

B. Additional Considerations

11. In addition to the arguments in the Respondent Factum, CMLS highlights that 129's arguments in the Appellant Factum are based on two incorrect assumptions: (1) that the applicable remedial objective of the *CCAA* is to "avoid the social and economic losses resulting from liquidation of an insolvent company";[19] and (2) that 129 has the ability to complete the 129 Refinancing.

12. The Chambers Judge appropriately exercised her discretion to balance various remedial objectives of the *CCAA* to dismiss 129's application for the approval of the 129 Refinancing.

13. CMLS submits that the Chambers Judge's decision was driven by the fact that she was skeptical that 129 had the ability to complete the 129 Refinancing, stating that the commercial reality of obtaining the funding for the 129 Refinancing was "speculative at best" and therefore not appropriate in the specific circumstances.[20]

14. The developments during the weeks following the decision of the Chambers Judge and the Leave Hearing (discussed earlier in this factum) demonstrate that the Chamber Judge's skepticism was well-founded, and the ability of 129 to complete the 129 Refinancing has since become even more speculative.

15. In addition to the skepticism that the 129 Refinancing would not complete, the Chambers Judge was of the view that even if it did complete, there was no evidence of a plan, or likelihood of a positive outcome for any stakeholders in the ongoing insolvency proceedings. The Chambers Judge:

    a) noted that the 129 Refinancing was not an attempt to seek relief for the purposes of resolving the current creditor claims against the Petitioners but rather that it was "apparent from the entire circumstances… that Mr. Reyes is only seeking to allow *himself* some "breathing space" by

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[19] *Appellant Factum*, supra note 5 at page viii and paras. 47 - 49, 63, 78, 90, 103, 116, and 121.
[20] *Chambers Reasons, supra* note 1 at para. 89.

borrowing money against the [Terrace House Project], by satisfying or keeping the secured creditors at bay while he seeks a better overall resolution than an outright sale that would crystalize his exposure to CMLS and Aviva."[21]; and

b) rightfully exercised her discretion to determine that it was not appropriate to grant the relief 129 sought without first providing even a "kernel" of a plan to the Petitioner's creditors.[22]

16. *Cliffs Over Maple Bay* does not *require* the filing of a draft plan of arrangement or compromise in order to authorize a judge to exercise their discretion to grant relief under section 11 of the *CCAA*;[23] and nowhere in Her Ladyship's reasons did the Chambers Judge state that *Cliffs Over Maple Bay* bound her to require a draft plan of arrangement or compromise.

17. Further, *Cliffs Over Maple Bay* Cliff is not unique in this regard as there are ample authorities which hold that where a debtor company seeks a stay under the *CCAA* in order to restructure, that the court should 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.[24]

18. Instead, the Chambers Judge determined that the 129 Refinancing was not appropriate given the unique circumstances considering some of the various overarching remedial objectives of Canada's insolvency statutes.

19. In 2020, the Supreme Court of Canada in *Callidus* provided a concise overview of the various overarching remedial objectives of Canada's insolvency statutes, stating:

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[21] *Chambers Reasons, supra* note 1 at para. 90.
[22] *Chambers Reasons, supra* note 1 at paras. 86-92.
[23] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 ("***Cliffs Over Maple Bay***") at para. 31.
[24] *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;

> Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Indalex Ltd., Re*, 2013 SCC 6, [2013] 1 S.C.R. 271 (S.C.C.), at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

20. While it is true that among these objectives, the *CCAA* **generally** prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company", this is most certainly not a hard-and-fast rule.[25]

21. In fact, *Callidus* clarifies that the "architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge."[26] The supervising judge has the discretion to weigh the different objectives of the *CCAA* in the particular case based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval.[27]

22. The discretionary authority is placed on the supervising judge in the *CCAA* proceedings and is "one of the principal means through which the *CCAA* achieves its objectives". Pertinent to this appeal hearing, *Callidus* stated in paragraph 48:

> The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" [*citation removed*]. The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine"

[25] *Callidus, supra* note 17 at para. 41, citing *Century Services Inc. v Canada (Attorney General)*, 2010 SCC 60 ("***Century Services***") at para. 70.
[26] *Callidus, supra* note 17 at para. 46.
[27] *Ibid.*

driving the statutory scheme (*Stelco Inc., Re* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).[28]

23. It is also clear that the Chambers Judge did balance numerous overarching remedial objectives in reaching her decision. For example:

a) The Chambers Judge balanced the objective of providing for a timely and efficient resolution of a debtor's insolvency, when after a "very long and crooked path",[29] she decided that "the time has come to end the process."[30]

b) The Chambers Judge also balanced the costs and benefits of restructuring or liquidating the Terrace House Project by carefully considering evidence on whether the 129 Refinancing was appropriate in the specific circumstances.[31] After deciding that the 129 Refinancing was not appropriate, the Chambers Judge then carefully considered the appropriateness of the remaining offers.

PART 5 - NATURE OF ORDER SOUGHT

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

All of which is respectfully submitted.

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

DocuSigned by:

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Colin Brousson, Counsel for the CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company

[28] *Callidus*, *supra* note 17 at para. 48.
[29] *Chambers Reasons*, *supra* note 1 at para. 110.
[30] *Chambers Reasons*, *supra* note 1 at para. 111.
[31] *Chambers Reasons*, *supra* note 1 at para. 89.

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.

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