Form 11 (Rules 23(2)(c)(i) and (4)(a) and 24(a))

Court of Appeal File No. CA-47585

COURT OF APPEAL

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

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF THE PLAN OF COMPROMISE AND ARRANGEMENT OF PORT CAPITAL DEVELOPMENT (EV) INC. and EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

BETWEEN:

PORT CAPITAL DEVELOPMENT (EV) INC. and
EVERGREEN HOUSE DEVELOPMENT LIMITED PARTNERSHIP

Respondents
(Petitioners/Applicants)

AND:

1296371 B.C. LTD.

Appellant
(Respondent/Applicant)

AND:

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

Respondents
(Respondents)

APPELLANT'S REPLY

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INDEX

APPELLANT'S REPLY ARGUMENT

1. In this reply, 129 adopts the terms defined in its factum filed September 1, 2021, unless otherwise defined herein. For the purpose of this reply, 129 refers to Solterra and Centura collectively as the "**Respondents**".

A. Whether there is a kernel of a plan must also be considered broadly

2. The Respondents suggest the appeal does not turn on *Cliffs Over Maple Bay*[1] because the chambers judge noted other authorities that stand for the proposition that, to affect creditors' rights, the applicant must provide evidence of an intention to put a kernel of a plan to creditors.[2]

3. There are two problems with this submission, the Respondents:

(a) conflate *Cliffs Over Maple Bay* with a different, albeit related, line of authorities; and

(b) characterize the "kernel of a plan" line of authorities too narrowly, suggesting it only relates to plans of arrangement or compromise.

4. The Respondents' argument does not save the chambers judge's analysis from the error articulated in 129's and Aviva's factums. Rather it highlights her reliance on *Cliffs Over Maple Bay*. The chambers judge concluded there was not a "'kernel of a plan' … 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."[3]

5. A "kernel of a plan" does not necessarily need to include an intention to put forward a plan of arrangement to creditors to be valid and reasonable.[4] The question is whether the intended ultimate outcome, whatever that may be, "will advance the purpose of the *CCAA*."[5]

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[1] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327.
[2] Factum of the Respondents Centura Building Systems (2013) Ltd. and Solterra Acquisition Corp. filed September 13, 2021 ("**Respondents' Factum**"), pg. 20, para. 81.
[3] *Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272 at para. 87 [***Chambers Reasons***], Appeal Record, Tab 14, pg. 265.
[4] *Quest University Canada (Re)*, 2020 BCSC 318 at para. 30, 108.
[5] *North American Tungsten Corporation Ltd. (Re)*, 2015 BCSC 1376 at para. 26; *Quest*, *supra* note 4 at para. 108.

6. Whether there is a "kernel of a plan" relates to, and turns on, the question of appropriateness as articulated in *Century Services*:

> 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.[6]

7. Since, for example, it is "appropriate for the company to use the *CCAA* to effect the sale of the company's business as a going concern" (i.e. a liquidation),[7] requiring a "kernel of a plan" that focuses on putting a plan of arrangement or compromise to creditors is clearly too narrow. One of the reasons the question of whether there is a "kernel of a plan" is assessed broadly is because it may not be known whether a "'restructuring' will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties."[8]

8. The required "kernel of a plan" may include refinancing assets, loans or operations.[9] Refinancing is distinct from an arrangement or compromise, but both are equally appropriate depending on the circumstances.

9. The two-stage nature of the 129 Refinancing[10] is aligned with recent authorities that address whether there is a "kernel of a plan", regardless of the lack of evidence of an intention to propose a plan of arrangement or compromise to creditors.

10. By conflating *Cliffs Over Maple Bay* and the "kernel of a plan" line of authorities, both the *Chambers Reasons* and the Respondents' argument demonstrate why *Cliffs Over Maple Bay* is overly restrictive and should be overruled. The question for a supervising *CCAA* judge is broad: does the relief sought usefully

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[6] *North American Tungsten*, *supra* note 5 at para. 25, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.
[7] *North American Tungsten*, *supra* note 5 at para. 27.
[8] *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26; see also *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 39.
[9] For example, *Pacific Shores Resort*, *supra* note 8 at para. 35(d); *Asset Engineering*, *supra* note 8 at para. 23; *Azure Dynamics Corporation (Re)*, 2012 BCSC 781 at para. 22. See also, *North American Tungsten*, *supra* note 5 at paras. 14, 30; *Quest*, *supra* note 4 at para. 30, 42, 108.
[10] Factum of the Respondent Aviva Insurance Company of Canada filed September 13, 2021, pg. 6, 19, paras. 20, 70-73.

further the remedial purpose of the *CCAA* to avoid the social and economic losses resulting from liquidation?[11]

11. In other words, is the relief (and the "kernel of a plan" in support of that relief) compatible with the remedial purpose of the *CCAA*? Since the purpose of the *CCAA* is broad, the "kernel of a plan" should be assessed broadly, and should not focus solely on a potential plan of arrangement or compromise.

12. The Respondents raise s. 11.02 of the *CCAA*, which specifically addresses stays of proceedings. However, the Respondents' argument with respect to s. 11.02 actually undermines the chambers judge's decision because, despite the issues raised by the Respondents, the chambers judge nevertheless extended the stay at the close of the hearing.

13. If the recent "kernel of a plan" jurisprudence is interpreted narrowly to mean only a plan of arrangement or compromise, which 129 submits it does not, the chambers judge could not have granted any stay extension. That relief would have been barred by her conclusion that there was no suggestion that there was a "'kernel of a plan' … 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."[12]

14. Viewed through the correct lens, the 129 Refinancing is "more than a kernel of a plan":

> It is a strategy to move forward in an orderly way which may provide benefits to all stakeholders. It takes into account the remedial purpose of the legislation and attempts to minimize the potential social and economic losses of liquidation of the [Petitioners].[13]

15. The ratio from *Cliffs Over Maple Bay* that absent evidence of a debtor's intention to propose a plan of arrangement or compromise it is inappropriate to grant relief under s. 11 of the *CCAA* is distinct from the line of authorities that requires a "kernel of a plan". The plan, for which a "germ" or "kernel" is required, must include outcomes that fit within the broad remedial purpose of the *CCAA*, not solely arrangements or compromises.

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[11] *Century Services*, *supra* note 6 at para. 70.
[12] *Chambers Reasons*, *supra* note 3 at para. 87, Appeal Record, Tab 14, pg. 265.
[13] *North American Tungsten*, *supra* note 5 at para. 31.

B. The 129 Refinancing should be compared to the sale transactions

16. The Respondents suggest the "core premise of 129's position is that the court must grant any order sought by a debtor … so long as the result is better than a liquidation" (emphasis added). This approach, the Respondents argue, "risks creating a dangerous precedent" with "far-reaching implications".[14]

17. The Respondents go on to suggest this approach would allow a debtor to seek any order so "long as it can be shown that unsecured or subordinate secured creditors are likely to receive nothing in a liquidation" (emphasis added). The Respondents argue this would denude the role of the monitor, confining its role to preparing liquidation analyses.[15] The Respondents cast 129's position too broadly in an effort to raise alarm.

18. 129's argument is not based on a theoretical liquidation analysis. The sale transactions were not abstract; there were two bidders before the chambers judge with multiple offers. The terms of those offers where known, in particular the purchase prices were set out (none of which exceeded the consideration in the 129 Refinancing), and the chambers judge concluded the Other Creditors were "out of the money".[16] The evidence was not that the Other Creditors would "likely" receive nothing in a liquation. The Other Creditors are going to either receive nothing under the Solterra Backup Offer, or have a hope of some recovery under the 129 Refinancing.

19. The Monitor was not required to perform a liquidation analysis. However, the Monitor compared the 129 Refinancing to the sale transactions, concluding it "would result in a 'materially better' outcome for the stakeholders".[17]

20. To the extent 129's position will create a precedent, it is an appropriate one. If a supervision *CCAA* judge is presented with competing transactions, the court must balance the actual options available to determine which transaction most closely aligns with the purpose of the *CCAA* and is thus most appropriate in the

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[14] Respondents' Factum, pg. 16-17, paras. 61-62.
[15] Respondents' Factum, pg. 17, paras. 63-64.
[16] *Chambers Reasons*, *supra* note 3 at paras. 42(a), 73, Appeal Record, Tab 14, pg. 250, 261.
[17] *Chambers Reasons*, *supra* note 3 at para. 40, Appeal Record, Tab 14, pg. 250.

circumstances. This is a proper, and 129 submits necessary, consideration in an appropriateness analysis under s. 11 of the *CCAA*.

21. However, that analysis is not necessarily driven by the financial outcome for stakeholders, although that will be an important aspect. The analysis in respect of “appropriateness” does not take away from the requirements of establishing good faith and due diligence,[18] meaning the relative financial impact of various transactions is clearly not the only consideration a chambers judge can take into account.

C. The 129 Refinancing was a redemption as of June 8, 2021

22. The Respondents do not take issue with 129’s summary of the law regarding redemption.[19] However, the Respondents’ argument that the chambers judge’s findings are entirely supported by the evidence is not based on the evidence that was before the chambers judge on June 8, 2021, rather the argument relies on the state of affairs on May 25, 2021.

23. As was the case for the Solterra Backup Offer, which was an improvement on the Solterra Offer #1, 129’s offer also improved between May 25, 2021 and June 4, 2021.[20]

24. As of the June 8, 2021 hearing, the 129 Refinancing sought to “redeem and take an assignment” of the CMLS Mortgage.[21] 129 increased the available funds “to ensure there are sufficient funds to redeem CMLS in full”.[22] Although it was not the case on May 25, 2021, the 129 Refinancing before the chambers judge on June 8, 2021 provided sufficient funds to pay CMLS “in full”.[23]

25. The chambers judge erred in her conclusion that the Petitioners could not redeem the CMLS Mortgage by paying it out and taking an assignment because

[18] *Century Services*, *supra* note 6 at paras. 69-70; *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 49-51, 70.
[19] Respondents’ Factum, pg. 18, para. 72.
[20] See Appellant’s Factum filed September 1, 2021 (“**129’s Factum**”), pg. 5-6, paras. 30-33.
[21] Affidavit #3 of Macario Teodoro Reyes filed June 4, 2021 (“**Reyes Affidavit #3**”), para. 3, Appellant’s Appeal Book (“**Appeal Book**”), Tab 2, pg. 54.
[22] Reyes Affidavit #3, para. 11, Appeal Book, Tab 2, pg. 56.
[23] Reyes Affidavit #3, para. 12(b), Appeal Book, Tab 2, pg. 56.

there was a subordinate mortgagee (Aviva).[24] This conclusion clearly demonstrates that the chambers judge was "unaware of the Petitioners' right of redemption" in this case.[25] In light of Aviva's consent and that 129 had funds to redeem the CMLS Mortgage in full, the Petitioners had a right to compel an assignment of the CMLS Mortgage,[26] which is the opposite of the chambers judge's conclusion.

All of which is respectively submitted this 17th day of September, 2021.

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[24] *Chambers Reasons*, *supra* note 3 at para. 56, Appeal Record, Tab 14, pg. 257
[25] See Respondents' Factum, pg. 19, para. 77.
[26] 129's Factum, pg. 13-14, paras. 57-62.

LIST OF AUTHORITIES

Authorities	**Page # in Reply**	**Para # in Reply**
Cases		
9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10	8	21
Asset Engineering LP v. Forest & Marine Financial Limited Partnership, 2009 BCCA 319	5	7, 8
Azure Dynamics Corporation (Re), 2012 BCSC 781	5	8
Century Services Inc. v. Canada (Attorney General), 2010 SCC 60	5, 6, 8	6, 10, 21
Cliffs Over Maple Bay Ltd. v. Fisgard Capital Corp., 2008 BCCA 327	4, 5	2 – 4, 10, 15
North American Tungsten Corporation Ltd. (Re), 2015 BCSC 1376	4 – 6	5 – 8, 14
Pacific Shores Resort & Spa Ltd. (Re), 2011 BCSC 1775	5	7, 8
Port Capital Development (EV) Inc. (Re), 2021 BCSC 1272	4 – 7, 9	4, 10, 13, 18, 19, 25
Quest University Canada (Re), 2020 BCSC 1883	4, 5	5, 8
Legislation		
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.02.	4 – 7	5 – 7, 10 – 12, 15, 20