NO. VLC-S-S205095
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

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 A PLAN OF COMPROMISE AND ARRANGEMENT OF

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

EIGHTH REPORT OF THE MONITOR

ERNST & YOUNG INC.

December 14, 2021

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INTRODUCTION

Background and Origin of this CCAA Proceeding

1. Port Capital Development (EV) Inc. (the "**General Partner**") and Evergreen House Development Limited Partnership ("**Evergreen LP**"), (each a "**Petitioner**", and collectively, the "**Petitioners**") own a real estate development project called the "**Terrace House Project**".

2. The Terrace House Project is a high-rise luxury residential strata development located at 1250 West Hastings St. (Coal Harbour area), Vancouver, BC. It is a 19-storey mixed-use development, providing a total of 20 residential units and 2 commercial retail units ("**CRU**"), above a 3-level underground parkade. The Terrace House Property is unique in that its primary structural material is timber.

3. The General Partner is the Bare Trustee that holds title to the real property owned by the Petitioners with a legal description as follows:

   PID: 006-721-397; LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK, VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92

4. The Petitioners are subsidiaries of the "**Port Capital Group**", which is in the business of real estate development and management primarily in British Columbia, but also Toronto, Ontario.

5. Until recently, CMLS Financial Ltd ("**CMLS**" or the "**Construction Lender**") was the Terrace House Project's construction lender pursuant to a commitment letter dated July 4, 2019 (the "**Construction Loan**"). The Construction Loan was secured by, among other things, a first ranking mortgage against the Terrace House Project. The Construction Loan was

refinanced (as described below) on October 28, 2021 pursuant to an Order made September 22, 2021 (the "**BCCA Sept 22 Order**") by the British Columbia Court of Appeal (the "**BCCA**").

6. Desjardins Financial Security Life Assurance Company (the "**Original DIP Lender**") provided the Petitioners access to a debtor-in-possession financing facility (the "**Original DIP Facility**"). The Original DIP Facility has also been fully repaid pursuant to the BCCA Sept 22 Order.

7. Aviva Insurance Company of Canada ("**Aviva**" and together with CMLS, the "**Secured Creditors**") provided a deposit protection insurance facility to permit the Petitioners to have access to the pre-sale purchasers' deposit monies for the payment of project costs. Management estimated that approximately $14.7 million would be owing pursuant to Aviva's insurance deposit facility contingent upon the return of deposits to the pre-sale purchasers.

8. Additionally, the Petitioners estimate that there are approximately $4.0 million in lien claimants and $2.3 million in unsecured creditors. The unsecured indebtedness and lien claimants of the Petitioners primarily consist of amounts owing on account of trade debt, property taxes and unpaid professional firms and consultants fees.

9. On May 29, 2020, this Honourable Court pronounced an Order (the "**Initial Order**") which, *inter alia*:

    a) appointed Ernst & Young Inc. ("**EY**") as monitor of the Petitioners (the "**Monitor**") in these CCAA proceedings (the "**CCAA Proceedings**");

    b) granted a "**Stay of Proceedings**" to June 8, 2020 (the "**Stay Period**"); and

    c) granted the Monitor "**Enhanced Powers**" to execute control over the Petitioners and to explore restructuring opportunities for the Terrace House Project and administer a "dual-track" sale and investment solicitation process (the "**SISP**") to obtain an equity investment, a refinancing or alternatively a sale of the Terrace House.

10. On June 8, 2020, this Honourable Court granted an order amending the Initial Order (the "**Amended and Restated Initial Order**" or "**ARIO**") that among other things approved the DIP Commitment Letter and the DIP Lender's Charge (both as defined in the First Report).

The Sale and Investment Solicitation Process

11. Paragraphs 19 – 28 of the Third Report dated November 27, 2020 provide extensive detail on the Monitor's administration of the two (2) phased SISP approved by this Honourable Court. The SISP initially resulted in the execution of an offer agreement (the "**Bosa Bid Offer Agreement**") on behalf of the Petitioners with Bosa Properties (OC) Inc. ("**Bosa**") which was approved by this Honourable Court on December 1, 2020.

12. The Bosa Bid Offer Agreement provided Bosa to February 16, 2021 (the "**Due Diligence Period**") to complete a satisfactory feasibility study and due diligence analysis (the "**Feasibility Study**") relating to the economics of the Terrace House Project, and to obtain construction financing.

13. Bosa provided the Monitor with a feasibility study (the "**Confidential Feasibility Study**") on the Terrace House Project and put forward a proposal that varied from the Bid Offer that was not acceptable to CMLS; and accordingly, the Monitor in consultation with CMLS did not advance the Bid Offer to a definitive agreement.

14. On April 13, 2021, the Monitor filed its "**Fifth Report**" in which it sought the approval of a Purchase and Sale Agreement with Landa Global Acquisition Inc. ("**Landa**") (the "**Landa PSA**") and a sealing order in connection with same. The process resulting to the Landa PSA and details pertaining to same is described in detail in paragraphs 25 to 35 of the Fifth Report.

15. On April 16, 2021, this Honourable Court granted an order which, *inter alia,* approved the Monitor's execution of the Landa PSA and the Order Sought in connection with same. The Landa PSA allowed the Monitor to engage in a "**Final Marketing Phase**" to solicit a Superior Offer to the Landa PSA. The Fifth Report described the Final Marketing Phase as a hybrid between a stalking horse procedure and a sealed bid procedure.

16. The Purchase Price established for by the Landa PSA for the Terrace House Project was $19 million.

17. Paragraphs 29 – 32 of the "**Sixth Report**" of the Monitor described the conduct of the Final Marketing Phase that resulted in a "**Superior Offer**" for the Terrace House Project from Solterra Acquisition Corp. ("**Solterra**") in the amount of $21 million.

18. On May 20, 2021, the Petitioners applied to this Honourable Court for an order approving, *inter alia,* a purchase and sale agreement between Solterra Acquisition Corp. ("**Solterra**") and the Petitioners (the "**Original Solterra PSA**").

19. On May 21, 2021, a cross-application was filed by 1296371 B.C. Ltd. ("**129**") to approve a new loan facility to purchase and take assignment of the loan and security held by CMLS (the "**Original 129 Offer**") and to repay the DIP Lender. 129 is a related party to the Petitioners.

20. On May 24, 2021, Landa submitted a revised offer for the Property increasing its offer price from $19 million to $21,500,000 (the "**Second Landa PSA**").

21. On May 25, 2021, Landa filed a response to the notices of application seeking the approval of their revised offer (the "**Second Landa PSA**").

22. On May 25, 2021 the Court held the above noted hearing to consider the Petitioner's motion to approve the Original Solterra PSA (at $21,000,000).

23. At the conclusion of the May 25, 2021 hearing, this Honourable Court:

a) adjourned the Petitioners’ application to approve the Original Solterra PSA to 2:00 PM on June 8, 2021;

b) advised that if any parties wished to submit further offers, they should do so on or before to 12:00pm on June 4, 2021; and

c) directed the Monitor to file a confidential report in advance of the June 8, 2021 hearing.

24. At the conclusion of the May 25, 2021 hearing, this Honourable Court gave the following instructions:

a) the hearing with respect to the Petitioners’ application to approve the Original Solterra PSA was adjourned until June 8, 2021;

b) parties interesting in submitting further offers, should ensure they are submitted on or before to 12:00pm on June 4, 2021; and

c) a direction to the Monitor to file a confidential report in advance of the June 8, 2021 hearing advising this Honourable Court of the commercially sensitive details with respect to offers received.

25. On June 4, 2021, the Monitor received three additional revised offers:

a) a second revised offer from Landa for $22,000,000 (the “**Third Landa PSA**”); and

b) a back-up offer submitted by Solterra (for $23,666,666 plus an additional purchase price addition in certain scenarios) (the “**Backup Solterra PSA**”) on a without prejudice basis given that Solterra intended to preserve its rights to argue that its Original Solterra PSA (for $21,000,000) should be approved notwithstanding the delivery of the Backup Solterra PSA; and

c) a revised offer from 129 filed in the form of a cross-application to the Petitioners' application to approve the Original Solterra PSA (the "**Revised 129 Offer**").

26. The Monitor summarized the offers received in its "**Seventh Confidential Report**" filed on June 8, 2021.

The Approval of the Backup Solterra PSA and Appeal

27. On June 15, 2021, this Honourable Court made an order (the "**June 15 Order**"), which *inter alia*:

a) approved the Backup Solterra PSA and granted the associated approval and vesting orders;

b) dismissed the application by 129 seeking the approval of the Revised 129 Offer;

c) increased the Petitioners borrowings under the Interim Facility to a maximum of $1,800,000; and

d) extended the stay of proceedings up to and including September 30, 2021.

28. On August 4, 2021, 129 sought leave to appeal the June 15 Order made by this Honourable Court (the "**129 Leave Motion**"). A copy of the 129 Leave Motion is attached hereto as **Appendix "A".**

29. The 129 Leave Motion was opposed by CMLS, the DIP Lender, Solterra, Centura Building Systems (2013) Ltd. ("**Centura**") (a lien claimant and related party to Solterra) and the Petitioners. Aviva supported the 129 Leave Motion.

30. On August 20, 2021, the BCCA granted 129 leave to appeal the June 15 Order and stayed the closing of the transaction contemplated by the Backup Solterra PSA pending the hearing of the appeal. The BCCA also directed that the appeal be heard before a five-justice

division. The Reasons for granting the 129 Leave Motion are attached hereto as **Appendix "B"**.

31. On September 1, 2021, 129 filed its appeal (the "**129 Appeal**"), a copy of which is attached hereto as **Appendix "C"**. The 129 Appeal sought various relief including an Order setting aside Back-Up Solterra SPA and approving the Revised 129 Offer in its place.

32. The 129 Appeal was opposed by CMLS, the DIP Lender, Solterra and Centura who each filed Reply Facta; although CMLS and the DIP Lender later changed their positions and supported the 129 Appeal during the hearing of the appeal . Aviva supported the 129 Leave Motion. The Monitor did not take a position on the 129 Appeal.

33. On September 22, 2021, the BCCA issued a memorandum advising stakeholders of its decision (the "**BCCA Memorandum**").

34. The BCCA Memorandum allowed the 129 Appeal and advised that reasons for judgment would be forthcoming but were "unlikely to be issued prior to September 30, 2021". The BCCA Memorandum advised that the BCCA was:

    a) setting aside the June 15 Orders;

    b) approving of the Revised 129 Offer; and

    c) subject to the completion of the Revised 129 Offer, approving amendments to the ARIO including, *inter alia,* the following:

        i. extending the stay of proceedings up to and including April 30, 2022 (the "**Current Stay Period**");

        ii. discharging and releasing in full the Interim Lender's Charge;

        iii. removing all references to the "Enhanced Monitor Powers"; and,

iv. amending the Administration Charge in favor of the Monitor, independent counsel to the Monitor, and counsel to the Petitioners to a maximum of $100,000.

35. A copy of the BCCA Memorandum and the subsequent BCCA Sept 22 Order are attached hereto as **Appendix "D",** and **Appendix "E"** respectively.

36. On October 4, 2021, by way of letter to the BCCA (the "**Solterra Leave Letter**") counsel to Solterra advised that they were considering bringing an application for leave to appeal before the Supreme Court of Canada (the "**SCC**"). A copy of the Solterra Leave Letter is attached hereto as **Appendix "F".**

37. On October 8, 2021, the BCCA released its reasons for judgment with respect to the 129 Appeal. Shortly thereafter, the BCCA arranged for a single justice to hear Solterra's application for a stay of the BCCA Sept 22 Order pending leave to appeal to the SCC. On October 22, 2021, the BCCA refused Solterra's application for a stay of the BCCA Sept 22 Order. A copy of the reasons for judgment in respect of the 129 Appeal are attached hereto as **Appendix "G"**.

38. On October 28, 2021, the Petitioners completed the Revised 129 Offer.

39. The Monitor has previously filed eight (8) reports in these CCAA proceedings: the "**Proposed Monitor's Report**", the "**First Report**", the "**Second Report**", the "**Third Report**", the "**Fourth Report**", the "**Fifth Report**", the "**Sixth Report**" and the "**Seventh Confidential Report**". These reports, with the exception of the Seventh Confidential Report, are posted on the Monitor's website at www.ey.com/ca/terracehouse.

40. The purpose of this "**Eighth Report**" is to provide information to this Honourable Court with respect to the following:

a) the activities of the Monitor since the Sixth Report;

b) the activities of the Petitioners since the granting of the BCCA Sept 22 Order;

c) the completion of the Revised 129 Offer;

d) the proposed increase to the Initial Domain Loan (defined below); and

e) the Monitor's conclusions and recommendation.

41. This Eighth Report should be read in conjunction with the Petitioners' Notice of Application filed December 10, 2021, and the supporting affidavit of Macario Teodoro Reyes sworn on December 10, 2021 (the "**Fifth Reyes Affidavit**").

TERMS OF REFERENCE

42. In preparing this Eighth Report and making the comments herein, the Monitor has been provided with and has herein relied upon, unaudited financial information, books, records and financial information prepared by the Petitioners, discussions with management of the Petitioners ("**Management**"), and information from other third party sources (collectively, the "**Information**"). Except as described in this Sixth Report in respect of the Cash Flow Forecast:

a) the Monitor has reviewed the Information for reasonableness, internal consistency and use in the context in which it was provided. However, the Monitor has not audited or otherwise attempted to verify the accuracy or completeness of such information in a manner that would wholly or partially comply with Generally Accepted Assurance Standards ("**GAAS**") pursuant to the *Chartered Professional Accountants Canada Handbook* and, accordingly, the Monitor expresses no opinion or other form of assurance contemplated under GAAS in respect of the Information; and

b) some of the information referred to in this Sixth Report consists of forecasts and projections. An examination or review of the financial forecast and projections, as outlined in the *Chartered Professional Accountants Canada Handbook*, has not been performed.

43. Future oriented financial information referred to in this Sixth Report was prepared based on Management's and the Monitor's estimates and assumptions. Readers are cautioned that since projections are based upon assumptions about future events and conditions that are not readily and currently ascertainable, the actual results will vary from the projections, even if the assumptions materialize, and the variations could be material.

44. Unless otherwise indicated, the Monitor's understanding of factual matters expressed in this Sixth Report concerning the Petitioners and their business is based on the Information, and not independent factual determinations made by the Monitor.

45. All capitalized terms used herein that are undefined have the meanings ascribed thereto in the Proposed Monitor's Report, the First Report, the Second Report, the Third Report, the Fourth Report, the Fifth Report, the Sixth Report, the Seventh Confidential Report and the Amended and Restated Initial Order.

46. Unless otherwise stated all monetary amounts contained herein are expressed in Canadian Dollars.

ACTIVITIES OF THE PETITIONERS SINCE THE BCCA SEPT 22 ORDER

47. Since the granting of the BCCA Sept 22 Order, which removed the "Monitor's Enhanced Powers, the Petitioners have been engaged in the following activities:

a) engaged with 129 to complete and fund the Revised 129 Offer and repay the Secured Loan;

b) set up monitoring protocols and met with the Monitor to discuss cash flows and payment of site preservation costs and other disbursements;

c) worked with Colliers International Realty Advisors Inc. to continue the property tax assessment appeals with the City of Vancouver;

d) began development of a communication strategy with respect to presale purchasers;

e) engaged with suppliers and vendors with respect to recommencing construction on the Terrace House Project;

f) engaged with Domain to secure additional financing by way of the Second Domain Loan (defined below);

g) prepared a cash flow forecast to provide for the use of the Second Domain Loan funds;

h) considered the *Real Estate Development Marketing Act* as they continue planning for future phases of the Terrace House Project; and

i) engaged with Aviva with respect to the Second Domain Loan.

ACTIVITIES OF THE MONITOR SINCE THE SIXTH REPORT

48. The ARIO provided the Monitor with Enhanced Powers to undertake certain control over the day-to-day operations of the Petitioners, to administer the SISP, and to explore restructuring opportunities for the Terrace House Project. To that end, since the date of the Sixth Report, the Monitor has, *inter alia*:

a) managed the site preservation of the Terrace House Project, including payment to vendors and suppliers with respect to post-filing activity;

b) managed the cash flows of the Petitioners;

c) prepared reporting packages and corresponded with the DIP Lender with respect to the DIP Facility;

d) assisted the Petitioners in obtaining a six month extension of property insurance for the Terrace House Project to March 31, 2022;

e) obtained an extension of the Building Permit issued by the City of Vancouver to January 12, 2022;

f) upon the removal of the Monitor's Enhanced Powers as ordered by the BCCA, transitioned the day-to-day operations of the Terrace House Project back to the Petitioners and transferred the remaining DIP Loan funds held in trust by the Monitor to the Petitioners, less a reserve held by the Monitor for outstanding professional fees;

g) prepared court materials and participated in the BCCA proceedings;

h) held discussions with the Petitioners, 129, and legal counsel to 129 on a periodic basis to discuss, *inter alia*, the following:

    i. the Revised 129 Offer, including the repayment of the Secured Loan and the closing and funding of the Revised 129 Offer, as more thoroughly described herein; and

    ii. the ongoing responsibilities of the Petitioners within these CCAA Proceedings, including compliance with the ARIO;

i) participated in the completion of the Revised 129 Offer;

j) participated in meetings and telephone discussions with the Petitioners' Secured Creditors;

k) responded to numerous inquiries from various financial stakeholders of the Terrace House Project as well as other third parties;

l) assisted with the Petitioners cash flow forecast;

m) communicated with Aviva with respect to the Second Domain Loan; and

n) prepared this Eighth Report.

UPDATE ON THE COMPLETION OF THE REVISED 129 OFFER

49. Following the BCCA Sept 22 Order and the dismissal of Solterra's application for a stay of the BCCA Sept 22 Order, the Petitioners and 129 closed the Revised 129 Offer with Domain as "**Senior Lender",** 1296371 B.C. Ltd ("**129**") and 1296371 B.C. Ltd ("**126**") (together with 129 the "**Junior Lender**").

50. A total of $25,249,060.03 was provided to the Petitioners for the purposes of redeeming and repaying the Interim Financing and the purchase and assignment of the existing security on the Terrace House Project. The 129 Offer completed in three tranches with $14,700,000 provided by Domain (the "**Initial Domain Loan**"), $8,399,060.03 provided by 129 and $2,150,000 provided by 126.

51. On completion, solicitors for the Senior Lender and Junior Lender made the following advances:

a) $21,676,019.13 to repay the Construction Loan provided by CMLS, as a redemption and assignment of their security;

b) $1,819,914.16 to the Interim Lender as a repayment of the interim financing facility;

c) $683,066.04 as payment for outstanding professional fees owing to the Monitor, the Monitor's Counsel and the Petitioners' Counsel;

d) $401,107.36 to the City of Vancouver representing the outstanding property taxes on the Terrace House Project lands;

e) $200,000 to Landa representing the break fee payable pursuant to the purchase and sale agreement dated March 25, 2021 and as required by the BCCA Order;

f) $109,250 to Marsh Canada Limited representing the deposit amount payable to bind the renewed insurance policy; and

g) other customary advances to complete the transaction.

PROPOSED INCREASE TO THE INITIAL DOMAIN LOAN

52. The Initial Domain Loan was almost entirely used to complete the Revised 129 Offer and left very little cash available to the Petitioners to pay for working capital and site preservation expenses throughout the Current Stay Period. Given the concerns of a shortfall to pay for these expenses, the Petitioners contacted Domain to arrange for an additional loan.

53. On December 1, 2021, Domain provided the Petitioners with a loan retainer agreement that provides $1,300,000 of additional capital (the "**Loan Retainer Agreement**") and is considered as an additional segment to the Initial Domain Loan (the "**Second Domain Loan**"), which, if funded and approved by this Honourable Court, would increase the Petitioners secured borrowings with Domain to a total of $16,000,000. A copy of the Loan Retainer Agreement is attached hereto as **Appendix "H"**.

54. The Loan Retainer Agreement is not a binding commitment to provide financing. Rather, the Loan Retainer Agreement would form the basis of subsequent binding Commitment Letter. No Commitment Letter has been executed by the parties.

55. Key financial terms of the Loan Retainer Agreement include the following:

a) a term loan of $1,300,000 (the "**Loan Face Amount**") but resulting in funds available for use by the Petitioners of $993,916.67 as described in the Loan Retainer Agreement after the deduction of various fees and reserves;
b) a maturity date of May 1, 2022 (to coincide with the maturity date of the Initial Domain Loan) resulting in a maximum 4.5 month loan from funding - if funding were to occur by December 15, 2021;
c) an interest rate of 24% per annum (not including those fees described below);
d) a loan servicing fee of 0.25% per annum;
e) a mortgage broker fee of 2% on the Loan Face Amount (or $26,000);
f) a fund raising fee of 1% on the Loan Face Amount (or $13,000); and
g) an exit fee of 2% (or $26,000) subject to certain exceptions as defined in Schedule "A" to the Loan Retainer Agreement.

56. The Loan Retainer Agreement has a minimum interest provision set at $104,000. Monthly interest at 24% is approximately $26,000 on the Loan Face Amount. As such, the minimum interest provision guarantees four months of interest payments regardless of the loan payout date.

57. As noted above, the funds available for use by the Petitioners resulting from the Second Domain Loan are $993,916.67 – as described in Article 1.6 of the Loan Retainer Agreement. The two largest deductions from the $1,300,000 Loan Face Amount are (i) $147,000 on account of a $147,000 fund raising fee payable to Domain from the Initial Domain Loan that remains unpaid; and (ii) $105,083 on account of a four month payment reserve on account of this Second Domain Loan.

58. Through the Second Domain Loan, the Petitioners are seeking an increase in the priority charge held by Domain. The Petitioners propose increasing the Domain's priority charge by $1,300,000 to a total of $16,000,000.

59. Funding under the Loan Retainer Agreement is conditional on a number of conditions set out in Articles 1.10, 1.11 and 2.0 of the Loan Retainer Agreement, including but not limited to, this Honourable Court's approval and certain consent rights of Aviva.

The Monitor's Observations

60. The Petitioners are not currently seeking an extension to the Stay of Proceedings beyond the Current Stay Period which is set to expire on April 30, 2022. However, Management with the assistance of the Monitor, has developed an updated cash flow forecast (the "**Cash Flow Forecast**") for the twenty one week period coinciding with the end of the Current Stay Period on April 30, 2022. The Cash Flow Forecast assumes that the Petitioners will have access to the funds contemplated in the Loan Retainer Agreement.

61. A copy of the Cash Flow Forecast together with assumptions is attached hereto as **Appendix "I"** and is summarized below.

	To April 30, 2022
Beginning Cash	**24,275**
Receipts	**311,681**
Disbursements	**(1,469,077)**
Insurance	(73,393)
Site preservation	(20,559)
Glass storage	(37,422)
Consultants – city requirements	(28,017)
Crane lease	(48,510)
Formwork rentals	(74,555)
Permit costs	(163)
General, admin & misc	(16)
Showroom Rental	(45,336)
Property Tax	(75,000)
Crane swing easement	(600,000)
Development fees	-
REDMA legal fees	(20,000)
Pre-sale marketing	(20,000)
Legal fees	(15,000)
Construction loan fees	(110,000)
Construction loan conditions	(45,000)
Project accounting	(12,000)
Restructuring costs	(244,106)
Total Cash before Second Domain Loan	**(1,133,121)**
Second Domain Loan (net of fees)	993,917
Ending Cash after Second Domain Loan	**(139,204)**

62. The Cash Flow Forecast projects that the Petitioners will utilize the funds available under the Second Domain Loan to maintain and preserve the Terrace House Project site and begin preparations for construction.

63. In addition, the Monitor notes the following on the Cash Flow Forecast:

a) site preservation costs are anticipated to continue as they have been throughout the within CCAA proceedings;

b) a payment to the owner of a neighbouring tower may be required to preserve an easement with respect to the air rights above the tower. The easement is necessary to allow the Terrace House Project crane to enter the neighbouring property's airspace in the construction of the Terrace House Project. The preservation of the easement rights are projected to cost approximately $600,000; and

c) there is a shortfall in the cashflow of approximately $120,000 in week 17 of the Cash Flow Forecast. This shortfall increases to approximately $139,000 in week 21 of the Cash Flow Forecast. The primary cause of the shortfall are fees and costs associated with obtaining a construction loan. These fees include appraisal fees, quantity surveyor fees and loan fees.

64. The Petitioners require additional funding in order to continue with their restructuring efforts. The Second Domain Loan is intended to provide the Petitioners with the necessary funding to preserve the Terrace House Project while they seek a construction lender.

65. As far as the Monitor is aware, there does not appear to be any dispute that the Petitioners require additional funding. However, there does not appear to be any consensus as among the Petitioners and the key stakeholders, being Aviva and Domain, as to how much funding is required to be advanced through a Domain loan or the timing of such.

66. Without the Second Domain Loan or some other form of financing, the Petitioners may soon face a liquidation of their assets. The results of the prior SISP within these CCAA proceedings are indicative of what would be a material shortfall to secured creditors in a liquidation scenario.

67. At the time of writing this report, it remains unclear to the Monitor whether Aviva will support the approval of the Second Domain Loan in its current, or revised form, or with additional covenants or controls. The Monitor notes that Aviva supported the Revised 129 Offer and has been generally supportive throughout the within CCAA proceedings.

68. The Monitor also notes that a Commitment Letter has not being executed.

69. The financial terms of the Second Domain Loan are onerous with the impact being borne by the Petitioners and Aviva. However, the Monitor notes that there is an immediate need to pay certain arrears and to ensure insurance payments are made going forward. Failure to make these payments will put the Petitioners, their assets and possibly the Petitioners restructuring at risk including at risk of not having any property insurance on the Terrace House Project.

70. The Monitor also notes that it may be required to file a material adverse change report in the near future if the Petitioners cash-flow and financial affairs are not resolved.

71. Accordingly, given all of the circumstances, what appear to be the limited options available, and the likely outcome if no further funds are made available to the Petitioners, the Monitor supports the approval of the Second Domain Loan as it represents a potentially viable path for the Petitioners to derive added recovery.

CONCLUSIONS AND RECOMMENDATIONS

72. For the reasons stated herein, the Monitor respectfully recommends that this Honourable Court grant an order approving the Second Domain Loan.

All of which is respectfully submitted this 14th day of December, 2021.

ERNST & YOUNG INC.
in its capacity as Monitor
of Port Capital Development (EV) Inc. and
Evergreen House Development Limited Partnership
and not in its personal or corporate capacity

Per:

Michael Bell, CPA, CA, CIRP LIT	**Philippe Mendelson, CPA, CIRP, LIT**
Senior Vice President	**Vice President**

Appendix A

Form 3 (Rule 7(1)(a)(i))

Court of Appeal File No. CA-47585
Supreme Court File No. S-205095
Supreme Court Registry: Vancouver

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)

NOTICE OF MOTION FOR LEAVE TO APPEAL

TO: The Respondents, Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.

AND TO: Their Solicitors.

AND TO: The Service List, attached as Schedule "A"

TAKE NOTICE THAT AN APPLICATION will be made by the Appellant, 1296371 B.C. Ltd. ("**129**"), to a division of the Court of Appeal at The Law Courts at 800 Smithe Street, Vancouver, British Columbia, at 10:00 a.m. on Tuesday, the 17th day of August 2021, for leave to appeal the orders of Madam Justice Fitzpatrick of the

Supreme Court of British Columbia pronounced the 15th day of June, 2021, at Vancouver, British Columbia (i) dismissing the application of 129 to, *inter alia*, approve a refinancing transaction; and (ii) granting the application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership to, *inter alia*, approve the sale of certain assets to Solterra Acquisitions Corp., and for the following orders:

1. the hearing of this application for leave to appeal and if leave is granted, the appeal, be heard on an expedited basis;
2. 129 be granted leave to introduce evidence that arose after pronouncement of the above noted orders;
3. if leave is granted:
    a. the Motion Book on this application for leave to appeal will stand as the Appeal Record on the appeal, and
    b. the time for filing and serving facta and the Appeal Record be abridged;
4. execution of and proceedings on the orders of Madam Justice Fitzpatrick pronounced June 15, 2021, be stayed pending appeal;
5. if leave is granted, this Honourable Court convene a five-justice division to hear the appeal; and
6. such further and other relief as to this Honourable Court seems just.

AND TAKE NOTICE THAT in support of the application will be read the affidavit of Macario Teodoro Reyes sworn on July 30, 2021.

Dated at Vancouver, British Columbia, this 30th day of July, 2021.

Jordan Schultz
Solicitor for the Appellant

This application will take no more than 1 day to be heard.

SCHEDULE "A"

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

SERVICE LIST

UPDATED: June 7, 2021

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Appendix B

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.,* 2021 BCCA 319

Date: 20210820
Docket: CA47585

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) 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)

Corrected Judgment: The text of the judgment was corrected at paragraph 1 on August 26, 2021.

Before: The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Voith
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated June 15, 2021 (*Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272, Vancouver Docket S-205095).

Oral Reasons for Judgment

Counsel for the Appellant:	J.D. Schultz E. Watson
Counsel for the Respondents, Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.:	K.M. Jackson T.A. Posyniak G.P. Nesbitt
Counsel for the Respondents, Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership:	D.E. Gruber
Counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company:	C.D. Brousson A.L. McCawley
Counsel for Ernst & Young Inc. in its capacity as the Monitor:	P. Bychawski
Counsel for Aviva Insurance Company of Canada:	W.L. Roberts
Place and Date of Hearing:	Vancouver, British Columbia August 17, 2021
Place and Date of Judgment:	Vancouver, British Columbia August 20, 2021

Summary:

The petitioners owned a commercial strata development that experienced financial difficulties when the construction lender stopped funding and demanded repayment of its secured debt. The petitioners sought and received an order under the Companies' Creditors Arrangement Act, staying proceedings against them and implementing a sales and investment solicitation plan. Several offers were forthcoming, including one by the appellant. The chambers judge rejected the appellant's offer but approved the project's acquisition by one of the respondents. The appellant seeks leave to appeal and a direction that the appeal be heard by a five-justice division to allow reconsideration of Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp., 2008 BCCA 327 [*Cliffs*]..

Held: Leave to appeal granted; appeal directed to be heard by a five-justice division. How the equity of redemption should be treated in an analysis under the Companies' Creditors Arrangement Act when faced with competing transactions and whether the intention to propose a plan of arrangement to creditors is a necessary precondition to relief were issues of significance. Whether the holding in Cliffs barred the appellant's proposal was highly relevant to the appeal. It was in the interests of justice for the division hearing the appeal to be able to reconsider the decision if necessary.

INTRODUCTION

[1] **GOEPEL J.A.** 1296371 B.C. Ltd. ("129") seeks leave pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*] to appeal the June 15, 2021 orders of Justice Fitzpatrick, which dismissed 129's application to approve a proposed refinancing and granted the application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (together, "the Petitioners") for the sale to Solterra Acquisition Corp. ("Solterra") of the Terrace House Project (the "Project"), a residential strata development located in downtown Vancouver. The chambers judge's reasons are indexed at 2021 BCSC 1272. If leave is granted, 129 seeks a direction that the appeal be heard by a five-justice division to allow reconsideration of *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,* 2008 BCCA 327 [*Cliffs*].

[2] When the decision being challenged is based on binding authority from the court, a single justice cannot grant leave. In such circumstances, the leave application is heard by a division of the court and the division has the authority, in turn, to direct the appeal be heard by a five-justice division: *Sangha v. Reliance Investment Group Ltd.,* 2010 BCCA 340 (Chambers); *R. v. Zora,* 2018 BCCA 34 (Chambers); *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.). For this reason, this leave application was heard by a division of the Court rather than a single justice.

[3] There is some urgency attached to this proceeding. The sale of the Project approved by the chambers judge is scheduled to close on September 30, 2021. If leave is granted, the parties have arranged that the appeal will be heard on September 21, 2021.

BACKGROUND

[4] The Project is a proposed 19-storey high-rise luxury residential and commercial strata development located at 1250 West Hastings Street, Vancouver. The Project provides for 20 residential units and two commercial retail units above a three-level underground parking arcade. The Petitioners are the owners of the Project.

[5] The Petitioners entered into these *CCAA* proceedings to allow them to undertake a process towards resolution of their financial difficulties that would

allow them to complete the Project. In her reasons, the chambers judge set out in detail the history of the Project and the *CCAA* proceedings leading up to the orders for which leave is now sought: at paras. 5–42. In these reasons, I will refer to that background information only to the extent necessary to give context to the issues arising on this application.

[6] In September 2017, presales of the units began. In late 2018, construction began. The construction lender is CMLS Financial Ltd. ("CMLS"), which holds a first mortgage against the Project. Aviva Insurance Company of Canada ("Aviva") provided deposit protection insurance for the presale depositors in order to allow the Petitioners to use the deposit money for the Project. Aviva holds a second mortgage against the Project to secure any claims under the insurance.

[7] As of mid-2020, the parkade and structure for the first level of the building were substantially complete, and approximately 20% of the Project was finished. At that time, approximately $16 million in presale deposits was in place for 17 residential units and both commercial units. Approximately $8 million of the deposit money has been spent on the Project.

[8] In May 2020, CMLS stopped funding and demanded payment of its secured debt. In late May 2020, the Petitioners filed these *CCAA* proceedings, supported by the evidence of Macario Reyes, a director and officer of the Petitioners. At that time, the evidence was that the Petitioners owed approximately $34.8 million secured debt and $8 million unsecured and lien debt. One of the lienholders is Centura Building Systems (2013) Ltd. ("Centura"), which is owed $473,277.

[9] On May 29, 2020, the chambers judge granted the initial order in the *CCAA* proceedings. The initial order stayed all proceedings against the Petitioners, granted an Administration Charge of $250,000, and appointed Ernst & Young Inc. as monitor (the "Monitor"), with enhanced powers to assume control of the Petitioners and the Project. Specifically, the Monitor was directed to implement a sales and investment solicitation plan ("SISP") with input from CMLS and Aviva. The SISP sought a "dual-track" process to either produce bids or offers for a sale of the Project, or an investment in the Petitioners on a going-concern basis, such as in the form of a restructuring, reorganization, or refinancing of the Project.

[10] On June 8, 2020, the chambers judge granted the Amended and Restated Initial Order, extending the stay and other relief granted under the initial order and authorizing interim financing of $1.25 million—now $1.8 million—(the "Interim Lending Facility") from Desjardins Financial Security Life Assurance Company ("Desjardins"), a company affiliated with CMLS.

[11] Over the next several months, as detailed in the judge's reasons, various offers were forthcoming. Ultimately, at the time of the June 8, 2021 hearing, the chambers judge had before her two offers from Solterra ("Solterra Offer #1" and "Solterra Backup Offer"), an offer from Landa Global Acquisitions Inc. ("Landa Offer #3"), and an offer from 129 ("129 Revised Offer"). 129 is a company controlled by Mr. Reyes and was incorporated to facilitate the proposed refinancing.

[12] The Solterra and Landa offers were asset purchase agreements. The 129 proposal contemplated a complex refinancing of the Project that would repay the Administration Charge, the Interim Lending Facility, and CMLS in full and take an assignment of the CMLS security. 129 said that the transaction was designed to create an opportunity to secure new construction financing that would allow the Petitioners to ultimately repay the new loans, exit *CCAA* proceedings, and proceed with the Project as intended.

[13] The chambers judge said that the crux of the issues relating to the 129 Revised Offer lay in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the court. She summarized that relief as follows:

> [48] The crux of the issues relating to the 129 Revised Offer lies in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the Court. They seek the following Court approval and orders, said to be necessary to implement the 129 Revised Offer:
>
> a) an extension of the stay of proceedings to December 11, 2021;
>
> b) Authorization to release the pre-sale deposits to 129 to allow 129 to pay $8 million to CMLS for the purchase and assignment of the CMLS security, to stand as an advance by 129 to the Petitioners secured by the CMLS security. All of these pre-sale purchasers consent to the release of the deposits;
>
> c) Authorization to borrow up to $750,000 from [1260780 B.C. Ltd. ("126")] for the "working capital" loan and approval of the terms of the commitment letter. Contrary to Mr. Reyes' statement that this would "likely" require a restructuring of the partnership interests, the Court is being asked to bless the commitment

letter to seemingly grant 126 the "right, in its sole discretion" to convert the debt into limited partnership units that *will be* preferential to all classes of existing units in the limited partnership;

d) The "Refinancing Transaction" involves granting Court approval to the Petitioners to borrow money from Domain to fund the Interim Lending Facility and repay CMLS in full and take an assignment of the CMLS security, up to $25 million. This "Refinancing" or "New Loan Facility" is to be documented in the usual fashion, with the significant proviso that the Petitioners are authorized to agree to amendments so as to provide that the CMLS security would secure *all obligations* of the Petitioners to both Domain, 126 and 129 (i.e. about $25 million) and stand as a first secured charge on the Project.

[Emphasis in original.]

[14] The Monitor reported that if the 129 Revised Offer completed, it would result in a materially better outcome for the stakeholders than either the Solterra or Landa offers.

[15] The chambers judge summarized the financial consequences to the major secured creditors of the various offers as follows:

> [42] In broad strokes, as of June 8, 2021, the financial consequences to the two major secured creditors of the various offers before the Court were as follows:
>
> a) Under the Solterra and Landa cash offers, the Interim Lending Facility and priority professional fees would be paid. In addition, CMLS would suffer a shortfall to varying degrees: Solterra Offer #1 — $3.2 million shortfall; Landa Offer #3 — $1.7 million shortfall; and Solterra Backup Offer — a shortfall in excess of $500,000;
>
> b) Under any of the cash offers, the Petitioners would disclaim the $16 million of pre-sale agreements. Aviva would immediately crystalize its exposure (estimated at $8.6 million). Both CMLS and Aviva hold security against the $8 million cash deposits. CMLS/Aviva would then potentially advance arguments that these pre-sale purchasers had forfeited the right to a return of those cash deposits such that CMLS/Aviva could claim those amounts toward satisfaction of their loans; and
>
> c) Under the 129 Revised Offer, the material benefits, as noted by the Monitor were: 1) the Interim Lending Facility and CMLS would be paid in full; 2) Aviva's security position would be "improved" with the prospect of full or material recovery; and 3) the parties would avoid litigation with respect to the $8 million in pre-sale cash deposits by converting them into a secured position against the Project.

[16] 129 brought its application and rested its arguments on s. 11 of the *CCAA* as the jurisdictional basis upon which it asked the court to grant the relief sought. Section 11 allows the court broad discretion to grant relief that is "appropriate in the circumstances."

[17] At the hearing on June 8, the 129 application to approve the 129 Revised Offer 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 Revised Offer did not complete. The Petitioners and the Monitor took no position on the 129 application. The 129 application was opposed by Centura and Solterra.

<u>THE CHAMBERS JUDGE'S REASONS</u>

[18] The chambers judge first considered whether she should approve the 129 Revised Offer. She found that the relief sought by 129 was not appropriate, including the stay and the refinancing approvals in 129's draft order. She declined to exercise her statutory discretion under s. 11 of the *CCAA* to grant the requested relief. In reaching this decision, she concluded, among other things:

a) the 129 refinancing was not a redemption of the CMLS mortgage;

b) comparing the 129 refinancing with the outcome if the Solterra or Landa offers were approved would be a "very unprincipled basis" upon which to argue the 129 financing was appropriate;

c) the 129 refinancing might not have been objectionable if it had been structured as a sale, whether via an outright sale or a reverse vesting order; and

d) the circumstances of this case were similar to those in *Cliffs*, and since there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, the 129 financing was not appropriate.

[19] Having found the 129 offer was not appropriate, the chambers judge then went on to consider the two competing cash offers. She found that the Solterra Backup Offer should be approved as reasonable and indicative of the fair market value of the Project. That offer would satisfy the priority debt, the

professional charges, and the Interim Lending Facility—and provide almost full payment to CMLS. Aviva would face a shortfall of $8.6 million with limited prospect of any recovery. All other creditors would also be "out of the money."

GROUNDS OF APPEAL

[20] 129 now seeks leave to appeal. It submits the chambers judge erred:

a) in fact and law by concluding the 129 refinancing was not a redemption;

b) in fact and law by determining that it was not appropriate to grant the 129 application because there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, despite the application being on notice to all creditors and supported by the two senior secured creditors; and

c) in law by approving the Solterra offer in the face of the 129 refinancing, which would clearly result in a better outcome for all stakeholders and is consistent with the remedial purposes of the *CCAA*.

[21] Aviva supports the leave application. It is opposed by Centura, Solterra, CMLS, and Desjardins. The Monitor takes no position on the application. The Petitioners, notwithstanding that on July 30, 2021, they entered into a revised interim financing agreement with 129 and that they and 129 are controlled by Mr. Reyes, oppose the leave application. When questioned in regards to the contradictory nature of those positions, counsel for the Petitioners advised that in opposing the application for leave, he was acting on the Monitor's instructions. The Monitor acknowledged it had given such instructions but was unable to provide the basis on which it was entitled to do so.

POSITIONS OF THE PARTIES

A. 129

[22] 129 submits that the chambers judge erred in concluding that the 129 refinancing was not a redemption of the CMLS mortgage. In this regard, the chambers judge said:

> [56] 129 describes the transaction in its application materials as a "redemption financing" and counsel submits that it is "effectively" a redemption of the CMLS mortgage. Centura refers to well-settled law that

> the right of redemption in these circumstances allows the subordinate mortgagee (Aviva), not the mortgagor (the Petitioners), to redeem the CMLS mortgage by paying it out and taking an assignment of the security: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1100 at paras. 13-16.
>
> [57] This transaction is not a redemption of the CMLS mortgage. The Petitioners are not paying CMLS. Aviva is not paying CMLS, although I acknowledge that Aviva consents to CMLS being paid out by 129/Domain and the assignment of the CMLS mortgage to Domain/Newco. While 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.

[23] While 129 does not quarrel with the broad proposition that the right of redemption allows only the subordinate mortgagee, not the mortgagor, to redeem, it submits that rule is subject to an exception that allows the mortgagor to redeem the first mortgage if it is done with the consent of the second mortgagee: *Classic Mortgage Corporation v. 0768723 B.C. Ltd.,* 2017 BCSC 1225 at para. 43. In this case, Aviva consents to the redemption.

[24] 129 submits that an owner's right to redeem is a core principle of real estate law: *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge, Inc.,* 2020 ONSC 3659 at paras. 37–40. 129 submits it was an error in principle for the chambers judge not to consider the right of redemption in weighing whether it was appropriate to approve the 129 Revised Offer. 129 submits that if the chambers judge had correctly determined that the 129 offer was a redemption, the appropriateness analysis may have been significantly different.

[25] 129 further submits that the chambers judge erred in principle in concluding that the 129 refinancing was not appropriate. In this regard, she failed to consider all of the circumstances and instead focused her analysis on only one issue, namely, the lack of evidence of an intention to propose a plan of arrangement or compromise to all the creditors.

[26] 129 submits that the chambers judge's analysis is premised on the basis that *Cliffs* stands for the broad principle that a debtor must provide evidence of its intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA.* In support of this submission, it points to the judge's comment at para. 77, where she said, "Crucially … 129 also seeks an extension on the stay of

creditors' rights without any indication that it will put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote."

[27] 129 submits that if the chambers judge is correct and that *Cliffs* stands for that broad principle, a five-justice division should reconsider *Cliffs*. In support of its submission that the remedial objectives of the *CCAA* are broader than articulated in *Cliffs*, 129 relies on the subsequent decisions of the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General),* 2010 SCC 60 and *9354-9186 Québec inc. v. Callidus Capital Corp.,* 2020 SCC 10 [*Callidus*]. In the alternative, 129 submits that, if *Cliffs* does not stand for that broad proposition, the chambers judge erred in her interpretation of *Cliffs.*

[28] 129 submits, in the circumstances of this case, the chambers judge's concerns for the rights of creditors ranked below Aviva was misplaced because those creditors will not recover anything from either of the proposals. It submits the appropriateness analysis should have centred on the outcome for parties who stood to benefit from the 129 Revised Offer. In particular, it notes that under the 129 Revised Offer, CMLS will be paid in full, Aviva may escape any exposure, and the pre-purchasers will not lose their rights to purchase a unit in the Project.

[29] 129 says the chambers judge's error is clearly illustrated by her comments at para. 73:

> [73] Again, as already stated, 129 does not seek relief under s. 11.2 of the *CCAA*. 129's counsel only suggests that its "refinancing" is appropriate in disregarding the interests of the other creditors, including the lienholders, since they are currently "out of the money". I agree with 129's counsel's assessment of the likely current monetary value of the other creditor's interests. However, in my view, that is a very unprincipled basis upon which to argue that this "refinancing" is an "appropriate" outcome in the balancing exercise with regard to all stakeholders.

B. Aviva

[30] Aviva supports 129's application for leave and adopts its submissions. It submits the issues raised in the proposed appeal have merit and are significant to the parties and to the practice. Aviva submits it may not be necessary to reconsider *Cliffs*, as the chambers judge erred in law and fact by failing to recognize that *Cliffs* is distinguishable and further erred in law in her interpretation of *Cliffs* by failing to consider the expanded formulation of the *CCAA*'s remedial

purpose in more recent and binding authorities. Aviva submits, however, that if this Court finds *Cliffs* is binding authority in British Columbia for the principle that a debtor must provide evidence of their intention to propose a plan of arrangement to creditors in order to obtain relief under the *CCAA*, then Aviva agrees with 129 that *Cliffs* ought to be reconsidered by a five-justice division.

[31] Aviva submits that the chambers judge erred in her analysis by focusing on the structure of the 129 offer instead of its impact on the various stakeholders.

[32] Aviva submits the appeal is of particular significance to it. If the sale to Solterra completes, Aviva will immediately lose $8.6 million with limited prospects of recovery. This result may be avoided entirely if the 129 refinancing is approved.

[33] Aviva further submits that the chambers judge erred by failing to appreciate the two-staged nature of the 129 plan. In the first stage, CMLS would be paid in full, and the Project would remain in *CCAA* protection as it attempted to raise new construction financing that, if received, would allow the Project to be completed as originally contemplated. In those circumstances, Aviva and other creditors may have the chance of escaping unscathed.

[34] Aviva submits the judge failed to consider other countervailing factors in her appropriateness analysis, including Aviva's right to redeem and the Petitioners' right to compel an assignment of the CMLS mortgage. Aviva submits that the chambers judge's emphasis that the 129 offer does not deal with the claims of other creditors is misplaced. In that regard, Aviva points out that the concern for the creditors other than CMLS and Aviva is artificial because those creditors will not recover anything under the approved Solterra offer.

C. Centura/Solterra

[35] Centura and Solterra are related companies. Solterra's offer to purchase the assets of the Project was approved subsequent to the judge dismissing the application of 129. Centura is a creditor who will receive nothing under either proposal. Notwithstanding their very different roles, they are represented by the same counsel.

[36] In their submissions before the chambers judge, Centura/Solterra opposed the 129 offer, and on this application, they oppose the granting of leave. On this

application, they noted that leave is granted sparingly in *CCAA* proceedings. They submit that the appeal is without merit. They submit that the chambers judge was entitled to and did take note of the fact that there was no evidence of any intention on the part of 129 or the Petitioners to resolve or even address the claims of creditors affected by their proposed refinancing transaction, let alone seek approval of those transactions from affected creditors by proposing a plan on which the creditors could vote. They submit the judge was properly concerned about the commercial viability of the overall restructuring plan and found that the new construction financing 129 intended to secure at a later date was "speculative at best."

[37] Centura/Solterra submit that 129's arguments conveniently ignore the interest of all other stakeholders, including lienholders, which would be prejudiced by the order sought by 129. They submit that, in these circumstances, there is no basis on which one could suggest that 129 had found common ground amongst the stakeholders, notwithstanding that both CMLS and Aviva, the two parties directly affected by the proposals, were generally supportive of the 129 offer.

[38] Centura/Solterra submit that the proposed appeal raises no points of interest to the practice and that the judge's decision involved the exercise of her discretion with reference to established authorities. They submit there is no precedent for the *CCAA* relief that 129 sought from the court and that the chambers judge did not err in refusing the application.

[39] Centura/Solterra put particular emphasis on the fact that the appeal will unduly hinder the progress of the action. They point out that the Solterra sale must close before the end of September 2021 and that if the appeal is allowed to go forward, there is a risk that either the Petitioners or Solterra may terminate the sales agreement. They submit leave, if granted, will create uncertainty as to the time of completion of the Solterra sale or whether it can be completed at all.

[40] Centura/Solterra also point out that there is no certainty that 129's plan will come to fruition, let alone in a timely fashion. In this regard, they note there is no assurance that anyone other than CMLS will make any recovery. In these circumstances, they submit that it is not in the interest of justice to grant leave.

[41] Centura/Solterra submit the Court should refuse the request for a five-justice division. In that regard, they submit that the judge could have exercised her discretion in the same way without reference to *Cliffs*. They further submit that *Cliffs* is not inconsistent with the subsequent Supreme Court of Canada authorities.

D. CMLS and Desjardins

[42] CMLS and Desjardins also oppose the request for leave. They do so because they doubt the ability of 129 to complete the proposed refinancing, notwithstanding that if the 129 financing completes, CMLS will be made whole. They submit that if leave is granted, it will unduly hinder the progress of the action. In this regard, they submit that if leave is granted and a five-justice division is allowed to hear the appeal, there is no certainty of a decision being reached before the September 30, 2021 closing date of the sale to Solterra. Even if a decision was reached in favour of 129 before September 30, 2021, the 129 refinancing is not set to fund until late October 2021. In these circumstances, CMLS submits there is jeopardy that the Solterra sale could be lost.

[43] In addition, CMLS submits that any delay will cause it significant prejudice. In that regard, it notes that priority funding ahead of CMLS includes payment of professional fees of the Monitor and its legal counsel as well as the Petitioners' counsel. The appeal will necessitate further payment to these groups of professionals, as well as CMLS and Desjardins incurring their own increased legal fees. These additional expenses will reduce the amount of funds available for recovery to CMLS if ultimately the appeal is dismissed or if the 129 Revised Offer is approved but 129 does not complete.

E. The Petitioners

[44] As noted, the Petitioners, although taking no position in the court below on this application, opposed leave on the basis it would unduly hinder the progress of the action. In this regard, it echoed the submissions of CMLS that the appeal would serve only to divert limited resources and also risk the closing of the Solterra transaction. The submissions of the Petitioners are, however, somewhat artificial. The Petitioners have entered into the interim financing agreement with 129. Mr. Reyes is a principal of both the Petitioners and 129. The Petitioners' submissions on this application were apparently dictated to them by the Monitor,

which itself refused to take a position. In these circumstances, the weight to be given to these submissions is limited.

TEST FOR LEAVE

[45] The test to be applied in determining whether leave to appeal should be granted is set out in *Goldman, Sachs & Co. v. Sessions,* 2000 BCCA 326:

1. Is the point on appeal of significance to the practice?
2. Is the point raised of significance to the action itself?
3. Is the appeal *prima facie* meritorious or frivolous?
4. Will the appeal unduly hinder the progress of the action?

[46] The criteria for leave are "all considered under the rubric of the interests of justice": *Vancouver (City) v. Zhang,* 2007 BCCA 280 at para. 10.

[47] Where leave is sought to appeal a discretionary order, the third factor requires an assessment of "whether there is an arguable case that the chambers judge erred in principle, made an order that is not supported by the evidence, or whether the order appealed will result in an injustice": *Hagwilneghl v. Canadian Forest Products Ltd.,* 2011 BCCA 478 at para. 31. The applicants must establish a reasonable possibility that a division of the Court of Appeal would grant the appeal on its merits: *Webb v. Canada (Attorney General),* 2019 BCCA 288 at para. 15.

[48] For reasons explained by Justice Tysoe in *Edgewater Casino Inc. (Re),* 2009 BCCA 40, leave to appeal from *CCAA* orders is given sparingly. This is because in most cases the orders are discretionary in nature, and if leave is granted, it might unduly disrupt the ongoing *CCAA* proceedings.

DISCUSSION

A. Is the appeal significant to the practice?

[49] I agree with the appellant that the questions concerning how the equity of redemption should be factored into an analysis under the *CCAA* when faced with competing transactions and whether an intention to propose a plan of arrangement or compromise to creditors is a necessary precondition to relief

under the *CCAA* raise issues of significance to the practice. While I agree with Centura/Solterra that there is no precedent for some of the relief sought, that in itself is not a basis to deny leave. To paraphrase Justice Fitzpatrick in *Quest University Canada (Re),* 2020 BCSC 1883 at paras. 153–154, leave to appeal ref'd *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364, the history of *CCAA* jurisprudence under the court's broad statutory discretion is littered with court approval of innovative solutions. The question is whether the particular solution meets the remedial objectives of the *CCAA*: *Callidus* at para. 49.

B. Is the point of significance to the action itself?

[50] The appeal is obviously of significance to the parties. On the one hand, Solterra is currently the approved purchaser of the Project. On the other hand, 129 seeks to refinance the Project and proceed with the Project for the benefit of all creditors. The appeal is of particular significance to Aviva. If leave is denied, it stands to lose $8.6 million with little hope of recovery.

C. Is the appeal *prima facie* meritorious or frivolous?

[51] The answer to this question requires a consideration of the grounds of appeal. In this case, the parties are not in agreement as to whether the orders were strictly discretionary. If the decision below is considered a purely discretionary order, there must be an arguable case that the chambers judge erred in principle, made an order that was not supported by the evidence, or made an order that would result in an injustice. Even if the order is considered to be discretionary, the appellant has raised an arguable case that the chambers judge erred in principle. In this regard, I refer to the submissions concerning the equity of redemption, *Cliffs,* and the failure to compare the competing offers. I find the appellant has established a reasonable possibility that a division of this Court would grant the appeal on its merits.

D. Will the appeal unduly hinder the action?

[52] As to whether an appeal would unduly hinder the progress of the action, I acknowledge and recognise the concerns of CMLS concerning its potential prejudice if the appeal is allowed to go forward. If the appeal is ultimately dismissed, CMLS will recover less money than at present. Its position will be

further prejudiced if, for any reason, the Solterra offer is withdrawn. Balanced against this potential prejudice, there is, of course, the possibility that the appeal might succeed and, if the 129 offer is funded, CMLS will indeed end up in a better position than they are at present. The prejudice to CMLS has to be balanced against the prejudice to Aviva and the pre-purchasers. Aviva stands to lose $8.6 million if leave is denied, and the pre-purchasers will be denied the units they purchased.

[53] In my view, in the present circumstances, the appeal will not unduly hinder the action's progress. While under the terms of the Solterra Backup Offer, the closing of the sale is to take place September 30, 2021, the appeal itself is scheduled to be heard on September 21, 2021. Solterra and the Monitor can agree under the terms of the sale agreement to extend the date for closing. While there is no assurance they will do so, given that Solterra, in the course of the bidding process, significantly raised its offer, it seems highly unlikely that, less than two months later, it would now withdraw from the transaction.

[54] Given all of the above, I am satisfied that it is in the interests of justice to grant leave to appeal.

<u>FIVE-JUSTICE DIVISION</u>

[55] The chambers judge found that a crucial consideration was that 129 was seeking an extension of the stay of creditor's rights without any indication it would put forward a plan of arrangement or compromise upon which the Petitioners' creditors may vote. She accepted the argument of Centura that the circumstances were similar to those in *Cliffs.* She quoted Justice Tysoe's comment in *Cliffs* that:

> [38] … The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[56] Whether those comments in *Cliffs* extend to and effectively prohibit the proposal of 129 is a matter of general import. While I appreciate the division hearing the appeal could conclude that *Cliffs* is distinguishable, it may hold otherwise, in which case it would be important that the division have the power, if they considered it appropriate, to reconsider *Cliffs*. Accordingly, in my view, a five-justice division is appropriate.

SUMMARY

[57] In summary, therefore, I would grant leave to appeal and direct the appeal be heard by a five-justice division. The appeal will proceed on September 21, 2021. The chambers judge's order with respect to the Solterra Backup Order is stayed pending the hearing of the appeal. It will be up to the division hearing the appeal to determine whether the stay should or should not be continued. 129 will, by consent, post $10,000 for security for Solterra's costs of the appeal.

[58] **VOITH J.A.**: I agree.

[59] **MARCHAND J.A.**: I agree.

[Discussion with counsel re: timing of payment of the security]

[60] **GOEPEL J.A.**: The posting of security for costs in the sum of $10,000 will coincide with the date when the appellant's factum is due (September 1, 2021). A term of the order should include that if the security for costs is not posted, the appeal will be stayed and the stay of the sale will be lifted. By consent, security for costs will be held in counsel's the trust account.

[Further discussion with counsel re: filing schedule]

[61] **GOEPEL J.A.**: I would propose the appeal record and appeal book be filed separately. The filing of the certificate of readiness is dispensed with. The appellant will file its factum, appeal record, and appeal book by September 1, 2021. All of the respondents will file their factums, individual appeal books, and condensed books by September 13, 2021. If there is to be a reply filed, it will be filed by September 17, 2021. Any further evidence to be filed by the parties should be filed by their respective factum filing date.

"The Honourable Mr. Justice Goepel"

Appendix C

Form 10 (Rules 22(1)(a) and 36(4))

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)

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CHRONOLOGY

Date	Event
September 2017	Pre-sales of units in a residential and commercial strata development located at 1250 West Hastings Street, Vancouver, British Columbia, called "**Terrace House**" begin.
October 17, 2017	By commitment letter, Aviva Insurance Company of Canada ("**Aviva**") agrees to provide a deposit protection insurance facility to permit the Petitioners to have access to certain pre-sale purchasers' deposits for the payment of project costs. This facility is secured by, among other things, a second ranking mortgage against the Terrace House property.
2017	Abatement and demolition of a pre-existing structure at the Terrace House site.
2018	Excavation and shoring at the Terrace House site.
Late 2018	Construction of Terrace House begins with the underground parkade.
July 4, 2019	By commitment letter, CMLS Financial Ltd. ("**CMLS**") agrees to finance the construction of Terrace House. This loan facility is secured by, among other things, a first ranking mortgage against the Terrace House property.
March 11, 2020	World Health Organization declares global pandemic.
May 12, 2020	CMLS makes demand and issues a notice of intentions to enforce security in respect of the indebtedness owning on its loan.
May 19, 2020	Port Capital Development (EV) Inc. (the "**General Partner**") and Evergreen House Development Limited Partnership ("**Evergreen LP**", and together with the General Partner, the

	“**Petitioners**”) file a petition seeking an initial order pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as amended, the “***CCAA***”).
May 21, 2020	The Petitioners, CMLS and Aviva consent to adjourning the hearing on the initial order to May 29, 2020, in an effort to work towards a consensual *CCAA* proceeding that balances the interests of the Petitioners, CMLS and Aviva.
May 29, 2020	With the support of CMLS and Aviva, the supervising chambers judge, Madam Justice Fitzpatrick (the “**Chambers Judge**”), grants the initial order (the “**Initial Order**”), which, among other things, appoints Ernst & Young Inc. as monitor (the “**Monitor**”), directs the Monitor to implement a “dual track” sales and investment solicitation plan (the “**SISP**”) and includes a stay of proceedings (the “**Stay of Proceedings**”) that was effective until June 8, 2020.
June 8, 2020	The Chambers Judge grants an order amending and restating the Initial Order (the “**ARIO**”), which, among other things, extends the Stay of Proceedings to September 3, 2020, grants a charge in favour of the Monitor, its counsel, and counsel to the Petitioners for fees and disbursements (the “**Administration Change**”), not to exceed $250,000, and approves a commitment letter from Desjardins Financial Security Life Assurance Company (the “**Interim Lender**”) to provide the Petitioners access to an interim financing facility (the “**Interim Facility**”) and grants a related interim lender’s charge (the “**Interim Lender’s Charge**”), not to exceed $1,250,000.
June 29, 2020	In accordance with the SISP, the Monitor begins to market Terrace House and circulates a summary of the opportunity, among other documents.

July 24, 2020	Deadline to submit non-binding letters of intent. The Monitor receives a number of non-binding letters of intent, prepares a side-by-side analysis, provides analysis to CMLS and Aviva and consults with the Petitioners, CMLS and Aviva to determine the best offer or offers.
August 31, 2020	The Chambers Judge grants an order extending the Stay of Proceedings to December 4, 2020.
September 18, 2020	Following consultation with CMLS and Aviva, the Monitor qualifies six bidders to participate in the second phase of the SISP. The Monitor advises each bidder that, among other things, the deadline for submissions of offers is October 16, 2020.
October 16, 2020	Deadline to submit binding offers. The Monitor receives six offers, prepares a side-by-side analysis and provides analysis to CMLS and Aviva.
November 10, 2020	Following a review of the offers in consultation with CMLS and Aviva, the Monitor determines the offer submitted by Bosa Properties (OC) Inc. (“**Bosa**”) is the best offer. The Monitor on behalf of the Petitioners executes the agreement with Bosa.
December 1, 2020	The Chambers Judge grants an order that, among other things, extends the Stay of Proceedings to February 26, 2021, and approves the Monitor’s execution of the agreement with Bosa.
February 16, 2021	Bosa provides the Monitor with a feasibility study on Terrace House and puts forward a proposal to vary its offer.
February 17, 2021	The Monitor convenes a videoconference with Bosa, CMLS and Aviva to discuss Bosa’s feasibility study and proposal to vary its offer. The revised offer is not acceptable to CMLS and Bosa’s offer collapses.

February 24, 2021	The Chambers Judge grants an order extending the Stay of Proceedings to May 4, 2021 and increasing the Interim Lender's Charge to $1,500,000.
March 1, 2021	Landa Global Acquisition Inc. ("**Landa**"), one of the six parties that submitted an offer under the SISP, after learning that Bosa's offer collapsed, sends the Monitor of letter of intent to acquire Terrace House (the "**Landa Offer #1**").
March 25, 2021	After reviewing the Landa Offer #1 with CMLS and following a series of discussions, the Monitor, on behalf of the Petitioners and subject to court approval, and Landa execute a purchase and sale agreement. This agreement includes a provision that allows the Petitioners and the Monitor to engage in further marketing of Terrace House (the "**Final Sale Process**").
April 16, 2021	The Chambers Judge grants an order extending the Stay of Proceedings to June 11, 2021, approves the execution of the agreement with Landa and sets the deadline for alternative proposals under the Final Sale Process as May 7, 2021.
April 19, 2021	The Monitor distributes a letter that describes the Final Sale Process to eight parties that expressed interest in an acquisition of or investment in Terrace House during the SISP.
May 7, 2021	The Monitor receives two offers: (1) an offer from Solterra Acquisitions Corp. ("**Solterra**") to purchase Terrace House (the "**Solterra Offer #1**"); and (2) an offer from 1296371 B.C. Ltd. ("**129**") to refinance Terrace House.
May 7 – 14, 2021	The Monitor reviews the two offers received in the Final Sales Process with CMLS and Aviva. The Monitor selects the Solterra Offer #1 as a superior offer over the Landa Offer #1.

May 14, 2021	The Monitor, on behalf of the Petitioner and subject to court approval, and Solterra execute a purchase and sale agreement for the acquisition of Terrace House.
May 20, 2021	The Petitioners file a notice of application, for hearing on May 25, 2021, seeking court approval of the transaction with respect to the Solterra Offer #1.
May 24, 2021	Landa submits a revised offer to purchase Terrace House (the "**Landa Offer #2**").
May 25, 2021	129 files a notice of application seeking court approval of a refinancing transaction.
May 25, 2021	The Chambers Judge adjourns the matter to June 8, 2021. The Chambers Judge sets June 4, 2021 at 12:00 p.m. as the final deadline for any further offers, but does not order a further bidding process.
June 4, 2021	The Monitor receives three offers: (1) a revised offer from Landa (the "**Landa Offer #3**"); (2) a "without prejudice" revised offer from Solterra (the "**Solterra Backup Offer**"); and (3) a revised offer from 129 to refinancing Terrace House (the "**129 Refinancing**").
June 8, 2021	Solterra and Centura Building Systems (2013) Ltd. ("**Centura**") file an application response to 129's notice of application filed May 25, 2021.
June 8 and 11, 2021	The Chambers Judge hears the applications of the Petitioners, filed May 20, 2021, and 129, filed May 25, 2021, and reserves judgment.

June 11, 2021	The Chambers Judge grants an order extending the Stay of Proceedings to September 30, 2021, and increasing the Interim Lender's Charge to $1,800,000.
June 15, 2021	The Chambers Judge dismisses 129's application and approves the Solterra Backup Offer with reasons to follow.
June 30, 2021	The Chambers Judge releases her Reasons for Judgment.
July 7, 2021	129 files a notice of application for leave to appeal in the Court of Appeal.
August 17, 2021	The Court of Appeal hears 129's application for leave and reserves judgment.
August 20, 2021	The Court of Appeal grants 129 leave to appeal the orders of the Chambers Judge dismissing 129 application and approving the Solterra Backup Offer.

OPENING STATEMENT

This appeal arises from proceedings under the *Companies' Creditors Arrangement Act*[1] (as amended, the "***CCAA***"). The appellant sought court approval of a refinancing transaction in the face of competing sale transactions. Despite being supported by the two senior secured creditors and providing a "materially better" outcome for the stakeholders,[2] the chambers judge dismissed the appellant's application. Instead the chambers judge approved a sale transaction, for less consideration, which crystalizes losses for all creditors.

At it is core, this appeal turns on the issue of "appropriateness", as that term has been defined in the context of s. 11 of the *CCAA* by the Supreme Court of Canada.[3]

Whether a court should grant relief under the *CCAA* is guided by three baseline principles: (1) appropriateness, (2) good faith, and (3) due diligence.[4] "Appropriateness" is assessed by inquiring whether the relief sought will usefully further the remedial purpose of the *CCAA*: avoiding the social and economic losses resulting from liquidation.[5]

In the court below, the chambers judge erred by focusing her appropriateness analysis on a single factor. The "crucial", and deciding, factor for the chambers judge was that the appellant had not provided evidence of its intention to put a plan of arrangement or compromise to creditors.[6]

Viewed through the primary remedial objective of the *CCAA* to avoid the "social and economic losses resulting from liquidation of an insolvent company",[7] the result below is unsupportable. The chambers judge's error is highlighted by her conclusion that no one

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[1] R.S.C. 1985, c. C-36 [***CCAA***].
[2] *Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272 at para. 40 [***Chambers Reasons***], Appeal Record, Tab 14, pg. 250.
[3] *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 50, 70 [*Callidus*]; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 70.
[4] *Century Services*, *supra* note 3 at para. 70; *Callidus*, *supra* note 3 at paras. 49, 70.
[5] *Century Services*, *supra* note 3 at para. 70.
[6] *Chambers Reasons*, *supra* note 2 at para. 77, Appeal Record, Tab 14, pg. 258.
[7] *Century Services*, *supra* note 3, at para. 70.

would have quarreled with the transaction proposed by the appellant if it had structured the proposed refinancing as a sale.[8] The chambers judge erred in law by concluding the refinancing was not appropriate in the circumstances.[9]

However, in reaching her decision the chambers judge was bound by *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327. The case at bar highlights why *Cliffs Over Maple Bay* is no longer good law and should be overturned by this Court. The *CCAA* has evolved since *Cliffs Over Maple Bay* was rendered, both judicially and as a result of amendments to the *CCAA*. The Supreme Court of Canada has since set the proper context for a case like the present one and that judicial guidance supports allowing the within appeal.

[8] *Chambers Reasons*, *supra* note 2 at para. 76, Appeal Record, Tab 14, pg. 262.
[9] *Ibid* at para. 92, Appeal Record, Tab 14, pg. 266.

PART 1 - STATEMENT OF FACTS

A. Parties

1. These *CCAA* proceedings were commenced by Port Capital Development (EV) Inc. (the "**General Partner**") and Evergreen House Development Limited Partnership ("**Evergreen LP**", and together with the General Partner, the "**Petitioners**"). The Petitioners own a real estate development project called "**Terrace House**".[10]

2. Terrace House is an ongoing development project located at 1250 West Hastings Street, Vancouver, BC (PID: 006-721-397, the "**Lands**").[11]

3. The Petitioners are subsidiaries of Port Capital Group Inc. ("**Port Capital**"), which is in the business of real estate development.[12]

4. 1296371 B.C. Ltd. ("**129**") was incorporated to implement a refinancing of Terrace House.[13]

5. Macario Teodoro Reyes ("**Mr. Reyes**") is the sole director of Port Capital, the Petitioners and 129.[14]

6. Ernst & Young, Inc. was appointed as monitor (in that capacity, the "**Monitor**") in these *CCAA* proceedings.[15]

7. CMLS Financial Ltd. ("**CMLS**") provided construction financing for Terrace House (the "**CMLS Facility**") and holds security over all property and assets of the Petitioners for payment thereof (the "**CMLS Security**"), including a mortgage of the Lands (the "**CMLS Mortgage**").[16] Desjardins Financial Security Life Assurance Company

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[10] Sixth Report of the Monitor dated May 20, 2021 ("**Sixth Report**"), para. 1, Appellant's Appeal Book ("**Appeal Book**"), Tab 06, pg. 151; *Chambers Reasons*, *supra* note 2 at para. 1, Appeal Record, Tab 14, pg. 243.
[11] *Chambers Reasons*, *supra* note 2 at para. 6, Appeal Record, Tab 14, pg. 243; Sixth Report, para. 2, Appeal Book, Tab 06, pg. 151.
[12] *Chambers Reasons*, *supra* note 2 at para. 5, Appeal Record, Tab 14, pg. 243; Sixth Report, para. 3, Appeal Book, Tab 06, pg. 151.
[13] *Chambers Reasons*, *supra* note 2 at para. 28(b), Appeal Record, Tab 14, pg. 247.
[14] *Ibid* at paras. 10, 28(b); Affidavit #2 of Macario Teodoro Reyes filed May 25, 2021 ("**Reyes Affidavit #2**"), para. 1, Appeal Book, Tab 01, pg. 4.
[15] *Chambers Reasons*, *supra* note 2 at para. 12, Appeal Record, Tab 14, pg. 244.
[16] Sixth Report, para. 4, Appeal Book, Tab 06, pg. 151.

(the "**Interim Lender**") provided an interim financing facility (the "**Interim Lender Facility**") to the Petitioners, as approved by the chambers judge, in these *CCAA* proceedings.[17]

8. Aviva Insurance Company of Canada ("**Aviva**") provided a deposit protection insurance facility to permit the Petitioners to have access to certain pre-sale purchasers' deposit monies for the payment of project costs. Aviva has second ranked security against the assets of the Petitioners (the "**Aviva Security**"), also including a mortgage of the Lands (the "**Aviva Mortgage**"), subject to the CMLS Security.[18]

9. Solterra Acquisitions Corp. ("**Solterra**") executed an asset purchase agreement with the Monitor, on behalf of the Petitioners, which was approved by the chambers judge and is a subject of this appeal.[19] Centura Building Systems (2013) Ltd. ("**Centura**") is related to Solterra. Centura has a claim of lien registered against the Lands in the amount of $473,277.00.[20]

B. Terrace House

10. Terrace House is a 19-storey high-rise luxury residential and commercial strata development located on the Lands. It is designed to provide 20 residential units and two commercial units above a 3-level underground parkade. The project is unique because its primary structural material is timber.[21]

11. Unit pre-sales began in September 2017 and construction began in late 2018.[22]

12. As of mid-2020, the parkade and the structure for the first level of the building were substantially complete. By that time, 17 of the residential units and both commercial units were pre-sold.[23]

[17] *Chambers Reasons*, *supra* note 2 at para. 13, Appeal Record, Tab 14, pg. 245.
[18] *Ibid* at para. 7; Sixth Report, para. 6, Appeal Book, Tab 06, pg. 151.
[19] *Chambers Reasons*, *supra* note 2 at para. 4, Appeal Record, Tab 14, pg. 243.
[20] *Ibid* at para. 10; Affidavit #1 of Suzanne Volkow filed June 8, 2021 ("**Volkow Affidavit #1**"), Exhibit A, Appeal Book, Tab 04, pg. 96.
[21] *Chambers Reasons*, *supra* note 2 at para. 6, Appeal Record, Tab 14, pg. 243.
[22] *Ibid* at para. 7.
[23] *Ibid* at para. 8.

13. However, in May 2020, CMLS stopped funding the project and demanded repayment of the CMLS Facility.[24]

C. *CCAA* Proceedings

14. On May 29, 2020, the Petitioners obtained an order in these proceedings (the "**Initial Order**") granting them various relief pursuant to the *CCAA*.[25] The Initial Order was amended and restated by order dated June 8, 2020 (the "**ARIO**"),[26] and thereafter further amended at various times throughout the proceedings.

15. The Initial Order included a stay of proceedings (the "**Stay of Proceedings**") effective until June 8, 2020 and appointed the Monitor.[27] The Stay of Proceedings has since been extended six times, most recently to September 30, 2021.

16. Under the Initial Order, and continued under the ARIO, the Monitor was granted "enhanced powers to assume control of the Petitioners and [Terrace House]."[28]

17. The ARIO also approved the Interim Lender Facility from the Interim Lender and granted a related interim lender's charge (the "**Interim Lender's Charge**").[29]

18. Under the Initial Order, as amended by the ARIO, the Monitor, among others, was granted a first priority charge against the Lands (the "**Administration Charge**").[30]

19. The Interim Lender's Charge and the Administration Charge rank above the CMLS Security and the Aviva Security.

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[24] *Ibid* at para. 9.
[25] *Ibid* at para. 12.
[26] *Ibid* at para. 13.
[27] *Ibid* at para. 12; Initial Order dated May 29, 2020 ("**Initial Order**"), para. 15, Appeal Record, Tab 07, pg. 159.
[28] *Chambers Reasons*, *supra* note 2 at para. 12, Appeal Record, Tab 14, pg. 244.
[29] *Ibid* at para. 13.
[30] *Ibid* at para. 12; Initial Order, paras. 33-35, Appeal Record, Tab 07, pg. 169.

20. In addition, the Petitioners have lien claimants that are estimated to total $4.0 million,[31] including Centura's lien claim of $473,277.00,[32] and unsecured creditors that are estimated to total $2.3 million (the "**Other Creditors**").[33]

I. Initial Sales Process

21. Under the Initial Order and the ARIO, the Monitor, with input from CMLS and Aviva, was directed to implement a sales and investment solicitation plan (the "**SISP**"):

> The SISP sought a "dual track" process to either produce bids or offers for a sale of [Terrace House] or an investment in the Petitioners on a going concern basis, such as in the form of a restructuring, reorganization or refinancing of [Terrace House].[34]

22. The SISP began in June 2020. By late 2020, the Monitor had received proposed asset purchases from Solterra, Landa Global Acquisitions Inc. ("**Landa**") and Bosa Properties (OC) Inc. ("**Bosa**").[35]

23. On December 1, 2020, on the recommendation of the Monitor, the chambers judge approved an offer from Bosa. However, the transaction ultimately collapsed because it was not acceptable to CMLS.[36]

II. Final Sales Process

24. On March 25, 2021, Landa and the Monitor, on behalf of the Petitioners, executed a purchase and sale agreement (the "**Landa Offer #1**").[37]

25. The chambers judge approved the execution of the Landa Offer #1 on April 16, 2021. As part of the order in this regard, the chambers judge approved "a short period of time (15 days) to re-activate the SISP and obtain any other superior offers that

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[31] Sixth Report, para. 7, Appeal Book, Tab 06, pg. 152.
[32] *Chambers Reasons*, *supra* note 2 at para. 10, Appeal Record, Tab 14, pg. 244.
[33] Sixth Report, para. 7, Appeal Book, Tab 06, pg. 152.
[34] *Chambers Reasons*, *supra* note 2 at para. 12, Appeal Record, Tab 14, pg. 244.
[35] *Ibid* at paras. 14-15.
[36] *Ibid* at paras. 16-17.
[37] *Ibid* at para. 19.

might be available from a party other than Landa."[38] Under this "**Final Sales Process**", there was a new bid deadline of May 7, 2021.[39]

26. The Monitor received two offers that were both higher than the Landa Offer #1: an offer to purchase from Solterra (the "**Solterra Offer #1**"), and an offer to refinance Terrace House from 129, discussed below.[40]

27. The Monitor determined that the Solterra Offer #1 was the superior offer and entered, on behalf of the Petitioners, a purchase and sale agreement with Solterra on May 14, 2021, subject to court approval.[41]

28. On May 20, 2021, the Petitioners, at the direction of the Monitor, served a notice of application and supporting materials seeking approval of the Solterra Offer #1 on the "**Service List**" (as defined in the Initial Order).[42] The hearing to approve the Solterra Offer #1 was scheduled for May 25, 2021.[43]

29. On May 24, 2021, the Monitor provided a report that outlined that Landa had submitted a revised purchase offer (the "**Landa Offer #2**").[44]

30. At the May 25, 2021 hearing, the chambers judge adjourned the matter until June 8, 2021. The chambers judge "indicated to the array of bidders that [she] was not directing any further process to allow for new bids; however, if any party wished to submit further offers, those offers should be received by the Monitor by noon June 4, 2021."[45]

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[38] *Ibid* at paras. 22-23.
[39] *Ibid* at para. 28.
[40] *Ibid* at para. 28.
[41] *Ibid* at paras. 29-30.
[42] Notice of Application of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership dated and filed May 20, 2021, Appeal Record, Tab 01, pg. 5.
[43] *Chambers Reasons*, *supra* note 2 at para. 30, Appeal Record, Tab 14, pg. 248.
[44] *Ibid* at para. 34.
[45] *Ibid* at para. 37.

31. By June 4, 2021, the Monitor had received (a) a revised offer from Landa (the "**Landa Offer #3**"), (b) a "without prejudice" backup offer from Solterra (the "**Solterra Backup Offer**"), and (c) a revised offer from 129, discussed below.[46]

32. Under any of the Landa or Solterra offers: (a) CMLS would suffer a shortfall; (b) the Petitioners would disclaim $16 million of pre-sale agreements; (c) Aviva would immediately crystalize its exposure, which was estimated to be $8.6 million; and (d) the Other Creditors would be left "out of the money".[47]

D. 129 Refinancing Transaction

33. As noted above, 129 initially submitted its proposed offer to refinance Terrace House to the Monitor by the bid deadline in the Final Sales Process. 129 served its notice of application (the "**129 Application**") seeking approval of its refinancing offer on the Service List.[48] However, 129's offer continued to improve. On June 4, 2021, in accordance with process described above, 129 provided the Monitor with a revised refinancing offer (the "**129 Refinancing**").

34. Although the overarching structure of the proposed transaction was unchanged, by June 4, 2021, 129 was able to remove all of the substantive conditions to its proposed transaction, and increase the funds available under the 129 Refinancing.

35. As of the hearing on June 8, 2021, the 129 Refinancing would:

(a) Repay the Interim Lender Facility and the fees secured by the Administration Charge in full;

(b) Repay the CMLS Facility in full, and assign the CLMS Security, including the CMLS Mortgage, to a company incorporated by Domain Mortgage Company ("**Domain**"), the primary source of funds for the 129 Refinancing;

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[46] *Ibid* at paras. 39-40.
[47] *Ibid* at paras. 42, 73.
[48] Notice of Application of 1296371 B.C. Ltd. dated May 21, 2021 and filed May 25, 2021 ("**129 Application**"), Appeal Record, Tab 02, pg. 40.

(c) Provide Aviva with improved security, by granting Aviva priority over certain parts of the loan facility contemplated by the 129 Refinancing (with Aviva's consent and support);

(d) Pay break fees owed to Landa and Solterra; and

(e) Provide working capital for the Petitioners.[49]

36. Further, as of June 8, 2021, the Monitor confirmed that most of the conditions relating to the 129 Refinancing were satisfied, save for customary funding conditions. The Monitor also reported that the 129 Refinancing would result in a "materially better" outcome for the stakeholders over any of the Solterra or Landa offers.[50]

37. On June 8, 2021, Centura and Solterra served an application response to the 129 Application on the Service List.[51] The only evidence in support of this application response was Centura's registered claim of lien against the Lands in the amount of $473,277.00.[52]

E. Decision of the Chambers Judge and Reasons for Judgment

38. On June 15, 2021, the chambers judge delivered a decision on the competing applications with reasons to follow. The chambers judge dismissed the 129 Application and approved the Solterra Backup Offer.

39. The chambers judge delivered written reasons for judgment on June 30, 2021 (the "***Chambers Reasons***"). In deciding that the 129 Refinancing was not appropriate the chambers judge concluded, among other things:

(a) The 129 Refinancing was not a redemption of the CMLS Mortgage.[53]

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[49] *Chambers Reasons*, *supra* note 2 at paras. 45(b), 47(c), Appeal Record, Tab 14, pg. 252.
[50] *Ibid* at paras. 40, 42(c), 46.
[51] Application Response of Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp. dated and filed June 8, 2021, Appeal Record, Tab 04, pg. 91.
[52] Volkow Affidavit #1, Exhibit A, Appeal Book, Tab 04, pg. 96.
[53] *Chambers Reasons, supra* note 2 at para. 57, Appeal Record, Tab 14, pg. 257.

(b) She was not aware that proper notice had been given to all of the secured creditors who might be affected by the 129 Refinancing.[54]

(c) That comparing the 129 Refinancing with the outcome if one of the Solterra or Landa offers were approved would be a "very unprincipled basis" upon which to argue the 129 Refinancing was appropriate.[55]

(d) The 129 Refinancing would not have been objectionable if it had been structured as a sale, whether via an outright sale or a reverse vesting order.[56]

(e) The circumstances of this case are similar to those in *Cliffs Over Maple Bay*.[57] Since there was no evidence of an intention to propose a plan of arrangement or compromise to creditors, the 129 Refinancing was not appropriate.[58]

PART 2 - ERRORS IN JUDGMENT

40. The chambers judge erred in law and fact by:

(a) concluding the 129 Refinancing was not a redemption of the CMLS Mortgage, and in turn by failing to balance the equity of redemption in her appropriateness analysis under s. 11 of the *CCAA*;

(b) determining that it was not appropriate to grant the 129 Application because there was no evidence of an intention to propose a plan of arrangement or compromise to creditors; and

(c) approving the Solterra Backup Offer in the face of the 129 Refinancing, which results in a materially better outcome for the stakeholders and is more consistent with the remedial purpose of the *CCAA*.

[54] *Ibid* at para. 71.
[55] *Ibid* at para. 73.
[56] *Ibid* at para. 75.
[57] *Ibid* at para. 82.
[58] *Ibid* at paras. 91-92.

PART 3 - ARGUMENT

A. Standard of Review

41. The standard of review on an appeal of a question of law is correctness. The "primary role of appellate courts is to delineate and refine legal rules and ensure their universal application."[59]

42. Questions of mixed fact and law "lie on a spectrum." When the error "can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness." On the other end of the spectrum, "where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error."[60]

43. Discretionary decisions made by supervising *CCAA* judges are afforded a high degree of deference. However, an appellate court should intervene "if the supervising judge erred in principle or exercised their discretion unreasonably".[61]

44. If "the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations … then the reversal of the order on appeal may be justified."[62]

45. In other words, the "degree of importance to be given to particular factors" may attract a deferential standard of review, whereas "a failure to consider such factors" will attract a correctness review.[63]

[59] *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8-9.
[60] *Ibid* at para. 36.
[61] *Callidus*, *supra* note 3 at para. 53.
[62] *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 at para. 20, citing *Friends of the Old Man River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 138.
[63] *New Skeena*, *supra* note 62 at para. 26.

B. Relief Pursuant to Section 11 of the *CCAA*

46. Section 11 of the *CCAA* grants a supervising judge broad discretion to "make any order that it considers appropriate in the circumstances."[64]

47. However, a supervising judge's discretion is "not boundless." The court must exercise this authority "in furtherance of the remedial objectives of the *CCAA*".[65] The *CCAA* is remedial in the purest sense; "it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made."[66]

48. The *CCAA* prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company".[67] In *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."[68]

49. In granting relief under s. 11 of the *CCAA*, the court must keep in mind the baseline considerations of appropriateness, good faith, and due diligence.[69] This appeal only raises the question of appropriateness:

> 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

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[64] *CCAA*, *supra* note 1, s. 11; *Callidus*, *supra* note 3 at paras. 48-49.
[65] *Callidus*, *supra* note 3 at para. 49.
[66] *Century Services, supra* note 3 at para. 59, citing *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282 at para. 57, Doherty J.A., dissenting.
[67] *Callidus*, *supra* note 3 at para. 41, citing *Century Services*, *supra* note 3 at para. 70.
[68] *Century Services*, *supra* note 3 at para. 14.
[69] *Callidus*, *supra* note 3 at para. 49.

> common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.[70]

50. Novelty does not constrain a court's discretion under s. 11 of the *CCAA*. Supervising judges are often called upon to innovate in exercising their jurisdiction and sanction measures for which there is no explicit authority in the *CCAA*.[71] The history of *CCAA* jurisprudence is "littered with court approval of innovative solutions."[72] It is this flexibility and broad discretion that distinguishes the *CCAA*.[73]

51. Jurisdiction to grant relief under s. 11 of the *CCAA* is subject to certain restrictions. For instance, a plan of compromise or arrangement must be put to a vote among affected creditors before receiving court approval, as that is an express statutory requirement.[74] As a result, s. 11 could not provide jurisdiction to approve a plan of compromise or arrangement that had not been voted on by creditors. In this case, subordination of creditor claims is not a "plan of arrangement" because it does not compromise creditors' rights, so those restrictions are not present here.[75] As noted by the chambers judge, there was no issue with her jurisdiction to grant the orders sought by 129, the question was only whether it was "appropriate" to do so.[76]

52. These restrictions are also narrowly interpreted. While there are sections in the *CCAA* authorizing specific relief, such as s. 11.2 which permits interim financing when sought by the debtor company, the general language of s. 11 "should not be read as being restricted by the availability of more specific orders."[77]

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[70] *Century Services*, *supra* note 3 at para. 70.
[71] *Ibid* at para. 61; *Quest University Canada (Re)*, 2020 BCSC 1883 at paras. 153-154, leave to appeal ref'd 2020 BCCA 364.
[72] *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*, 2021 BCCA 319 at para. 49, Appeal Record, Tab 17, pg. 295.
[73] *Callidus*, *supra* note 3 at para. 73, citing *Century Services*, *supra* note 3 at para. 14.
[74] *Callidus*, *supra* note 3 at para. 99.
[75] *Ibid* at paras. 111, 114.
[76] *Chambers Reasons*, *supra* note 2 at paras. 51, 54, Appeal Record, Tab 14, pg. 255.
[77] *Century Services*, *supra* note 3 at para. 70.

53. The chambers judge had the discretion to approve the 129 Refinancing. She erred in principle in her appropriateness analysis by:

(a) failing to consider the equity of redemption;

(b) determining that the "crucial" issue was the lack of evidence of an intention to propose a plan of arrangement or compromise to creditors; and

(c) concluding it was "unprincipled" to compare the outcome under the 129 Refinancing to that under the varying sale transactions.

C. The 129 Refinancing was a Redemption

54. The chambers judge erred in concluding the 129 Refinancing was not a redemption of the CMLS Mortgage.[78] The equity of redemption was engaged on the facts of this case irrespective of which party it favoured (the Petitioners or Aviva), as that principle clearly applies to the CMLS Mortgage.

55. Aviva provided its consent to the 129 Refinancing. The 129 Refinancing was paying the entire indebtedness to CMLS and assigning the CMLS Mortgage to Domain. It should not have mattered whether the funds were coming from Aviva or the Petitioners directly, or from another party, such as 129. The source of the funds should not have impacted the chambers judge's analysis.[79] It is clear the chambers judge was overly focused on the source of the funds,[80] rather than the overarching nature of the 129 Refinancing and the parties who supported it.

56. As a result, the chambers judge did not consider the equity of redemption broadly. Instead, she narrowly focused her analysis on the Petitioners, stating the Petitioners could not redeem the CMLS Mortgage because a second mortgage had been granted to Aviva.[81]

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[78] *Chambers Reasons*, supra note 2, at para. 57, Appeal Record, Tab 14, pg. 257.
[79] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*., 2020 ONSC 3659 at para. 19.
[80] *Chambers Reasons*, *supra* note 2 at para. 57, Appeal Record, Tab 14, pg. 257.
[81] *Ibid* at para. 56.

57. The right to redeem and the equity of redemption are related, but not identical. A mortgagor may always pay out a mortgagee in full, which is the fundamental component of redemption. Upon making full payment to a mortgagee, the mortgagor may either:

(a) compel a discharge of the mortgage, which "operates as a conveyance of the estate to the person best entitled" (whoever holds the "equity of redemption");[82] or

(b) seek an assignment of the mortgage, either (1) pursuant to a contract with the mortgagee, or (2) by virtue of a statutory right to compel an assignment.[83]

58. In British Columbia, the statutory right to compel an assignment is contained in s. 14 of the *Law and Equity Act*,[84] which states:

> Despite any stipulation to the contrary, if a mortgagor is entitled to redeem, the mortgagor may require the mortgagee, or the mortgagee's personal representatives or assigns, instead of giving a certificate of payment or reconveying, and on the terms on which the mortgagee would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs and the mortgagee is bound to assign and convey accordingly.

59. However, a mortgagor may "not compel an assignment when the equity of redemption [rests] with a subsequent mortgagee, although the mortgagee may consent to a different outcome". When a mortgagor grants a second mortgage, it conveys the equity of redemption to the second mortgagee. As a result, the mortgagor is no longer "'entitled to redeem' in the sense of permitting him to require a mortgagee to assign the mortgage to a third party when the equity of redemption is in a subsequent mortgagee."[85]

60. However, it does not follow from the above that, where a mortgagor grants a second mortgage, it has lost the ability to redeem, i.e. payout, the mortgage. A

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[82] *Classic Mortgage Corporation v. 0768723 B.C. Ltd*., 2017 BCSC 1100 at para. 16, aff'd 2017 BCSC 1225; *Gulf Estates Ltd. v. Rix* (1985), 61 B.C.L.R. 205 (S.C.), 1985 CanLII 392 at paras. 13-14.
[83] *Classic Mortgage*, *supra* note 82 at para. 27.
[84] *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 14(1).
[85] *Classic Mortgage*, *supra* note 82 at para. 16, citing *Gulf Estates*, *supra* note 82 at para. 14.

mortgagor "in that position" still has the right to compel a discharge upon full payment, which is a redemption of the mortgage. This right is consistent with standard foreclosure practice in British Columbia.[86]

61. The chambers judge erred in determining the 129 Refinancing was not a redemption. As a result, she failed to consider the equity of redemption and the Petitioners right to compel a discharge upon redemption in her analysis of appropriateness under s. 11 of the *CCAA*.

62. The Petitioners clearly had the right to payout the mortgage and seek a discharge. With the consent of Aviva (who held the equity of redemption), the Petitioners were also "entitled to redeem" and had the right to compel an assignment under s. 14(1) of the *Law and Equity Act*. However, it was not necessary to rely on s. 14(1) of the *Law and Equity Act* because CMLS consented to the assignment.

63. As discussed above, the primary purpose of the *CCAA* is to "avoid the social and economic losses resulting from liquidation of an insolvent company".[87] Facilitating the redemption of a mortgage held by a mortgagee who is driving a liquidation process, in this case CMLS, directly aligns with that purpose, and should have been an important factor in assessing appropriateness under s. 11 of the *CCAA*.

64. In the receivership context, as in foreclosure, "the right to redeem must be given due weight. It must be weighed in the balance, and the extent of the possible prejudice on all sides must be taken into account".[88]

65. As a core principle of real estate law, the chambers judge should have considered the Petitioners' ability to redeem the CMLS Mortgage and compel an assignment under s. 14(1) of the *Law and Equity Act*. The equity of redemption is more

[86] *Classic Mortgage*, *supra* note 82 at paras. 29, 33.
[87] *Century Services*, *supra* note 3 at paras. 15, 70; *Callidus*, *supra* note 3 at para. 41.
[88] *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406 at para. 74, citing *BCIMC Construction*, *supra* note 79 at paras. 36-41, 47, 49-52, 66-69.

than a mere equity. It is "an interest in the mortgaged land which is not lightly to be put aside" and courts have jealously guarded the equity of redemption.[89]

66. The chambers judge erred in law and fact in her conclusion that the 129 Refinancing was not a redemption. This led to a further error on the appropriateness analysis as the chambers judge failed to weigh the Petitioners' ability redeem the CMLS Mortgage, its right to compel an assignment of the CMLS Mortgage with Aviva's consent and the equity of redemption generally. This was not a matter of how this principle was weighed. The chambers judge failed to consider these legal principles in her appropriateness analysis. Given that was a relevant consideration, the reversal of the chambers judge's order is justified on this basis.[90]

D. Evidence of Intention to Propose a Plan was not Crucial

67. The chambers judge concluded that the "crucial" issue on her appropriateness analysis was 129's failure to indicate "that it will put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote."[91]

68. In this regard, the chambers judge concluded the case at bar was similar to the facts in *Cliffs Over Maple Bay*.[92]

69. In *Cliffs Over Maple Bay*, Tysoe J.A. stated the purpose of the *CCAA* was narrowly focused on facilitating "compromises and arrangements between companies and their creditors" as expressed in the statute's long title.[93] This narrow view of the purpose of the *CCAA* led to the conclusion that it was not appropriate to grant relief under s. 11 in the absence of an intention to propose a plan of arrangement or compromise to creditors.[94]

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[89] *BCIMC Construction*, *supra* note 79 at paras. 38-40, citing *Petranik v. Dale*, [1977] 2 S.C.R. 959.
[90] *New Skeena*, *supra* note 62 at paras. 20, 26.
[91] *Chambers Reasons*, *supra* note 2 at para. 77, Appeal Record, Tab 14, pg. 262.
[92] *Ibid* at para. 82.
[93] *Ibid* at para. 83; *Cliffs Over Maple Bay Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at para. 27.
[94] *Cliffs Over Maple Bay*, *supra* note 93 at para. 35.

70. It is clear from the *Chambers Reasons* that the chambers judge was bound by this interpretation of *Cliffs Over Maple Bay* and the narrow purpose of the *CCAA* articulated therein.

71. *Cliffs Over Maple Bay* should be overruled on this appeal. In the alternative, if this Court concludes *Cliffs Over Maple Bay* stands for a narrower proposition, the chambers judge erred in her interpretation of *Cliffs Over Maple Bay* as binding her to a single outcome: dismissing the 129 Application because of a lack of evidence with respect to 129's or the Petitioners' intention to proposed a plan of arrangement or compromise to creditors.

I. Cliffs Over Maple Bay should be overruled

72. A five-justice division may overrule *Cliffs Over Maple Bay* if the decision is wrong or, "for any other reason" the decision ought to be overruled.[95]

73. The case at bar presents a perfect example of why *Cliffs Over Maple Bay* is problematic and should be overruled. The chambers judge concluded that the 129 Refinancing could have been approved if it was a sale, even though a sale would result in immediate losses to all creditors. However, she concluded she could not approve the 129 Refinancing in its current form, despite the fact that the 129 Refinancing provided the greatest consideration and preserved at least the prospect of further recovery by creditors, while also paying CMLS in full, which was a better outcome for CMLS than under any of the sale transactions.

74. The chambers judge suggests that had the 129 Refinancing been a sale, no one would have quarreled with the structure of the transaction, even if a reverse vesting order was necessary.[96] These statements make it clear the chambers judge believed she was bound by the outcome in *Cliffs Over Maple Bay*, and also demonstrates the unreasonableness of the chambers judge's analysis. In short, she determined that a sale transaction, which results in loss for all creditors, was a more appropriate outcome

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[95] *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 (C.A.), 1995 CanLII 1537 at para. 12, citing *B.C. (Govt.) v. Worthington (Can.) Inc.* (1988), 29 B.C.L.R. (2d) 145 at 159 (C.A.), 1988 CanLII 175.
[96] *Chambers Reasons*, *supra* note 2 at paras. 75-76, Appeal Record, Tab 14, pg. 262.

than a transaction, of greater value, that pays out the primary creditors in full, and preserves the prospect for some recovery for other creditors at a later date – merely because there was a lack of evidence with respect to an intention to propose a plan of arrangement or compromise to creditors.

75. *Cliffs Over Maple Bay* should be overruled for four principled reasons.

a. The purpose of the *CCAA* is broader than articulated in *Cliffs Over Maple Bay*

76. *Cliffs Over Maple Bay* is premised on the conclusion that the fundamental purpose of the *CCAA* is as expressed in the act's long title: "to facilitate compromises and arrangements between companies and their creditors".[97]

77. However, more recent authority of the Supreme Court of Canada has articulated a broader purpose of the *CCAA*, which is consistent with the expanded authority introduced by Parliament in 2009.

78. The purpose of the *CCAA* "is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets."[98]

79. *Cliffs Over Maple Bay* creates a mandatory precondition in *CCAA* proceedings that is inconsistent with subsequent authority of this Court which points out that if it is possible in *CCAA* proceeding, "to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better."[99] The application of *Cliffs Over Maple Bay* by the chambers judge prevented this potential outcome.

80. The Supreme Court of Canada made a similar observation in *Century Services*:

> 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.[100]

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[97] *Cliffs Over Maple Bay*, *supra* note 93 at para. 27.
[98] *Century Services*, *supra* note 3 at para. 15.
[99] *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26.
[100] *Century Services*, *supra* note 3 at para. 14.

81. It is clearly accepted that a *CCAA* proceeding may not end in an arrangement or compromise with creditors, and in fact it is recognized that such an arrangement or compromise is not even the best outcome.

b. <u>*CCAA* proceedings often do not include a plan of arrangement or compromise</u>

82. The broader purpose articulated in *Century Services*, which is not focused solely on plans of arrangement or compromise, aligns with the relief that is frequently sought and granted under the *CCAA* without a creditor vote, or even an intention to propose a plan.

83. The best example of this are proceedings commonly referred to as "liquidating *CCAA*s". These are now granted pursuant to s. 36 of the *CCAA*, although technically the practice predates the addition of that section to the act.[101]

84. Section 36(3)(d) raises, as a factor to consider, "the extent to which the creditors were consulted". However, there is no requirement for plan of arrangement or compromise be filed.[102]

85. These *CCAA* proceedings present a good example of why *Cliffs Over Maple Bay* does not comport with current *CCAA* practices. The 129 Application came almost a year after the Initial Order. During that time there had been no plan of arrangement proposed to the creditors, nor was there any evidence of an intention of the Monitor (acting on behalf of the Petitioners, under its expanded powers noted above) to do so. Despite that, the chambers judge granted three orders extending the stay to facilitate the SISP, which sought to solicit potential sale or refinancing transactions, two further orders extending the stay to facilitate the Final Sales Process and a sixth stay in aid of closing the Solterra Backup Offer. It was only when 129 sought to refinance Terrace House that *Cliffs Over Maple Bay* became an issue.

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[101] *Fairmont Resort Properties Ltd. (Re)*, 2012 ABQB 39 at paras. 17, 20.
[102] *Ibid* at para. 26.

c. Unwarranted interference with broad discretion

86. In *Cliffs Over Maple Bay*, the Court concluded:

> It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the *CCAA*. ...[103]
>
> [Emphasis added.]

87. Here, *Cliffs Over Maple Bay* articulates a debtor's intention to propose a plan of arrangement or compromise as a mandatory precondition to granting or extending a stay under the *CCAA*, the fundamental precursor to any *CCAA* proceeding.

88. Such a mandatory requirement interferes with the "flexible mechanism" that is the *CCAA*,[104] and stifles a court's broad discretion under s. 11 of the *CCAA*. The "exercise of this discretion must further the remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence."[105] The mandatory rule in *Cliffs Over Maple Bay*, as was applied by the chambers judge, casts the question of appropriateness too narrowly.

89. In other words, *Cliffs Over Maple Bay* actually extinguishes a court's jurisdiction under s. 11 of the *CCAA* if there is no intention to propose a plan to creditors. Such a "bright line" approach is clearly inconsistent with the purpose of the *CCAA* and the history of *CCAA* jurisprudence.

90. Appropriateness is not determined by the presence or absence of an intention to propose a plan of arrangement or compromise. "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."[106]

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[103] *Cliffs Over Maple Bay*, *supra* note 93 at para. 35.
[104] *Callidus, supra* note 3 at para. 73, citing *Century Services*, *supra* note 3 at para. 14.
[105] *Ibid* at para. 70.
[106] *Century Services*, *supra* note 3 at para. 70.

d. *Cliffs Over Maple Bay* creates an artificial evidentiary hurdle

91. A stated in *Winnipeg Motor Express*:

> It also seems to me that a formal plan of arrangement or compromise is, at least theoretically, always a possibility, so to require a debtor company to utter some magic incantation that it intends to propose a plan of arrangement, as a prerequisite for relief under the CCAA, is overly technical and inconsistent with this remedial objective. The result of such a conclusion may simply be that applicants would make a statement in some pro forma or boiler plate language, or go through an exercise for no valid purpose.[107]

92. This statement is particularly true when considered in this context. The 129 Application was not being advanced by the Petitioners, and the Petitioners had not, to date, expressed an intention to propose a plan of arrangement or compromise to creditors. Given the circumstances, 129 was not in a position to provide the Court with admissible evidence with respect to the Petitioners' intentions. Without control of Terrace House, it was not possible for Mr. Reyes or 129 to advance all the aspects of a long-term restructuring.[108]

II. The chambers judge erred in considering only one factor

93. In the alternative, if *Cliffs Over Maple Bay* stands for a narrower proposition, the chambers judge erred in interpreting it so broadly and in her application of *Cliffs Over Maple Bay* to the case at bar.

94. *Cliffs Over Maple Bay* may stand for the narrower proposition that, when considering relief under s. 11 of the *CCAA*, an intention to propose a plan of arrangement or compromise:

(a) is a factor to consider, but not the only factor, that should be balanced against potential countervailing factors, such as secured creditor support; or

(b) is relevant to the initial order, in particular the stay of proceedings, but no longer applies at later stages of *CCAA* proceedings, particularly when the

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[107] *Winnipeg Motor Express Inc. et al.*, 2008 MBQB 297 at para. 42.
[108] Reyes Affidavit #2, paras. 16-19, Appeal Book, Tab 01, pg. 7.

supervising judge has previously granted stay extensions to facilitate the ongoing objectives of the *CCAA* proceedings at issue.

95. Since the chambers judge determined the "crucial" issue on her appropriateness analysis was 129's failure to indicate "that it will put forward a plan of arrangement or compromise on which the Petitioners' creditors may vote",[109] she erred in principle by giving no weight to the other relevant considerations, such as the equity of redemption.

96. The chambers judge's conclusion with respect to *Cliffs Over Maple Bay* is also inconsistent with the five prior extensions to the Stay of Proceedings which she granted to further the SISP and Final Sales Process, both of which sought to solicit a potential purchase or refinancing of Terrace House, among other things.

E. The 129 Refinancing was Materially Better than a Sale

97. There were two bidders before the chambers judge that had submitted offers to purchase Terrace House on substantially the same terms. The two bidders presented the same outcome for all creditors, with the exception of CMLS, which would have recovered more depending on what purchase price was approved. All of the other creditors would be left "out of the money", although Centura (given its affiliation with Solterra) argued it preferred that outcome.[110] Under all of the competing offers, Aviva's and the Petitioners' equity of redemption would be extinguished.

98. In contrast, the 129 Refinancing presented a different option. It left all the creditors with some hope of financial recovery, while providing CMLS full recovery, which was also better than any alternative. Aviva, being a sophisticated party with the largest stake behind CMLS and suffering the largest financial shortfall under any of the sale transactions, supported the 129 Refinancing.

99. However, despite this reality the chambers judge concluded comparing these alternative transactions was a "very unprincipled basis" on which to argue the

[109] *Chambers Reasons*, *supra* note 2 at para. 77, Appeal Record, Tab 14, pg. 262.
[110] *Ibid* at paras. 71, 73.

129 Refinancing was "an 'appropriate' outcome in the balancing exercise with regard to all stakeholders."[111]

100. This conclusion stemmed, in part, from her concern that she was "not aware that proper notice [had] been given to all of the secured creditors who might be affected by the proposed transaction." Because of this concern, the chambers judge concluded that it was "difficult to properly assess whether any creditor would be materially prejudiced".[112]

101. This led the chambers judge to conclude it was unprincipled to assess appropriateness based on the likely monetary value of the Other Creditors' interests under the sale transactions.[113] Viewed together, the *Chambers Reasons* demonstrate the chambers judge was of the view that the Other Creditors being "out of the money" under the sale transaction was not enough to conclude there was no prejudice, given her concern with respect to notice.

102. First, there was notice of the 129 Application to the Service List in accordance with the Initial Order. As a result, the chambers judge's underlying concern was misplaced. Second, even if notice was deficient, it remains an error to refuse to consider the reality that the alternative to the 129 Refinancing would wipe out the claims of all the Other Creditors.

103. Further, the chambers judge's conclusion that it was unprincipled to compare outcomes under the 129 Refinancing with those under the sale transactions is directly at odds with the overarching remedial objectives of the *CCAA*. In particular, her analysis failed to balance the "costs and benefits of restructuring or liquidating the company".[114] Comparing the options favours the 129 Refinancing and clearly answers the question of "whether the order will usefully further efforts to achieve the remedial purpose of the

[111] *Ibid* at para. 73.
[112] *Ibid* at para. 71.
[113] *Ibid* at para. 73.
[114] *Callidus*, *supra* note 3 at para. 40.

CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company."[115]

104. The chamber judge's analysis is also inconsistent with her analysis in *League Assets* where she noted the important and "stark contrast" between a proposed restructuring and the "result that would otherwise have applied in respect of either a sale … or the order absolute."[116]

105. Ironically, despite concluding it was unprincipled to rely on the sale transactions to support the appropriateness of the 129 Refinancing, the chambers judge was of the view that 129 could have advanced its transaction as an outright sale or reverse vesting order and no one would have quarreled with the structure of that transaction.[117]

106. The chambers judge's analysis leads to the odd conclusion that a sale transaction, for less value, which crystalize losses for all creditors (including CMLS), is a preferable outcome to a transaction, of greater value, that pays out CMLS in full, and preserves the prospect for some recovery for the remaining creditors at a later date. It cannot be that the purpose of the *CCAA* is advanced by a sale of assets and immediate loss by all creditors, when an alternative path that at least preserves the prospect of a restructuring, and has the support of all key stakeholders, is available and before the Court.

107. In the face of the Monitor reporting that the 129 Refinancing provides a "materially better" outcome for the stakeholders, the chambers judge erred in principle by not balancing the options available in determining whether the 129 Refinancing was appropriate.

[115] *Century Services*, *supra* note 3 at para. 70.
[116] *League Assets Corp (Re)*, 2014 BCSC 2589 at para. 8.
[117] *Chambers Reasons*, *supra* note 2 at paras. 75-76, Appeal Record, Tab 14, pg. 262.

F. The Court of Appeal Should Grant the Order

108. If the Court identifies reviewable errors in the *Chambers Reasons*, it may proceed in one of two way:

(a) the Court could remit the matter back to the chambers judge for a new hearing; or

(b) "if it is feasible and in the interests of justice, it can conduct a fresh assessment of the evidence".[118]

109. Feasibility is primarily an evidentiary question. In this case, the evidence is entirely documentary in nature and it is sufficiently clear to permit a fresh assessment by the Court.

110. A fresh assessment of the 129 Refinancing now is also in the interests of justice.

111. First, the entire appeal can be resolved by a fresh assessment of the "appropriateness" of the 129 Refinancing. If the Court determines the 129 Refinancing is appropriate, it should grant the order sought by 129 and there is no need to consider the sale transactions. This was the approach adopted by the chambers judge.[119] The assessment of appropriateness turns on facts that were before the chambers judge at the hearing on June 8, 2021, all of which are in the record on the appeal.

112. A redemption should be given preference over an application to sell assets. Absent truly extraordinary circumstances, a court should not prevent a party from redeeming mortgaged property upon payment in full of the amount owed to the secured creditor prior to an order approving a sale.[120]

113. Since all the other issues fall away, it is not necessary for the Court to have the same degree of understanding of all the background as the chambers judge. Nevertheless, assessing the appropriateness of the 129 Refinancing, especially in light

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[118] *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 135, citing *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634 at para. 33.
[119] *Chambers Reasons*, *supra* note 2 at para. 43, Appeal Record, Tab 14, pg. 251.
[120] *Bank of Montreal v. Hester Creek Estate Winery Ltd. et al*, 2004 BCSC 724 at paras. 29-30.

of the alternative being a sale, is primarily prospective. To the extent the background is necessary, those facts are in the record and uncontested.

114. Second, both the 129 Refinancing and the Solterra Backup Offer are subject to mounting time pressures. Further, interest and costs to CMLS, the Interim Lender and of the *CCAA* proceedings generally continue to accrue. These circumstances do not provide the time to refer the matter back to the chambers judge because one of the transactions needs to close imminently.

115. Finally, the Final Sale Process has been extending for some time. It is not in the interest of justice to refer the 129 Application back to the chambers judge and further extend this matter. Although 129 has been able to increase the available funds to redeem CMLS in full, despite the later closing date in October, a further extension of the closing date may prejudice 129's ability to redeem CMLS in full due to additional cost. Granting the 129 Refinancing now will avoid further delaying these time sensitive *CCAA* proceedings.[121]

G. The 129 Refinancing is Appropriate and Should be Approved

116. In summary, the 129 Refinancing is appropriate because it 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." The 129 Refinancing achieved common ground among the senior secured creditors and treats the remaining stakeholders as "advantageously and fairly as the circumstances permit."[122]

117. The following factors demonstrate the appropriateness of the 129 Refinancing:

(a) The Petitioners had the ability to redeem the CMLS Mortgage and compel a discharge, and could further compel an assignment of the CMLS Mortgage with Aviva's consent, these were not considered by the chambers judge nor was the equity of redemption generally;

[121] *Canada v. Global Equity Fund Ltd.*, 2012 FCA 272 at para. 65.
[122] *Century Services*, *supra* note 3 at para. 70.

(b) The 129 Refinancing was a materially better outcome for the stakeholders, but the chambers judge concluded it was unprincipled to compare the outcomes under the 129 Refinancing to the those under a sale; and

(c) Aviva and CMLS, the senior secure creditors and the only two creditors financially impacted by the chambers judge's decision, supported the 129 Refinancing.

118. These factors further demonstrate that the lack of evidence with respect to 129's or the Petitioners' intention to propose a plan of arrangement or compromise to creditors was not crucial.

119. The only stakeholder that opposed the 129 Refinancing was Centura. Centura is a lien creditor with a lien claim in the amount of $473,277.00. Centura is a related entity to Solterra, and without Centura, Solterra did not have standing to contest the 129 Application. Finally, under all of the sale transactions, Centura, like the Other Creditors generally, was "out of the money". These facts do not prevent Centura from opposing the 129 Application, but do raise questions as to the weight that should be given to their position.

120. More critically, even if the chambers judge ought to have taken Centura's position at face value, despite the clear interest in the Solterra offers, which she should not have, that position could not be extended to any of the remaining Other Creditors that chose not to appear on the 129 Application. The only reasonable inference to draw from the Other Creditors not appearing was indifference. However, the chambers judge incorrectly and unfairly extended Centura's position to the "lien claimants" generally.[123]

121. As a result, of the parties appearing on the 129 Application, the 129 Refinancing had overwhelming support. The 129 Refinancing was the best option to achieve maximum recovery for creditors while also furthering the remedial purpose of the *CCAA* by avoiding the social and economic losses resulting from liquidation. This Honourable Court should approved the 129 Refinancing.

[123] *Chambers Reasons*, *supra* note 2 at para. 71, Appeal Record, Tab 14, pg. 261.

H. New Evidence on Appeal

122. 129 seeks leave to adduce evidence that was not before the chambers judge pursuant to R. 31 of the *Court of Appeal Rules*.[124]

123. The further evidence 129 seeks to adduce serves a single purpose: demonstrate to the parties and the Court that the 129 Refinancing remains a viable transaction. In other words, despite the passage of time since the chambers hearing, 129 seeks to establish that the parameters of the 129 Refinancing are substantially the same as on June 8, 2021.

124. The further evidence addresses the commercial realities that costs associated with closing the 129 Refinancing continue to accrue and the payout amounts to CMLS, the Interim Lender and with respect to the Administration Charge have increased.

125. As it relates to the further evidence, the circumstances of this appeal are particularly rare and exceptional.[125] 129 is not attempting to demonstrate a change of circumstances from what was before, or assumed by, the chambers judge.[126] To the contrary, 129 seeks to adduce further evidence to establish that the overarching facts of the 129 Refinancing are the same as those before the chambers judge, despite the passage of time.

126. The further evidence is therefore not easily assessed as either fresh or new evidence. Nevertheless, it is in the interests of justice to admit the further evidence.[127]

127. Fresh evidence "is evidence that existed at the time of the trial but was not adduced at that time". New evidence "is evidence that was not in existence at the time of trial but has arisen as a result of events or matters that transpired subsequent to trial."[128]

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[124] *Court of Appeal Rules*, R. 31(1).
[125] *Barendregt v. Grebliunas*, 2021 BCCA 11 at para. 32.
[126] *Ibid* at para. 38.
[127] *Ibid* at paras. 33, 41, 48.
[128] *Ibid* at para. 29.

128. The test governing the admission of fresh evidence is set out in *R. v. Palmer*, [1980] 1. S.C.R. 759 at 775:

> This test requires the appellant to demonstrate that the evidence was not discoverable by reasonable diligence before the end of the trial; that the evidence is credible; that it would be practically conclusive of an issue before the court; and that if believed, the evidence could have affected the result of the trial.[129]

129. The *Palmer* test does not apply to new evidence.[130] New evidence will only be admitted in "rare" or "exceptional" circumstances.[131] The overarching consideration on a motion to adduce new evidence is whether it is in the interests of justice to grant leave.[132]

130. Evidence of the 129 Refinancing was before the chambers judge based on a closing date no later than June 30, 2021. It was not necessary, at the time of the chambers hearing, for the 129 Refinancing to close in October, as a result the further evidence could not have been reasonably anticipated. As a result, the further evidence is more akin to new evidence. However, it was at least possible for the further evidence to have been adduced at the chambers hearing since the 129 Refinancing could have been structured to close in October, although there was no reason to do so. To the contrary, there were a numbers of reasons to close the 129 Refinancing quickly.

131. The further evidence satisfies the first three *Palmer* criteria:

(a) 129 acted diligently in advancing evidence with respect to the 129 Refinancing, which was set to close before June 30, 2021;

(b) the further evidence is clearly relevant since the conditionality of the 129 Refinancing has been an ongoing question for stakeholders and whether CMLS is being paid in full is central to the issue of redemption; and

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[129] *Korol (Re)*, 2014 BCCA 380 at para. 35; see also *Ascent Developments Corp. v. Stonehenge Projects Inc.*, 2016 BCCA 287 at para. 63.
[130] *Korol*, *supra* note 129 at para. 36; *Barendregt*, *supra* note 125 at para. 30.
[131] *Barendregt*, *supra* note 125 at para. 32.
[132] *Ibid* at para. 48.

(c) the further evidence is credible, it takes the same form as previous affidavits and primarily exhibits executed documents.

132. The fourth *Palmer* criteria is challenging to apply in this case. This is indicative of the rare and exceptional circumstances before the Court. The further evidence attempts to maintain the 129 Refinancing in the same state as it was before the chambers judge. Thus, it cannot be said that the further evidence "could have affected the result of the trial." 129 points to other errors by the chambers judge. However, without the further evidence the factual underpinnings of 129's argument and the *Chambers Reasons* change. The facts on appeal will not align with the facts that were before the chambers judge, and in turn the errors 129 submits she made. As a result, not admitting "the evidence could well lead to an injustice."[133]

133. If the further evidence is better characterized as new evidence, it is in the interests of justice to grant leave to adduce the further evidence on appeal. The main exception to the prohibition on new evidence cannot be applied to the further evidence in this case as it does not attempt to address a change in circumstances from the facts before the chambers judge that casts serious doubt on factual underpinnings of the *Chambers Reasons*.[134]

134. However, the further evidence will allow the Court to review matters "as they stood at the time of trial", which is a requirement of appellate review. As a result, the evidence promotes, rather than offends, "the principle of finality".[135]

135. In the circumstances of this appeal, 129 submits there are only two fair approaches:

(a) grant leave to adduce the further evidence; or

(b) hear the appeal on the facts exactly as they were on June 8, 2021 with no regard for the passage of time.

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[133] *Ascent Developments*, *supra* note 129 at para. 64.
[134] *Barendregt*, *supra* note 125 at paras. 35, 38, 40.
[135] *Scott v. Scott*, 2006 BCCA 504 at para. 25.

136. Allowing the respondents to argue the 129 Refinancing is no longer viable due to the passage of time and increased costs while ignoring further evidence that addresses these issues would lead to an injustice.

PART 4 - NATURE OF ORDER SOUGHT

137. 129 seeks the following Orders:

(a) that the appeal be allowed;

(b) that leave be granted to adduce further evidence;

(c) that the chambers judge's orders dismissing the 129 Application and approving the Solterra Backup Offer be set aside; and

(d) the order sought by 129, approving the 129 Refinancing, be granted on the same terms as sought before the chambers judge except as follows (capitalized terms in this paragraph are defined in the draft order sought by 129,[136] except where stated otherwise):

(i) increasing the maximum amount under the New Loan Facility to $25,900,000;[137]

(ii) changing the date of the Domain Commitment Letter to July 30, 2021;[138]

(iii) adding repayment of the CMLS Facility to the permitted uses of the Working Capital Facility;[139] and

(iv) continuing and extending the Stay of Proceedings (as defined herein) to and including April 30, 2022.[140]

All of which is respectively submitted this 1st day of September, 2021.

Jordan Schultz and Eamonn Watson
Counsel for the Appellant,
1296371 B.C. Ltd.

[136] Draft Form of Order Sought by 1296371 B.C. Ltd. on June 8, 2021, Appeal Record, Tab 2(a), pg. 60.
[137] *Ibid*, para. 3, Appeal Record, Tab 2(a), pg. 62.
[138] *Ibid*, para. 4(a), Appeal Record, Tab 2(a), pg. 62.
[139] *Ibid*, para. 17, Appeal Record, Tab 2(a), pg. 64.
[140] *Ibid*, para. 16, Appeal Record, Tab 2(a), pg. 64.

APPENDIX: ENACTMENTS

COMPANIES' CREDITORS ARRANGEMENT ACT

R.S.C. 1985, c. C-36

General power of court

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.

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

> **(a)** the period during which the company is expected to be subject to proceedings under this Act;
>
> **(b)** how the company's business and financial affairs are to be managed during the proceedings;
>
> **(c)** whether the company's management has the confidence of its major creditors;
>
> **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> **(e)** the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor’s report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

Restriction on disposition of business assets

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.

Notice to creditors

(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.

Factors to be considered

(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.

Additional factors — related persons

(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.

Related persons

(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).

Assets may be disposed of free and clear

(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.

Restriction — employers

(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.

Restriction — intellectual property

(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.

LAW AND EQUITY ACT

R.S.B.C. 1996, c. 253

Mortgagor may require mortgagee to assign

14 (1) Despite any stipulation to the contrary, if a mortgagor is entitled to redeem, the mortgagor may require the mortgagee, or the mortgagee's personal representatives or assigns, instead of giving a certificate of payment or reconveying, and on the terms on which the mortgagee would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs and the mortgagee is bound to assign and convey accordingly.

(2) A mortgagee in possession who is required to assign, transfer and convey under subsection (1) does not incur any legal liability that the mortgagee would not have incurred if the mortgagee had executed a release of the mortgage.

COURT OF APPEAL RULES

B.C. Reg. 297/2001

Further evidence

31 (1) With leave of the court or a justice, a party may adduce evidence that was not before the court appealed from.

LIST OF AUTHORITIES

Authorities	**Page # in factum**	**Para # in factum**
Cases		
9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10	ix, 9-11, 14, 19, 22	43, 46-51, 63, 88, 103
Ascent Developments Corp. v. Stonehenge Projects Inc., 2016 BCCA 287	28, 29	129, 133
Asset Engineering LP v. Forest & Marine Financial Limited Partnership, 2009 BCCA 319	17	79
Bank of Montreal v. Hester Creek Estate Winery Ltd. et al, 2004 BCSC 724	24	112
Barendregt v. Grebliunas, 2021 BCCA 11	27- 29	126-128, 130, 134
BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659	12, 14, 15	55, 64, 65
Canada v. Global Equity Fund Ltd., 2012 FCA 272	25	115
Century Services Inc. v. Canada (Attorney General), 2010 SCC 60	ix, 10, 11, 14, 17-19, 23, 25	47-50, 52, 63, 78, 80, 82, 88, 90, 103, 116
Classic Mortgage Corporation v. 0768723 B.C. Ltd., 2017 BCSC 1100	13, 14	57, 59, 60
Classic Mortgage Corporation v. 0768723 B.C. Ltd., 2017 BCSC 1225	13	57
Cliffs Over Maple Bay Ltd. v. Fisgard Capital Corp., 2008 BCCA 327	x, 15, 17-21	68, 69, 76, 86, 70-76, 79, 85-89, 93, 94, 96
Fairmont Resort Properties Ltd. (Re), 2012 ABQB 39	18	83, 84
Gulf Estates Ltd. v. Rix (1985), 61 B.C.L.R. 205 (S.C.), 1985 CanLII 392	13	57, 59
Housen v. Nikolaisen, 2002 SCC 33	9	41, 42

Authorities	Page # in factum	Para # in factum
Korol (Re), 2014 BCCA 380	28	129, 130
Kruger v. Wild Goose Vintners Inc., 2021 BCSC 1406	14	64
League Assets Corp (Re), 2014 BCSC 2589	23	104
New Skeena Forest Products Inc., Re, 2005 BCCA 192	9, 15	44, 45, 66
Petranik v. Dale, [1977] 2 S.C.R. 959	15	65
Port Capital Development (EV) Inc. (Re), 2021 BCSC 1272	ix, x, 1-8, 11, 12, 15, 16, 21-24, 26, 29	1-18, 20-32, 35, 36, 39, 51, 54-56, 67-69, 74, 95, 97, 99-101, 105, 108, 111, 120, 134
Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd., 2021 BCCA 319	11	50
Quest University Canada (Re), 2020 BCSC 1883	11	50
Scott v. Scott, 2006 BCCA 504	29	135
Skidmore v. Blackmore, (1995), 2 B.C.L.R. (3d) 201 (C.A.), 1995 CanLII 1537	16	72
Southern Star Developments Ltd. v. Quest University Canada, 2020 BCCA 364	11	50
West Moberly First Nations v. British Columbia, 2020 BCCA 138	24	108
Winnipeg Motor Express Inc. et al., 2008 MBQB 297	20	91
Legislation		
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36	ix, x, 1, 2, 8-11, 14, 15, 17-20, 22, 26	1, 6, 7, 40, 43, 46-52, 61, 63, 69, 70, 76-79, 81-90, 94, 103, 121

Authorities	**Page # in factum**	**Para # in factum**
Court of Appeal Rules, B.C. Reg. 297/2001, R. 31(1)	27	123
Law and Equity Act, R.S.B.C. 1996, c. 253, s. 14(1)	13, 14	58, 62, 65

Appendix D

THE LAW COURTS
400 - 800 HORNBY STREET
VANCOUVER, B.C.
V6Z 2C5

COURT OF APPEAL

MEMORANDUM

To: Torri Enderton, Scheduling Coordinator

From: The Division

Date: September 22, 2021

RE: **PORT CAPITAL DEVELOPMENT (EV) INC. vs. 1296371 B.C. LTD. (A)**
Court of Appeal File No: CA47585

Ms. Enderton,

By way of copy of this memorandum, please advise counsel as follows:

"The appeal is allowed, subject to the following terms:

a. leave is granted to adduce the new evidence tendered at the hearing of the appeal;

b. the chambers judge's orders dismissing the "129 Application" and approving the "Solterra Backup Offer" are set aside;

c. the order sought by 129 approving the 129 Refinancing is granted on the same terms as were sought before the chambers judge, except as follows (using capitalized terms as defined in the draft order sought by 129):

    i. increasing the maximum amount under the New Loan Facility to $25,900,000;

    ii. changing the date of the Domain Commitment Letter to July 30, 2021;

iii. adding repayment of the CMLS Facility to the permitted uses of the Working Capital Facility; and

iv. continuing and extending the stay of proceedings to and including April 30, 2022;

and subject to such non-substantive changes as this court may approve at the suggestion of counsel in order to reflect changes in circumstances that have arisen since the hearing below and are reflected in the new evidence.

Reasons will follow, but are unlikely to be issued prior to September 30, 2021.”

Appendix E

Form 23 (Rule 47(3)(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)

ORDER

BEFORE:

The Honourable Madam Justice Newbury
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Dickson
The Honourable Mr. Justice Voith

Vancouver, British Columbia, this 22nd day of September, 2021.

THE APPEAL from the orders of Madam Justice Fitzpatrick of the Supreme Court of British Columbia pronounced the 15th day of June, 2021, at Vancouver, British Columbia, coming on for hearing the 21st day of September, 2021; AND ON HEARING Jordan Schultz and Eamonn Watson, counsel for the

Appellant 1296371 B.C. Ltd. ("**129**"); Kibben Jackson and Tom Posyniak, counsel for Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.; David Gruber, counsel for Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (collectively the "**Petitioners**"); Peter Bychawski, counsel for Ernst & Young (in its capacity as the "**Monitor**"); Colin D. Brousson and Alexandra McCawley, counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company; and William Roberts, counsel for Aviva Insurance Company of Canada; AND ON READING the materials filed herein; AND ON JUDGMENT BEING PRONOUNCED ON THIS DATE;

THIS COURT ORDERS that the appeal is allowed.

AND THIS COURT FURTHER ORDERS that leave is granted to adduce the new evidence tendered at the hearing of the appeal.

AND THIS COURT FURTHER ORDERS that the chambers judge's orders dismissing the application of 129, and approving the application of the Petitioners to, *inter alia*, approve the sale of certain assets to Solterra Acquisitions Corp., are set aside.

AND THIS COURT FURTHER ORDERS that:

Release of Deposits

1. Dentons Canada LLP ("**Dentons**") is hereby authorized and directed to pay the following amounts, each of which are deposits (collectively the "**Deposits**") held in trust by Dentons pursuant to various pre-sale purchase agreements (the "**Pre-Sale Purchase Agreements**") among the Petitioners, as vendors, and the following persons (the "**Pre-Sale Purchasers**"), as purchasers, each in respect the following units in the Terrace House development project:

    (a) $2,800,000, representing the deposit paid by Luz Consuelo Reyes in respect of her agreement to purchase unit 801;

    (b) $1,155,000, representing the deposit paid by 1192706 B.C. Ltd., in respect of its agreement to purchase unit 1001;

    (c) $975,000, representing the deposit paid by 1208596 B.C. Ltd., in respect of its agreements to purchase units CRU#1 and CRU#2;

    (d) $1,162,500, representing the deposit paid by 1301981 B.C. Ltd. (as assignee from Hudani Investment Corp.), in respect of its agreement to purchase unit 901;

(e) $645,000, representing the deposit paid by 1207867 B.C. Ltd., in respect of its agreement to purchase unit 403;

(f) $592,500, representing the deposit paid by Robert Davis in respect of his agreement to purchase unit 503; and

(g) $675,000, representing the deposit paid by Simon Wang in respect of his agreement to purchase unit 401,

to 129 on the following terms:

(h) the Deposits shall be paid by 129 directly to CMLS Financial Ltd. ("**CMLS**") for the purposes of purchasing and taking an assignment of all loans (the "**CMLS Facility**") and security (the "**CMLS Security**") held by CMLS against the Petitioners, and such payment shall constitute an advance of a loan by 129 to the Petitioners (the "**Junior Loan**"), to be secured by the CMLS Security; and

(i) upon repayment of the Junior Loan, or any part thereof, the amount repaid shall be immediately paid by 129 to Dentons, in trust, which amounts shall be held pro rata as a Deposit pursuant to each Pre-Sale Purchase Agreement.

2. The Pre-Sale Purchase Agreements shall be unaffected by this Order, except as expressly provided for herein.

Refinancing Transaction

3. The Petitioners are hereby authorized, empowered and directed to obtain and borrow under a credit facility from Domain Mortgage Corp. ("**Domain**"), 1260780 B.C. Ltd. ("**NumberCo**") and 129 (collectively, the "**New Lenders**") in order to finance:

(a) repayment in full of all amounts owing to the "**Interim Lender**" (as defined in the Amended and Restated Initial Order made June 8, 2020, herein the "**ARIO**") pursuant to the commitment letter between the Petitioners and the Interim Lender dated as of June 5, 2020, as amended (the "**Interim Lending Facility**");

(b) the purchase and assignment of the CMLS Facility and the CMLS Security by the New Lenders,

provided that principal amount borrowed under such credit facility shall not exceed $25,900,000 (the "**New Loan Facility**") unless permitted by further Order of the supervising chambers judge.

4. Such credit facility shall be:

(a) in the case of the loan by Domain, on the terms and subject to the conditions set forth in the commitment letter between the Petitioners and Domain dated July 30, 2021 (the "**Domain Commitment Letter**"); and

(b) in the case of the loans by NumberCo and 129, on an interest free basis, payable on demand, but subject to repayment of the Petitioners' obligations to Domain

(collectively, the "**Finance Terms**").

5. The Petitioners are hereby authorized, empowered and directed to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "**New Definitive Documents**"), as are contemplated by the Finance Terms or as may be reasonably required by the New Lenders pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the New Lenders under and pursuant to the Finance Terms and the New Definitive Documents as and when the same become due and are to be performed.

6. Upon repayment in full of the Interim Lending Facility, as contemplated in paragraph 3(a) hereof, all security held by the Interim Lender as security for the Petitioners' obligations under the Interim Lending Facility (including, without limitation, the Interim Lender's Charge (as defined in the ARIO)) shall be discharged and released in full, for all purposes.

7. The purchase and assignment of the CMLS Loan and the CMLS Security by Domain, for and on behalf of the New Lenders (the "**Security Assignment**"), is hereby authorized and approved, and following completion of the Security Assignment, the Petitioners are authorized, empowered and directed to execute and deliver such amending agreements or other documents as may be reasonably required by the New Lenders (collectively the "**Amending Agreements**") to provide that the CMLS Security secures all indebtedness and obligations of the Petitioners to the New Lenders.

8. The CMLS Security, as amended by the Amending Agreements, shall constitute a mortgage, security interest, assignment by way of security and charge on the "**Property**" (as defined in the ARIO) and such charge shall rank in priority to all other security interests, trust, liens, mortgages, charges and encumbrances and claims of secured creditors, statutory or otherwise, other than the Administration Charge (as defined in the ARIO) and those claims contemplated by Section 11.8(8) of the CCAA.

9. Upon receipt of funding from the New Loan Facility, repayment in full of the Interim Lending Facility and completion of the purchase and assignment of

the CMLS Facility and the Security Assignment, the Petitioners are hereby authorized and directed to pay $200,000 to Landa Global Acquisitions Ltd. ("**Landa**"), representing the Break Fee payable pursuant to the Purchase and Sale Agreement dated March 25, 2021, among the Petitioners and Landa.

Amendments to Initial Order

10. Notwithstanding any other provision of the ARIO, including without limitation the stay of proceedings ordered pursuant to paragraphs 16 and 17 thereof:

(a) upon the occurrence of a default under the Domain Commitment Letter, any of the New Definitive Documents, or the CMLS Security (as amended), Domain, upon five business days' notice to the Petitioners and the Monitor, may exercise any and all of its rights and remedies against the Petitioners or the Property under or pursuant to the Domain Commitment Letter, the New Definitive Documents and the CMLS Security (as amended), including without limitation, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioners and for the appointment of a trustee in bankruptcy of the Petitioners; and

(b) the foregoing rights and remedies of Domain shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioners or the Property.

11. Domain, in its capacity as lender pursuant to the Domain Commitment Letter, shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioners under the *Companies' Creditors Arrangement Act* (the "**CCAA**"), or any proposal filed by the Petitioners under the *Bankruptcy and Insolvency Act* of Canada, with respect to any advances made under the Domain Commitment Letter.

12. No order shall be made, including pursuant to section 11.2 of the CCAA, granting any security or charge priority over the CMLS Security (as amended) without the consent of Domain.

13. Upon receipt of funding from the New Loan Facility, repayment in full of the Interim Lending Facility and completion of the purchase and assignment of the CMLS Facility and the Security Assignment, the ARIO shall be amended by deleting paragraphs 24(a) and (b), and paragraphs 29 to 33 thereof, and by deleting all other references to the "Enhanced Monitor Powers" in the ARIO.

14. Upon receipt of funding from the New Loan Facility, repayment in full of the Interim Lending Facility and completion of the purchase and assignment of the CMLS Facility and the Security Assignment, payment of the outstanding amounts owing to the Monitor, counsel to the Monitor and counsel to the Petitioner, paragraphs 36 and 43 of the ARIO shall be amended as follows:

> 36. The Monitor, counsel to the Monitor, if any, and counsel to the Petitioners shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of <u>$100,000.00</u>, as security for their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order which are related to the Petitioners' restructuring. The Administration Charge shall have the priority set out in paragraph 45 hereof.
>
> 43. *[Intentionally Deleted]*

15. While the New Loan Facility remains outstanding, no further step shall be taken by the Petitioners in these proceedings without the consent of Domain.

Extension of Stay

16. The stay of proceedings provided for in the ARIO is hereby continued and extended to and including April 30, 2022.

17. The Petitioners are hereby authorized, empowered and directed to obtain and borrow under a credit facility from NumberCo in order to finance repayment of the CMLS Facility and working capital requirements following funding of the New Loan Facility and completion of the Security Assignment, provided that principal amount borrowed under such credit facility shall not exceed $750,000 (the "**Working Capital Facility**") unless permitted by further Order of this Court.

18. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Petitioners and NumberCo attached as Exhibit "A" to the Affidavit #4 of Macario Reyes (the "**NumberCo Commitment Letter**").

19. The Petitioners are hereby authorized, empowered and directed to execute and deliver such credit agreements and other definitive documents (collectively, the "**WC Definitive Documents**"), as are contemplated by the NumberCo Commitment Letter or as may be reasonably required by NumberCo pursuant to the terms thereof, and the Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to NumberCo under and pursuant to the NumberCo Commitment Letter and the WC Definitive Documents as and when the same become due and are to be performed.

APPROVED AS TO FORM:

Signature of Jordan Schultz
Counsel for 1296371 B.C. Ltd.

BY THE COURT: Newbury J.

Deputy Registrar

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Signature of Kibben Jackson
Counsel for Centura Building
Systems (2013) Ltd. and
Solterra Acquisitions Corp.

Signature of David Gruber
Counsel for Port Capital Development
(EV) Inc. and Evergreen House
Development Limited Partnership

Signature of Peter Bychawski
Counsel for Ernst & Young Inc.
(in its capacity at the Monitor)

Signature of Colin D. Brousson
Counsel for CMLS Financial Ltd. and
Desjardins Financial Security Life
Assurance Company

Signature of William Roberts
Counsel for Aviva Insurance
Company of Canada

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Signature of Colin D. Brousson
Counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company

Signature of William Roberts
Counsel for Aviva Insurance Company of Canada

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)

ORDER

DENTONS CANADA LLP
BARRISTERS & SOLICITORS
250 Howe Street, 20th Floor
Vancouver, BC V6C 3R8
Phone No.: (604) 691-6452
Attention: Jordan Schultz

File 568308-333

Appendix F

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October 5, 2021
File No.: 326726.00001/15053

BC Court of Appeal
The Law Courts
400 - 800 Hornby Street
Vancouver, BC V6Z 2C5

Attention: Registrar Outerbridge

Dear Registrar Outerbridge:

Re: ***In the Matter of Port Capital Development (EV) Inc. v 1296371 B.C. Ltd. Inc. and Centura Building Systems (2003) Ltd*., BCCA No. CA47585**

We are counsel for Centura Building Systems (2013) Ltd. ("**Centura**") and Solterra Acquisitions Corp. ("**Solterra**"), the respondents in the above-captioned appeal.

We request that this letter be brought to the attention of the division that heard the appeal in this matter on September 21, 2021.

The respondents write to request directions from the division as to whether it would be prepared to issue an interim stay from now until two weeks following the issuance of reasons for judgment to allow the respondents time to consider and, if thought appropriate, prepare an application for leave to appeal to the Supreme Court of Canada and a stay of this Court's order pending the determination of the application for leave to appeal, or, alternatively, whether this Court or a single justice sitting in chambers should hear such an application for an interim stay, despite the absence of reasons.

On September 22, 2021, this Court allowed the appeal (the "**Order**"), subject to certain terms, including granting the order sought by 129 approving the 129 Refinancing on the same terms as before the chambers judge, with some exceptions. The Court indicated that it would provide reasons, but they were "unlikely to be issued prior to September 30, 2021."

The respondents are considering bringing an application for leave to appeal to the Supreme Court of Canada and a stay of this Court's Order pending leave to appeal to that Court pursuant to section 65.1 of the *Supreme Court Act* and section 18 of the *Court of Appeal Act*.

The test for leave to appeal under the *Supreme Court Act* requires an applicant to demonstrate that the issues raised are of public or national importance. In an application for a stay pending leave to appeal to the Supreme Court of Canada, the applicant must show "an arguable issue of public importance, an important issue of law or mixed law and fact, or that the matter is otherwise of such a nature and significance as to warrant decision by the Supreme Court of Canada as required to leave to appeal to that Court".

The Court of Appeal's reasons for judgment are central to this test.

This case presents some unusual circumstances. In most cases, an applicant would have reasons for judgment on which to base their application for leave to appeal and the stay application pending leave to appeal, which could be brought on an expedited basis if necessary.

In this case, reasons are pending. At the same time, 129's Refinancing Proposal has a funding date between October 22, 2021 and October 29, 2021: see the Reyes Affidavit #6, Exhibit B. There is also no certainty that the Refinancing Proposal will not close prior to October 22, 2021.

If the transaction closes and Domain funds the transaction, the appeal will be moot as the transaction could not be unwound, and Solterra could not obtain the property under its asset purchase agreement.

Accordingly, there is a continually diminishing window of time in which the respondents may bring an application for leave to appeal and a stay application with the benefit of reasons for judgment.

In the meantime, before reasons are issued, the respondents are prepared to bring an application, either to this Court or to a single justice under sections 10(2)(b) and 18 of the *Court of Appeal Act* for an interim stay of the Order pending the release of reasons for judgment of this Court, plus at least two weeks to consider the reasons and, if deemed appropriate, prepare applications for leave to appeal and for a stay pending leave to appeal, and have the latter motion heard on an expedited basis.

The respondents are mindful that whether the division or a single justice hears the matter pending the issuance of reasons for judgment, the consideration of whether the application has merit will likely be considered without reasons and, when reasons are issued, the test for merit will be considered a second time.

As this Court is still preparing reasons, the respondents request this Court's advice as to whether it is prepared to grant an interim stay as requested. Alternatively, if the Court is not prepared to grant an interim stay, the respondents seek directions as to whether the division or a single justice should hear the respondents' application for an interim stay.

If this Court wishes to hear from counsel on this issue, we can make ourselves available to the Court on short notice.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

DocuSigned by:
Kibben Jackson
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Kibben Jackson
Personal Law Corporation

KJ/hl

cc: Service List

Appendix G

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.,* 2021 BCCA 382

Date: 20211008
Docket: CA47585

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) 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)

Corrected Judgment: The cover page of the judgment was corrected on October 18, 2021.

Before:	The Honourable Madam Justice Newbury The Honourable Mr. Justice Willcock The Honourable Mr. Justice Goepel The Honourable Madam Justice Dickson The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated June 30, 2021 (*Port Capital Development (EV) Inc. (Re)*, 2021 BCSC 1272, Vancouver Docket S205095).

Counsel for the Appellant (via videoconference):	J.D. Schultz E. Watson
Counsel for the Respondents (Petitioners), Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (via videoconference):	D.E. Gruber
Counsel for the Respondents, Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp. (via videoconference):	K.M. Jackson T.A. Posyniak
Counsel for Aviva Insurance Company of Canada (via videoconference):	W.L. Roberts
Counsel for CMLS Financial Ltd. and Desjardins Financial Security Life Assurance Company (via videoconference):	C.D. Brousson A.L. McCawley
Counsel for Ernst & Young Inc. in its capacity as Monitor (via videoconference):	P. Bychawski
Place and Date of Hearing:	Vancouver, British Columbia September 21, 2021
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, British Columbia September 22, 2021
Place and Date of Written Reasons:	Vancouver, British Columbia October 8, 2021

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Goepel
The Honourable Madam Justice Dickson
The Honourable Mr. Justice Voith

Summary:

Petitioners were constructing a high-rise tower in Vancouver until construction lender ("CMLS") ceased funding. CMLS and "Aviva" have first and second mortgages registered against the project respectively. Various lienholders and unsecured creditors, including respondent "Centura," are also owed money. Petitioners commenced proceeding under CCAA and Supreme Court granted stay of proceedings and appointed monitor, which solicited offers for purchase of Petitioners' assets or other 'investments' of funds.

Court below ultimately had two asset purchase or "liquidation" offers and a proposal made by appellant ("129") from which to choose. Under the latter, 129 would borrow funds and use pre-sale deposits sufficient to pay out interim loan and administrative charge (which had been given "super-priority" by chambers judge), and both secured creditors; CMLS mortgage would be assigned to new lender and its terms would be amended; and various other expenses would be met by 129 and other investors. As against this, the more desirable liquidation offer, made by 'Solterra', would allow Petitioners to pay out most of the CMLS mortgage but likely leave Aviva with a loss of $8.6 million; half the pre-sale purchasers would lose their rights to purchase; and lienholders would lose their rights of registration against the project.

Chambers judge rejected arguments that 129's offer was effectively a "redemption" or that the arrangement to pay out and assign the CMLS mortgage constituted "interim financing" under s. 11.2 of CCAA. Although she stated 129's proposal made sense "from a business point of view", she was critical of it on other bases including that 'crucially', there was no suggestion the Petitioners or 129 intended to advance a plan of arrangement or compromise under s. 11 of the CCAA. Applying Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.(2008 BCCA), she ruled that 129's proposal did not meet the 'appropriateness' criterion and declined to exercise her discretion to grant an order approving the proposal. She granted Solterra's "Backup Offer" to purchase Petitioners' assets under s. 36.

Appeal brought by 129 was heard by a division of five justices in order to consider whether 'Maple Bay' should continue to be binding. New evidence was admitted by CA, generally "updating" developments concerning 129's proposal. It was in the interests of justice for the court to have information that was as accurate as possible. This evidence generally reflected improved prospects of success of the 129 proposal.

129 contended that chambers judge had erred in focussing in her appropriateness analysis on the "single factor" of the absence of an intended compromise rather than on the "primary remedial objective" of the CCAA. 129 contended that that objective is to assist debtor companies to avoid the "social and economic losses resulting from liquidation of an insolvent company" (citing Century Services.) It also contended that Maple Bay is no longer good law and had been overtaken by the broadened objectives of the Act and amendments thereto. Centura and Solterra contended that it was "antithetical" to the CCAA regime and binding authorities to facilitate a proposal that contained no provision for a compromise or arrangement to be voted on by debtors' creditors. They also emphasized the chambers judge's description of the proposal as "speculative".

CA traced recent developments under the CCAA, under which courts have found they had jurisdiction to appoint monitors, to approve interim financing with "super-priority" and to approve liquidation sales of assets of debtor companies (prior to the enactment of what is now s. 36) without any express provision granting jurisdiction to do so. Section 11 is now very broadly worded and the SCC seems to have approved a broad and liberal interpretation of the statute and various "innovations" by counsel in devising restructuring plans aimed at avoiding the travails of bankruptcy.

CA ruled that Maple Bay should not have been regarded as dispositive as a matter of law (if indeed it was so regarded by the chambers judge); and that the absence of a planned compromise should not have weighed as a "crucial" factor in the judge's discretionary analysis of appropriateness under s. 11. While the absence of a planned compromise might be relevant in some cases, in this case there was a substantive and complex plan that was likely to further the broad objectives of the Act as now understood. On these bases alone, the appeal should be allowed.

Other errors in the chambers judge's reasoning were noted which in principle had led the judge erroneously to prefer the Solterra offer. 129's plan presented the best solution as compared to the liquidation offers and was much more than the "kernel" of a plan.

Appeal allowed; chambers judge's orders set aside and the order sought by 129 was approved, subject to terms.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] Shortly after hearing this appeal, we advised counsel by memorandum that the appeal was allowed, for reasons to follow. We did so because of the fast-moving nature of the circumstances and a looming deadline in the proposal made by 1296371 B.C. Ltd. ("129") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*" or the *"Act")*, which proposal we ultimately approved. Our reasons follow.

[2] 129 appeals an order of a judge of the Supreme Court of British Columbia who dismissed 129's application for court approval of certain steps and transactions relating to the debt structure of Port Development (EV) Inc. and Evergreen House Development Limited Partnership (collectively, the "Petitioners"). Having rejected that proposal, the judge approved an offer from the respondent Solterra Acquisitions Corp. ("Solterra") to purchase the assets of the Petitioners on the terms set forth in Schedule B to the "Approval and Vesting Order" granted on June 15, 2021. A division of this court granted 129 leave to appeal the orders (see 2021 BCCA 319.) The division also ordered that the appeal be heard by a division of five judges given that the appellant intended to ask this court to reconsider and, if necessary, overrule *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. 2008 BCCA 327 ("*Maple Bay"*.)

Factual Background

[3] The Petitioners are the owners of a real estate project, "Terrace House", in downtown Vancouver. The Project is a proposed 19-storey luxury residential and commercial strata development. It provides for 20 residential units and two commercial retail units above a three-level underground parking facility. Terrace House is unusual in that its primary structural component is timber.

[4] In September 2017, presales of the units began. In late 2018, construction began. The construction lender is CMLS Financial Ltd. ("CMLS"), which holds a first mortgage against the Project. Aviva Insurance Company of Canada ("Aviva") provided deposit insurance for the presale depositors in order to allow the Petitioners to use the deposit funds for the Project. It holds a second mortgage to secure any claims under the insurance.

[5] As of mid-2020, the parkade and structure for the first level of the building were substantially complete, and approximately 20% of the Project was finished. At that time, approximately $16 million in presale deposits was in place for 17 residential units and the commercial units. Approximately $8 million of the deposit funds had been spent on the Project.

[6] In May 2020, CMLS stopped funding construction and demanded payment of its loan. In short order, the Petitioners commenced proceedings under the *CCAA*. In their pleading, they sought relief of the kind usually sought under the

Act, including an order authorizing them to file with the Court a "plan or plans of compromise and arrangement." They filed affidavit evidence of Mr. Macario Reyes, a director and officer of the corporate Petitioner, who was hopeful a restructuring could be achieved either by means of an equity investment or a liquidation of assets. (Reasons, at para. 11.) At the time, the Petitioners owed approximately $34.8 million in secured debt and another $8 million in unsecured and liened debt.

[7] The chambers judge below made an initial order on May 29, 2020, staying proceedings against the Petitioners and appointing Messrs. Ernst and Young Inc. as monitor to assume control of the Petitioners and the Project. The Monitor was given "enhanced powers" over the Petitioners and was to carry out a "dual track" process (referred to as a "sales and investment solicitation plan" or "SISP") aimed at finding offers for either a sale of the property or an equity investment in the Project as a going concern. The latter could, the order stated, take the form of proposals to restructure, reorganize or refinance the business of the Petitioners.

[8] The initial order was restated by an order of the chambers judge dated June 8, 2020. It authorized interim financing of $1.25 million (later increased to $1.8 million) from Desjardins Financial Security Life Assurance Company ("Desjardins") under s. 11.2(1) of the *CCAA*. Under the order, this loan was to rank after an administration charge (covering *inter alia* the Monitor's fees) of up to $250,000; both were given priority over all existing charges.

[9] The Monitor's efforts produced a number of offers which the chambers judge below described in her reasons beginning at para. 15. By the time of the hearing before her on June 10, 2021, three active asset purchase or "liquidation" offers under s. 36 of the *CCAA* were outstanding — one from Landa Global Acquisitions Inc. ("Landa") referred to as "Offer #3", and two from Solterra, namely "Solterra Offer #1" and the "Solterra Backup Offer." (Solterra is a related company to a lienholder, Centura Building Systems (2013) Ltd. ("Centura"), which is owed some $473,000 by the Petitioners.)

[10] Of the three liquidation proposals, Solterra's Backup Offer featured the highest purchase price. The purchase proceeds would pay the interim loan and administration charges in full; the balance would be paid to CMLS, leaving it with a shortfall of about $576,000. There would be no money remaining for Aviva or the other creditors.

[11] As I read the proposed contract of sale, Solterra would acquire the Project *free and clear* of all financial encumbrances, including all liens filed against the Project under PPSA and builders' lien legislation. The *liability* of the Petitioners thereunder would not be affected, but the liens would no longer be registered against the Project.

[12] In addition to the three liquidation offers, the chambers judge also had before her the so-called "Refinancing Transaction" proposal from 129, which will be described below. It was supported by affidavit evidence of Mr. Reyes, who is the controlling shareholder of 129 as well as of the corporate Petitioner. He has provided personal guarantees of the indebtedness of the Petitioners to CMLS and to Aviva.

[13] Mr. Reyes deposed that the 129 proposal was a "refinancing", intended to provide "breathing room" to secure new construction financing for Terrace House. He hoped this would "provide the opportunity to shift the focus to a long-term restructuring." He said there was "strong interest from lenders to provide new construction financing" but that it could not be secured until the new refinancing was in place and control of the Project was back in the hands of the Petitioners. He continued:

> In the interim, working capital will be funded by existing limited partners and new third-party investors. This working capital is expected to be in the range of $3 million to $5 million, which will be sourced externally and will not encumber the Lands or other assets.
>
> The most advanced negotiation on a new [construction] loan is with [name omitted]. The parties are close to finalizing a term sheet, however I do not expect negotiations can progress further until the Petitioners have regained control of the Terrace House Project. I estimate, with control of the project and the breathing room provided by the [new refinancing], it will take 30 to 60 days to finalize a term sheet with [name omitted] or another lender.

From this I infer that the proposal is likely to be the first part of a two-part restructuring of the Petitioners' debt, and that the new loan from Domain was regarded in a sense as "interim" as well. Mr. Reyes went on to depose:

> The Terrace House Project is an innovative mass timber development. When completed, the Terrace House Project will become one of the tallest hybrid timber structure[s] in the world, constructed from concrete, wood and steel. The existing trades and consultants are specialists in mass timber construction and are essential to moving the Terrace House Project forward. The project has many stakeholders who will benefit from the completion of the Terrace House Project as designed. The Terrace House

Project will contribute to the development of the mass timber industry. The City of Vancouver is invested in seeing the Terrace House Project completed, as are investors and other supporters of the project.

[14] 129's proposal was, initially at least, subject to many conditions, including the raising of funds from "private investors". The Monitor reported to the Court that *if 129's proposal completed*, it would result in a materially better outcome for the stakeholders than either the Solterra or Landa offers.

[15] At the hearing below, Aviva consented to the proposal for obvious reasons: it would allow Aviva to recoup its $8 million, or most of it — as compared to the asset liquidation offers, under which it would likely recover nothing. The proposal was also supported by CMLS, but conditionally on the Court's approving one of the "cash" or liquidation offers "as a backup in case the 129 [Refinancing] did not complete." The Petitioners and the Monitor took no position on the 129 application; Centura opposed it.

The Chambers Judge's Reasons

[16] The judge issued her reasons on June 30, 2021. After describing the court proceedings to that date, she summarized "in broad strokes" the financial consequences of the liquidation offers *as of June 8, 2021 vis-à-vis* the two secured creditors, as compared to the consequences of 129's proposal. In her words:

> a) Under the Solterra and Landa cash offers, the Interim Lending Facility and priority professional fees would be paid. In addition, CMLS would suffer a shortfall to varying degrees: Solterra Offer #1 — $3.2 million shortfall; Landa Offer #3 — $1.7 million shortfall; and Solterra Backup Offer — a shortfall in excess of $500,000;
>
> b) Under any of the cash offers, the Petitioners would disclaim the $16 million of pre-sale agreements. Aviva would immediately crystalize its exposure (estimated at $8.6 million). Both CMLS and Aviva hold security against the $8 million cash deposits. CMLS/Aviva would then potentially advance arguments that these pre-sale purchasers had forfeited the right to a return of those cash deposits such that CMLS/Aviva could claim those amounts toward satisfaction of their loans; and
>
> c) Under the 129 Revised Offer, the material benefits, as noted by the Monitor were: 1) the Interim Lending Facility and CMLS would be paid in full; 2) Aviva's security position would be "improved" with the prospect of full or material recovery; and 3) the parties would avoid litigation with respect to the $8 million in pre-sale cash deposits by converting them into a secured position against the Project. [At para. 42; emphasis added.]

[17] As she explained at para. 51, 129 invoked s. 11 of the *CCAA* as the basis of the Court's authority to approve its refinancing proposal. Section 11 provides:

> 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, <u>make any order that it considers appropriate in the circumstances</u>. [Emphasis added.]

The very wide discretion conferred by s. 11 (which came into force in its present form in 2009) has been noted by courts on many occasions. In *Century Services Inc. v. Canada (Attorney General)* 2010 SCC 60 at para. 70, the Court stated that the general language of s. 11 "should not be read as being restricted by the availability of more specific orders." More recently, the Supreme Court in *9354-9186 Quebec Inc. v. Callidus Corp*. 2020 SCC 10 observed that s. 11 signals Parliament's endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence." (At para. 67.) The Court added, however, that the discretion is not unlimited, that it must be exercised "in furtherance of the remedial objectives of the *CCAA*" and that it is subject to the "baseline considerations" of appropriateness, good faith and due diligence. (At para. 49.)

[18] After emphasizing that 129's offer was not put forward by the Petitioners but by 129 — a new company formed by Mr. Reyes specifically for the proposed transaction — the judge described its terms as follows:

> The salient details of the 129 Revised Offer are as follows:
>
> a) $<u>24.96 million would be raised</u>, as follows:
>
> i. $<u>14.7 million from Domain </u>[Domain Mortgage Company];
>
> ii. $8 million in pre-sale deposits (including a $2.8 million deposit held for Ms. Reyes) to be released and advanced to 129;
>
> iii. $2.15 million to be loaned from 126 [1260780 B.C. Ltd., a company controlled by Mr. Reyes' mother] to 129;
>
> iv. 129, as the Junior Lender, then loans these amounts to "Newco", a company to be incorporated by Domain to hold the CMLS security;
>
> v. Pre-payments to Domain ($105,000),
>
> b) $24.96 million would be used, as follows:
>
> i. Payment in full of the Interim Lending Facility ($1.3 million) and CCAA secured professional fees ($507,000) [i.e., the Administration Charge];

ii. Purchase and assignment of the CMLS loan and security ($21.3 million) to Newco, thus saving Mr. Reyes from his covenant;

iii. Fees and various holdbacks ($1.5 million), including a six-month interest reserve for Domain ($851,250); and

iv. Payment of Break Fee/Expense Reimbursement to Landa and Solterra (total $250,000).

It is quite apparent that the 129 Offer has evolved substantially since May 7, 2021 until its current iteration on June 4, 2021 under the 129 Revised Offer (including by an increased consideration amount). The Monitor confirms that most of the conditions relating to the 129 Revised Offer have now been satisfied, save for customary funding conditions. That was not the case as of May 25, 2021 and, indeed, some conditions were only satisfied on the eve of this hearing.

There are some unique features under the 129 Revised Offer relevant to the existing stakeholder interests:

a) The $16 million in pre-sale contracts are to remain intact (unlike the Landa and Solterra Offers);

b) Subordinate security interests after Domain in first ranking position are: second, 129 as the Junior Lender to hold security in respect of the pre-sale deposits in a sharing arrangement with Aviva; third, Aviva for any balance owed; fourth, 126 for the $2.15 million loan; and fifth, 129 for the balance owed to it. Effectively, this allows Aviva to maintain some hope of recovery under its secured loan as opposed to an immediate exposure of $8.6 million (subject to any recovery against the $8 million cash deposits held) under the Landa/Solterra Offers. Mr. Reyes benefits from this potential reduction or elimination of his personal exposure to Aviva; Ms. Reyes avoids litigation with Aviva over her pre-sale deposit;

c) The proposed structure will not leave the Petitioners with any excess cash. Accordingly, 129 proposes to have 126 advance a further unsecured convertible loan to the Petitioners of up to $750,000 as "working capital", to be converted into some new equity structure of the Petitioners. The Monitor has prepared a cash flow forecast for the next six months to December 2021 indicating funding requirements of approximately $600,000; and

d) Mr. Reyes says that this later conversion of 126's working capital loan will "likely" require the creation of new limited partner units that would have preferential rights over the existing limited partners.

The crux of the issues relating to the 129 Revised Offer lies in the *CCAA* relief that Mr. Reyes and 129 say they must obtain from the Court. They seek the following Court approval and orders, said to be necessary to implement the 129 Revised Offer:

a) an extension of the stay of proceedings to December 11, 2021;

b) Authorization to release the pre-sale deposits to 129 to allow 129 to pay $8 million to CMLS for the purchase and assignment of the CMLS security, to stand as an advance by 129 to the Petitioners secured by the CMLS security. All of these pre-sale purchasers consent to the release of the deposits;

c) Authorization to borrow up to $750,000 from 126 for the "working capital" loan and approval of the terms of the commitment letter. Contrary to Mr. Reyes' statement that this would "likely" require a restructuring of the partnership interests, the Court is being asked to bless the commitment letter to seemingly grant 126 the "right, in its sole discretion" to convert the debt into limited partnership units that will be preferential to all classes of existing units in the limited partnership;

d) The "Refinancing Transaction" involves granting Court approval to the Petitioners to borrow money from Domain to fund the Interim Lending Facility and repay CMLS in full and take an assignment of the CMLS security, up to $25 million. This "Refinancing" or "New Loan Facility" is to be documented in the usual fashion, with the significant proviso that the Petitioners are authorized to agree to amendments so as to provide that the CMLS security would secure all obligations of the Petitioners to both Domain, 126 and 129 (i.e. about $25 million) and stand as a first secured charge on the Project.

> In addition, the proposed order sought by Mr. Reyes and 129 would provide significant controls in this *CCAA* proceeding to Domain. Domain may act on its secured loan upon default and without Court approval or oversight; Domain is to be unaffected by any plan of arrangement or proposal; no order can be granted approving interim financing in priority to the New Loan Facility (essentially, the CMLS security, as amended); the Monitor's enhanced powers are removed; and:
>
> 15. While the New Loan Facility remains outstanding, no further step shall be taken by the Petitioners in these proceedings without the consent of Domain.
>
> [At paras. 45–49; emphasis added.]

(I note parenthetically that the commitment letters relating to Domain's proposed loan contemplate that it will also be fully guaranteed personally by Mr. Reyes.)

[19] The chambers judge noted that, as mentioned above, the Monitor had reported that *if 129's offer completed*, it would "result in a 'materially better' outcome for the stakeholders" than the Solterra and Landa Offers, "when weighing all the factors and continued financial participation by stakeholders." In particular, the Monitor's Confidential Seventh Report, dated June 8, 2021, stated:

> In particular, the Revised 129 Offer:
>
> a) proposes to pay-out the DIP Lender and CMLS in full;
>
> b) improves the security value of the Aviva charge and provides Aviva with the prospect of a full or material recovery; whereas all other

offers will result in no, or minimal, recovery to Aviva leaving it with collateral remedies against the Uninsured Presale Deposits and guarantors; and

c) avoids likely litigation with respect to the Uninsured Presale Deposits by converting those deposits into a secured position against Terrace House Project.

As the judge stated at para. 109, however, the Monitor did not express any "specific recommendation" to the court below as to which of the offers before the Court should be approved, "choosing to remain agnostic" as among them.

A Redemption?

[20] The judge rejected the argument that 129's offer was effectively a "redemption" of the CMLS mortgage. (At paras. 56–7.) I note parenthetically that she may have been under the impression (which was not unreasonable given the unclear wording of the proposal) that neither the Petitioners nor Aviva was to pay out the mortgage. We are advised by counsel, however, that it was and is intended that 129 would make funds (to be advanced by the new lender) available *to the Petitioners*, who would in turn pay out CMLS in full. The mortgage would then be assigned to Domain, 129 and 126.

[21] The judge noted *Classic Mortgage Corporation v. 0768723 B.C. Ltd*. 2017 BCSC 1100, a decision of Master Wilson affirmed at 2017 BCSC 1225. In both sets of reasons, the Court cited *Great West Life Assurance Co. v. Rix* (1984) 59 B.C.L.R. 75. There the Court equated 'redemption' with the 'payout' of a mortgage, noting that "'Redemption' and 'assignment' are alternatives." (At para. 26.) Weatherill J. at 2017 BCSC 1225 endorsed the view that a mortgagor who has granted first and second mortgages is entitled to redeem (i.e., pay out) the first, but is not entitled to require an assignment because the equity of redemption has been conveyed by way of a second mortgage. (See paras. 39–44.) In the case at bar, although Aviva was consenting to the payout of the CMLS mortgage, Domain was not only to take an assignment of the first mortgage, but was requiring *inter alia* that the face amount of the mortgage be increased to $25 million and the interest rate be raised. (At paras. 49, 57 and 63.) In the chambers judge's opinion, this took the transaction "well beyond a redemption."

Interim Financing?

[22] This fact was also relevant to the chambers judge's finding that the proposed restructuring would not constitute "interim financing" within the meaning of s. 11.2 of the *CCAA.* It provides in subsection 1:

> 11.2 (1) <u>On application by a debtor company</u> and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge --- in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made. [Emphasis added].

The judge observed:

> 129 (in place of the Petitioners) seeks to authorize the Petitioners to not just refinance the existing debt with the existing priorities, <u>but increase that secured debt against the Project. The net effect of the "refinancing" is to convert the debt under the Interim Lending Facility and the professional fees into the CMLS secured charge and also add millions of dollars of secured debt on the Project (to be accommodated within the increased limit of $25 million).</u>
>
> The New Loan Facility also significantly alters the commercial terms of the CMLS debt and security, including by substantially increasing the interest rate on the secured loan. 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. 25, ss. 1 (definitions of "charge" and "encumbrance") and 206(2). [At paras. 63–4; emphasis added.]

[23] The judge found it unnecessary to decide whether 129's proposal could be said to "compromise" the rights of creditors, thus going "beyond a 'refinancing'". Even if it did constitute a "refinancing" for purposes of s. 11.2, it was 129 rather than the Petitioners who had sought the approval of the Court. (Under s. 11.2(1), it is *the debtor company* that must seek the court's approval.) The judge also found that neither 129 nor the Petitioners had made any effort to "specifically address and provide a proper evidentiary foundation" for the Court to consider the four factors set out in s. 11.2(4); nor had it been shown to her satisfaction that all secured creditors had been given "proper notice" of the proposal in accordance with s. 11.2. She continued:

> ... Without notice and the opportunity to make submissions, <u>it is difficult to properly assess whether any creditor would be materially prejudiced in consideration of s. 11.2(4)(f). Centura alleges "material" prejudice, noting that despite being presently "out of the money" under its lien, the lien claimants may have a preference that a new developer acquire the Project</u>.

> Centura argues that, in some instances, suppliers can have leverage aside from their lien claims, including because they are required to sign off on completion for engineering reports and permits, or because their work is sufficiently advanced that hiring a replacement is economically impractical. [At para. 71; emphasis added.]

(As will be seen below, it appears the judge was unaware that all creditors had in fact been notified of 129's application, in accordance with a "Service List" used by counsel throughout this proceeding.)

[24] Finally under the rubric of "interim financing", the chambers judge noted 129's submission that the fact the interests of other creditors were being 'disregarded' did not make its proposal inappropriate, given that the lienholders and unsecured creditors (referred to collectively in the documents as the "Other Creditors") were already "out of the money". (They would also be in that unfortunate position under the asset purchase offers of Solterra and Landa.) The judge expressed her strong disapproval of this submission:

> ... I agree with 129's counsel's assessment of the likely current monetary value of the other creditor's interests. However, in my view, <u>that is a very unprincipled basis upon which to argue that this "refinancing" is an "appropriate" outcome in the balancing exercise with regard to all stakeholders</u>. [At para. 73; emphasis added.]

A Sale?

[25] The judge also rejected the proposition that 129's revised offer was a "sale" akin to what Landa and Solterra had proposed. She reasoned that there would have been nothing objectionable if Mr. Reyes had used 129 as a corporate vehicle to *purchase* the Project assets outright or under a reverse vesting order structure. In doing so, she said, 129 could have implemented the new Domain financing, either by refinancing the CMLS security or simply paying it out and placing new security on title. However, Mr. Reyes had not advanced the 129 offer as a "sale" of the Project, but instead sought a "suite of relief" under the *CCAA*, including court approval of an increase of the secured debt against the Project which would rank in priority over the claims of Other Creditors. It was, she again noted, also seeking to alter the commercial terms of the CMLS debt and security and to extend the stay — all without any indication that 129 intended to advance a plan of arrangement or compromise on which the Petitioners' creditors could vote. (At para. 77.)

Appropriateness

[26] Having set forth what the 129 offer was *not*, the chambers judge turned at para. 78 of her reasons to the crux of the application before her — the question of whether the offer was "appropriate" in the circumstances. In essence, she said, 129's plan was to:

> … use the proposed six-month stay extension to secure construction financing with the intention then of exiting these *CCAA* proceedings and completing the Project. This makes sense from a business point of view — that way, Mr. Reyes satisfies his obligations to Aviva by allowing the pre-sale purchasers to obtain their units by crediting their deposits, thus avoiding a call on Aviva's deposit insurance. [At para. 80; emphasis added.]

[27] Centura objected that 129 was seeking to implement this "restructuring" without putting forward a plan of arrangement or compromise on which creditors could vote. In this sense, it submitted, the case was similar to *Maple Bay*. The chambers judge agreed.

[28] Like the Petitioners in this case, the debtor company in *Maple Bay* was the developer of one large project. It had run into difficulties concerning a source of water for irrigation of the golf course that was included in the project. A receiver had been appointed by the mortgage lenders and the company was said to be "dormant" — i.e., it was no longer a going concern. *CCAA* proceedings were then initiated and a judge of the Supreme Court granted a stay and appointed a monitor. The monitor recommended that the Court authorize interim financing to enable it to pursue a water source, and requested additional powers so that it could pursue a source of water and receive any offers for the purchase of all or part of the development. The monitor suggested that once a water source was obtained, it would make further recommendations with respect to the completion of the project. The Court approved the interim financing and granted expanded powers to the monitor.

[29] On appeal, the creditors argued that the *CCAA* should not apply to companies "whose sole business is a single land development or to companies whose business is essentially dormant". This court rejected that argument, noting that the nature and state of the business of a debtor company are simply factors to be taken into account when considering whether a stay should be granted or continued under (then) s. 11(6). (At para. 25.) However, the Court, *per* Mr. Justice

Tysoe, found that there was “another, more fundamental factor” that the chambers judge had failed to consider — the principle that a stay “should only be granted in furtherance of the *CCAA*’s fundamental purpose.” (At para. 26.) Tysoe J.A. reasoned that (then) s. 11 is “not a free-standing remedy that the court may grant whenever an insolvent company wishes to undertake a ‘restructuring’, a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing.” In his analysis:

> <u>The fundamental purpose of the *CCAA* is expressed in the long title of the statute:</u>
>
> > <u>“An Act to facilitate compromises and arrangements between companies and their creditors”.</u>
>
> ...
>
> Sections 4 and 5 of the *CCAA* provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.
>
> <u>The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Re Fairview Industries Ltd.* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). 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</u>. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, <u>a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing</u>. ... [At paras. 27, 30–31; emphasis added.]

[30] Ultimately, he ruled that in the absence of an intention on the part of the debtor company to propose an arrangement or compromise to its creditors “before embarking on its restructuring plan”, it was not appropriate to grant or extend a stay under s. 11. (At para. 35.) The failure of the court below to consider “the fundamental purpose of the *CCAA*” was also found to have ‘infected’ the exercise of discretion in authorizing interim financing. (At para. 37.)

[31] The chambers judge in the case at bar also noted *Re North American Tungsten Corporation Ltd.* 2015 BCSC 1376, in which the Court suggested that the debtor company must as a “prerequisite” show “that it has at least ‘a kernel of a plan’”. (At para. 26.) The Court cited the decision of Fitzpatrick J. in *Re Azure*

Dynamics Corporation 2012 BCSC 781. In that instance, an initial stay granted under the *Act* was about to expire but the petitioners were in the process of trying to find new or additional financing. They had held discussions with “various interested parties” concerning either refinancing, recapitalization or a sale. In these circumstances, the judge rejected the notion that there was not the “kernel of a plan” or, as she put it, “some sense of what the petitioners intend to do so as to give the court and, obviously, the stakeholders, some comfort that there is some utility in continuing further with these proceedings.” (At para. 13.)

[32] Like the judge in *Tungsten,* the judge in *Azure* made no mention of any requirement for a compromise or arrangement. Although she recognized that the costs of negotiations had to be paid by the debtor company, she observed:

> ... that prejudice is balanced against what is seen as being a reasonable prospect that there will be a successful restructuring which will ultimately benefit all parties (or conversely, that the restructuring is not doomed to fail). As such, the cost of these professionals and the cost to maintain and protect management during the restructuring are seen simply as a requirement to take advantage of that opportunity.
>
> ...
>
> ... A lifting of the stay, even as it relates only to JCI, would result in great prejudice to the Azure Group in terms of its ongoing efforts. There are indications that there is enterprise value in this Group; <u>that is part of the germ of the plan and that is the value which the Azure Group is trying to preserve. Any material change to the current situation would cause prejudice to those efforts, a matter that would accrue to all of the stakeholders in this case. ...</u>
>
> The ninth situation set out in *Canwest* [*Canwest Global Communications Corp. (Re)* (2009), 61 C.B.R. (5th) 200 (Ont. Sup Ct. J.)] is whether it is in the interests of justice to lift the stay. This is an overarching consideration and, frankly, subsumes the other factors that I have already discussed above in more detail. I do not think the parties will be surprised to hear that, in my view, <u>it is in the interests of justice that this restructuring be allowed to continue. I am satisfied that it is appropriate in this case and that the concerns of JCI cannot override the interests of all stakeholders</u> in allowing this restructuring to continue at least to some extent to see whether this germ of a plan can be brought to fruition. [At paras. 26–28; emphasis added.]

Having also found that the petitioner company was acting in good faith and with due diligence, she declined to lift the stay. (See also *Re Quest University Canada* 2020 BCSC 318 at paras. 108–9; *Callidus Capital Corp. v. CarCap Inc.* 2012 ONSC 163; *Re Hayes Forest Services Limited.* 2008 BCSC 1256.)

[33] Returning to the case at bar, the chambers judge took a very different view of the situation before her. Although she acknowledged that it was not necessary for a debtor to advance a "fully fleshed out" plan of arrangement in order to justify continuing a stay in *CCAA* proceedings, she agreed with Centura's submission that there was no suggestion — let alone "the kernel of a plan" — anywhere in Mr. Reyes' evidence to support the notion that 129, the Petitioners or any other party intended to "put forward a plan of arrangement *or compromise on which the Petitioners' creditors may vote*." In her analysis:

> ... All Mr. Reyes speaks of is securing the new construction financing and then restructuring the limited partnership interests.
>
> Specifically, there is <u>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</u>".
>
> Centura also points to other issues arising from the feasibility of completing the Project with the pre-sale purchase contracts intact. Centura notes that, <u>even if the "new construction financing" is obtainable, which is speculative at best, Mr. Reyes will also have to solve his liability problems with Aviva in that context. It is anyone's guess that the completion of the Project is still feasible</u> while also allowing for a full credit of over $16 million from the pre-sale deposits (which would reduce sale revenues). There is no evidence as to how that might be addressed. [At paras. 87–9; emphasis added.]

[34] The chambers judge was of the view that Mr. Reyes was "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 [presumably on personal guarantees] to CMLS and Aviva." She continued:

> ... He seemingly requires that this Court assist him in freezing the rights of the Petitioners' creditors while he seeks to do so. <u>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</u> against the Petitioners within the context of these *CCAA* proceedings.
>
> In other words, Mr. Reyes <u>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</u>. [At paras. 90–1; emphasis added.]

In the result, she concluded that the relief sought by 129 — including the stay and various refinancing steps set out in its draft orders — did not meet the ‘appropriateness’ criterion applicable under s. 11. She declined to exercise her discretion to grant the order approving 129’s proposed restructuring.

[35] Having rejected 129’s proposal, the chambers judge turned at para. 93 to the question of which of the three cash or liquidation offers should be accepted. In the end, she found that Solterra’s Backup Offer would garner “significant benefits” to the stakeholders:

> The time has come to end the process. I am satisfied that the Monitor has now explored all available options. Those options have been put before the stakeholders and now the Court. I am also satisfied that Solterra Backup Offer should now be approved as reasonable and indicative of the fair market value of the Project. <u>It is unfortunately a result that does not see any immediate recovery for Aviva, although neither did the 129 Revised Offer. In my view, Solterra Backup Offer represents the best outcome for the stakeholders in all the circumstances</u>. [At para. 111; emphasis added.]

The Court dismissed 129’s application by order dated June 15, 2021 and, by separate order, approved Solterra’s Backup Offer under s. 36 of the *Act*.

[36] As mentioned earlier, a division of this court granted 129 a stay of the chambers judge’s orders and leave to appeal, for reasons indexed as 2021 BCCA 319. The division also ordered that appeal be heard by five judges in order to allow the Court to consider whether *Maple Bay* should continue to be binding on British Columbia courts.

On Appeal

Grounds of Appeal

[37] In this court, 129 submits that the chambers judge erred “in fact and in law” in:

> (a) concluding the 129 Refinancing was not a redemption of the CMLS Mortgage, and in turn by failing to balance the equity of redemption in her appropriateness analysis under s. 11 of the CCAA;
>
> (b) determining that it was not appropriate to grant the 129 Application because there was no evidence of an intention to propose a plan of arrangement or compromise to creditors; and
>
> (c) approving the Solterra backup Offer in the face of the 129 Refinancing, which [refinancing] results in a materially better outcome for the stakeholders and is more consistent with the remedial purpose of the *CCAA.*

Standard of Review

[38] Having framed its grounds of appeal as questions of "law and fact", the appellant 129 notes in its factum that the standard of review on a question of law is correctness and that questions of mixed fact and law "lie on a spectrum" (citing *Housen v. Nikolaisen* 2002 SCC 33). Here, the parties below agreed (see para. 54) that the Court had the *"jurisdiction*" (usually a question of law) to grant the relief sought by 129, so that as the chambers judge noted, the real issue was whether it was "appropriate" to do so — a matter of discretion.

[39] As for discretionary decisions made by supervising judges under the *CCAA*, 129 acknowledges these are afforded a "high degree of deference" but that an appellate court should intervene if the supervising judge erred in principle or exercised his or her discretion unreasonably. It is perhaps sufficient to note the comments of the Supreme Court of Canada in *Callidus*:

> A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 Inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).
>
> This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*"), at para. 20, are apt:
>
>> . . . one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. [At paras. 53–4; emphasis added.]

[40] Reference may also be made to *Perrier v. Canada (Revenue Agency)* 2021 BCCA 269, where this court stated in a different context:

> Discretionary decisions may, of course, be overturned if a judge has materially misconstrued the law or made a palpable and overriding error in respect of the facts underlying the exercise of discretion. Discretionary decisions may also be overturned, however, where the judge has made no manifest error of law or fact, but has failed to apply the discretion in a principled and reasonable manner. In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27, the Court described the standard as follows:
>
>> [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77. [At para. 45.]

[41] It may be that the only true question of law on this appeal is whether the judge erred in concluding that the refinancing sought by 129 did not involve a "redemption" of the CMLS mortgage. As will be seen below, I find it unnecessary to deal with that ground of appeal. I do note, however, that whether a "redemption" is part of 129's proposal or not, it would be only a part. The nomenclature does not affect the result in this case.

New Evidence

[42] We have before us four motions to adduce new evidence on appeal. These attest to the "dynamic" nature of *CCAA* proceedings, even at the appellate level. The first motion was filed by the Monitor to adduce the evidence of a legal assistant, Ms. Petrakis. Exhibited to her affidavit was a letter from Mr. Bell of Ernst & Young to all counsel concerning difficulties faced by the Monitor in obtaining property insurance for the project. The existing insurance was set to expire on September 30, 2021. Mr. Bell advised that the insurance broker for the project had declined to extend the insurance beyond that date and that accordingly, there was a "significant risk" the development would not be insured after that date.

[43] This affidavit also exhibited a letter dated September 13, 2021 from counsel for the Monitor to counsel for 129 and Mr. Reyes advising that the loan that was to have been made by Domain to 129 as part of the 129 refinancing had not closed by September 10 as anticipated. The Monitor requested an update on the status of the financing and 129's ability to meet its commitments to CMLS and Desjardins in

the circumstances. Finally, the Monitor requested that 129 provide stakeholders with a “written update on whether any of the other outstanding conditions to the 129 Refinancing have now been satisfied.”

[44] 129 applied to adduce two affidavits of Mr. Reyes, the first sworn July 30, 2021. Its purpose was to update matters described in evidence that had been before the chambers judge and/or the division of this court that granted leave to appeal. Mr. Reyes deposed that although Domain’s commitment to fund the new loan had lapsed on June 16 as a result of the chambers judges’ dismissal of 129’s application, Domain had committed to extend the condition removal date to September 30, subject to certain payments and the granting of leave to appeal. As well, he confirmed that the solicitors for 129 were holding $2.5 million in trust for release in connection with the proposed refinancing.

[45] Mr. Reyes’ second affidavit, sworn September 1, 2021, referred to by counsel as “Affidavit #6”, was a further update. He deposed that the pre-sale purchasers of units in the project had provided irrevocable directions authorizing the use of their deposits in the proposed refinancing transaction and extending the termination dates of their directions to December 31, 2021. Domain had also committed to extend the condition removal date in its loan commitment letter to September 30, 2021 and in that regard had executed an “Amendment to the Third Revised Commitment Letter” dated September 1, 2020. Mr. Reyes continued:

> Based on the updated payouts provided by the Monitor, an additional $900,000 (approximately) is estimated to be required to provide sufficient funding to complete the proposed refinancing as it was originally contemplated on June 8, 2021 (as described in paragraph 12 of my third affidavit).
>
> The additional funding requirements will be satisfied by:
>
> (a) additional funding from 129 in the amount of at least $480,000; and
>
> (b) allocating any additional amounts required from the Convertible Loan (as defined in my fourth affidavit) to be provided by 126.
>
> I am advised by Luz Consuelo Reyes, the sole director and officer of 126, and verily believe that 126 consents to allocating a portion of the Convertible Loan to the refinancing transaction.
>
> 129 is raising funds to cover the additional funding requirements. However, at a minimum, 129 has secured $480,000 from a further loan commitment by Domain. The loan will be in the principal amount of $1,675,000, is expected to close on or about September 10, 2021, and proceeds from this loan will be paid as follows:

(a) to repay existing debt in the amount of $1,117,706;

(b) to pay certain fees and interest reserves to Domain in the amount of approximately $75,000; and

(c) the balance, to be funded to 129 for use in connection with the refinancing transaction. [At paras. 7–10.]

[46] Further, Mr. Reyes deposed that if 129 contributes an additional $480,000 it would still require approximately $340,000 for working capital purposes immediately if the 129 refinancing takes place. He expected to raise further funds from partners of the Petitioner partnership and other investors, "after the refinancing transaction completes and certain amendments to the limited partnership agreement can be made." The solicitors for 129 had been put in funds by 126 and they were now holding a total of $2.7 million in trust for purposes of the refinancing.

[47] The final item of proposed new evidence was an email dated September 21, 2020 (the date of the hearing in this Court) sent by Mr. Schultz, counsel for 129, to all counsel in this matter in response to the Monitor's request for an update. With respect to insurance, it confirmed that Aviva had offered to provide general property insurance for a term of six months commencing September 30, 2021. This amount was to be funded from the working capital funds that would be available under the 129 transaction and would satisfy the insurance condition contained in Domain's commitment letter. With respect to the status of the "additional financing", Mr. Schultz advised:

> We are not acting on this financing, but I am advised by both counsel (for borrower and lender) that despite a concerted effort to close the transaction yesterday, a few outstanding conditions remained at close of business that prevented that from occurring. However, I am further advised that both parties anticipate those will be satisfied today, and that funding will occur at some point today. It is now expected that on closing, net proceeds of $450,000 will be paid to our firm in trust, and held as part of the additional advance by 129 contemplated in Mr. Reyes' 6th affidavit. <u>That amount will still be sufficient to allow 129 to pay CMLS (and the priority creditors) in full</u>. [Emphasis added.]

With respect to other "outstanding conditions" to the refinancing, Mr. Schultz said he was advised by counsel for Domain that the only remaining conditions on the commitment for a loan of $14.7 million were the execution of a priority agreement between Domain and Aviva, the form of which had been approved; the issuance of the insurance policy which Aviva had agreed to issue; and this court's approval of the proposal.

[48] Counsel for Centura opposed the admission of Mr. Reyes' affidavit #6. New evidence is of course subject to an even stricter test than fresh evidence. Counsel referred to this court's recent decision in *Barendregt v. Grebliunas* 2021 BCCA 11, in which Mr. Justice Voith observed:

> New evidence is admitted in "rare" or "exceptional" circumstances: see *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2015 BCCA 148 at para. 10 and *Fotsch* at para. 20, respectively. In *Jens* at para. 29, the Court used "rare" and "exceptional" interchangeably.
>
> This high standard is on account of the importance of certainty and finality in trial judgments: *Fotsch* at para. 21; *Struck* at para. 37. Nevertheless, it is contrary to the "interests of justice" to have a decision that is inconsistent with the known facts: *Jens* at para. 30; *Animal Welfare* at para. 12; *Island Savings Credit Union v. Brunner*, 2014 BCCA 449 at para. 25.
>
> One recognized "exceptional" circumstance, where new evidence may be admitted, was described by the Court in *Fotsch*:
>
>> [21] Circumstances which might permit the admission of new evidence include where the judge made assumptions about future events but new evidence establishes those assumptions to be incorrect. See *North Vancouver (District) v. Lunde*, (1998), 60 B.C.L.R. (3d) 201 (C.A.) at paras. 25–26.
>
> In *United States of America v. Wilson*, 2010 BCCA 85 at para. 34, the Court described this "assumption" category as the "main exception" to the general inadmissibility of new evidence on appeal. [At paras. 32–35.]

[49] In my opinion, it is in the interests of justice for this court to admit all the proffered evidence. This was not a trial at which the credibility of witnesses was tested or in which the facts were strongly disputed. Although the evidence does not completely invalidate or 'falsify' the assumptions relied on by the chambers judge below, it is important for us to be working on the basis of accurate information in a case in which circumstances are fast-moving, as often occurs in *CCAA*, receivership or bankruptcy matters. Indeed a reading of appellate *CCAA* decisions (which are rare given that lower courts' decisions are usually moot by the time an appeal can be heard) suggests that courts on appeal often admit 'updating' evidence without formal application being made. Certainly in this case the admission of the new evidence will not detract from certainty; rather, it will ensure that the assumptions underlying our conclusions are as close to correct as possible.

Financial Comparison of the Offers

[50] Having admitted the new evidence, it may be helpful to summarize here the financial consequences (as I now understand them) of the 129 proposal on the one hand, and Solterra's Backup Offer on the other.

<u>129's Proposal</u>	*<u>Solterra's Backup Offer</u>*
Prior charges representing the interim loan and administration charge, and CMLS mortgage to be paid in full.	Interim loan and administration charge to be paid in full; CMLS suffers shortfall of $1 million.
129 to be secured as to 65% of pre-sale deposits; Aviva to be secured as to 35%, in both cases up to the principal amount of $8,005,201.	Aviva loses $8.6 million; little hope of recovery.
Aviva's security will remain for the balance owed to it.	
Pre-sale purchasers retain right to purchase if Petitioners are able to complete construction.	Half of the pre-sale purchasers lose their right to purchase.
Other creditors receive no immediate benefit; but have chance of future recovery if Petitioners are able to complete.	Other creditors receive no funds on sale; lienholders lose rights of registration against the Project.

[51] The summary provided by Aviva in its factum also seems apt:

> The financial repercussions of the 129 Refinancing and the Solterra Backup Offer are diametrically opposed. The former will avoid the immediate crystallization of the Petitioners' liability to Aviva, thus freeing up equity for and preserving the prospect of recovery for the remaining creditors, while providing the additional benefit of the possibility of a restructuring. The latter will result in pre-sale contracts being disclaimed and requiring Aviva to pay out $8.6 million of insured deposits already used in the Project and no longer held in trust, with virtually no prospect of recovery for Aviva and no recovery for any other creditor.

[52] It will be noted that the "materially better outcome" of 129's proposal commented upon by the Monitor has improved since the hearing below: the amount of Domain's new loan has increased; Aviva's prospects for the recovery of its $8 million are improved; the 'conditionality' of several of the steps has

diminished or been removed, with the result that the proposal is less ‘speculative’; the prospects of purchasers who have paid deposits for units in the Project have improved to some extent; and adequate working capital seem to be assured for the next few months. As mentioned earlier, Mr. Reyes stated in his Affidavit #6 that he expected to “raise further funds from the limited partners of the Petitioners, and other investors, after the refinancing transaction completes and certain amendments to the limited partnership agreement can be made.” In this court, counsel for 129 acknowledged that it may become necessary at that later stage to seek a compromise with unsecured creditors, but that that stage had not been reached and may be unnecessary if the new construction financing is successful.

Overview of Parties’ Positions

[53] I propose to deal with the second and third grounds of appeal together, since both turn on issues relating to the objectives of the *CCAA* and the significance (or lack thereof) of the absence of an intention on the part of 129 or the Petitioners to pursue a plan of compromise or arrangement to be voted on at a meeting of creditors.

[54] In very general terms, 129 submits that the chambers judge below erred by focussing in her appropriateness analysis on the “single factor” of the absence of an intended compromise rather than on the “primary remedial objective” of the *CCAA*. In 129’s submission, that objective is to avoid the “social and economic losses resulting from liquidation of an insolvent company”: see *Century Services* at para. 70.

[55] The chambers judge’s error is highlighted, 129 contends, by her conclusion that if Mr. Reyes had structured his offer as an outright sale or a reverse vesting order, no one would have quarreled with the “structure” of the transaction (and, I note, no compromise or arrangement would have been required. Instead the Court would have had to consider the factors set out at s. 36(3) of the *Act*.) 129 says she thus preferred form over substance; and that in any event, *Maple Bay* is no longer good law and has been overtaken by amendments made to the *CCAA* — in particular the broadening of the discretion granted by s. 11 and the enactment of s. 36 — and by pronouncements of the Supreme Court of Canada in cases such as *Century Services* and *Callidus*. 129’s appeal is supported by CMLS and Aviva.

[56] In response, Centura and Solterra contend that it is "antithetical" to the *CCAA* regime and all relevant binding authorities for the court to facilitate 129's proposal — which they say will affect the "civil and property rights of secured and unsecured creditors alike" — without any intention of addressing the claims of *all* creditors by means of a compromise to be voted on by them. In the respondents' submission, the fact that 129's proposal provides a "potentially better outcome" for the two secured creditors is not the only material consideration. They note that the chambers judge described the proposal as "speculative" at best. (At para. 89.) In her words:

> Specifically, 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".
>
> Centura also points to other issues arising from the feasibility of completing the Project with the pre-sale purchase contracts intact. Centura notes that, even if the "new construction financing" is obtainable, which is speculative at best, Mr. Reyes will also have to solve his liability problems with Aviva in that context. It is anyone's guess that the completion of the Project is still feasible while also allowing for a full credit of over $16 million from the pre-sale deposits (which would reduce sale revenues). There is no evidence as to how that might be addressed. [At paras. 88–9.]

[57] Thus while 129 characterizes its proposal as "clearly superior" to the Solterra Backup Offer, the respondents discount it as an attempt by the Petitioners "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."

Objective(s) of the CCAA

[58] Obviously, one of the matters on which the parties disagree is the objective, or objectives, of the *CCAA*. 129 submits that these have evolved and broadened since the *Act* was adopted over 80 years ago. At that time the long title of the *CCAA* was often referred to as reflecting its purpose — to "facilitate compromises and arrangements between companies and their creditors."

[59] I do not intend to recount at length the history of the *Act*, which has been amended several times after wide-ranging commissions were carried out by parliamentary committees and other experts over the years: see A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-structuring Law in Canada*",* (2014) 56 *Can. Bus. L. J.* 73 at 77–86. It is well-known

that the *Act* was introduced during the Depression to permit Canadian companies to reorganize or restructure their debt in order to avoid the travails of bankruptcy. Nocilla writes:

> The *CCAA* was modeled on the provisions of the *English Companies Act* of 1929. At the first reading of the *CCAA* in the House of Commons, the Hon. C.H. Cahan, then Secretary of State, explained that the legislation was intended <u>to allow an insolvent company to avoid bankruptcy and to survive by reorganizing</u>. The Secretary explained that some reorganization mechanism was necessary because so many companies had become insolvent during the Depression:
>
>> At the present time, some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression and it was thought by the government that we should adopt <u>some method whereby compromises might be carried into effect under the supervision of the court</u> without utterly destroying the company or its organization without loss of good will and without forcing the improvident sales of its assets. [At 76–7.]

The fact that the *Act* related to "Bankruptcy and Insolvency" under s. 91(21) of the then *British North America Act, 1867,* 30–31 Vict., c. 3 (U.K.) meant that courts could be given the power by (paramount) federal legislation to affect the rights or priorities of creditors that would normally be regulated by the provinces acting under their jurisdiction over "Property and Civil Rights." (See generally *Reference re Companies' Creditors Arrangement Act* [1934] S.C.R. 659.)

[60] As noted in *Century Services* (see paras. 17–21), the *CCAA* fell into disuse after the Depression. However, during the economic downturn of the 1980s, the "broad and flexible authority" given to supervising courts to "facilitate the reorganization of the debtor and achieve the *CCAA*'s objective" began to be recognized as lawyers invented increasingly creative and complex schemes to enable debtors to avoid bankruptcy. Courts generally gave their blessing to such innovations, while taking care to ensure they were as fair as possible to all stakeholders. In so doing, they relied first on the interpretation of the text of the *CCAA* itself and second on their "inherent or equitable" jurisdiction: see *Century* at paras. 64–5.

[61] One example of the exercise by a court of its equitable jurisdiction in the *CCAA* context was the appointment of monitors, who were likened to interim receivers: see *Re Northland Properties Ltd.* (1988) 69 C.B.R. 266 (B.C.S.C.)

at 277. Court approval of interim financing is a more obvious example of the evolution of the court's jurisdiction under the *Act* in accord with its broadening objectives: even *prior to the enactment of s. 11.2 in 2009*, courts regularly approved such financing as a necessary part of facilitating restructurings aimed at continuing the debtor's business as a going concern while more permanent solutions were sought. Although there was initially some debate (see, e.g., *Re Fairview Industries Ltd.* (1991) 11 C.B.R. (3rd) 71 (N.S.T.D.)) concerning the jurisdictional basis for the granting of such orders *without an arrangement or compromise*, the practical need for "breathing space" (including the need to obtain professional assistance) usually meant immediate injections of cash were necessary. Responsive interim financing orders became commonplace: see *United Used Auto & Truck Parts Ltd. v. Aziz* 2000 BCCA 146; *Re Hunters Trailer & Marine Ltd.* 2001 ABQB 546; *Re Skydome Corp.* (1998) 16 C.B.R. (4th) 118 (Ont. Gen. Div.); *Re Starcom International Optics Corp.* (1998) 3 C.B.R. (4th) 177 (B.C.S.C.); *Re Royal Oak Mines Inc.* (1999) 7 C.B.R. (4th) 293 (Ont. Gen. Div.); *Re Stelco Inc.* (2004) 48 C.B.R. (4th) 299 (Ont. S.C.J.).

[62] Such financings were usually granted "super-priority" — i.e., priority over existing creditors, including secured creditors. In this sense, the priorities that would normally apply under provincial legislation were altered, without any meeting or votes of all creditors under the *CCAA.* In the process, of course, the debtor company (and indirectly its creditors) benefitted from the fact that funds were being provided to assist in preserving its business as a going concern. In *Rescue! The Companies' Creditors Arrangement Act* (2nd ed., 2013), Professor Sara observes:

> Prior to 2009, the courts found authority for granting super-priority charges or interim financing under both the *CCAA* and their inherent jurisdiction. The British Columbia Court of Appeal in *United Used Auto* held that the effective achievement of the *CCAA*'s objectives requires a broad and flexible exercise of jurisdiction to facilitate a restructuring and the court's equitable jurisdiction permits orders granting super-priority in some circumstances. Secured creditors may be required to make some sacrifice because of the reasonably anticipated benefits for all stakeholders; and the objective of the *CCAA* extends beyond protecting assets for eventual realization by creditors. At the same time, the British Columbia Court of Appeal [in *United Used Auto*] cautioned that granting interim financing on a priority basis and the road that security of creditor its and, thus, the court should make such orders only where there is a reasonable prospect of successfully restructuring. …. [At 208.]

[63] The *CCAA* now provides expressly in s. 11.2 for interim financing to be approved by the court, but does not (expressly) require a compromise approved at a creditors' meeting as a precondition. The factors to be considered are now set out at s. 11.2(4).

[64] An even more substantive development — again without express statutory authority — occurred in the 1990s when courts began to approve liquidation sales of the assets of debtor companies in certain circumstances — but without presenting a compromise or arrangement to creditors for approval under s. 5 or 6 of the *Act*. In *Re Canadian Red Cross Society* (1998) 5 C.B.R. 299 (Ont. C.J.), Blair J., as he then was, considered the question of the court's jurisdiction to make such orders. He reasoned in part:

> <u>I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the court, not to make orders which contradict a statute, but to "fill in the gaps in legislation so as to give effect to the objects of the *CCAA*</u>, including the survival program of a debtor until it can present a plan" …
>
> ...
>
> <u>It is very common in *CCAA* restructurings for the court to approve the sale and disposition of assets during the process and before the Plan</u> if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The *CCAA* is designed to be a flexible instrument and it is that very flexibility which gives it its efficacy. ...
>
> In the spirit of that approach, and having regard to the circumstances of this case, I am satisfied not only that the Court has the jurisdiction to make the approval and related orders sought, but also that it should do so. <u>There is no realistic alternative to the sale and transfer that is proposed, and the alternative is a liquidation/bankruptcy scenario which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To fore go that purchase price—supported as it is by reliable expert evidence—would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view.</u>
>
> While the authorities as to exactly what considerations a court should have in mind in approving a transaction such as this are scarce, I agree with Mr. Zarnett that an appropriate analogy may be found in cases dealing with the approval of a sale by a court-appointed receiver. In those circumstances, as the Ontario Court of Appeal has indicated in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at p. 6, the Court's duties are,
>
>> (i) to consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;

> (ii) to consider the interests of the parties;
>
> (iii) to consider the efficacy and integrity of the process by which offers are obtained; and,
>
> (iv) to consider whether there has been unfairness in the working out of the process.

I am satisfied on all such counts in the circumstances of this case. [At paras. 43–8; emphasis added.]

[65] In 2009, the "overarching policy" of the *CCAA* to preserve the going-concern value of a debtor company was invoked by Morawetz J. in *Re Nortel Networks* (2009) 55 C.B.R. (5th) 229 (Ont. S.C.J.). In the course of his reasons approving the sale of the debtor company's assets, he cited various Ontario cases, including *Canadian Red Cross, Re Lehndorff General Partner Ltd*. (1993) 17 C.B.R. (3d) 24 (Ont. Gen. Div.) and *Re Stelco Inc*. (2004) 6 C.B.R. (5th) 316 (Ont. S.C.J.). He then concluded:

Counsel to the Applicants further submits that *CCAA* courts have repeatedly noted that <u>the purpose of the *CCAA* is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":</u>

> The purpose of the *CCAA* is to <u>facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors</u> (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

Counsel to the Applicants further submits that the *CCAA* should be given a broad and liberal interpretation to <u>facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders</u> and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the *CCAA* will be met.

...

Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a *CCAA* proceeding. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.

...

> ... The *CCAA* is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.
>
> I therefore conclude that the court does have the jurisdiction to authorize a sale under the *CCAA* in the absence of a plan. [At paras. 33–4, 41, and 47–8; emphasis added.]

[66] In *Callidus*, the Supreme Court of Canada discussed the evolution of the *CCAA*, pointing to the development of liquidation sales as one example of "an array of overarching remedial objectives" intended to avoid the potentially "catastrophic" effects of insolvency. However, the Court referred as well to some *more specific aspects* of that 'overarching' objective. In the words of Chief Justice Wagner and Moldaver J., speaking for the Court, these were:

> ... 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 … [Authorities omitted].
>
> Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). ...
>
> That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70). [At paras. 40–42; emphasis added.]

[67] Regarding liquidation sales in particular, the Court continued:

> Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "*en bloc*" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal

> sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. …
>
> *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute"… [Authorities omitted
>
> However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business. Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).
>
> Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. ... [At paras. 43–46; emphasis added.]

Compromises

[68] As this too-long review has shown, the originally "skeletal" nature of the *Act* and its stated objective of 'facilitating compromises and arrangements of Canadian companies with their creditors' have been substantially overtaken, not only by reason of amendments to the *Act* but by reason of court rulings. Judges have interpreted their authority liberally to include jurisdiction to approve interim financing with "super-priority" over secured creditors, to approve the sale or asset liquidation of debtor companies, and to approve various complex proposals that result in debtors "exiting" the *CCAA* regime — without finding it necessary to require that a compromise be sought and approved at a meeting of creditors. (See *Century Services* at para. 14; *Asset Engineering LP v. Forest & Marine Financial Limited Partnership* 2009 BCCA 319 at para. 26.) The Supreme Court of Canada appears to have approved of this evolution, as has Parliament in codifying

conditions that were already being applied by courts in exercising their discretion prior to the legislative amendments.

[69] The result, in my view, is that this court's focus in *Maple Bay* on the purpose stated in the long title of the *Act* — "*An Act to facilitate compromises and arrangements between companies and their creditors*" — may now be outdated. If compromises and meetings of creditors were not necessary for the granting of super-priority for interim financing, or for liquidation sales, it seems "inappropriate" that they should be seen as a legal 'prerequisite' for a refinancing, or the first stage of a refinancing, that (i) is clearly superior, from the point of view of all stakeholders; (ii) was consented to by both primary secured creditors; and (iii) would not affect the *rights* of unsecured creditors.

[70] In emphasizing unsecured creditors' "*rights*", I note that one of the issues before the Court in *Callidus* was whether it was open to the supervising judge to approve a litigation funding agreement ("LFA") that would provide interim financing in the *CCAA* proceeding. The creditors argued that the proposed LFA was a "plan of arrangement" and therefore had to be put to a creditors' vote under ss. 4 or 5 prior to receiving court approval. The Supreme Court rejected that argument for reasons set forth at paras. 100–104. It suggested that although "arrangement" and "compromise" are very broad terms, they do have some limits and require, "at minimum, some compromise of creditors' rights." In the Court's words:

> For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it <u>did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights"</u> (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:
>
> > <u>A "plan of arrangement" or a "compromise" is not defined in the *CCAA*. It is, however, to be an arrangement or compromise between a debtor and its creditors</u>. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. <u>Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment.</u> If not paid, they have a right to apply for a bankruptcy order under the *BIA*. Under the *CCAA*, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
> >
> > (*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)

> Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*. [At paras. 101–02; emphasis added.]

[71] The Court concluded that the LFA was not "a plan of arrangement" because the contents of the so-called 'pot of gold' constituted by the litigation, if successful, might result in the creditors' being paid in full. It was only if there was a shortfall that a compromise would be required to determine how the funds would be distributed. The debtor company, "Bluberi", had committed to proposing such a plan if it became necessary. Thus, the Court said at para. 111, the case was distinguishable from *Maple Bay*.

Maple Bay

[72] I have already described at para. 28 above the facts of *Maple Bay* and quoted from the Court's reasoning; but for convenience, I again reproduce Tysoe J.A.'s most important comments here:

> The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Re Fairview Industries Ltd.* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). 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. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of *Re Ursel Investments Ltd.* (1990), 2 C.B.R. 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the *CCAA* because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.
>
> ... I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or

> liquidation be distributed to its creditors. [At paras. 31–2; emphasis added.]

He concluded that in the absence of an intention of the part of the debtor company to propose a compromise to its creditors "before embarking on its restructuring plan", it was not appropriate for a stay to have been granted or extended under s. 11.

[73] A similar issue arose in *Asset Engineering*. There, the Court was asked whether an order should have been granted under the *CCAA* in light of the facts that only the refinancing of a loan was proposed, rather than any compromise or arrangement, and in any event, the debtor had "unequivocally" declared it would oppose any arrangement. The case was found to be distinguishable from *Maple Bay*; in the Court's analysis:

> The *CCAA* is appropriate for situations such as this where it is unknown whether the "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. 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. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives. [At para. 26; emphasis by underlining added.]

(See also *Re Fairmont Resort Properties Ltd.* 2012 ABQB 39 at para. 27–8; *Re Pacific Shores Resort and Spa Ltd.* 2011 BCSC 1775 at paras. 37–39; *Re Quest University Canada* at paras. 108–110.)

[74] Obviously, the facts of the case at bar are also very different from those of *Maple Bay*. 129 has made a complex and substantive proposal to which the two secured creditors have agreed. Evidently they are satisfied that the proposal represents the best outcome realistically available to protect Terrace House as an ongoing project. The proposal will not alter the rights of the Other Creditors; they never had any "right" to block the Petitioners' granting security that would rank ahead of them; and whichever proposal goes ahead, the result for them will be the same. 129's proposal was within the parameters of the SISP approved by the

chambers judge and would appear now to have a decent chance of achieving the *CCAA*'s overarching objective and the more specific objectives described in *Callidus*. If the second stage of the proposal does not materialize, it will be open to the Petitioners to seek a compromise at that time. As it is, however, the first stage avoids the adverse effects of the liquidation deals proposed by Solterra and Landa.

[75] As I see it, no "compromise" is taking place that requires the consent of affected creditors beyond the secured parties. As Mr. Reyes deposed, "The 129 Offer does not seek to terminate any pre-sale contracts, or vest of or compromise any other claims against the Petitioners." (In contrast, lienholders would suffer the loss of their registration under the Solterra Backup Offer.) The *Act* does not — at least expressly — *require* that a debtor seek a compromise and creditors' meeting as a condition of obtaining an order under s. 11. Thus the approval of 129's proposal would not contradict the *Act*. Sections 5 and 6 merely state that *where a compromise is proposed*, the court may order a meeting of creditors or a class thereof; and under s. 6, if the compromise is approved and sanctioned by the court, it is binding on the creditors or class, subject to the conditions described in s. 6.

[76] I conclude that *Maple Bay* was clearly distinguishable from this case *and* that it should not have been regarded as dispositive *as a matter of law* — assuming it was so regarded. (The fact the chambers judge did not take issue with the parties' agreement that the Court had the "jurisdiction" to grant 129's application weighs against this view.) On this point of law, I agree generally with the comments of Suche J. in *Winnipeg Motor Express Inc.* 2008 MBQB 297 about the objectives of the *CCAA*:

> ... Everyone agrees the *CCAA* is intended to be flexible, and must be given a broad and liberal interpretation to achieve its objectives. I consider those objectives to be both more fundamental and broader than the title of the statute, and go beyond the circumstances of a formal plan of arrangement. The world of commercial lending and the complexity of security interests has evolved, and I consider the remedial nature of the *CCAA* allows it to deal with such changes. [At para. 41; emphasis added.]

The Chambers Judge's Exercise of Discretion

[77] I also find that the absence of a planned compromise in this case should not have weighed as a *'crucial'* factor in the chambers judge's exercise of her

discretion in determining appropriateness under s. 11. We must of course accord a high degree of deference to the chambers judge's exercise of discretion, but I believe, with respect, that she erred in principle in this regard. Giving primary importance to the statutory purpose stated in the *CCAA*'s long title seems to run contrary to the evolution of the *CCAA* and its objectives described above, and to the evolution of the complex and innovative 'solutions' that now characterize *CCAA* applications. Like the Court in *Winnipeg Motor Express*, I consider the objectives of the *Act* now to be both more fundamental and broader than the title of the *Act* would suggest and to "go beyond the circumstances of a formal plan of arrangement." I conclude that the chambers judge erred in principle in giving primary importance to this factor.

[78] This is not to suggest that the question of whether a compromise is sought will *never* be relevant to an appropriateness analysis under s. 11. Indeed, I agree with the Court in *Maple Bay* that it was of some relevance *on the facts of that case*. Like Tysoe J.A., I would not welcome the prospect of debtor companies resorting to the statute simply to buy time, without having some proposal in hand — or the kernel of one — that is *likely to further the objectives of the Act*. These may be achieved by various means, of which a compromise may be one, but the seeking of one is not a legal "prerequisite". It is useful to bear in mind the Court's comment in *Century Services* that:

> ... <u>Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*</u>. 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. [At para. 70; emphasis added.]

[79] On the foregoing bases alone, I would allow the appeal. I am also of the view that the chambers judge erred in weighing as a negative factor against 129's offer, the fact that, in her words:

> ... 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.
>
> 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. [At paras. 90–1; emphasis added.]

[80] With respect, without an adverse credibility finding it cannot be inferred that Mr. Reyes is only seeking to avoid a liquidation sale because it would “crystallize his exposure to CMLS and Aviva,” that he is not seeking relief in order to resolve “the current creditor claims against the Petitioners” within the context of the *Act*, or that he is otherwise acting “with no true intention to address those creditor claims in the future.” To the contrary, as I have already indicated, 129’s proposal is clearly superior to the cash purchase offers, viewed from the viewpoint of all the stakeholders. It is true that Mr. Reyes is a guarantor of the CMLS mortgage, but according to the documents in evidence, he will also be guaranteeing the Domain loan. Even if this were not the case, many debtor companies under the *CCAA* are owned or controlled by persons who have very substantial financial stakes in the restructuring or refinancing, but there is nothing untoward about that fact. Just as creditors act in their own interests, so do controlling shareholders of debtor companies. (Directors are, of course, a different matter.) Mr. Reyes is also a controlling shareholder of 129, which is obviously lending funds as part of the refinancing. Clearly, he is not ridding himself of a burden of debt as a result of this restructuring. The statements I have reproduced from paras. 90 and 91 above are, in my view, simply incorrect and should not in principle have informed the judge’s exercise of her discretion under s. 11.

[81] Another related error lies in the chambers judge’s reasoning at para. 73:

> Again, as already stated, 129 does not seek relief under s. 11.2 of the CCAA. 129’s counsel only suggests that its “refinancing” is appropriate in disregarding the interests of the other creditors, including the lienholders, since they are currently “out of the money”. I agree with 129’s counsel’s assessment of the likely current monetary value of the other creditors’ interests. However, in my view, <u>that is a very unprincipled basis upon which to argue that this “refinancing” is an “appropriate” outcome in the balancing exercise with regard to all stakeholders</u>. [Emphasis added.]

[82] This reasoning may be read in two ways. First, it may be intended to suggest that (in the words of Mr. Justice Goepel at para. 18(b) of his reasons in the leave application) that “comparing the 129 refinancing with the outcome if the Solterra or Landa offers were approved would be a ‘very unprincipled basis’ upon which to argue the 129 financing was appropriate”. The case-law is replete with judicial decisions that “balance” and “weigh” the “costs and benefits” of alternative proposals before the courts in *CCAA* proceedings. Indeed, this kind of weighing or balancing lies at the heart of most substantive *CCAA* decisions.

[83] The judge’s reasons at para. 73 might also be taken to mean that it was “unprincipled” for 129 to proceed on the basis that it did not have to include unsecured creditors in its plan because they were “out of the money” — as they would be under the liquidation offers of Landa and Solterra as well. The fact the Other Creditors are “out of the money” is simply a reality that had to be accepted. The fact that neither 129 nor Solterra had proposed to make some funds available to them is a neutral fact, not a sign of bad faith (which in any event was not argued). It is no doubt part of the respective calculations of the benefits and risks underlying the offers that were before the Court. It would be unrealistic to expect offerors in situations such as this to go any further than was absolutely necessary in formulating those offers.

[84] A fourth error in the chambers judge’s reasoning lies in her failing to take into consideration Mr. Reyes’ affidavit evidence regarding his intentions in connection with the restructuring. At para. 88 she observed:

> Specifically, there is <u>no evidentiary foundation</u> 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”.

and at para. 90:

> ... There is <u>nothing to suggest</u> 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. [Emphasis added.]

[85] Earlier in these reasons I quoted at some length from Mr. Reyes’ affidavit evidence, including his expression of hope that after some “breathing space” has been obtained, he will be in a position to locate construction financing that will

enable the project to go ahead as planned. To say that there is “nothing” to suggest he is attempting to resolve the claims of creditors ignores this for no reason that the judge has provided.

[86] The rights of the secured creditors are “resolved” by 129’s plan and in any event, it presents the best solution as compared to the liquidation offers. It is much more than the “kernel of a plan”. In summary, unless the chambers judge was implying a lack of good faith in describing Mr. Reyes as having “no true intention” to address creditor claims in the future, she erred in ignoring the “evidentiary foundation” for 129’s proposal.

[87] It is not necessary to deal with the remaining ground of appeal concerning the question of “redemption”, which I leave for another day.

Disposition

[88] For the foregoing reasons, this court formed the view that leave should be granted to adduce the new evidence, that this appeal should be allowed, and that it would be impractical to remit this matter at this late stage to the Supreme Court for reconsideration. We also formed the view that we should exercise our discretion to find that 129’s proposal was appropriate and superior, from the point of view of all the stakeholders, to Solterra’s Backup Offer.

[89] Accordingly, we informed counsel that the appeal was allowed on the following terms:

a. leave is granted to adduce the new evidence tendered at the hearing of the appeal

b. the chambers judge’s orders dismissing the “129 Application” and approving the “Solterra Backup Offer” are set aside;

c. the order sought by 129 approving the 129 Refinancing is granted on the same terms as were sought before the chambers judge, except as follows (using capitalized terms as defined in the draft order sought by 129):

   i. increasing the maximum amount under the New Loan Facility to $25,900,000;

   ii. changing the date of the Domain Commitment Letter to July 30, 2021;

   iii. adding repayment of the CMLS Facility to the permitted uses of the Working Capital Facility; and

iv. continuing and extending the stay of proceedings to and including April 30, 2022;

and subject to such non-substantive changes as this court may approve at the suggestion of counsel in order to reflect changes in circumstances that have arisen since the hearing below and are reflected in the new evidence.

[90] We are indebted to all counsel for their able arguments in this difficult case.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Madam Justice Dickson"

I agree:

"The Honourable Mr. Justice Voith"

Appendix H

Domain Funding
1100–1040 West Georgia St.
Vancouver, BC V6E 4H1
604.681.3000

BY E-MAIL

Wednesday, Dec. 1, 2021

Evergreen House Development LP
Port Capital Development (EV) Inc.
Port Capital Development Inc.
Mr. Macario Teodoro Reyes
c/o 325 West 4th Avenue,
Vancouver, B.C. V5Y 1H3

E-mail: tobi@portliving.com

Dear Sir(s)/Madams(s):

LOAN RETAINER AGREEMENT
2021-BC011

RE:

Mortgage Financing:	**$10,500,000 (the "First Loan Segment" – funded)** **$ 4,200,000 (the "Second Loan Segment" – funded)** **$ 1,300,000 (the "Third Loan Segment" – to be funded)** **$16,000,000** **Together, the First Loan Segment, the Second Loan Segment, and the Third Loan Segment are referred to herein as the "Loan"**
Secured Property:	**±8,258 sq. ft. mixed-use development site located at 1250 West Hastings Street, Vancouver, B.C. and as further described in the Appraisal Report prepared by Ryan ULC with an effective date of April 14, 2021 (referred to herein as the "Secured Property")**

Bankers Mortgage Corporation, doing business as Domain Funding (referred to herein as "Domain Funding"), is the exclusive mortgage broker of Domain Mortgage Corp.

You have previously retained Domain Funding to obtain financing over the Secured Property from Domain Mortgage Corp. pursuant to the Loan Retainer Agreement dated April 29, 2021. The First Loan Segment and the Second Loan Segment in aggregate of $14,700,000 were funded on or about October 26, 2021.

This Loan Retainer Agreement is to reflect your application for a $1,300,000 Third Loan Segment to be added to the Loan and to be funded as a second advance of the Loan.

The following terms and conditions are proposed:

1.0 SUMMARY OF LOAN TERMS:

1.1 LENDER/MORTGAGEE:

Name:	**Domain Mortgage Corp.** syndicated in trust for private mortgage investors, and/or nominee.
Address	1100-1040 W. Georgia St., Vancouver B.C. V6E 4H1

1.2 BORROWER(S)/MORTGAGOR(S):

Name:	**Evergreen House Development Limited Partnership**
Relationship:	The beneficial owner of the Secured Property
Address:	325 West 4th Avenue, Vancouver, B.C. V5Y 1H3

Name:	**Port Capital Development (EV) Inc.**
Relationship:	The General Partner of Evergreen House Development Limited Partnership
Address:	325 West 4th Avenue, Vancouver, B.C. V5Y 1H3

1.3 COVENATOR(S):

The Lender(s) will require the Loan to be guaranteed by the personal and/or corporate shareholders of the Borrowing Company(s) and/or others. The Lender(s) must be satisfied that the Covenantors have sufficient financial resources and real estate development/investment experience to qualify to guarantee the Loan.

To date the following Covenantors have been identified:

Name:	**Macario Teodoro Reyes**
Relationship to Borrower:	Principal of Port Capital Development Inc.
Address:	#801-2211 Cambie Street, Vancouver, B.C. V5Z 2T5

Name:	**Port Capital Development Inc.**
Relationship to Borrower:	100% shareholder of Port Capital Development (EV) Inc.
Address:	325 West 4th Avenue, Vancouver, B.C. V5Y 1H3

1.4 LOAN TYPE AND PURPOSE:

The Borrower(s) are seeking additional funds for the exclusive purpose of reviving the Terrace House Condominium Project located at the Secured Property which has stalled due to the Covid-19 pandemic, a CCAA proceeding involving the Borrower(s), and a series of liens registered on title to the Secured Property. Uses of funds are expected to include consultants' expenses, sales and marketing expenses, finance expenses, etc.

The First Loan Segment and the Second Loan Segment of the Loan in the aggregate amount of $14,700,000 were funded on or about October 26, 2021, and were secured by a super-priority court ordered charge over all assets, undertakings and property of the Borrower(s) including the following Mortgage, Assignment of Rents, and Modification:

Nature:	MORTGAGE
Registration Number:	CA7337616
Registration Date and Time:	2019-02-06 15:25
Registered Owner:	DOMAIN MORTGAGE CORP. INCORPORATION NO. BC1140295
Transfer Number:	CA9459739
Remarks:	MODIFIED BY CA9459782

Nature:	ASSIGNMENT OF RENTS
Registration Number:	CA7337617
Registration Date and Time:	2019-02-06 15:25
Registered Owner:	DOMAIN MORTGAGE CORP. INCORPORATION NO. BC1140295
Transfer Number:	CA9459740

Nature:	MODIFICATION
Registration Number:	CA9459782
Registration Date and Time:	2021-10-26 15:59
Remarks:	MODIFICATION OF CA7337616

1296371 B.C. Ltd. along with 1260780 B.C. Ltd. are Junior-ranking participants in the current ownership of the Existing Security by way of a Participation and Standstill Agreement with Domain Mortgage Corp. dated on or about Oct. 26, 2021 (the "Participation Agreement").

It will be a condition of the Third Loan Segment that the Participation Agreement be amended and executed by the parties to the agreement.

1.5 LOAN DETAILS:

Loan Amount:	**$10,500,000 (the "First Loan Segment" – funded)** **$ 4,200,000 (the "Second Loan Segment" – funded)** **$ 1,300,000 (the "Third Loan Segment" – to be funded)** **$16,000,000**
Loan Term:	**6 months from the Interest Adjustment Date of the First Loan Segment and the Second Loan Segment to mature May 1, 2022.** **For greater certainly, the maturity date of the Third Loan Segment will be co-terminus with the maturity date of the First Loan Segment and the Second Loan Segment.**
Early Repayment Terms:	**The Loan may be repaid in full without penalty provided the Lender receives minimum interest of $104,000 (the "Minimum Interest")**
Amortization:	**Interest Only**
Interest Rate:	**Third Loan Segment:** **24.00% per annum, compounded monthly**
Loan Servicing Fee:	**Third Loan Segment:** **0.25% per annum, calculated and paid monthly**
Monthly Payments:	**Third Loan Segment:** **$ 26,000.00 interest payment** **$ 270.83 Loan Servicing Fee (0.25% of Third Loan Segment)** **$ 26,270.83 subtotal**
Loan Funding Date:	**Third Loan Segment:** **Estimated to be during the month of December 2021. Exact date to be specified by the Lender.**
Loan Fee(s):	**Third Loan Segment:** **2.00% of Third Loan Segment = Domain Funding Mortgage Broker Fee** **1.00% of Third Loan Segment = Domain Securities Corp. Fund Raising Fee** **NOTE *1: See Schedule "A" for more information on the Loan Fees***

1.6 LOAN FUNDING FORMULA (Third Loan Segment):

Loan proceeds to be used in accordance with the following Uses and Sources of Funds Budget:

Uses of Funds

Monthly Payment Reserve (4 months - incl. Loan Servicing Fee)	$	105,083.33
Domain Funding Mortgage Broker Fee (2.0% of Third Loan Segment)	$	26,000.00
Domain Securities Corp Fund Raising Fee (1.0% of Third Loan Segment)	$	13,000.00
Domain Securities Corp Fund Raising Fee (Previously owing)	$	147,000.00
Lender's legal fees, title insurance, misc., etc. (estimate)	$	15,000.00
Funds available to use by the Borrower related to the Terrace House Project	$	993,916.67
Total Uses of Funds	**$**	**1,300,000.00**

Sources of Funds

Domain Mortgage Corp. Mortgage Loan Amount (Third Loan Segment)	$	1,300,000.00
Total Sources of Funds	**$**	**1,300,000.00**

NOTE 1: The above budget has been prepared by Domain Funding based on information provided by the Borrower(s) and Covenantor(s) and is subject to change.

NOTE 2: All figures listed in above budget are subject to verification and approval by the Lender.

NOTE 3: At the option of the Lender, any Loan proceeds will be controlled and/or disbursed by the Lender or its solicitor for the purposes outlined above or for other Lender-approved purposes.

1.7 LOAN RESERVE(S):

The Lender requires the Borrower(s) to assign a Monthly Payment Reserve to the Lender from the proceeds of the Third Loan Segment (the "Loan Reserve(s)"). Upon payout of the Loan in full, any unused amounts in the Loan Reserve(s) will be returned to the Borrower(s) subject to the Early Repayment Terms outlined herein.

1.7.1 MONTHLY PAYMENT RESERVE:

Third Loan Segment:

The Borrower(s) will assign $105,083.33 to the Lender from the proceeds of the Third Loan Segment which will be added to the existing Monthly Payment Reserve to be used to make the monthly interest payments and Loan Servicing Fee during the remaining Loan Term. Thereafter, 100% of the Monthly Payments will be made from the Borrower(s) and Covenantor(s) other financial resources.

1.8 PERMISSIBLE PRIOR ENCUMBRANCES:

The Lender will permit the following prior-ranking charge(s) to be registered against title to the Secured Property:

None.

1.9 PERMISSIBLE SUBSEQUENT ENCUMBRANCES:

The Lender will permit the following subsequent-ranking financial charge(s) to be registered against title to the Secured Property:

Those charges registered against Land Title No. CA7287055 set out in Schedule "D"

Unless otherwise consented to by the Lender in writing, all subsequent financial charge(s) are to execute Priority Agreement(s) in favour of Domain Mortgage Corp., satisfactory to the Lender and/or the Lender's solicitor.

1.10 SPECIAL TERMS AND CONDITIONS:

A. Court approval of the proposed Third Loan Segment outlined in this Loan Retainer Agreement.

B. Consent of Aviva Insurance Company of Canada to the transfer and assignment of the Existing Loan and Existing Security to Domain Mortgage Corp., and the amendment/supplement of the Existing Loan and the Existing Security as contemplated herein.

C. Borrower(s) and Covenantor(s) to execute the Loan Retainer Agreement issued by Domain Funding dated May 12, 2021 (which according to our records has not been executed).

D. Other Special Terms and Conditions that may be recommended by the Lender's solicitor.

1.11 LOAN SECURITY:

The Lender will require the following Loan Security and other or further Loan Security, all of which must be found satisfactory to the Lender(s) and its solicitor:

At time of $1,300,000 Third Loan Segment:

a) All of the Loan Security in effect at the time of the $14,700,000 initial advance of the Loan.

b) Assignment of a $105,083.33 to the Lender to be added to the existing Monthly Payment Reserve.

c) Modification of FCT Loan Policy in favour of the Lender to recognise the $1,300,000 Third Loan Segment as outlined herein.

d) Modification of the Participation Agreement, signed by the Junior Lender, to give effect to the priority of $1,300,000 Third Loan Segment as outlined herein.

e) Court approval of the $1,300,000 Third Loan Segment as outlined herein.

f) Such other and further Loan security in connection with the Secured Property as may be required by the Lender or its solicitor.

2.0 LOAN APPROVAL

In order to proceed, Domain Funding requires the following material all of which must be found to be acceptable to Domain Funding and the Lender:

$1,300,000 Third Loan Segment:

a) Executed copy of this Loan Retainer Agreement.

b) Confirmation of no default under the Loan.

c) Satisfactory review by the Lender of the Certificate of Title for the Secured Property including all registered charges.

d) Satisfactory inspection of the Secured Property by the Lender.

e) Satisfactory credit review of the Borrower(s) and Covenantor(s).

a) Appraisal Report(s) and Transmittal Letter(s) from a Lender-approved appraisal firm demonstrating:

- $26,000,000 minimum "as is" land value for the Secured Property

f) Budget of proposed use of net proceeds from the Third Loan Segment.

g) Such other and further information and material that may be requested by Domain Funding or the Lender.

3.0 LOAN FEE(S), DISCLOSURE, AUTHORIZATION, AND ACCEPTANCE:

3.1 LOAN FEE(S):

Before accepting this Loan Retainer Agreement, you must read, understand, and agree with the Loan Fee(s) outlined in Schedule "A".

3.2 DOMAIN FUNDING NOTICE AND DISCLOSURE:

Before accepting this Loan Retainer Agreement, you must read, understand, and agree with Domain Funding's Notice and Disclosure outlined in Schedule "B".

3.3 BCFSA CONFLICT OF INTEREST AND DISCLOSURE

Before accepting this Loan Retainer Agreement, you must read, understand, and agree with the BC Financial Services Authority (BCFSA) Form 10 Conflict of Interest Disclosure Statement outlined in Schedule "C".

3.4 BORROWER(S) DISCLOSURE:

The Borrower(s) disclose to Domain Funding that the purpose of the Loan is primarily for business, investment or commercial purposes and is not primarily for personal, family or household purposes.

3.5 CREDIT AUTHORIZATION & IDENTITY VERIFICATION:

The Borrower(s) and Covenantor(s) agree to grant permission to Domain Funding to conduct a complete credit and identity verification investigation upon acceptance of this Loan Retainer Agreement.

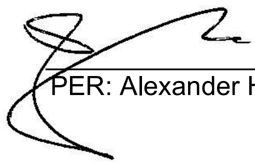
3.6 ACCEPTANCE:

The Borrower(s) and Covenantor(s) should indicate their acceptance of this Loan Retainer Agreement by signing where indicated below, and by initialing Schedule “A”, Schedule “B”, Schedule “C”, and Schedule “D” attached, and returning to Domain Funding on or before **5:00 PM on Friday, December 3, 2021.**

This is not a commitment to provide Financing.

Yours truly,

DOMAIN FUNDING



PER: Alexander Hayne

ACCEPTANCE OF LOAN RETAINER AGREEMENT

We hereby accept and agree to the terms and conditions outlined in this Loan Retainer Agreement and retain Domain Funding as our mortgage broker to arrange the Loan from Domain Mortgage Corp. as outlined herein.

We hereby agree to pay to Domain Funding the Loan Fee(s) outlined in Schedule "A", attached.

We hereby confirm that we have read, understood, and agreed with Schedule "B", attached.

We hereby confirm that we have read, understood, and agreed with Schedule "C", attached.

Dated this___________day of December 2021.

BORROWER(S):	COVENANTOR(S):
Evergreen House Development Limited Partnership	**Port Capital Development Inc.**
PER: Authorized Signatory	PER: Authorized Signatory
Port Capital Development (EV) Inc. as the General Partner of Evergreen House Development Limited Partnership	**Mr. Macario Teodoro Reyes**
PER: Authorized Signatory	Mr. Macario Teodoro Reyes

SCHEDULE "A" – LOAN FEE(S)

The Borrower(s) and Covenantor(s) agree to pay Domain Funding the following Loan Fee(s) in connection with the Third Loan Segment:

1.0 MORTGAGE BROKER FEE:

$ 26,000.00 = 2.00% of Third Loan Segment arranged by Domain Funding (the "Mortgage Broker Fee")

The Mortgage Broker Fee will be earned by Domain Funding upon Domain Funding providing the Borrower(s) with a Loan Commitment Letter(s) containing terms substantially similar to those outlined herein or otherwise acceptable to the Borrower(s).

The Mortgage Broker Fee is due and payable to Domain Funding as follows:

$ 26,000.00 - Upon the earlier of: (a) the funding of the Third Loan Segment; or (b) the Third Loan Segment Funding Date specified in the Loan Commitment Letter(s); or (c) the cancellation of this Loan Retainer Agreement by the Borrower(s). The $26,000.00 balance of the Mortgage Broker Fee will be further evidenced and secured by a Promissory Note to be issued and executed by the Borrower(s) and Covenantor(s) along with the Loan Commitment Letter(s).

2.0 FUND RAISING FEE:

$ 13,000.00 = 1.00% of Third Loan Segment arranged by Domain Funding (the "Fund Raising Fee")

The Fund Raising Fee will be due and payable to Domain Securities Corp. as follows:

$ 13,000.00 - Upon the earlier of: (a) the funding of the Third Loan Segment; or (b) the Third Loan Segment Funding Date specified in the Loan Commitment Letter(s); or (c) the cancellation of this Loan Retainer Agreement by the Borrower(s).

Fund Raising Fee in amount of $147,000.00 applicable to the initial advance of the $14,700,000 has not been paid by the Borrower(s). Pursuant to the Promissory Note dated October 25, 2021, payment towards the Fund Raising Fee for the initial advance of $14,700,000 will be paid to Domain Securities Corp. from the proceeds of the Third Loan Segment.

It is agreed that the Fund-Raising Fee is non-refundable and is to be applied on account of the reasonable costs of Domain Securities Corp.'s work and expenses in raising funds to fund the Loan outlined in this Commitment Letter. In the event the Loan Commitment Letter is cancelled, either by the Lender or by the Borrower, or in the event the Loan is not funded for any reason, the Fund Raising Fee shall be retained by the Lender as liquidated damages, and not as a penalty.

3.0 NON-REFUNDABLE WORKING FEE:

Not Applicable

4.0 EXIT FEE:

$ 26,000.00 = 2.00% of Third Loan Segment arranged by Domain Funding (the "Exit Fee")

The Exit Fee is due and payable to Domain Funding by the Borrower(s) upon the full repayment of the Loan unless:

a) the Loan is repaid in full on or before the Loan Balance Due Date to be specified in the Loan Commitment Letter(s); or
b) the Loan is repaid in full on or before the Loan Balance Due Date as extended pursuant to a Loan renewal, which may be offered by the Lender at its sole discretion to the Borrower(s); or
c) the Loan is repaid from a separate loan arranged by Domain Funding.

SCHEDULE "B" – NOTICE AND DISCLOSURE

Domain Funding is not a financial advisor, legal advisor, real estate advisor, construction advisor or other kind of advisor except for a commercial mortgage advisor.

In its capacity as a commercial mortgage advisor, Domain Funding attempts to arrange loan financing secured by real estate on behalf of its clients. All activities performed by Domain Funding on behalf of its clients are solely with respect to its role as a commercial mortgage broker. All commercial mortgage broker activities are performed on a "commercially reasonable efforts" basis.

All costs associated with the efforts of Domain Funding to arrange loan financing are the responsibility of the clients on whose behalf Domain Funding is working. This may include appraisal, legal, consultants or other costs. All clients agree to indemnify Domain Funding for costs incurred on their behalf.

Prior to the funding of a loan pursuant to a loan approval or commitment to provide financing, there is never any assurance that Domain Funding will be successful in its efforts to arrange financing. There is always a risk that Domain Funding will be unsuccessful in its efforts to arrange financing.

From time to time, Domain Funding may express its opinions and beliefs to its clients or others about the likelihood of arranging financing. Also, Domain Funding may communicate information received from potential lenders or others regarding the likelihood of arranging financing. Notwithstanding the expression of its opinions or beliefs or the communication of information received from others, there is never any assurance that a financing will be successful until it is actually funded pursuant to a loan approval or commitment.

The ability of Domain Funding to successfully arrange mortgage financing is dependent on several factors, including but not limited to the following:

a) The ability of Domain Funding to receive timely and accurate information and material regarding the Borrower(s), the Covenantor(s), the Property to be financed, and other matters related to the financing.
b) The market value of the Property as determined by a qualified real estate appraiser, by Domain Funding, and/or by a potential lender.
c) The characteristics of the Property to be financed including property type, property condition, historical and future property income, property location, etc.
d) The creditworthiness of the Borrower(s) and the Covenantor(s) as determined by Domain Funding and/or by a potential lender.
e) The real estate market conditions and mortgage lending standards that exist at the time of a loan application. NOTE: real estate market conditions and mortgage lending standards are subject to change.

In most matters related to commercial mortgage broker activities, time is of the essence. Failure by clients to meet deadlines or to act expeditiously may affect the ability of Domain Funding to arrange mortgage financing.

Any loan approval should be evidenced in writing and signed by an authorized signatory of the lender. No client should rely on a verbal loan approval or commitment to provide financing. This Loan Retainer Agreement constitutes the entire and final agreement between the parties and supersedes any and all prior oral or written agreements or discussions. This Agreement may not be modified in any respect except in writing which states the modification and is signed by both parties hereto.

SCHEDULE "C"

Conflict of Interest Disclosure Statement Form 10

INSTRUCTIONS

1. Please type or print clearly
2. If additional information is required, reference and attach a schedule to this form

Neither the Registrar of Mortgage Brokers nor any other authority of the government of the Province of British Columbia has in any way passed on the merits of the matters dealt with in this disclosure statement. This information statement has not been filed with the Registrar of Mortgage Brokers and the Registrar has not determined whether or not it complies with Part 2 of the *Mortgage Brokers Act*.

PART 1 – INFORMATION

FULL NAME OF MORTGAGE BROKER	TELEPHONE NUMBER
Bankers Mortgage Corporation dba Domain Funding	604 681 3000

ADDRESS (complete address including postal code)
#1100 - 1040 West Georgia Street, Vancouver, B.C. V6E 4H1

ADDRESS OF PROPERTY TO BE MORTGAGED (complete address including postal code)
1250 West Hastings Street, Vancouver B.C., V6E 2M4

LEGAL DESCRIPTION OF PROPERTY TO BE MORTGAGED

LOT 18, EXCEPT THAT PART OF THE CANADIAN PACIFIC RAILWAY RIGHT-OF-WAY AS DESCRIBED IN ABSOLUTE FEE PARCELS BOOK, VOLUME 9, FOLIO 317, NO. 1154C, AND EXCEPT THE SOUTH 7 FEET NOW ROAD, BLOCK 29 DISTRICT LOT 185 PLAN 92
PID: 006-721-397

Describe any direct or indirect interest the mortgage broker has or, as currently contemplated, may acquire in the transaction for which this disclosure statement is provided.

1. The Mortgage Broker represents (a) Domain Mortgage Corp. and/or (b) syndicate mortgage lenders, and/or (c) Domain First Mortgage Investment Corporation, and/or (d) Domain High-Yield Mortgage Investment Corporation.
2. Domain Mortgage Corp., Domain First Mortgage Investment Corporation, Domain High-Yield Mortgage Investment Corporation, and Domain Securities Corp. have the following common officers/directors as the Mortgage Broker: Alexander Hayne and Shamir Alibhai.
3. The Mortgage Broker will be compensated for this mortgage transaction with a 2.0% Mortgage Broker Fee based on the Loan Amount, payable by the Borrower.
4. The Mortgage Broker or the Lender may be compensated in the future for this mortgage transaction with Administration Fee(s), Renewal Fee(s), Asset Monitor Fee(s), Exit Fee(s), and Servicing Fee(s), payable by the Borrower.
5. Domain Mortgage Corp. will be compensated with a Mortgage Administration Fee of 1.0% of the Loan Amount per year, payable by the investors in the mortgage investment.
6. Domain Securities Corp. Is a related party to the Mortgage Broker and acts as the registered securities dealer in the raising of investment capital used to fund the Mortgage for which this Form 10 is required. Domain Securities Corp. will be compensated for this mortgage transaction with a 1.0% Fund Raising Fee based on the Loan Amount, payable by the Borrower.

Describe any direct or indirect interest that a related party or associate of the mortgage broker, as defined in the *Mortgage Brokers Act Regulations* has or, as currently contemplated, may acquire in the transaction for which this disclosure statement is provided.

Associates and/or related parties to the Mortgage Broker may acquire an interest in the mortgage investment.

PART 2 – CERTIFICATION

I certify that I am the mortgage broker or an authorized representative of the mortgage broker in this transaction and based on my knowledge, belief and information provided by third parties, this Disclosure Statement contains no untrue statement and does not omit to state a fact that is required to be stated or that is necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made.

FULL NAME OF MORTGAGE BROKER	ADDRESS (complete address including postal code)
Bankers Mortgage Corp. dba Domain Funding	#1100 - 1040 West Georgia Street, Vancouver B.C. V6E 4H1
SIGNATURE OF MORTGAGE BROKER OR AUTHORIZED REPRESENTATIVE	NAME OF AUTHORIZED REPRESENTATIVE OF MORTGAGE BROKER (PRINT NAME) John Kim
	DATE SIGNED (YYYY/MM/DD) 2021-12-01
ACKNOWLEDGEMENT OF RECEIPT SIGNATURE	PRINT NAME
	DATE SIGNED (YYYY/MM/DD)

SCHEDULE "D"

Copy of Title No. CA7287055

Appendix I

In the matter of the CCAA of Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership
Weekly Cash Flow Projection for the Period of December 13, 2021 to April 30, 2022
$CAD

	Week Ending	1 13-Dec-21 Forecast	2 20-Dec-21 Forecast	3 27-Dec-21 Forecast	4 3-Jan-22 Forecast	5 10-Jan-22 Forecast	6 17-Jan-22 Forecast	7 24-Jan-22 Forecast	8 31-Jan-22 Forecast	9 7-Feb-22 Forecast	10 14-Feb-22 Forecast	11 21-Feb-22 Forecast	12 28-Feb-22 Forecast	13 7-Mar-22 Forecast	14 14-Mar-22 Forecast	15 21-Mar-22 Forecast	16 28-Mar-22 Forecast	17 4-Apr-22 Forecast	18 11-Apr-22 Forecast	19 18-Apr-22 Forecast	20 25-Apr-22 Forecast	21 30-Apr-22 Forecast	Total
Receipts	**Notes**																						
GST Refund	1	-	47,211	-	-	-	-	7,036	-	-	-	2,290	-	-	-	3,009	-	-	-	2,136	-	-	**61,681**
		-	**47,211**	**-**	**-**	**-**	**-**	**7,036**	**-**	**-**	**-**	**2,290**	**-**	**-**	**-**	**3,009**	**-**	**-**	**-**	**2,136**	**-**	**-**	**61,681**
Site maintenance disbursements (inc GST)																							
Insurance	2	(18,348)	-	-	-	(18,348)	-	-	-	(18,348)	-	-	-	-	-	-	-	(18,348)	-	-	-	-	**(73,393)**
Site preservation	3	(6,853)	-	-	-	(3,426)	-	-	-	(3,426)	-	-	-	(3,426)	-	-	-	(3,426)	-	-	-	-	**(20,559)**
Glass storage costs	4	(12,474)	-	-	-	(6,237)	-	-	-	(6,237)	-	-	-	(6,237)	-	-	-	(6,237)	-	-	-	-	**(37,422)**
Consultants - city requirements	5	(10,270)	-	-	-	(4,437)	-	-	-	(4,437)	-	-	-	(4,437)	-	-	-	(4,437)	-	-	-	-	**(28,017)**
Crane lease	6	(16,170)	-	-	-	(8,085)	-	-	-	(8,085)	-	-	-	(8,085)	-	-	-	(8,085)	-	-	-	-	**(48,510)**
Formwork rentals	7	(29,237)	-	-	-	-	-	-	-	(15,106)	-	-	-	(15,106)	-	-	-	(15,106)	-	-	-	-	**(74,555)**
Permit costs	8	(163)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**(163)**
Showroom Rental	9	(15,112)	-	-	-	(7,556)	-	-	-	(7,556)	-	-	-	(7,556)	-	-	-	(7,556)	-	-	-	-	**(45,336)**
General, admin & miscellaneous expenses	10	(16)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**(16)**
Contingency	11	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**-**
		(108,644)	**-**	**-**	**-**	**(48,089)**	**-**	**-**	**-**	**(63,195)**	**-**	**-**	**-**	**(44,847)**	**-**	**-**	**-**	**(63,195)**	**-**	**-**	**-**	**-**	**(327,971)**
Restructuring Disbursements (exc GST)																							
Restructuring costs	12	(39,106)	(55,000)	(5,000)	(5,000)	(60,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	(5,000)	**(244,106)**
		(39,106)	**(55,000)**	**(5,000)**	**(5,000)**	**(60,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(5,000)**	**(244,106)**
Pre-construction disbursements (exc GST)																							
Property Tax	13	-	-	-	-	-	-	(75,000)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**(75,000)**
Crane swing and easement rights	14	-	(600,000)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**(600,000)**
Development Fees (Admin charges)	15	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**-**
Legal fees (new disclosure statement per REDMA)	16	-	-	-	-	(10,000)	-	(10,000)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**(20,000)**
Pre-sale marketing materials	17	-	-	-	-	-	-	-	-	-	-	-	-	(20,000)	-	-	-	-	-	-	-	-	**(20,000)**
Legal fees (exit CCAA)	18	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(15,000)	-	-	-	-	**(15,000)**
Construction loan fee	19	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(110,000)	-	-	-	-	**(110,000)**
Construction loan conditions (QS, appraisal, etc)	20	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	(45,000)	-	-	-	-	**(45,000)**
Project accounting	21	(2,000)	-	-	-	(2,000)	-	-	-	(2,000)	-	-	-	(2,000)	-	-	-	(2,000)	-	-	-	(2,000)	**(12,000)**
		(2,000)	**(600,000)**	**-**	**-**	**(12,000)**	**-**	**(85,000)**	**-**	**(2,000)**	**-**	**-**	**-**	**(22,000)**	**-**	**-**	**-**	**(172,000)**	**-**	**-**	**-**	**(2,000)**	**(897,000)**
Net Cash Flow		**(149,751)**	**(607,789)**	**(5,000)**	**(5,000)**	**(120,089)**	**(5,000)**	**(82,964)**	**(5,000)**	**(70,195)**	**(5,000)**	**(2,710)**	**(5,000)**	**(71,847)**	**(5,000)**	**(1,991)**	**(5,000)**	**(240,195)**	**(5,000)**	**(2,864)**	**(5,000)**	**(7,000)**	**(1,407,396)**
Cash Balance																							
Opening Available Cash Balance		24,275	868,441	260,652	255,652	250,652	130,562	125,562	42,598	287,598	217,403	212,403	209,693	204,693	132,846	127,846	125,855	120,855	(119,340)	(124,340)	(127,204)	(132,204)	**24,275**
Net Cash Flow		(149,751)	(607,789)	(5,000)	(5,000)	(120,089)	(5,000)	(82,964)	(5,000)	(70,195)	(5,000)	(2,710)	(5,000)	(71,847)	(5,000)	(1,991)	(5,000)	(240,195)	(5,000)	(2,864)	(5,000)	(7,000)	**(1,407,396)**
Port advance	22	-	-	-	-	-	-	-	250,000	-	-	-	-	-	-	-	-	-	-	-	-	-	**250,000**
Domain Funds	23	1,300,000	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**1,300,000**
Domain Loan Fees	24	(306,083)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	**(306,083)**
Closing Available Cash Balance		**868,441**	**260,652**	**255,652**	**250,652**	**130,562**	**125,562**	**42,598**	**287,598**	**217,403**	**212,403**	**209,693**	**204,693**	**132,846**	**127,846**	**125,855**	**120,855**	**(119,340)**	**(124,340)**	**(127,204)**	**(132,204)**	**(139,204)**	**(139,204)**

In the Matter of CCAA of the Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership (the "Petitioners")

Notes to the Unaudited Cash Flow Forecast of the Petitioners

Disclaimer:

In preparing this cash flow forecast (the "**Cash Flow Forecast**"), the Petitioners have relied upon unaudited financial information and the Petitioners have not attempted to further verify the accuracy or completeness of such information. The Cash Flow Forecast includes estimates concerning the operations of the Petitioners and additional assumptions discussed below with respect to the requirements and impact of a Companies' Creditor Arrangement Act ("**CCAA**") filing. Since the Cash Flow Forecast is based on assumptions about future events and conditions that are not ascertainable, the actual results achieved during the Cash Flow Forecast period will vary from the Cash Flow Forecast, even if the assumptions materialize, and such variation may be material. There is no representation, warranty or other assurance that any of the estimates, forecasts or projections will be realized.

The Cash Flow Forecast includes the receipts and disbursements of all the Petitioners during the Cash Flow Forecast Period covering the period from December 13, 2021 to April 30, 2022 (the "**Period**"). The Petitioners, with the assistance of Ernst & Young Inc., in its capacity as the Monitor, have prepared the Cash Flow Forecast based primarily on estimated receipts and disbursements related to the CCAA proceedings and the ongoing construction project (Terrace House). The Cash Flow Forecast covers the period from December 13, 2021 to April 30, 2022 (the "**Period**").

1. Receipts (GST Refund): Represents receipts for GST input tax credits paid and refunded during the Period.

2. Insurance: Represents the monthly premium payable on the current insurance policy.

3. Site Preservation: includes site security, scaffolding and fence rental, formworks rental and other items related to site preservation.

4. Glass Storage Costs: includes rental costs for the on-site office and costs associated with the storage of acquired glass and related materials.

5. Consultants – City Requirements: Represents management's estimates of required cash outlay to meet basic city requirements.

6. Crane Lease: Represents lease payments for the crane on site at the Terrace House site.

7. Formwork Rentals: Represents payment for formwork currently on site at the Terrace House site.

8. Permit Costs: Relates to costs to the City of Vancouver for permits, including street use permits.

9. Showroom rental: Represents payment to the landlord of the showroom.

10. General, Admin & Miscellaneous Expenses: Includes equipment repairs & maintenance, office expenses and other miscellaneous items.

11. Contingency: There is no contingency included in the Cash Flow Forecast for the Period.

12. Restructuring Costs: Represents professional fee payments to counsel to the Petitioners, the Monitor and the Monitor's counsel.

13. Property Tax: Represents the initial instalment for 2022 property taxes.

14: Crane Swing and Easement Rights: Represents a payment to a neighbouring building for crane swing easement rights allowing the Petitioners crane to enter the neighbouring property's airspace.

15: Development Fees: There are no development fees anticipated in the Period.

16: Legal Fees (REDMA): Represents legal fees associated with drafting a new disclosure statement that is in accordance with the *Real Estate Development Marketing Act* ("**REDMA**").

17: Pre-Sale Marketing Materials: Represents fees associated with marketing material to assist in the pre-sale campaign.

18: Other Legal Fees: Represents fees and Costs to begin preparation for exiting CCAA protection.

19: Construction Loan Fees: Represents fees and costs associated with securing construction financing.

20: Construction Loan Consultants: Represents fees and costs of various consultants that are anticipated as requirements to construction financing. These consultants include appraisers and quantity surveyors.

21: Project Accounting: Represents fees associated with on going book keeping services for the Terrace House Project.

22. Port Advances: Represents funds held in trust at Dentons for as interest on presale purchase deposits.

23. Domain Funds: Represents the gross loan of $1,300,000 from Domain Mortgage Corp. The loan is contingent on court approval.

24. Domain Loan Fee: Represents fees and costs associated with the proposed Domain Mortgage Corp loan of $1,300,000.