COURT OF APPEAL FOR ONTARIO

DOCKET: M53556 (C69236, C69264, C69278, C69305, C69306, C69318, C69321)

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.

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Respondents (Appellant)(Moving Party)

FACTUM OF THE RESPONDENTS-APPELLANTS-MOVING PARTIES JOHN AQUINO, MARCO CARUSO, GUISEPPE ANASTASIO A.K.A. JOE ANA, LUCIA COCCIO A.K.A. LUCIA CANDERLE AND 2304288 ONTARIO INC.

Motion to Review Order of van Rensburg, J.A., dated June 15, 2022

August 2, 2022

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PART I – INTRODUCTION AND SUMMARY

1. The respondents-appellants-moving parties John Aquino, Marco Caruso, Guiseppe Anastasio, Lucia Coccia-Canderle and 2304288 Ontario Inc. (collectively, "the Applicants") have brought forth this motion, pursuant to rule 61.16(6) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended (the "Rules"), seeking an Order setting aside the Order of van Rensburg, J.A., dated June 15, 2022 ("van Rensburg Order"). In its stead, the Applicants seek an Order, pursuant to section 65.1(1) of the *Supreme Court Act*, R.S.C., 1985, c. S.26, as amended, staying the execution of the Judgments of Dietrich, J., dated March 19, 2021, as upheld by the Court of Appeal for Ontario (per Lauwers, J.A.), on March 10, 2022 (the "Judgments"), pending the decision of the Supreme Court of Canada as to whether to grant leave to the Applicants to appeal the Judgments.

2. For the reasons to be stated herein, the Applicants respectfully submit that their requested relief be granted, with costs throughout being awarded in their favour on a partial indemnity basis.

PART II – BACKGROUND

3. On November 12, 2019, Ernst & Young Inc. ("Monitor"), in its capacity as Court-Appointed Monitor of Bondfield Construction Company Limited ("Bondfield"), commenced an application as against the Applicants, *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, KSV Kofman Inc. ("Trustee"), in its capacity as Trustee-in-Bankruptcy of 1033803 Ontario Inc. and 1087507 Ontario Limited (collectively, "Forma-Con"), commenced an application as against the Applicants, *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 217-218 (of 1549) of the PDF of the Motion Record of the Applicants, dated August 2, 2022, referenced at para. 3 of the Affidavit of John Aquino, sworn April 25, 2022 ("Aquino Affidavit").

4. 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 Applicants. In particular, the Applicants 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 218-220 of the PDF), *ibid*.

5. 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 220-221 of the PDF, *ibid*.

6. The Applicants 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 more than a 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 222-223 of the PDF, *ibid.*

7. *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 223 of the PDF, *ibid*.

8. *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 223 of the PDF, *ibid.*

9. Having thus ruled, the Court of Appeal sustained the Judgments of Justice Dietrich, which collectively found the Applicants (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 Applicants thereafter sought leave to appeal to the Supreme Court of Canada. *See* para. 8 of the MOA (page 221 of the PDF), and paras. 13-14 of the MOA (page 223 of the PDF), *ibid.*

10. 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. 6 of the Aquino Affidavit, pages 68 to 69 of the PDF, *ibid*.

11. Since the Applicants 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 Applicants 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[1]. *See* paras. 8-9 of the Aquino Affidavit, pages 69-70 of the PDF, *ibid*.

12. Accordingly, having been rebuffed by both the Monitor and the Trustee at what was a very reasonable request, the Applicants brought forth a motion seeking a stay of

1 The Monitor subsequently modified its rejection to temporarily exclude from enforcement certain assets of John Aquino.

execution pending the leave application before a single Judge of the Court of Appeal. This motion came on for a hearing before Justice van Rensburg on June 2, 2022. After a brief reserve, the learned motion judge released her decision on June 15, 2022, wherein she dismissed the Applicants' motion, and further awarded costs in favour of the Monitor in the staggering amount of $25,000, and further ordered costs in favour of the Trustee in the amount of $2,500. *See* Tab 3 of the Motion Record, pages 30-40 of the PDF.

13. This motion to review now follows.

PART III – LAW AND ANALYSIS

A. *Relevant Jurisprudence*

14. 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.

15. 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.

16. 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.

17. 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.

B. *Standard of Review*

18. 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. As this a motion to review a decision of a single judge of the Court of Appeal, and therefore a motion in the nature of an appeal, the learned motion judge's ruling can only be disturbed on errors

of law or on palpable and overriding errors of fact. *See Housen* v. *Nikolaisen*, 2002 SCC 33 (per Iacobucci and Major, JJ., for the majority).

C. *Serious Issue*

19. *First*, is "there [] a serious issue to be adjudicated on [the Applicants'] 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 Applicants 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.

20. At para. 10 of the Endorsement of van Rensburg, J.A., the learned motion judge ruled, in relevant part, as follows:

> Whether the corporate attribution doctrine formulated in [citations omitted] is the correct point of departure for determining the intention of a corporate debtor to defraud creditors under s. 96(1)(b)(ii)(B) of the *BIA*, and whether the approach by this court in this case is correct, may raise an issue of public importance concerning the interpretation of s. 96. Nevertheless, I see nothing in the <u>result</u> in this case that is inconsistent with settled law applying s. 96 of the *BIA*, and, irrespective of how the test might be interpreted and applied, I see no reasonable

> prospect of a different result, should the Supreme Court grant leave to appeal and hear the appeal.

(Emphasis in the original.)

21. Needless to say, there are numerous errors of law embedded within the foregoing statement, each one of which (when viewed either singularly or collectively) warrants appellate intervention. *First*, as made clear in *Alectra Utilities Corp.* v. *Solar Power Network Inc., supra,* this branch of the test is concerned with the merits of the leave application itself and not, if leave were to be granted, with the merits of the appeal. This of course makes intuitive sense since the stay will only be effective pending the leave application itself. Accordingly, Justice van Rensburg's reference to the appeal itself was an error in law.

22. *Second*, having already ruled that "an issue of public importance concerning the interpretation of s. 96" may arise in this case, the first branch of the test was in fact satisfied. As the relevant jurisprudence makes clear, the threshold for this branch is "low" and, based on the motion judge's ruling, was *ipso facto* satisfied.

23. *Finally*, the learned motion judge's statement that "[she] see[s] nothing in the result in this case that is inconsistent with settled law applying s. 96 of the BIA" (emphasis in the original) is misguided. As made clear by the Court of Appeal itself when dismissing the appeals, we are dealing with a matter of "first impression". Accordingly, there is nothing "settled" about this matter. Furthermore, as also made clear by the Court of Appeal, new law was created as it concerns the corporate

attribution doctrine within the bankruptcy context. Accordingly, Justice van Rensburg's conclusion that the result of this case (*i.e.*, John Aquino's state of mind being attributed to the corporate debtors) as flowing naturally from "settled law applying s. 96 of the BIA" is a clear error in law.

D. *Irreparable Harm*

24. *Second*, will the Applicants "suffer irreparable harm if the stay is not granted"? Prior to the Monitor's concession at para. 59 of its factum before Justice van Rensburg, which was in the nature of an undertaking given at the proverbial 11th hour, the answer to this question was also undeniably "yes". With the undertaking now in effect, the answer is still "yes", though the extent of the irreparable harm has been mitigated.

25. 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 had made it clear that it would 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 would be available for execution.

26. Dealing first with the issue of cash, the Monitor had 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 had not agreed to exempt these assets from seizure pending the leave application, the Monitor (if not judicially enjoined from doing so) would have been at liberty to pay this cash to the creditors of Bondfield. However, if the leave application were to be granted, and the appeal ultimately succeeded, John Aquino would have no entitlement to recover on any of these disbursed assets. In other words, he would have incurred "irreparable harm".

27. 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, pages 70-72 of the PDF, *ibid*.

28. 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 pages 1482-1484 of the PDF, *ibid.*

29. As noted at para. 7 of the van Rensburg Endorsement, the Monitor's undertaking, in relevant part, reads as follows: "In any event, the Monitor will undertake not to distribute any seized assets or the fruits thereof to Bondfield's creditors until resolution of the leave to appeal motion." Accordingly, the Monitor has agreed not to dispose of any seized assets to third parties during the leave application period, and thus eliminated the risk to the Applicants of not being able to recover their seized assets should they ultimately succeed at the Supreme Court of Canada. However, the risk of irreparable harm remains to the extent that John Aquino, as registered owner of these company shares, will lose the power to negotiate and effect a sale of these shares to any *bona fide*, third party purchaser for value. In other words, should the Monitor proceed to seize the shares now owned by John Aquino during the pendency of the leave application, and should John Aquino be approached by such a buyer during this interim period, he will have no ability to effect such a sale. This will constitute irreparable harm.

30. At para. 11 of the van Rensburg Endorsement, the motion judge sought to negate such a risk by asserting that (i) John Aquino's shares and/or properties are the subject of litigation with his father; (ii) represent interests in insolvent companies, and thus of no monetary value; and (iii) are of "no value", according to John Aquino's own testimony under oath. Needless to say, these assertions constitute both errors in law and palpable and overriding errors of fact.

31. *First*, even though John Aquino is involved in litigation with his father over the ownership of shares in various corporations, the undisputed fact of the matter is that John Aquino is the registered, and thus *prima facie*, owner of 50% of those shares. Therefore, just because someone is challenging your ownership of these shares does not mean that such ownership interest is completely negated. The properties owned by these companies are collectively worth millions of dollars, and there could very well be buyers out there who would be interested in buying (presumably at some discount) John Aquino's interest therein, despite the ongoing litigation.

32. *Second*, even though John Aquino's ownership interest in Bondfield may at present be worthless, it does not follow that this will be the case at some point in the future. It is important to note that Bondfield is under a monitorship (as opposed to a bankruptcy trusteeship), where the potential remains for a corporate rehabilitation at some point in the future.

33. *Finally*, Justice van Rensburg's assertion, in regards to the Anderson property, that John Aquino had "claimed was of "no value" during his recent cross-examination" is a palpable and overriding error of fact. The "no value" commentary was taken out of context, and is to be viewed not as a literal statement of fact, but rather as a relative statement of fact. In particular, the Anderson property at the time that these cross-examinations took place was still some way from receiving the all-important zoning from the relevant governmental authorities. However, in light of the fact that such zoning is now imminent, John Aquino provided sworn affidavit evidence that this property, once fully zoned, will be worth $300 million. Clearly, John Aquino will suffer irreparable harm should he be prevented from disposing of his interest therein during the interim period.

34. *En passant*, a final point that needs mentioning in regards to the irreparable harm branch of the test is this: It is respectfully submitted that it is an abuse of the process of the Court for the Monitor, faced with a motion seeking a stay of execution, to offer the undertaking that it did at the 11th hour. In other words, much akin to a responding party seeking to amend its pleadings in response to a pending summary judgment motion, the Monitor ought not to have been allowed to offer such an undertaking as it unfairly prejudiced the Applicants' motion.

E. *Balance of Convenience*

35. *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 be dismissed.

36. 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, pages 73 to 77 of the PDF, *ibid.*

37. At para. 12 of the van Rensburg Endorsement, the motion judge stated, in relevant part, the following:

> The Monitor submits that it, and by extension the creditors, would suffer irreparable harm if the execution of the judgments is delayed further. […] No security has been offered in this case, and I have concluded that the assets in the Monitor's hand are insufficient to satisfy the judgments.

38. The foregoing statements are palpable and overriding errors of fact. *First*, in light of the undertaking given by the Monitor, the Monitor's creditors will be no worse off than if the stay of execution were granted. In either scenario, they will not get paid anything pending this interim period. *Second*, the Monitor is holding onto $3.1 million

of John Aquino's assets. If this does not constitute "security", then what will? *Finally*, the evidence provided by John Aquino as to the monetary value of his assets, which evidence went unchallenged by the Monitor, is more than sufficient to satisfy the Judgments *in toto*.

F. *Costs Award*

39. As the Supreme Court of Canada held in *Hamilton v. Open Window Bakery*, 2004 SCC 9, at para. 27, a court's discretionary costs award can only be disturbed upon a showing that the motion judge made "an error in principle or if the costs award is plainly wrong." In the case at bar, the motion judge's costs award is "plainly wrong". Having allowed the Monitor to provide an 11th hour undertaking, which negated much of the irreparable harm analysis of the Applicants, the motion judge should not have awarded any costs to the Monitor. By so doing, she rewarded behaviour which should have been viewed as an abuse of the process of the Court. Furthermore, awarding costs of $2,500 to the Trustee, who submitted no materials whatsoever on the motion, and whose counsel's oral submissions were limited to a few minutes, was unreasonable and excessive.

PART IV – RELIEF SOUGHT

40. The Applicants seek an Order from this Court setting aside the Order of van Rensburg, J.A., dated June 15, 2022, and in its stead granting the requested stay of execution of the Judgments of Dietrich, J., as upheld by the Court of Appeal, pending

the leave application to the Supreme Court of Canada. The Applicants also seek their costs, both before this panel and before Justice van Rensburg, on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd day of August 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 1 hour 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
5. *Housen* v. *Nikolaisen*, 2002 SCC 33
6. *Hamilton v. Open Window Bakery*, 2004 SCC 9

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. M53556 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, MARCO CARUSO, GIUSEEPE ANASTASIO A.K.A JOE ANA LUCIA COCCIA A.K.A LUCIA CANDERLE AND 2304288 ONTARIO INC.

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