COURT OF APPEAL FOR ONTARIO

Court File No. C69263

B E T W E E N:

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of
Bondfield Construction Company Limited

Applicant (Respondent)(Responding Party)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellants)(Moving Parties)

Court File No. C69264

A N D B E T W E E N:

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of
1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)(Responding Party)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle,~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc.

Respondents (Appellants)(Moving Parties)

Court File No. C69278

A N D B E T W E E N:

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of
1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle, ~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. and 2304288 Ontario Inc.

Respondents (Appellant)

Court File No. C69305

A N D B E T W E E N:

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Applicant (Respondent)(Responding Party)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellant)(Moving Party)

Court File No. C69306

A N D B E T W E E N:

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of
Bondfield Construction Company Limited

Applicant (Respondent)(Responding Party)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage,2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellants)

Court File No. C69318

A N D B E T W E E N:

KSV Kofman Inc. in its capacity as Trustee-in-Bankruptcy of
1033803 Ontario Inc. and 1087507 Ontario Limited

Applicant (Respondent)(Responding Party)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, The Estate of Michael Solano, Lucia Coccia a.k.a. Lucia Canderle,~~Dominic Dipede~~, 2483251 Ontario Corp. a.k.a. Clearway Haulage, MMC General Contracting, MTEC Construction, Strada Haulage, 2104664 Ontario Inc. And 2304288 Ontario Inc.

Respondents (Appellants)(Moving Parties)

Court File No. C69321

A N D B E T W E E N:

Ernst & Young Inc., in its capacity as Court-Appointed Monitor of
Bondfield Construction Company Limited

Applicant (Respondent)(Responding Party)

and

John Aquino, Marco Caruso, Giuseppe Anastasio a.k.a. Joe Ana, Lucia Coccia a.k.a. Lucia Canderle, The Estate of Michael Solano, Giovanni Anthony Siracusa a.k.a. John Siracusa, 2483251 Ontario Corp. a.k.a. Clearway Haulage, 2420595 Ontario Ltd. a.k.a. Strada Haulage, 2304288 Ontario Inc., 2466601 Ontario Inc. a.k.a. MMC Contracting, 2420570 Ontario Ltd. a.k.a. MTEC Construction, Time Passion, Inc. and RCO General Contracting Ltd.

Respondents (Appellant)(Moving Party)

FACTUM OF THE RESPONDENTS (APPELLANTS)(MOVING PARTIES), JOHN AQUINO, 2304288 ONTARIO INC., MARCO CARUSO, GIUSEPPE ANASTASIO, A.K.A. JOE ANA and LUCIA COCCIA A.K.A. LUCIA CANDERLE

Motion seeking stay of execution pending leave application to the Supreme Court of Canada

(Motion returnable June 2, 2022)

May 17, 2022

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PART I – INTRODUCTION AND SUMMARY

1. The respondents-appellants on appeal-moving parties John Aquino, 2304288 Ontario Inc., Marco Caruso, Giuseppe Anastasio and Lucia Coccia-Canderle (collectively, "the Moving Parties") have brought forth this motion, pursuant to section 65.1(1) of the *Supreme Court Act*, R.S.C., 1985, c. S-26, as amended, seeking a stay of execution of the Judgments of Dietrich, J., dated March 19, 2021, as upheld in their entirety by the Court of Appeal for Ontario (per Lauwers, J.A.) on March 10, 2022, pending the decision of the Supreme Court of Canada as to whether to grant them leave to appeal and, if leave is granted, pending its decision on appeal. The applicant-respondent on appeal-responding party Ernst & Young Inc. ("Monitor"), in its capacity as court-appointed monitor of Bondfield Construction Company Limited ("Bondfield"), is resisting the relief being requested by the Moving Parties, and has submitted materials in response thereto[1]. The applicant-respondent on appeal-responding party KSV Kofman Inc. ("Trustee"), in its capacity as trustee-in-bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited (collectively, "Forma-Con"), though ostensibly also in opposition to the relief being requested, has nonetheless declined to submit any materials of its own. For the reasons to be given herein, the Moving Parties respectfully submit that it is in the interests of justice that the substantive relief they have requested be granted, with costs awarded in their favour and as against the Monitor and Trustee (if it actually does oppose the motion), on a partial indemnity basis.

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1 The Monitor has submitted a document styled "Fifteenth Supplement to the Phase II Investigation Report of the Monitor" ("Monitor's 15th Supplement"), dated May 9, 2022. This document, however, is not an affidavit, and thus does not qualify as evidence under our rules of civil procedure. Be that as it may, for the purposes of this motion, the Moving Parties are prepared to treat this document as the equivalent of a sworn document.

PART II – BACKGROUND

2. On November 12, 2019, the Monitor commenced an application as against the Moving Parties, *inter alios*, wherein it sought to hold each liable, on a joint and several basis, in the aggregate amount of approximately $33 million. Its sole cause of action was s. 96(1)(b)(ii)(B) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("*BIA*"), as incorporated into the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended ("*CCAA*") by section 36.1 thereof. Similarly, on February 21, 2020, the Trustee commenced an application as against the Moving Parties, *inter alios*, wherein it sought to hold each liable, on a joint and several basis, in the aggregate amount of approximately $11.4 million. Once again, the sole cause of action advanced in pursuit of this application was s. 96(1)(b)(ii)(B) of the *BIA*. *See* paras. 1 and 2 of the Memorandum of Argument ("MOA"), pages 176-177 of the PDF of the Motion Record of the Moving Parties, dated April 25, 2022, referenced at para. 3 of the Affidavit of John Aquino, sworn April 25, 2022 ("Aquino Affidavit").

3. On account of this litigation strategy, the Monitor and the Trustee had the legal burden of proving, on the civil balance of probabilities standard, that Bondfield and Forma-Con subjectively "intended to defraud, defeat or delay" their respective creditors. If they failed in this endeavour, their respective claims to monetary damages would be reduced to *nil*. Since the debtors were corporations, both the Monitor and the Trustee expressly relied on the intentionality of John Aquino, who was at the relevant times the President and a "directing mind" of each of the corporate debtors.

This is where one of the main legal defences was raised by the Moving Parties. In particular, the Moving Parties claimed that, under the common law doctrine of corporate attribution as formulated by the Supreme Court of Canada in *Canadian Dredge & Dock Co.* v. *The Queen*, [1985] 1 S.C.R. 662 (per Estey, J.) and its progeny, John Aquino's intentionality could not, as a matter of law, be attributed onto the corporate debtors. Accordingly, both the Monitor's and the Trustee's applications could not succeed. *See* paras. 3-5 of the MOA (pages 177-179 of the PDF), *ibid*.

4. Justice Dietrich, who was the judge who heard the applications and subsequently granted the judgments, made the following salient rulings. *First*, at para. 210 of her decision, she stated as follows: "The corporate attribution doctrine has yet to be applied in the context of s. 96 of the *BIA*." At para. 217, she stated as follows: "If the *Canadian Dredge* criteria were applied strictly, it would mean that John Aquino's intent could not be attributed to the debtor corporations." At para. 222, she continued as follows: "All of this would suggest that the *Canadian Dredge* criteria is to be applied strictly in all civil cases, including, arguably, those arising under s. 96 of the *BIA*." *Second*, rather than ending her analysis of this issue then and there, and thus dismissing the applications in their entirety, the learned applications judge proceeded to consider both the principles of statutory interpretation and policy considerations in her analysis of s. 96 of the *BIA*. *Finally*, upon concluding her analysis of these issues, Justice Dietrich ruled, at para. 229, as follows: "Given that the *BIA* is concerned with providing proper redress to creditors, the "intention of the debtor" in s. 96 should be interpreted liberally to include the intention of individuals in control of the

corporation, regardless of whether those individuals had any intent to defraud the corporation itself." *See* paras. 6-8 of the MOA, pages 179-180 of the PDF, *ibid*.

5. The Moving Parties appealed Justice Dietrich's judgments. The appeals were heard over a two-day period (September 1-2, 2021) by a three-member panel of the Court of Appeal. After a more than six-month reserve, the Court of Appeal rendered its decision, which upheld in its entirety the judgments rendered in the court below. In relevant part, the Court of Appeal (per Lauwers, J.A.), after identifying the relevant legal issue, made the following points. *First*, at para. 52, Justice Lauwers stated: "This argument raises a thorny question about the interplay between the provisions of the *BIA* and common law doctrine. When can common law doctrine be engaged in construing and applying the *BIA*?" At para. 58, Justice Lauwers continued as follows: "The Supreme Court has held that "Parliament is presumed to intend not to change the existing common law unless it does so clearly and unambiguously". At para. 70, Justice Lauwers continued with the following: "Thus far, the corporate attribution doctrine has been applied in the fields of criminal and civil liability. Courts have yet to consider the doctrine in the bankruptcy and insolvency context under s. 96 of the *BIA*, making this a case of first impression." *See* paras. 9-11 of the MOA, pages 181-182 of the PDF, *ibid.*

6. *Second*, at para. 74, Justice Lauwers stated as follows: "While this court must take the elements of the corporate attribution doctrine seriously, the genius of the

common law is in its robust circumstantial adaptability." *See* para. 12 of the MOA, page 182 of the PDF, *ibid*.

7. *Finally*, Justice Lauwers concluded his analysis of this issue by stating the following:

> In light of these considerations, I would reframe the test for imputing the intent of a directing mind to a corporation in the bankruptcy context this way: The underlying question here is who should bear responsibility for the fraudulent acts of a company's directing mind that are done within the scope of his or her authority – the fraudsters or the creditors?
>
> Permitting the fraudsters to get a benefit at the expense of creditors would be perverse. The way to avoid that perverse outcome is to attach the fraudulent intentions of John Aquino to Bondfield and Forma-Con in order to achieve the social purpose of providing proper redress to creditors, which is the core aim of s. 96 of the *BIA*. The application judge did not err in finding that the "intention of the debtor" under s. 96 can include "the intention of individuals in control of the corporation, regardless of whether those individuals had any intent to defraud the corporation itself."

(Emphasis added.) *See* para. 12 of the MOA, page 182 of the PDF, *ibid.*

8. Having thus ruled, the Court of Appeal sustained the judgments of Justice Dietrich, which collectively found the Moving Parties (save and except for Lucia Coccia-Canderle) to be jointly and severally liable to the Monitor and the Trustee in the aggregate amount of nearly $33 million. The Moving Parties thereafter sought leave to appeal to the Supreme Court of Canada. *See* para. 8 of the MOA (page 180 of the PDF), and paras. 13-14 of the MOA (page 182 of the PDF), *ibid.*

9. Needless to say, on account of the fact that the Court of Appeal created new law involving an important sector of the economy, a great deal of interest and commentary was generated within the legal community, especially amongst the bankruptcy and insolvency bar. A sample of this legal commentary is as follows: (i) "Court of Appeal Refines the Corporate Attribution Doctrine", written by Jonathan Bell et al. of Bennett Jones on March 15, 2022; (ii) "OCA addresses fraudulent transfers under Bankruptcy and Insolvency Act", written by Josef Kruger et al. of Borden Ladner Gervais on April 5, 2022; (iii) "Protecting creditors and the public interest: Ontario Court of Appeal modifies the corporate attribution doctrine", written by Jordan Deering et al. of DLA Piper on April 1, 2022; and (iv) "*Dredge*-ing up new law: Court of Appeal reframes corporate attribution doctrine for bankruptcy matters", written by Scott A. Bomhof et al., of Torys on March 16, 2022. In the parlance of today's youth, one can say that this matter has gone "viral". *See* para. 5 of the Aquino Affidavit, Tab 2 of the Motion Record.

10. Since the Moving Parties are seeking leave to appeal to the Supreme Court of Canada, which leave application was submitted and filed on April 21, 2022, a request was made by the Moving Parties to both the Monitor and the Trustee that they refrain from any enforcement measures pending the outcome of the leave application and, if leave were to be granted, pending the appeal itself. Unfortunately, both the Monitor and the Trustee rejected this request[2]. *See* paras. 6-8 of the Aquino Affidavit, *ibid.*

2 The Monitor subsequently modified its rejection to temporarily exclude from enforcement certain assets of John Aquino. However, as will be explained below, this was deemed insufficient by the Moving Parties, who thus rejected this counter-offer.

11. Accordingly, having been rebuffed by both the Monitor and the Trustee at what was a very reasonable request, the Moving Parties have now brought forth this motion.

PART III – LAW AND ANALYSIS

12. In *Ting (Re)*, 2019 ONCA 768, Justice Brown ruled as follows:

> [15] The test for granting a stay pending an application for leave to appeal to the Supreme Court of Canada is well-established. The moving party must demonstrate that: (i) there is a serious issue to be adjudicated on its proposed appeal, including that the appeal raises an issue of public or national importance; (ii) it will suffer irreparable harm if the stay is not granted; and (iii) the balance of convenience favours granting the stay. These three components are interrelated in that the overriding question is whether the moving party has shown that it is in the interests of justice that the court grant a stay: *Iroquois Falls Power Corporation v. Ontario Electricity Financial Corporation*, 2016 ONCA 616, at paras. 14 and 15; *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395, 131 O.R. (3d) 784, at para. 7.

13. In *Alectra Utilities Corp.* v. *Solar Power Network Inc.*, 2019 ONCA 332, Justice Paciocco ruled as follows:

> [11] When a party is seeking a stay of a decision of this court pending an application for leave to appeal, pursuant to *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 65.1, the serious issue factor is modified: *Livent Inc. v. Deloitte & Touche* (2016), 131 O.R. (3d) 784, [2016] O.J. No. 2659, 2016 ONCA 395, at para. 7.
>
> [12] As Gillese J.A. explained in *Iroquois Falls Power Corp. v. Ontario Electricity Financial Corp.*, [2016] O.J. No. 4159, 2016 ONCA 616, affd [2016] O.J. No. 4826, 2016 ONCA 687, the application judge "must make a preliminary assessment of the merit of the leave application,

> taking into consideration the stringent leave requirements in the *Supreme Court Act*": at para. 17. Since the Supreme Court of Canada typically grants leave only in cases of public or national importance, an application judge must consider whether these considerations are apt to be met.
>
> [13] To be sure, the threshold on both the merits and the national or public importance considerations remains low: *Livent Inc.*, at paras. 8-9. If there is little likelihood that leave to appeal will be granted, however, this will militate against the imposition of a stay: *Iroquois Falls*, [2016] O.J. No. 4826, 2016 ONCA 687, at para. 4.

14. In *Iroquois Falls Power Corporation* v. *Ontario Electricity Financial Corporation*, 2016 ONCA 616, Justice Gillese ruled as follows:

> [22] As the issues raised on the leave application are highly fact dependent, appear to be hypothetical, and are likely to be of little interest to others beyond the litigants, it is unlikely that the Supreme Court will grant leave.

15. Finally, in *Livent Inc. (Receiver of)* v. *Deloitte & Touche*, 2016 ONCA 395, Chief Justice Strathy ruled as follows:

> [10] The irreparable harm requirement refers to "harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": *RJR-Macdonald*, at p. 341 S.C.R.; *Fontaine*, at para. 36. In Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Toronto: Canada Law Book), it is stated, at para. 2.411, that "[i]t has been held that the courts should avoid taking a narrow view of irreparable harm."
>
> [11] In this case, as in *Yaiguaje*, the evidence of irreparable harm is weak. Nevertheless, I am satisfied that permitting the respondent to immediately enforce its judgment, while the leave application is pending, would be sufficiently disruptive of the appellants' business to

> amount to irreparable harm. While it is weak, it is sufficient to require an assessment of the balance of convenience.
>
> [12] The balance of convenience is just that -- a balancing of which party will suffer the greater harm from the stay being granted or refused. In this case, in my view, it goes in particular to the question of whether the interests of justice make up for the weakness of the irreparable harm factor.
>
> [13] The respondent recognizes that, short of paying the judgment, the provision of acceptable security for the judgment would eliminate or substantially mitigate the risk of harm and tip the balance of convenience in favour of a stay. For this reason, the debate before me centred on the nature of security to be provided.
>
> [14] In my view, the security ultimately offered by the appellants was reasonable and provides the respondent with satisfactory assurance that the judgment will be promptly paid in full if the application for leave fails.

16. Having elucidated the necessary factual background and legal principles, we can now apply the three-part stay of execution test to the facts at bar.

17. *First*, is "there [] a serious issue to be adjudicated on [the Moving Parties'] proposed appeal, including that the appeal raises an issue of public or national importance"? The answer to this question, it is respectfully submitted, is undeniably "yes". The Court of Appeal, by "reframing" the venerable common law doctrine of corporate attribution in the bankruptcy context, created new law with wide applicability in a very important sector of our economy. In other words, the issues that have been raised by the Moving Parties in their leave application to the Supreme Court of Canada are <u>not</u> "highly fact dependent, appear to be hypothetical, and are likely to be of little interest to others beyond the litigants", but rather deal with real-world

issues, are highly pertinent in the bankruptcy context, and have already generated much interest in this area of the law.

18. At para. 2(b) of the Monitor's 15th Supplement, the Monitor stated as follows: "The proposed appeal is not of national or public importance; it is premised on narrow, fact specific grounds." This statement, however, apart from being a bald statement without any analysis or any attempt at justification, is also rather disingenuous. After all, how can the Monitor make such a statement when the Court of Appeal explicitly modified a common law doctrine as it pertains to an entire area of law (*i.e.*, bankruptcy law)? If this issue does not qualify as one of "national or public importance", quite frankly, it is hard to imagine what will.

19. *Second*, will the Moving Parties "suffer irreparable harm if the stay is not granted"? The answer to this question is also undeniably "yes". At para. 2(d) of the Monitor's 15th Supplement, the following was stated therein: "John Aquino will suffer no irreparable harm as the Monitor has advised it will refrain from disposing of the only non-disputed non-liquid asset identified by John Aquino absent consent or order of the CCAA case management judge." In other words, since the Monitor has made it clear that it will only refrain from enforcement measures as it pertains to John Aquino's ownership of the shares in 2544266 Ontario Inc. (which is non-disputed), both John Aquino's cash and shares that he owns in disputed companies will be available for execution. As will be explained more fully below, this will result in

irreparable harm to John Aquino should the Moving Parties ultimately prevail at the Supreme Court of Canada.

20. Dealing first with the issue of cash, the Monitor has acknowledged (at para. 29 of the Monitor's 15th Supplement) that it is holding onto $3.1 million in "liquid assets" (*i.e.*, cash) that belong to John Aquino. Since the Monitor has not agreed to exempt these assets from seizure pending the leave application, the Monitor (if not judicially enjoined from doing so) would be at liberty to pay this cash to the creditors of Bondfield. However, if the leave application were to be granted, and the appeal ultimately succeed, John Aquino would have no entitlement to recover on any of these disbursed assets. In other words, he would incur "irreparable harm".

21. It is important to note here that the Monitor, though the beneficiary of a world-wide *Mareva* injunction that it obtained from Justice Hainey on February 25, 2020, as against all of John Aquino's assets, was never required nor did it ever provide any undertaking as to damages. Accordingly, John Aquino does not have any recourse as against the Monitor should he ultimately prevail with his appeal and the assets have been disbursed to creditors during the interim period. *See* paras. 11 and 12 of the Aquino Affidavit, *ibid.*

22. Dealing now with the issue of John Aquino's ownership of shares in the disputed companies, the Monitor has similarly (and rather mysteriously) refused to exempt any enforcement measures as against those shares pending the leave

application. These disputed companies are as follows: (i) 2119642 Ontario Inc., (ii) 2061089 Ontario Inc., (iii) Highbourne Estates Development Inc., and (iv) 2241036 Ontario Inc. Even though there is an extant action involving John Aquino and his father, Ralph Aquino, as to who is the beneficial owner of the shares in those companies, it is in fact conceded by Ralph Aquino that his son John is the registered (and thus *prima facie*) owner of 50% of those shares. In particular, at para. 12 of Ralph Aquino's Statement of Defence and Counterclaim, the following is pled therein: "The corporate records reflect that the Corporate Defendant[s] are legally owned by Ralph and John Aquino." *See* para. 7 of the Reply Affidavit of John Aquino, sworn May 16, 2022 ("Reply Aquino Affidavit"), found at Tab 1 the Reply Motion Record of the Moving Parties.

23. Accordingly, as the registered (and thus legal) owner of 50% of the shares in the disputed companies, the Monitor could seize on those shares and sell them to any third party, including to Ralph Aquino himself. If this were to occur during the pendency of the leave application, and if the Moving Parties ultimately prevail, John Aquino would have no entitlement to reclaim those sold shares nor would he have any recourse to claim monetary damages as against the Monitor. Once again, he would have sustained "irreparable ham".

24. *En passant*, it is also important to note here that the Monitor has refused to allow John Aquino access any of his frozen funds for the purposes of funding this litigation with Ralph Aquino. This is rather anomalous since the Monitor would

clearly benefit if John Aquino were to prevail in this lawsuit. After all, the Monitor would have access to millions of dollars worth of uncontested assets with which to collect on its Judgment. *See* para. 7 of the Reply Aquino Affidavit, *ibid.*

25. *Third*, does "the balance of convenience favours granting the stay"? It is respectfully submitted that the answer to this question is also undeniably "yes". The main reason for this is the fact that the Monitor, by virtue of the fact of the *Mareva* injunction that it had previously obtained against John Aquino, has frozen assets belonging to John Aquino that are more than sufficient to pay the Judgments in full should the leave application (or any appeal) be dismissed.

26. At para. 15 of the Aquino Affidavit, John Aquino both identified assets that he owns and ascribed a monetary value thereto. In the aggregate, the monetary value of these assets amount to an estimated $68.76 million (net of the mortgages), of which an estimated $41.5 million is from the Anderson Property alone (subject to final zoning approval). In other words, the Monitor (and by implication the Trustee) have more than sufficient assets to fully satisfy the Judgments should they ultimately be sustained. *See* para. 15 of the Aquino Affidavit, *ibid.*

27. The Monitor, for its part, has failed to ascribe any monetary value to the assets that it has frozen under the *Mareva* injunction. Accordingly, in the absence of any evidence challenging the estimated values that John Aquino has ascribed to his assets,

it is respectfully submitted that John Aquino's ascribed values be accepted by the Court for the purposes of this motion.

28. In addition, in specific regards to the Anderson Property, it is important to note that this property is currently in the process of obtaining final zoning approval for 700 lots by the relevant governmental authorities. When this approval is finalized, John Aquino has estimated that the value of this property will be worth $300 million in total. (As previously mentioned, John Aquino's estimated net value of his investment therein will be $41.5 million.) In other words, delaying enforcement in regards to this specific property will benefit all, including of course the Monitor and the Trustee. *See* para. 15 of the Aquino Affidavit, *ibid.*

29. *Finally*, is it "in the interests of justice that the court grant a stay"? The answer to this question, it is also respectfully submitted, is undeniably "yes". The delay to the creditors should the leave application be dismissed will likely be 4-6 months. When one considers that both Justice Dietrich and the Court of Appeal each took approximately six months to render their respective decisions upon conclusion of argument, this additional delay should be viewed as *de minimus*.

30. On the other hand, John Aquino has demonstrated that the Monitor and the Trustee already have access to sufficient assets upon which the Judgments (if ultimately sustained) can be paid in full. In point of fact, with passing time, the value of these assets will only appreciate, which of course will be for the benefit of all.

PART IV – CONCLUSION

31. The Monitor and the Trustee have obtained judgments for millions of dollars as against the Moving Parties. These judgments were recently upheld by the Court of Appeal. However, in so doing, the Court of Appeal created new law with wide applicability and important ramifications. In response thereto, the Moving Parties have sought leave to appeal to the Supreme Court of Canada. The issues raised by the Moving Parties are matters of clear "public and national importance". Though no one can foretell with certainty whether the Supreme Court of Canada will grant the Moving Parties the requested leave, the Moving Parties have requested in the interim that a stay of execution be granted. The Moving Parties in general, and John Aquino in particular, will suffer irreparable harm should the stay not be granted and they were to ultimately prevail at the Supreme Court. John Aquino's cash and shares in the disputed companies, which the Monitor has not agreed to exempt from seizure, if disbursed and/or sold during this interim period, will be unavailable for recapture by John Aquino should the appeal succeed. The Monitor and the Trustee, by virtue of a Mareva injunction previously granted by Justice Hainey, have more than adequate security with which to collect on the Judgments should the leave application be dismissed. Accordingly, it is in the interests of justice that the requested stay of execution be granted during this interim period.

PART V – RELIEF SOUGHT

32. The Moving Parties seek an Order from this Court for the following relief:

(i) An Order, pursuant to section 65.1(1) of the *Supreme Court Act*, staying the Judgments of Dietrich J., as upheld by the Court of Appeal for Ontario, pending the disposition of the leave application to the Supreme Court of Canada and, if leave is granted, pending the outcome of that appeal;

(ii) An Order, if necessary, pursuant to rule 3.02 of the Rules of Civil Procedure, abridging the time for service of this motion record; and

(iii) Costs of this motion, on a partial indemnity basis, in favour of the Moving Parties and as against the Monitor and the Trustee (if in actual opposition to this motion).

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th day of May 2022

Terry Corsianos

Terry Corsianos

George Corsianos

George Corsianos

CERTIFICATE OF THE RESPONDENTS-

APPELLANTS ON APPEAL-MOVING PARTIES

(i) An order under subrule 61.09(2) (original record and exhibits) is not required;

- and -

(ii) The undersigned, being the lawyers for the appellant, estimate that 0.5 hours (30 minutes) will be required for their oral argument, not including reply.

Terry Corsianos

Terry Corsianos

George Corsianos

George Corsianos

SCHEDULE A – LIST OF AUTHORITIES

1. *Ting (Re)*, 2019 ONCA 768.

2. *Alectra Utilities Corp.* v. *Solar Power Network Inc.*, 2019 ONCA 332.

3. *Iroquois Falls Power Corporation* v. *Ontario Electricity Financial Corporation*, 2016 ONCA 616.

4. *Livent Inc. (Receiver of)* v. *Deloitte & Touche*, 2016 ONCA 395.

SCHEDULE B – TEXT OF STATUTES AND REGULATIONS

Stay of execution — application for leave to appeal

- **65.1** (1) The Court, the court appealed from or a judge of either of those courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.
- Marginal note:Additional power for court appealed from

  (2) The court appealed from or a judge of that court may exercise the power conferred by subsection (1) before the serving and filing of the notice of application for leave to appeal if satisfied that the party seeking the stay intends to apply for leave to appeal and that delay would result in a miscarriage of justice.
- Marginal note:Modification

  (3) The Court, the court appealed from or a judge of either of those courts may modify, vary or vacate a stay order made under this section.
- 1990, c. 8, s. 40
- 1994, c. 44, s. 101

Court of Appeal File Nos. C69263, C69306, C69321

ERNST & YOUNG INC., in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited

Applicant (Respondent on Appeal)

-and-

JOHN AQUINO et al. Respondents (Appellants on Appeal)

Court of Appeal File No. C69264, C69278, C69305, C69318

KSV KOFMAN INC., in its capacity as Trustee-in-Bankruptcy of 1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Applicant (Respondent on Appeal)

-and-

JOHN AQUINO et al. Respondents (Appellants on Appeal)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

FACTUM, OF THE RESPONDENTS (APPELLANTS)(MOVING PARTIES) JOHN AQUINO, 2304288 ONTARIO INC., MARCO CARUSO, GIUSEEPE ANASTASIO AND LUCIA COCCIA

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