CITATION: CannTrust Holdings Inc., et al. (Re), 2021 ONSC 4408
COURT FILE NO.: CV-20-00638930-00CL
DATE: 20210624

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANNTRUST HOLDINGS INC., CANNTRUST INC., CTI HOLDINGS (OSOYOO) INC. AND ELMCLIFFE INVESTMENTS INC.

BEFORE: Justice L. A. Pattillo

COUNSEL: *Paul Steep, Jamey Gage, Shane D'Souza* and *Trevor Courtis,* for the Applicants

Steven Graff and *Jonathan Yantzi*, for the Monitor, Ernst & Young Inc.

Alex Morrison and *Karen Fung*, for Ernst & Young Inc.

David Wingfield and *Serge Kalloghlian,* for the CCAA Canadian Representatives

Steven Weisz, Pat Corney, James Johnson and *Michael H. Rogers*, for the CCAA U.S. Representatives

David Bish, for the Underwriters

Paul le Vay and *Carlo Di Carlo,* for Eric Paul

Peter Howard and *Brian Pukier*, for the Litwin Group

Rachel Corrigan U.S. lawyers, for the Litwin Group

John Salmas, for Cortland Credit Lending Corporation

Michael Wright, *Michael Robb* and *Alex Dirnson,* for Zola Finance Holdings Ltd. and Igor Gimelshtein

Linc Rogers, *Andrea Laing*, *Ryan Morris*, *Caitlin McIntyre* and *Justin Manoryk,* for KPMG LLP

Alistair Crawley and *Jonathan Preece,* for Peter Aceto

Michael Krygier-Baum and *Barry Papazian,* for Newline Canada Insurance Limited

David Vaillancourt, for Arch Insurance Canada Ltd.

Colin Empke, for Chubb Insurance Company of Canada and Allied World Assurance Company

Heather Gray, for Allianz Global Risks US Insurance Company

HEARD: June 10 and 16, 2021

ENDORSEMENT

Introduction

[1] The Applicants, CannTrust Holdings Inc. ("CT Holdings"), CannTrust Inc. ("CT"), CTI Holdings (Osoyoos) Inc. ("CTI") and Elmcliffe Investments Inc. ("Elmcliffe") move for an order approving and sanctioning the second amended and restated plan of compromise, arrangement and reorganization of CT Holdings, CT and Elmcliffe under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c, C-36 ("CCAA") and the *Business Corporations Act*, dated June 2, 2021 (the "Plan") and ancillary relief arising therefrom.

Overview

[2] CT Holdings is a public company and is a licensed producer of cannabis in Canada with facilities in Vaughn and Fenwick (Niagara), Ontario. Following audits by Health Canada at its facilities in June and July 2019, shipments of all its cannabis products were stopped and its cannabis licenses were partially suspended.

[3] On July 8, 2019, CT Holdings publicly announced that it was growing cannabis in breach of federal law, resulting in an immediate and substantial decline in the price of its shares. Shortly thereafter, numerous action and Class Actions (collectively the "Securities Claims") were commenced against CT Holdings and others in several provinces in Canada and at the federal and state level in the United States, claiming damages in excess of $500 million.

[4] Despite extensive efforts to resolve its issues, by March 2020, the Applicants determined it was in the best interest of themselves and their stakeholders to commence CCAA proceedings. On March 31, 2020, the Applicants obtained an initial order pursuant to the CCAA which included a stay of proceedings. Ernst & Young Inc. was appointed the Monitor. Subsequently, counsel in the lead securities class actions in Canada and the US were appointed CCAA Representative Counsel.

[5] Since commencing CCAA proceedings, the Applicants have completed each of the business restructuring objectives including completion of the remainder of its remediation work, reinstatement of its cannabis licenses, resumption of production and processing operations and a return to the recreational and medical cannabis markets.

[6] On May 8, 2020, the Applicants obtained a Mediation Order appointing the Honourable Dennis O'Connor, Q.C. to conduct a mediation process between CT Holdings, the plaintiffs and representative plaintiffs in the Securities Claims, co-defendants and insurers with a view to reaching a resolution of some or all of the securities and related claims between the various parties.

[7] On January 19, 2021, following extensive negotiations, facilitated by Mr. O'Connor, the Applicants entered into a Restructuring Support Agreement ("RSA") with the representative plaintiffs in the Ontario Class Action and the U.S. Class Action (the "Securities Claimants"). In general, the RSA provides for the settlement of the Class Actions against the Applicants and the support of the Securities Claimants to enable the Applicants to emerge from the CCAA proceedings.

[8] The settlement framework is set out in Schedule "B" to the RSA and provides, in part, for the establishment of a Securities Claimants Trust (the "Trust") for the benefit of Securities Claimants; that CT Holdings will contribute $50 million and assign all its securities related claims to the Trust and will provide information and cooperation to the Securities Claimants in the prosecution of the continuing litigation; a court order will be obtained, either as part of the Sanction Order or otherwise, barring any claims against the Settlement Parties asserted in the Actions or based on events giving rise to the Actions, including contribution and set-off claims; and if the amounts obtained by the Trust through settlement or prosecution of claims exceeds $250 million net of fees and expenses, CT Holdings will be entitled to receive payments up to the settlement amount of $50 million;

[9] The RSA further provides that additional Settlement Parties can be added to it, providing them the benefit of its provisions. Subsequently, additional settlements have been reached with co-defendants resulting in the Trust having received an additional $83 million.

[10] On May 28, 2021, meetings of four classes of Affected Creditors were held in accordance with a Meeting Order obtained on April 16, 2021, at which the March draft Plan was overwhelmingly approved by each class of creditors both by the numbers voting and by the value of their claims.

[11] In general, the Plan which the Applicants seek approval of, implements the framework for the settlement of all Securities Claims and addresses the other claims and contingent claims against the Applicants, to enable them to continue to carry on business and avoid the social and economic consequences of liquidation. It is supported by the Monitor, the Chief Restructuring Officer (FTI Consulting Canada Inc.) and a broad constituency of stakeholders including the General Unsecured Creditors and the Securities Claimants (the Class Action plaintiffs and other Settling Parties who have joined the RSA).

[12] As a result of many of the issues between the stakeholders and the Applicants being resolved during the proceedings, at the commencement of the hearing, only Zola Finance Holdings Ltd. and Igor Gimelshtein (the "Zola Plaintiffs"), KPMG LLP and Newline Insurance Co. opposed the motion. Further, prior to the conclusion of the hearing, Newline advised it had resolved its issues with the Applicants and was no longer opposing leaving only the Zola Plaintiffs and KPMG in opposition.

Discussion

[13] There is no issue between the parties concerning the requirements that must be met for court approval of a plan of compromise or arrangement under the CCAA. They are well established: a) there must be strict compliance with all statutory requirements; b) all material filed and procedures carried out must be examined to determine if anything has been done or purported to have been done which is not authorized by the CCAA and prior orders of the court in the CCAA proceedings; and c) the plan must be fair and reasonable. See: *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 22; *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 14.

The Zola Plaintiffs

[14] Included in the orders sought is a request for approval of the Allocation and Distribution Scheme ("A&DS"). The Zola Plaintiffs support the Plan but take issue with one aspect of the A&DS.

[15] The A&DS sets out a process for securities claimants who purchased shares in CT Holdings between January 1, 2018 and September 17, 2019 to seek compensation from the net proceeds from settlements or prosecution of actions or assigned claims by the Trust. It arose out of the RSA and was developed by Class Action lead plaintiffs and Class Action counsel with input from an expert financial economist.

[16] The Class Actions are based on allegations of misrepresentation by CT Holdings, among others. They allege CT Holdings share price was artificially inflated by different amounts at different periods of time during the share purchase period because different alleged misrepresentations began at different times and because artificial inflation declined incrementally after certain actions were taken by CT Holdings. The compensation is based, in part, on artificial "share inflation" at the time the shares were acquired and disposed of.

[17] The allegation in the Ontario Class Action is that CT Holdings made separate misrepresentations about compliance at each of the Vaughan and Niagara facilities. The former between June 1, 2018 and September 30, 2018, and the latter from October 1, 2018 forward. The October 1, 2018, date is based on CT Holdings public announcement that the illegal growing in Niagara began in October 2018.

[18] The A&DS provides for an artificial inflation amount between June 1 and September 30, 2018 (when only the Vaughan misrepresentation was outstanding) of $1.29 and $5.02 from October 1, 2018 onward reflecting the effect of both the Vaughan and Niagara misrepresentations on the share price.

[19] The Zola Plaintiffs take issue with the date provided for in the A&DS when CT Holdings began to misrepresent the operations in its Niagara facility. They submit that the October 1, 2018 date is arbitrary and not fair and reasonable and request that the court revise the date to a date a few weeks earlier in September 2018. In support, they have filed the affidavit of Mr. Gimelshtein, Zola's former CFO, who has extensive knowledge of cannabis operations.

[20] Mr. Gimelshtein's evidence is that the October 1, 2018 date is not a logical start date for when CT Holdings illegal growing began at its Niagara facility because the decision and preparation to begin the illegal operation would have begun one to two weeks and up to four weeks before the growth start date.

[21] The Zola Plaintiffs purchased 3 million shares of CT Holdings between September 26 and 28, 2018. There is no question therefore, based on the compensation formula in the A&DS that they will receive significantly less compensation for their loss than if they purchased the shares a few days later. But that does mean that A&DS should be amended as they request.

[22] I am satisfied, based on the evidence, that the compensation formula set out in the A&DS has been developed on a rational basis and is reasonable having regard to the interests of the Securities Claimants as a whole. The CCAA Representatives case theory about when the misrepresentations began and upon which the compensation formula is reasonable and supported by the evidence. While I have concerns about Mr. Gimelshtein's evidence given his obvious conflict, the conception of the illegal growing as deposed by him could still have taken place in October based on CT Holdings public statement.

[23] In my view, the A&DS is fair and reasonable, and I therefore reject the Zola Plaintiffs' objection.

KPMG

[24] KPMG Inc. was the auditor for the applicants during the material time. It is also a Co-Defendant in the Securities Claims. It has objected to the Plan since the first iteration in March 2021. While some of its objections have been resolved along

the way including during the break between the hearing dates, the following issues remain:

1) Was KPMG improperly excluded from voting at the Creditors' Meetings as a result of the creditors being improperly classified, resulting in the vote not reflecting a true consensus of affected creditors;

2) Whether the assignment of the Applicants' claim for auditor's negligence against KPMG to the Trust in the Plan is fair and reasonable; and

3) Whether the Bar Order terms in paragraph 7.3 of the Plan, and specifically the Judgment Reduction Provision in Article7.3(2) is fair and reasonable.

Exclusion from Voting

[25] In my view, KPMG's complaint that it was excluded from voting at the creditors' meeting is one that should have been raised by it at the hearing for the Meetings Order. Instead, KPMG submits that in order to have an opportunity to rectify its concerns with the Applicants regarding the draft Plan, it withdrew its objection to the Meetings Order while reserving all of its rights and arguments with respect to opposing the Plan. That reservation is incorporated into the Meetings Order and acknowledged by the Applicants.

[26] Parties are encouraged to resolve issues with a CCAA plan prior to court approval of the Meetings Order, if possible. A plan that cannot meet the sanction approval criteria at that stage will result in a meeting order not being granted: *Target Canada Co. (Re)*, 2016 ONSC 316. This is particularly so, in my view, where the issue concerns the classification of creditors and whether a creditor has a right to vote on the plan, as here.

[27] That said, KPMG's claim against CT Holdings is a claim for contribution and indemnity as a co-defendant in the Securities Claims. While it is an equity claim under the CCAA, it is derivative to the claims of the Securities Claimants. The Securities Claimants were classified as their own class. Even if KPMG was placed in that class, given the nature of its claim, in my view, it would not have had the right to vote as a result of the rule against double proofs which would apply.

[28] The "rule against double proof" provides that there cannot be two proofs of claim filed for the same debt, even though there may be two separate contracts or sources of liability in respect of that debt: *Aslan (Re)*, 2014 ONCA 245 at para. 16. Further, the rule extends to voting: *Quintette Coal Ltd. (Re)*, 1991 CanLII 303 (B.C.S.C.) at para. 35.

[29] Accordingly, I agree with the Applicants that the classification of the Affected Creditors was appropriate in the circumstances and having regard to the nature of KPMG's claim, it and the other non-settling defendants were not entitled to a vote at the creditors' meetings.

Assignment of Claims

[30] KPMG takes issue with the manner in which the purported assignment of the Applicants' auditor's negligence claim against it is provided for in the Plan.

[31] The SRA provides as part of the settlement between the Applicants and the Securities Claimants, that the Plan provide that the Applicants assign their "Assigned Claims" (if any) to the Trust on the date of the Plan's implementation (para. 3.01(c)). The SRA defines "Assigned Claims" as follows:

> "Assigned Claims" means the claims of CannTrust Holdings against any Co-Defendant that is a Non-Settlement Party and, if applicable, the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for loss or damage up to the date of the CCAA Sanction Order and arise from or relate to the Securities-Related Matters.

[32] The Plan, as well as its earlier iteration in March 2021, provides for the assignment of "Assigned Claims" (if any) to the Trust prior to the Implementation Date. Other than the addition of CannTrust Opco as an assignor, the March draft contained a definition of "Assigned Claims" similar to the one in the SRA.

[33] The definition of "Assigned Claims" in the Plan for approval provides as follows:

> "Assigned Claims" means (i) the claims of CannTrust Holdings and CannTrust Opco against any Co-Defendant that is a Non-Settlement Party, other than contribution and indemnity claims and, if applicable, (ii) the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for the loss or damage up to the date of the Sanction Order and arise from or relate to the Securities-

> Related Matters, and without limiting the generality of the foregoing (iii) the claims of CannTrust Holdings and CannTrust Opco in contract and tort against KPMG LLP as of the Filing Date.

[34] In addition, the bar in respect of claims over by a Settlement Party against a Co-Defendant in Article 7.3(3) of the Plan was also amended subsequent to the March draft "for greater certainty" to exclude all Assigned Claims. It now reads:

> 7.3(3) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, all Claims or the Channelled Claims, which were or could have been brought by a Settlement Party in the Actions or otherwise against a Co-Defendant that is a Non-Settlement Party, excluding for greater certainty all Assigned Claims, will be permanently and forever barred, estopped, stayed and enjoined.

[35] To make matters even more confusing, on June 16, 2021, the day before the resumption of the hearing of the motion, the Applicants provided yet another revision to the proposed definition of "Assigned Claims" in the Plan. The June 16th definition reads:

> "Assigned Claims" means (i) if applicable, the claims of CannTrust Holdings and the other Settlement Parties against any Insurer that is a Non-Settlement Party, in each case to the extent such claims are for loss or damage up to the date of the CCAA Sanction Order and arise from or relate to the Securities-Related Matters, and (ii) the claims of CannTrust Holdings and CannTrust Opco in contract and tort arising from the audit and professional services of KPMG LLP as of the Filing Date.

[36] KPMG submits, relying on *Target*, that the Applicants should not be permitted to amend the initial definition of "Assigned Claims" contained in the March version of the Plan which was approved by the creditors and in the alternative that the definition of "Assigned Claims" in both the June 2 Plan and the June 16 revised definition should be amended to strike out the specific reference to CannTrust Holdings and CannTrust Opco's claim against it. It further submits that the wording in Article 7.3(3) of the Plan excluding "Assigned Claims" from the bar order for all cross-claims by Settlement Parties against Co-Defendants should be removed.

[37] The Applicants submit that the principle in *Target* does not apply given there was never any agreement with KPMG concerning the Plan and the Plan provides that the Applicants can amend it at any time. In addition, both the Applicants and the Securities Claimants submit that the assignment of the KPMG audit claim was

an important factor in reaching their settlement and there is no basis in law for not allowing the assignment.

[38] I agree with the Applicants that the principle discussed in *Target*, to the effect that a proposed CCAA plan which contravenes an agreement previously reached between the debtor and a stakeholder will not be sanctioned, is not applicable. There is no evidence there was ever any agreement between KPMG and the Applicants in respect the Assigned Claims. Further, and as noted by the Applicants, Article 10.3 of the Plan provides that it can be amended by them subsequent to the Meeting.

[39] I have no issue with CannTrust Holdings and CannTrust Opco assigning any claims it may have to the Trust as long as such assignment is not inconsistent with the Plan or otherwise contrary to law. I accept the evidence on behalf of the Securities Claimants that the assignment of the Applicant's claims, including its claim against KPMG for auditors' negligence, is an important element of the settlement with the Applicants. I have a concern, however, with the way in which the Applicants have provided for the assignment in the Plan.

[40] More specifically, the Plan includes a bar on any claim the Applicants may have for contribution and indemnity or other claims over against a Co-Defendant that is a Non-Settlement Party – i.e., KPMG (Article 7.3(3)). At the same time, however, the Applicants seek to exclude "all Assigned Claims" from that bar. The result is that while the Applicants are barred from bringing a contribution and indemnity claim or claims against their Co-Defendants, by assigning that claim, their assignee can. In other words, it permits the Applicants to do indirectly what they can't do directly. In my view, the removal of the bar for all Assigned Claims is neither fair nor reasonable.

[41] Further, I also see no reason why the definition of "Assigned Claims" has to specifically refer to CannTrust Holdings and CannTrust Opco's claims against KPMG other than to provide some sort of legitimacy to the assignment as a result of the court's sanction of the Plan. Specific reference to the claim against KPMG is neither necessary nor appropriate. Any assignment should permit the defendant to raise all defences available to it both in respect of the assigned claim as well as the assignment, including a defence to a claim for contribution and indemnity arising from the bar order in Article 7.3(3) of the Plan.

The Judgment Reduction Provision

[42] KPMG submits that the Bar Order in Article 7.3 of the Plan and specifically

the Judgment Reduction Provision in Article 7.3(2), is unfair and prejudicially affects its rights.

[43] The initial version of the Plan circulated in March 2021 purported, among other things, to release CT Holdings from all securities related indemnity claims. As a result, in the event of joint and several liability of a non-settling defendant in the remaining Securities Action, that defendant would be liable for the full amount of the judgment, including CT Holdings' portion of the liability, without recourse to CT Holdings for contribution and indemnity.

[44] Prior to the motion for the Meetings Order, the Applicants amended the Bar Order provision in Article 7.3 of the Plan to provide for a Judgment Reduction Provision as follows:

> 7.3(2) From and after the Effective Time, to the extent provided in the CCAA Sanction Order, any judgment or other award obtained by a Securities Claimant or the Securities Claimant Trust in respect of any Securities-Related Claim against a Non-Settlement Party or other Person that is not a Released Party shall be reduced by the amount, if any, that the court or other tribunal adjudicating the Securities-Related Claim determines would have been recovered by such Non-Settlement Party or other Person pursuant to a Securities-Related Indemnity Claim held by it against a Released Party in respect of such Securities-Related Claim but for the release of such Securities-Related Indemnity Claim pursuant to the CCAA Plan or the CCAA Sanction Order, determined as of the moment before the Effective Time and, for greater certainty, taking into account (i) the Cash Contribution to be made by CannTrust Holdings to the Securities Claimant Trust and (ii) all other Securities-Related Indemnity Claims of other Non-Settlement Parties or other Persons participating in any recovery on a *pro rata* basis.

[45] KPMG submits that the Judgment Reduction Provision is fundamentally flawed and is not fair and reasonable to the non-settling defendants. It submits that the Bar Order in Article 7.3 deviates from the provisions a *Pierringer* arrangement by not limiting the non-settling defendants' joint and several liability to the Security Claimants in the Securities Claims to several liability resulting in prejudice to the non-settling defendants, including KPMG.

[46] While the Applicants acknowledge that a *Pierringer* arrangement is otherwise appropriate in respect of the settlement of partial claims in class actions, they submit the settlement here occurs within a CCAA proceeding and therefore different considerations apply involving the balancing of the interests of all stakeholders. Accordingly, they submit the Judgment Reduction Provision is

appropriate and places the non-settling defendants, including KPMG, in an economically neutral position. Even if the non-settling defendants had a claim over against the Applicants in the Securities Claimants' action, given that they are insolvent, that claim would not be satisfied leaving the non-settling defendants liable for 100% of the Securities Claimants damages. Further, the Judgment Reduction Provision gives the non-settling defendants a credit for the $50 million the Applicants paid to the Trust as part of its settlement with the Securities Claimants.

[47] The Applicants submit that the Judgment Reduction Provision is appropriate in the circumstances and rely on *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181 and *Arrangement relative à 9323-7055 Québec Inc. (Aquadis International Inc.)*, 2018 QCCA 1345.

[48] A *Pierringer* arrangement facilitates settlement between a plaintiff and a defendant in circumstances where other defendants remain against whom the plaintiff wishes to proceed to trial and who have a crossclaim for contribution and indemnity against the settling defendant. The purpose of a *Pierringer* arrangement is to enable the settlement while maintaining a level playing field for the remaining defendants in the action: *Endean* at para. 52. See too: *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 27, [2013] 2 S.C.R. 623 at paras. 23-26.

[49] The essential provisions of a *Pierringer* arrangement are as follows: 1. The settling defendant settles with the plaintiff; 2. The plaintiff discontinues its claim against the settling defendant; 3. The plaintiff continues its action against the non-settling defendant but limits its claim to the non-settling defendant's several liability; 4. The settling defendant agrees to co-operate with the plaintiff in the action against the non-settling defendant; 5. The settling defendant agrees not to seek contribution and indemnity from the non-settling defendants; and 6. The plaintiff agrees to indemnify the settling defendants against any claims over by the non-settling defendant: *Endean* at para. 52. As noted in *Sable Offshore* at para. 26, it is inherent in *Pierringer* agreements that non-settling defendants can only be liable for their share of the damages and are therefore severally, not jointly, liable with the settling defendants.

[50] The objectives of a *Pierringer* arrangement include promoting settlement while ensuring fairness to the non-settling defendants. They have been endorsed by courts in Canada for some time and approved in CCAA proceedings. See: *Hollinger Inc.*, Re, 2012 ONSC 5107.

[51] The settlement between the Applicants and the Securities Claimants as provided for in the RSA contains some but not all the provisions of a *Pierringer* arrangement. It provides for the settlement of the Securities Claimants action against the Applicants; for the co-operation of the Applicants in the continuing action; and for what is referred to as a "Bar Order" which provides that the "Definitive Documents" which include the Plan and the Sanction Order, will provide, among other things, a bar of any and all claims against the Applicants that relate to or arise out of, among other claims, any claims for contribution and indemnity by any non-settling defendants (RSA, s. 3.02(c)). That bar is provided for in Article 7.3(1) of the Plan.

[52] Notably, there is no agreement in the SRA that the Securities Claimants will limit their claims against the non-settling defendants to their several liability or that they will indemnify the Applicants in respect of any claims over against the applicants by the non-settling defendants.

[53] Article 7.3 of the Plan provides for the bar orders required by the SRA. In response to the concerns expressed, in part, by KPMG, rather than limiting the liability of the non-settlings defendants in the Securities Claims to several liability, the Applicants added the Judgment Reduction Provision in Article 7.3(2).

[54] In my view, Article 7.3 of the Plan as it is currently drafted is not fair to the non-settling defendants, including KPMG. While it bars any claims, including contribution and liability, against the Applicants, it fails to restrict the Securities Claimants' claims in the Action against the non-settling defendants to several liability. Having elected to settle with the Applicants, the Securities Claimants bear the risk of an inadequate settlement. By enabling the Securities Claimants to continue their action against the non-settling defendants and recover 100% of their damages, that risk shifts to the non-settling defendants. Rather than balancing the interests of the stakeholders therefore, it favours the Securities Claimants (one group of creditors) over the non-settling defendants (another group of creditors).

[55] Importantly, while there is evidence of the importance of the assignment to the settlement between the Applicant and the Securities Claimants, there is no evidence of the importance of the Securities Claimants being able to maintain their claims against the non-settling defendants and recover 100% of the damages while barring the non-settling defendants right to contribution and indemnity.

[56] The Applicants submit, relying on *Endean*, that because they are insolvent, the non-defendants' right to contribution and indemnity is worthless. While that is true now, it will not necessarily be the case at some point in the future when the issue of any claim over will be decided and when the Applicants have emerged from these insolvency proceedings and hopefully have become a successful and credit worthy corporation.

[57] Nor do I consider that the Judgment Reduction Provision in Article 7.3(2) of the Plan operates to cure the failure to limit the non-settling defendants' joint and several liability to several only. Reducing the non-settling defendants' liability by the amount of the settlement paid by the Applicants has no relationship to the non-settling defendants' several liability to the plaintiffs.

[58] A true *Pierringer* arrangement has no regard to the settlement amount, nor does it have to be disclosed (*Sable Offshore*). The protection for the non-settling defendant (who is not a party to the settlement agreement) is the plaintiff's agreement to limit its claim to the non-settling defendant's several liability, not a credit for the settlement amount against 100% of the liability.

[59] The Applicants submit that *Aquadis* supports the Judgment Reduction Provision. I disagree. *Aquadis* concerned the approval of a proposed settlement of some defendants in a products liability claim where the *Québec Civil Code* provides for 100% liability of each person in the chain of the goods, from the seller to the manufacturer with a right of subrogation. In approving the judgment reduction provision, which effectively indemnified the non-settling parties for any portion of the damages the court may determine it could have effectively recovered from the settling party, the court equated it to a *Pierringer* arrangement. In my view, in circumstances such as here, where there is joint and several liability of the defendants and the non-settling defendants' liability can be restricted to several liability, a judgment reduction provision is neither necessary nor appropriate.

[60] The Applicants rely on *Endean* to support the Judgment Reduction Provision. In *Endean* the trial judge reduced the non-settling defendant's liability by apportioning a percentage of liability to entities who were bankrupt and had not been sued. The Court of Appeal held that liability should be allocated between the defendants and that interpreting the bar order in a *Pierringer* agreement to apply to bankrupt non-defendants was not appropriate. Overall, however, the Court affirmed the underlying policy goals sought to be achieved by a *Pierringer* arrangement.

[61] I also disagree with the way in which the Applicants have drafted the Judgment Reduction Provision to provide for the assessment of recoverability. Apart from being confusing and potentially difficult to determine, by providing for a time when the Applicants were insolvent ("as of the moment before the Effective Time") rather than, as noted above, at some point in the future when a non-settling defendant would actually seek to recover indemnity and after the Applicants have emerged from insolvency proceedings is not appropriate.

[62] For those reasons, I do not consider the Plan, and specifically Article 7.3(2) and the wording of Article 7.3(3) referred to, to be fair and reasonable in the circumstances and as a result, I am not prepared to approve or sanction the Plan in its current form.

Conclusion

[63] For the above reasons, therefore, I dismiss the sanction motion with leave to bring it back on, if, and when the issues I have identified have been addressed.

[64] In the interim and to allow that process to occur, I extend the stay in the proceeding to July 30, 2021.

L. A. Pattillo J.

Released: June 24, 2021