SUPREME COURT OF CANADA

CITATION: Chandos Construction Ltd. *v.* Deloitte Restructuring Inc., 2020 SCC 25

APPEAL HEARD: January 20, 2020
JUDGMENT RENDERED: October 2, 2020
DOCKET: 38571

BETWEEN:

Chandos Construction Ltd.
Appellant

and

Deloitte Restructuring Inc. in its capacity as Trustee in Bankruptcy of Capital Steel Inc., a bankrupt
Respondent

- and -

Attorney General of Canada, Canadian Association of Insolvency and Restructuring Professionals and Insolvency Institute of Canada
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT: (paras. 1 to 46)	Rowe J. (Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Martin and Kasirer JJ. concurring)
DISSENTING REASONS: (paras. 47 to 139)	Côté J.

Chandos Construction Ltd. *Appellant*

v.

Deloitte Restructuring Inc. in its capacity as Trustee in Bankruptcy of Capital Steel Inc., a bankrupt *Respondent*

and

Attorney General of Canada, Canadian Association of Insolvency and Restructuring Professionals and Insolvency Institute of Canada *Interveners*

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File No.: 38571.

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Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Bankruptcy and insolvency — Anti-deprivation rule — Priority of claims — Clause in subcontract awarding fee to general contractor in the event of subcontractor's bankruptcy — Subcontractor filing assignment in bankruptcy prior to completing subcontract — Whether general contractor entitled to set fee off against amount owing to subcontractor — Whether anti-deprivation rule exists at common law — If so, whether clause invalid by virtue of anti-deprivation rule.

Chandos Construction Ltd. ("Chandos"), a general construction contractor, entered into a construction subcontract with Capital Steel Inc. ("Capital Steel"). Clause VII Q(d) of the subcontract provides that Capital Steel will pay Chandos 10 percent of the subcontract price as a fee for the inconvenience or for monitoring the work in the event of Capital Steel's bankruptcy. When Capital Steel filed an assignment in bankruptcy prior to completing its subcontract with Chandos, Chandos argued it was entitled to set off the costs it had incurred to complete Capital Steel's work and to set off 10 percent of the subcontract price, as provided for by clause VII Q(d). Capital Steel's trustee in bankruptcy applied for advice and directions as to whether clause VII Q(d) was valid. The application judge found the provision to be a valid liquidated damages clause, but the Court of Appeal reversed the decision.

Held (Côté J. dissenting): The appeal should be dismissed.

Per Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, **Rowe**, Martin and Kasirer JJ.: Clause VII Q(d) is invalid by virtue of the anti-deprivation

rule. This rule renders void any provision in an agreement which provides that upon an insolvency (or bankruptcy), value is removed from the reach of the insolvent person's creditors which would otherwise have been available to them, and places that value in the hands of others.

The anti-deprivation rule has existed in Canadian common law since before federal bankruptcy legislation existed, and has not been eliminated by any decision of the Court or by Parliament. Parliament's actions are better understood as gradually codifying limited parts of the common law rather than seeking to oust all related common law. The anti-deprivation rule prevents contractual provisions from frustrating the scheme of the *Bankruptcy and Insolvency Act* ("*BIA*") as it renders void contractual provisions that would prevent property from passing to the trustee. This helps maximize the global recovery for all creditors in accordance with the priorities set out in the *BIA*.

The test under the anti-deprivation rule has two parts: the relevant clause is triggered by an event of insolvency or bankruptcy, and the effect of the clause is to remove value from the insolvent's estate. This is an effects-based test. What should be considered is whether the effect of the contractual provision was to deprive the estate of assets upon bankruptcy, not whether the intention of the contracting parties was commercially reasonable. Adopting a purpose-based test would create new and greater difficulties. It would require courts to determine the intention of contracting parties long after the fact, detract from the efficient administration of corporate

bankruptcies, and encourage parties who can plausibly pretend to have *bona fide* intentions to create a preference over other creditors by inserting such clauses. It would also be inconsistent with the general principles of contractual freedom — parties do not negotiate with a view to protecting the interests of their creditors in the event of their bankruptcy. Finally, under a purpose-based rule, unsecured creditors would receive even less than they do now. An effects-based approach provides parties with the confidence that contractual agreements, absent a provision providing for the withdrawal of assets upon bankruptcy or insolvency, will generally be upheld.

Clause VII Q(d) violates the anti-deprivation rule and is thus void. It provides that, in the event Capital Steel commits any act of bankruptcy, Capital Steel shall forfeit 10 percent of the subcontract price — this is a direct and blatant violation of the rule. It cannot be rescued by the law of set-off, as set-off only applies to enforceable debts or claims. It applies to debts owed by the bankrupt that were not triggered by the bankruptcy, since the anti-deprivation rule only makes deprivations triggered by insolvency unenforceable.

Per **Côté** J. (dissenting): There is agreement with the majority that the anti-deprivation rule has a longstanding and strong jurisprudential footing in Canadian law and that it has not been eliminated by the Court or through legislation. However, this rule should not apply to transactions or contractual provisions which serve a *bona fide* commercial purpose. As clause VII Q(d) furthers a *bona fide*

commercial purpose, it is enforceable and does not offend the anti-deprivation rule. Accordingly, the application judge's order should be restored.

The anti-deprivation rule should not apply to transactions or contractual provisions which serve a *bona fide* commercial purpose for three reasons. First, courts applying the anti-deprivation rule in Canada have not been content to rest their reasons for decision merely on a finding that the effect of a transaction or contractual provision was to deprive a bankrupt's estate of value — the golden thread weaving its way through the jurisprudence is the presence or absence of a *bona fide* commercial purpose behind the deprivation. In the minority of cases where *bona fide* commercial purpose has not been discussed, its absence has been readily inferable from the circumstances.

Second, there is a principled legal basis for retaining a *bona fide* commercial purpose test. The anti-deprivation rule is based on the common law public policy against agreements entered into for the unlawful purpose of defrauding or otherwise injuring third parties. It thus requires an objective assessment of the parties' intentions. In contrast, the *pari passu* rule has an effects-based test because it is based on an implied prohibition in the *BIA* that operates regardless of the parties' intentions. The *pari passu* provision in the *BIA* establishes a very clear bright line rule that all claims proved in a bankruptcy shall be paid rateably. This clear and straightforward statutory language readily supports a conclusion that Parliament intended to prohibit a debtor from contracting with creditors for a different

distribution of the debtor's assets in bankruptcy than that provided in s. 141 of the *BIA*.

The anti-deprivation rule does not derive from a strained interpretation of s. 71 of the *BIA*. But even if the anti-deprivation rule was an implied prohibition in the *BIA*, it is a well-established principle that the *BIA* does not grant a trustee any greater interest in a bankrupt's property than that enjoyed by the bankrupt prior to the bankruptcy. Holding that s. 71 of the *BIA* converts the bankrupt's qualified interest in an asset into an absolute or unqualified interest in the hands of the trustee breaks with this principle. The statutory context includes numerous provisions indicating that arm's-length *bona fide* commercial transactions are valid as against the trustee of a bankrupt's estate.

Third, as a matter of public policy, the considerations cited in support of an effects-based test are not sufficient to override the otherwise strong countervailing public interest in the enforcement of contracts. Despite being a judicially-derived public policy, it is still prudent for courts to take into account the policies embodied in legislation as a reflection of society's public policy concerns. Therefore, anti-deprivation rule's common law character does not preclude a court from taking into account Parliament's objective of maximizing global recovery for all creditors, when considering how to formulate the anti-deprivation rule. However, Parliament's objectives must be weighed against the other policy interests protected by the common law when considering how to best formulate the rule. The common law

places great weight on the freedom of contracting parties to pursue their individual self-interest, and the public policy considerations which have been cited in support of an effects-based test are not sufficient to override the otherwise strong countervailing public interest in the enforcement of contracts.

A purely effects-based test gives too little weight to freedom of contract, party autonomy, and the elbow-room which the common law traditionally accords for the aggressive pursuit of self-interest. It may also create significant uncertainty by introducing a vague standard which unduly restricts the scope of the anti-deprivation rule. By contrast, a subjective purpose test would place too little weight on Parliament's objective of maximizing global recovery for all creditors. The middle path — the objective *bona fide* commercial purpose test — is the best way to balance freedom of contract, the interests of third party creditors, and commercial certainty. Certainty in commercial affairs is typically better served by giving effect to contracts which were freely entered into, particularly when they serve commercial purposes and are not directed at an unlawful objective.

In addition, applying a *bona fide* commercial purpose test would not require a significantly more onerous analysis into the parties' intentions than that entailed by an effects-based test. Moreover, while debtors are not properly incentivized to protect their creditors' interests when dealing with third parties, creditors can access a full range of options to protect their rights: the oppression remedy, the directors' duty of care, the various anti-avoidance provisions in the *BIA*

and in provincial statutes, as well as the ability of creditors to bargain for contractual protections. Parliament has also occupied much of the ground formerly covered by the common law such that there is a reduced need for a general anti-deprivation rule. Indeed, the many statutory protections already in place to safeguard the interests of creditors undermine any perceived policy need to expand the reach of the anti-deprivation rule. These provisions reflect Parliament's policy preference for upholding the validity of *bona fide* commercial arrangements, even when they have the effect of reducing the pool of assets available to a debtor's creditors in bankruptcy.

In the instant case, clause VII Q(d) furthers a *bona fide* commercial purpose. A general contractor's role is essentially to oversee and coordinate the construction of a project by various subcontractors according to a set schedule. It is evident that a subcontractor's bankruptcy during the construction of the project would require the general contractor to redirect significant administrative and management resources. The general contractor would also incur administrative and management costs from mitigating the fallout up and down the construction pyramid. Costly delays would ensue as well. Thus, a fee for the inconvenience of completing the work using alternate means is legitimate. Clause VII Q(d) does not demonstrate any intent on the part of Chandos or Capital Steel to avoid the operation on bankruptcy laws or to prejudice Capital Steel's creditors.

Cases Cited

By Rowe J.

Distinguished: *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900; **referred to:** *Belmont Park Investments Pty. Ltd. v. BNY Corporate Trustee Services Ltd.*, [2011] UKSC 38, [2012] 1 A.C. 383; *A.N. Bail Co. v. Gingras*, [1982] 2 S.C.R. 475; *Canadian Imperial Bank of Commerce v. Bramalea Inc.* (1995), 33 O.R. (3d) 692; *In Re Hoskins and Hawkey, Insolvents* (1877), 1 O.A.R. 379; *Re Wetmore*, [1924] 4 D.L.R. 66; *Westerman (Bankrupt), Re*, 1998 ABQB 946, 234 A.R. 371, rev'd 1999 ABQB 708, 275 A.R. 114; *Re Knechtel Furniture Ltd.* (1985), 56 C.B.R. (N.S.) 258; *Re Frechette* (1982), 138 D.L.R. (3d) 61; *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, 2013 ONCA 95, 14 C.B.R. (6th) 276; *HGC v. IESO*, 2019 ONSC 259; *1183882 Alberta Ltd. v. Valin Industrial Mill Installations Ltd.*, 2012 ABCA 62, 522 A.R. 285; *Watson v. Mason* (1876), 22 Gr. 574; *Hobbs v. The Ontario Loan and Debenture Company* (1890), 18 S.C.R. 483; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306; *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Borland's Trustee v. Steel Brothers & Co., Limited*, [1901] 1 Ch. 279; *Holt v. Telford*, [1987] 2 S.C.R. 193.

By Côté J. (dissenting)

A.I. Enterprises Ltd. v. Bram Enterprises Ltd., 2014 SCC 12, [2014] 1 S.C.R. 177; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Symes v. Canada*, [1993] 4 S.C.R. 695; *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, [2001] 2 S.C.R. 1082; *Belmont Park Investments Pty. Ltd. v. BNY Corporate Trustee Services Ltd.*, [2011] UKSC 38, [2012] 1 A.C. 383; *Hobbs v. The Ontario Loan and Debenture Company* (1890), 18 S.C.R. 483; *Ex parte Voisey* (1882), 21 Ch. D. 442; *Ex parte Williams* (1877), 7 Ch. D. 138; *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900; *A.N. Bail Co. v. Gingras*, [1982] 2 S.C.R. 475; *British Eagle International Airlines Ltd. v. Cie Nationale Air France*, [1975] 1 W.L.R. 758; *In Re Hoskins and Hawkey, Insolvents* (1877), 1 O.A.R. 379; *Murphy, a Bankrupt* (1803), 1 Ch. 44; *Watson v. Mason* (1876), 22 Gr. 574; *Re Frechette* (1982), 138 D.L.R. (3d) 61; *Borland's Trustee v. Steel Brothers & Co., Limited*, [1901] 1 Ch. 279; *Re Knechtel Furniture Ltd.* (1985), 56 C.B.R. (N.S.) 258; *Canadian Imperial Bank of Commerce v. Bramalea Inc.* (1995), 33 O.R. (3d) 692; *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, 2013 ONCA 95, 14 C.B.R. (6th) 276; *Westerman (Bankrupt), Re*, 1998 ABQB 946, 234 A.R. 371, rev'd 1999 ABQB 708, 275 A.R. 114; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157; *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249; *Higinbotham v. Holme* (1812), 19 Ves. Jr. 88, 34 E.R. 451; *In re Stephenson*, [1897] 1 Q.B. 638; *Whitmore v. Mason*

(1861), 2 J. & H. 204, 70 E.R. 1031; *Ex parte Mackay* (1873), L.R. 8 Ch. App. 643; *Elford v. Elford* (1922), 64 S.C.R. 125; *Campbell River Lumber Co. v. McKinnon* (1922), 64 S.C.R. 396; *Zimmerman v. Letkeman*, [1978] 1 S.C.R. 1097; *Giffen (Re)*, [1998] 1 S.C.R. 91; *Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326; *Flintoft v. Royal Bank of Canada*, [1964] S.C.R. 631; *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *St. John Shipping Corp. v. Joseph Rank Ltd.*, [1957] 1 Q.B. 267; *Still v. M.N.R. (C.A.)*, [1998] 1 F.C. 549; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494; *In re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1; *Fender v. St. John-Mildmay*, [1938] A.C. 1; *Lomas v. JFB Firth Rixson Inc.*, [2010] EWHC 3372 (Ch.), [2011] 2 B.C.L.C. 120, aff'd [2012] EWCA Civ. 419, [2012] 2 All E.R. (Comm.) 1076; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888.

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Worthington, Sarah. "Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule" (2012), 75 *M.L.R.* 112.

APPEAL from a judgment of the Alberta Court of Appeal (Rowbotham, Veldhuis and Wakeling JJ.A.), 2019 ABCA 32, 438 D.L.R. (4th) 195, 70 C.B.R. (6th) 1, 91 B.L.R. (5th) 1, [2019] A.J. No. 99 (QL), 2019 CarswellAlta 125 (WL Can.), setting aside a decision of Nielsen J., Alta. Q.B., Edmonton, No. 24-2169632, March 17, 2017. Appeal dismissed, Côté J. dissenting.

Darren Bieganek, *Q.C.*, and *Ryan Quinlan*, for the appellant.

Shauna N. Finlay and *Victoria Merritt*, for the respondent.

Zoe Oxaal, for the intervener the Attorney General of Canada.

Ashley Taylor and *Sinziana R. Hennig*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Sean F. Collins, *Brandon Kain* and *Cassidy Thomson*, for the intervener the Insolvency Institute of Canada.

The judgment of Wagner C.J. and Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ. was delivered by

ROWE J. —

[1] This case concerns a common law rule (the "anti-deprivation rule") that operates to prevent contracts from frustrating statutory insolvency schemes. Chandos Construction Ltd. ("Chandos") entered into a construction contract ("Subcontract") with Capital Steel Inc. ("Capital Steel"). A provision of the Subcontract would award Chandos a sum of money in the event of Capital Steel's bankruptcy, which later occurred. This case deals with whether that provision was invalid by virtue of the anti-deprivation rule.

[2] I conclude that it is, essentially for the reasons of the majority of the Court of Appeal of Alberta. Accordingly, the appeal is dismissed.

I. Facts

[3] Chandos, a general construction contractor, entered into the Subcontract with Capital Steel, a subcontractor. The value of the Subcontract was $1,373,300.47. The provision at issue is in clause VII Q, one of the "Conditions" of the subcontract:

> **Q Subcontractor Ceases Operation**
>
> In the event the Subcontractor commits any act of insolvency, bankruptcy, winding up or other distribution of assets, or permits a receiver of the Subcontractor's business to be appointed, or ceases to carry on business or closes down its operations, then in any of such events:
>
> (a) this Subcontract Agreement shall be suspended but may be reinstated and continued if the Contractor, the liquidator or Trustee of the Subcontractor and the surety, if any, so agree. If no agreement is reached, the Subcontractor shall be considered to be in default and the Contractor may give written notice of default to

the Subcontractor and immediately proceed to complete the Work by other means as deemed appropriate by the Contractor, and

(b) any cost to the Contractor arising from the suspension of this Subcontract Agreement or the completion of the Work by the Contractor, plus a reasonable allowance for overhead and profit, will be payable by the Subcontractor and or his sureties, and

(c) the Contractor is entitled to withhold up to 20% of the within Subcontract Agreement price until such time as all warranty and or guarantee periods which are the responsibility of the Subcontractor have expired and,

(d) the Subcontractor shall forfeit 10% of the within Subcontract Agreement price to the Contractor as a fee for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period.

(A. R., at p. 157)

[4] This clause provides four consequences that follow from the insolvency, bankruptcy, or cease of business of Capital Steel. First, clause VII Q(a) provides that the Subcontract will be suspended and can only be continued if the Trustee in bankruptcy and Chandos agree. Second, clause VII Q(b) provides that Capital Steel will pay Chandos "any cost . . . arising from the suspension" of the Subcontract or from Chandos having to complete the work, plus a "reasonable allowance for overhead and profit". Third, clause VII Q(c) allows Chandos to withhold certain funds from Capital Steel until the warranty and guarantee periods run out. Fourth, clause VII Q(d) provides that Capital Steel will pay Chandos 10 percent of the Subcontract price "as a fee for the inconvenience . . . and/or for monitoring the work".

[5] When Capital Steel filed an assignment in bankruptcy prior to completing its Subcontract with Chandos, Deloitte Restructuring Inc. was appointed as its Trustee in bankruptcy. At the time, Chandos owed Capital Steel $149,618.39 under the Subcontract. Chandos argued that it was entitled to set off $22,800 — the costs it had incurred to complete Capital Steel's work — such that it would owe Capital Steel only $126,818.39 ($149,618.39 less $22,800). In so arguing, Chandos did not have to rely on clause VII Q as it could rely on the ordinary common law rules relating to damages for breach of contract and the law of set-off, which persists in bankruptcy under s. 97(3) of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3 ("*BIA*").

[6] Chandos argued that it was also entitled to set off the amount triggered by the bankruptcy according to clause VII Q(d), under which Capital Steel forfeits 10 percent of the Subcontract price in the event of insolvency. The Subcontract price was $1,373,300.47, so, by its terms, clause VII Q(d) created a debt owed by Capital Steel to Chandos of $137,330.05. If clause VII Q(d) applied, it would mean Chandos had a $10,511.66 claim provable in bankruptcy proceedings rather than a debt to Capital Steel of $126,818.39.

[7] Faced with these arguments, the Trustee applied for advice and directions from the Court of Queen's Bench as to whether clause VII Q(d) was valid.

II. Judgments Below

[8] The application judge found the provision to be valid (Alta. Q.B., Edmonton, 242169632, 17 March 2017). He concluded that, so long as the provision was not an attempt to avoid the effect of bankruptcy laws, the anti-deprivation rule does not prevent contracting parties from agreeing that upon the insolvency of one party, the other party can make a liquidated damages claim. He found that, in this case, Chandos had not attempted to avoid the effect of bankruptcy laws. He also found that the provision was a (valid) liquidated damages clause, not an (invalid) penalty clause.

[9] On appeal, the majority of the Court of Appeal reversed the decision, finding the provision invalid (2019 ABCA 32, 438 D.L.R. (4th) 195).

[10] As Rowbotham J.A., for the majority, explained, whether a provision is a liquidated damages clause or a penalty clause is a separate and distinct analysis from whether the provision violates the anti-deprivation rule. A provision can be invalid if it violates either the anti-deprivation rule or the penalty clause rule.

[11] Justice Rowbotham's reasons proceeded in three stages. First, she identified the long history of the anti-deprivation rule in Canadian jurisprudence. Second, she found that the rule has not been eliminated by either subsequent decisions or by statutory amendments. Finally, she determined that the content of the rule should remain as articulated in the Canadian jurisprudence rather than adopt the approach taken by the United Kingdom Supreme Court in *Belmont Park Investments*

Pty. Ltd. v. BNY Corporate Trustee Services Ltd., [2011] UKSC 38, [2012] 1 A.C. 383 ("*Belmont Park*", earlier know as "*Perpetual Trustee*").

[12] As Rowbotham J.A. explained, the common law has two distinct rules that both invalidate contracts that affect the distribution of proceeds in bankruptcy, although they had earlier been combined under the moniker of a "fraud upon the bankruptcy law". The rules do not stand on their own, but rather exist to give effect to an implicit prohibition in bankruptcy legislation. First, the *pari passu* rule forbids contractual provisions that would allow certain creditors to receive more than their fair share. It does not matter whether the provision is triggered by insolvency or bankruptcy, so long as it would alter the scheme of distribution after proceedings begin. Second, the anti-deprivation rule prevents parties from agreeing to remove property from a bankrupt's estate that would otherwise have vested in the trustee. It invalidates provisions that are "engaged by a debtor's insolvency and remove value from the debtor's estate to the prejudice of creditors" (para. 32). Put another way, although both rules concern creditors receiving an appropriately-sized slice of the proverbial pie, the anti-deprivation rule relates to the size of the pie and the *pari passu* rule relates to the slicing of the pie, whatever size it may be (see R. Goode, "Perpetual Trustee and Flip Clauses in Swap Transactions" (2011), 127 *L.Q.R.* 1, at p. 4).

[13] Justice Rowbotham concluded that both rules have been applied in Canadian jurisprudence. She cited *A.N. Bail Co. v. Gingras*, [1982] 2 S.C.R. 475, at para. 23, as an application of the *pari passu* rule, and the following cases as examples of the application of

the anti-deprivation rule: *Canadian Imperial Bank of Commerce v. Bramalea Inc*. (1995), 33 O.R. (3d) 692 ("*Bramalea*"); *In Re Hoskins and Hawkey, Insolvents* (1887), 1 O.A.R. 379; *Re Wetmore*, [1924] 4 D.L.R. 66 (N.B.S.C. (App. Div.)); *Westerman* (*Bankrupt*), *Re*, 1998 ABQB 946, 234 A.R. 371, rev'd on other grounds 1999 ABQB 708, 275 A.R. 114; *Re Knechtel Furniture Ltd.* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.); *Re Frechette* (1982), 138 D.L.R. (3d) 61 (Que. Sup. Ct.); *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, 2013 ONCA 95, 14 C.B.R. (6th) 276, at paras 10-12; *HGC v. IESO*, 2019 ONSC 259, at para. 100 (CanLII); *1183882 Alberta Ltd. v. Valin Industrial Mill Installations Ltd.*, 2012 ABCA 62, 522 A.R. 285 (per McDonald J.A., dissenting).

[14] Justice Rowbotham identified no cases where the anti-deprivation rule had been eliminated. She considered *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900 ("*Coopérants*"), because, even though it involved a contractual provision triggered by liquidation, this Court did not discuss the anti-deprivation rule. She noted, however, that there was no evidence the provision at issue prejudiced creditors, so the anti-deprivation rule would not have been engaged.

[15] Justice Rowbotham also found that no statutory changes had eliminated the anti-deprivation rule, either explicitly or by negative implication, as when Parliament occupies the field. The only changes that might arguably be relevant were to the *BIA*. They, however, addressed a different problem than that addressed by the

anti-deprivation rule: whereas the anti-deprivation rule protects creditors, the changes in question protect debtors.

[16] One such change came when Parliament enacted ss. 65.1 and 66.34 of the *BIA*. These sections invalidate contractual provisions triggered by insolvency in both commercial and consumer restructurings. Parliament's focus was on ensuring that debtors have time necessary to restructure their affairs. There was no suggestion that these sections were meant to affect the anti-deprivation rule, which is aimed at protecting the interest of creditors.

[17] Similarly, when Parliament enacted s. 84.2 of the *BIA*, it intended to protect consumer debtors from the deleterious consequences of provisions that trigger upon bankruptcy, not to protect one creditor from a debtor's contract with another creditor.

[18] Justice Rowbotham concluded that in none of these instances did Parliament intend to occupy the field and eliminate the anti-deprivation.

[19] Next, Rowbotham J.A. considered whether to follow the U.K. Supreme Court's approach to the anti-deprivation rule in *Belmont*. In *Belmont*, the U.K. Supreme Court concluded that the anti-deprivation rule does not apply to "bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy" (para. 104).

[20] Justice Rowbotham declined to follow *Belmont*. She noted that this purpose-based test was contrary to the effects-based test applied by Canadian courts, and that this new test had been criticized by British legal scholars as defeating the purpose of the anti-deprivation rule. She further noted that a party who might become insolvent has no incentive to resist a clause that directs property out of its estate upon insolvency, since, upon that event, the insolvent party will no longer have an interest in that property.

[21] Finally, Rowbotham J.A. applied the common law anti-deprivation rule to clause VII Q(d). She determined that this clause triggered upon insolvency and that giving effect to it would remove value from the debtor's estate to the prejudice of creditors. The clause was therefore invalid.

[22] Justice Wakeling dissented. In his view, the anti-deprivation rule has never existed in Canadian common law or, if it did, it ceased to exist after amendments to the *BIA* and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, in 2009. Even if it did exist, he would have adopted the purpose-based test from *Belmont*. These conclusions were advanced by Chandos before this court. Justice Wakeling also would have reformulated the penalty rule. Given my conclusions as to the anti-deprivation rule, I do not address the penalty rule.

III. Issues on appeal

[23] On appeal before us, Chandos alleges the majority at the Court of Appeal made five errors, by:

a) emphasizing bankruptcy law over contract law;

b) failing to abandon the classic penalty rule of contract law;

c) finding an anti-deprivation rule exists at common law;

d) applying an effects-based anti-deprivation rule; and

e) failing to consider the effect of set off.

[24] The first issue is readily dealt with: contract law and bankruptcy law work together, in this instance through the operation of the anti-deprivation rule. The second issue can also be disposed of summarily: if the provision is invalid for one reason (the anti-deprivation rule in bankruptcy law), it does not matter whether it is or is not invalid for another (the penalty rule in contract law). I will discuss the other issues below.

IV. The Existence of the Common Law Anti-Deprivation Rule

[25] As to the existence of the anti-deprivation rule, I see no error in Rowbotham J.A.'s consideration of this issue, in that the rule has existed in Canadian common law and has not been eliminated by either this Court or Parliament.

[26] Justice Rowbotham correctly found that there has been support for the anti-deprivation rule in the decisions to which she referred; I would add *Watson v. Mason* (1876), 22 Gr. 574 (U.C. Ch.) and *Hobbs v. The Ontario Loan and Debenture Company* (1890), 18 S.C.R. 483, at p. 502 (per Strong J.), even if *Hobbs* is from a period in Canadian history where no federal bankruptcy legislation existed (R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 33-35).

[27] No decision of this Court has eliminated the anti-deprivation rule. *Coopérants*, as Rowbotham J.A. stated, was not an anti-deprivation case as there was no deprivation (*Coopérants*, at paras. 43-44).

[28] Nor has Parliament eliminated the anti-deprivation rule. As Rowbotham J.A. observed, Parliament did not implement ss. 65.1, 66.34, or 84.2 of the *BIA* so as to eliminate the anti-deprivation rule: the anti-deprivation rule protects third party creditors, whereas Parliament's changes were directed toward protecting debtors (see *Bill C-22: Clause by clause Analysis*, cl. 87, s. 65.1 and cl. 89, s. 66.34, reproduced in the Attorney General of Canada's book of authorities, at Tab 4; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden*: *A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 74-75). This goal of protecting the debtor is

relevant only where the debtor persists after the proceedings conclude. It is common for the debtor to persist after a restructuring or after the bankruptcy of a natural person. It is uncommon for the debtor to persist after a corporate bankruptcy as, typically, no assets remain for the corporation after all creditors are paid.

[29] Moreover, as the intervenor Attorney General of Canada submitted, Parliament's actions are better understood as gradually codifying limited parts of the common law rather than seeking to oust all related common law. As this Court has repeatedly observed, Parliament is presumed to intend not to change the existing common law unless it does so clearly and unambiguously (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157, at para. 39; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 29-30).

[30] Indeed, the most relevant statutory provision in the *BIA* is not s. 65.1, s. 66.34, or s. 84.2, but rather s. 71. As this Court recognized in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325, s. 71 provides that the property of a bankrupt to "passes to and vests in the trustee" (para. 44). This helps maximize the "global recovery for all creditors" in accordance with the priorities set out in the *BIA* (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 33; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at paras. 7-9). The anti-deprivation rule renders void contractual provisions that would prevent property from passing to the

trustee and thus frustrate s. 71 and the scheme of the *BIA*. This maximizes the assets that are available for the trustee to pass to creditors.

V. The Content of the Anti-Deprivation Rule

[31] As *Bramalea* described, the anti-deprivation rule renders void contractual provisions that, upon insolvency, remove value that would otherwise have been available to an insolvent person's creditors from their reach. This test has two parts: first, the relevant clause must be triggered by an event of insolvency or bankruptcy; and second, the effect of the clause must be to remove value from the insolvent's estate. This has been rightly called an effects-based test.

[32] Chandos submits that this Court should change the anti-deprivation rule to follow *Belmont* and adopt a purpose-based test. As noted above, *Belmont* held that the English anti-deprivation rule does not invalidate provisions of "bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy". Chandos says we should follow this reasoning because upholding *bona fide* commercial agreements would strike the best balance of public policy considerations and contribute to commercial certainty. It also submits that the side-effects of such a rule would not be so deleterious, as unsecured creditors tend to receive little in bankruptcy; as well, courts would be able to tell who had inserted provisions that remove value from the debtor's estate for *bona fide* commercial reasons. None of these reasons holds water.

[33] The goal of public policy, in this instance, is not decided by the common law; rather, that policy has been established in the legislation. What is left to the common law is the choice of means that best gives effect to the statutory scheme adopted by Parliament. Thus, once a court ascertains that Parliament intended, by virtue of s. 71, that all of the bankrupt's property is to be collected in the trustee, it is not for the court to substitute a competing goal that would give rise to a different result. In this, I agree with Professor Worthington that "[a]ny avoidance, whether intentional or inevitable, is surely a fraud on the statute" ("Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule" (2012), 75 *M.L.R.* 112, at p. 121).

[34] In addition, I would disagree that adopting a purpose-based test would create commercial certainty. To the contrary, applying such a test would require courts to determine the intention of contracting parties long after the fact and it would detract from the efficient administration of corporate bankruptcies. Parties cannot know at the time of contracting whether a court, possibly years later, will find their contract had been entered into for *bona fide* commercial reasons. This will give rise to uncertainty at the time of contracting.

[35] The effects-based rule, as it stands, is clear. Courts (and commercial parties) do not need to look to anything other than the trigger for the clause and its effect. The effect of a clause can be far more readily determined in the event of bankruptcy than the intention of contracting parties. An effects-based approach also

provides parties with the confidence that contractual agreements, absent a provision providing for the withdrawal of assets upon bankruptcy or insolvency, will generally be upheld. Maintaining an effects-based test is also consistent with the existing effects-based test recognized in *Gingras*, at p. 487, for the *pari passu* rule founded on s. 141 of the *BIA* (previously s. 112 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3), as well as the effects-based test set out in ss. 65.1, 66.34 and 84.2 of the *BIA*. These tests should remain consistent to prevent duplicative proceedings and avoid arcane disputes over whether the *pari passu* rule or the anti-deprivation rule is engaged by a particular provision. Although it is often easy to tell that a provision would affect the amount a creditor will receive, determining whether this is because it deprives the estate of value (thus violating the anti-deprivation rule) or because it reallocates the estate among creditors (thus violating the *pari passu* rule) depends on the precise machinery of law, disputes over such intricacies can be avoided if both rules apply an effects-based test.

[36] Moreover, an intention-based test would encourage parties who can plausibly pretend to have *bona fide* intentions to create a preference over other creditors by inserting such clauses. Parties will often be able to state some commercial rationale for provisions altering contractual rights in the event of a counterparty's insolvency, such as guarding against the risk of the counterparty's non-performance. An intention-based test would render the rule ineffectual, save in the most flagrant cases of deliberate circumvention of insolvency law. This would threaten to undermine the statutory scheme of the *BIA*.

[37] Reliance on general principles of contractual freedom to support an intention-based test is no less misplaced. As noted in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 70, the common law of contract "generally places great weight on the freedom of contracting parties to pursue their individual self-interest" but, by definition, an assignment in bankruptcy strips the insolvent party of their interest. As Rowbotham J.A. observed, a party who might become insolvent has no incentive to resist a clause that deprives their estate of value upon bankruptcy. Parties do not negotiate with a view to protecting the interests of their creditors in the event of their bankruptcy. The costs of accepting the clause are borne solely by the unsecured creditors of the insolvent company (who are without a seat at the bargaining table) while the benefits are enjoyed only by the company while it is solvent.

[38] Finally, while it may be true that unsecured creditors tend to receive relatively little now, the effect of a purpose-based rule is that they would receive less.

[39] Overall, Chandos has not shown us good reason to adopt a purpose-based test. In my view, adopting the purpose-based test would create "new and greater difficulties" of the sort cautioned against in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 762. As recognized in *Bhasin*, at para. 40, although a change to the Canadian common law may be appropriate when it creates greater certainty and coherence, it is not when the change would foster uncertainty and incoherence.

[40] All that said, we should recognize that there are nuances with the anti-deprivation rule as it stands. For example, contractual provisions that eliminate property from the estate, but do not eliminate value, may not offend the anti-deprivation rule (see *Belmont*, at para. 160, per Lord Mance; *Borland's Trustee v. Steel Brothers & Co. Limited*, [1901] 1 Ch. 279; see also *Coopérants*). Nor do provisions whose effect is triggered by an event other than insolvency or bankruptcy. Moreover, the anti-deprivation rule is not offended when commercial parties protect themselves against a contracting counterparty's insolvency by taking security, acquiring insurance, or requiring a third-party guarantee.

[41] In sum, the Court of Appeal was correct to consider whether the effect of the contractual provision was to deprive the estate of assets upon bankruptcy rather than whether the intention of the contracting parties was commercially reasonable.

VI. Application and the Effect of Set-Off

[42] This brings us to Chandos' final argument concerning the effect of set-off on the application of the anti-deprivation rule in this case. Set-off is given statutory approval in s. 97(3) of the *BIA*:

> (3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off

> or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

As this Court described in *Husky Oil*, at para. 3, s. 97(3) incorporates the provincial law of set-off (and the related civil law concept of compensation) into the federal bankruptcy regime. Set-off is a defence to the payment of a debt. The effect of set-off is to allow a creditor who happens to be also a debtor to recover ahead of their priority.

[43] The *BIA*'s affirmation of set-off and the anti-deprivation rule are not incompatible. While set-off reduces the value of assets that are transferred to the Trustee for redistribution, it is applicable only to enforceable debts or claims (see, e.g., *Holt v. Telford*, [1987] 2 S.C.R. 193, at pp. 204-6). The anti-deprivation rule makes deprivations triggered by insolvency unenforceable. The combination means that set-off applies to debts owed by the bankrupt that were not triggered by the bankruptcy.

[44] The case at bar is quite different. The chapeau of clause VII Q provides that the clause triggers "[i]n the event [Capital Steel] commits any act of insolvency, bankruptcy, winding up or other distribution of assets". Since, here, the clause was triggered by bankruptcy, the threshold for considering the anti-deprivation rule had been met.[1] Clause VII Q(d) itself provides the deprivation: "[Capital Steel] shall forfeit 10% of the within Subcontract Agreement price to [Chandos] as a fee". The

[1] Whether clause VII Q (d) would have been enforceable if Capital Steel had stopped operations in other circumstances is not before us and not relevant here (*Aircell*, at para. 12).

effect of this provision is to create a debt from Capital Steel to Chandos that would not exist but for the insolvency. It is this "debt" created by Clause VII Q(d) because of the insolvency that Chandos seeks to "set off" against the amount it owed to Capital Steel. One can hardly imagine a more direct and blatant violation of the anti-deprivation rule.

[45] Accordingly, I conclude that clause VII Q(d) violates the anti-deprivation rule and is thus void.

VII. Conclusion

[46] I would dismiss the appeal with costs throughout.

The following are the reasons delivered by

CÔTÉ J. —

I. Introduction

[47] I have had the advantage of reading the reasons of my colleague, Rowe J., and there is much with which I agree in them. In particular, I agree that the anti-deprivation rule has a longstanding and strong jurisprudential footing in Canadian law and that it has not been eliminated by this Court or through legislation. However, I

write to express a different view on a point of law which is central to the outcome of this appeal. In short, my view is that the anti-deprivation rule should not apply to transactions or contractual provisions which serve a *bona fide* commercial purpose. I reach this conclusion essentially for three reasons.

[48] First, my reading of the jurisprudence is that courts applying the anti-deprivation rule in Canada have not been content to rest their reasons for decision merely on a finding that the effect of a transaction or contractual provision was to deprive a bankrupt's estate of value. As I explain below, Canadian courts have looked past the effects of the arrangement and inquired into the presence or absence of a *bona fide* commercial purpose behind the deprivation.

[49] Second, there is a principled legal basis for retaining a *bona fide* commercial purpose test. The anti-deprivation rule has its origins in the common law public policy against agreements entered into for the unlawful purpose of defrauding or otherwise injuring third parties. Unlike the related *pari passu* rule, the anti-deprivation rule should not be regarded as arising from an implied prohibition in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Thus, the different legal bases of the two rules explain why the *pari passu* rule operates regardless of the parties' intentions while the anti-deprivation rule takes into account the parties' *bona fide* commercial purposes.

[50] Third, as a matter of public policy, the considerations cited in support of an effects-based test are not sufficient to override the otherwise strong countervailing

public interest in the enforcement of contracts. A purely effects-based test gives too little weight to freedom of contract, party autonomy, and the "elbow-room" which the common law traditionally accords for the aggressive pursuit of self-interest: see *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, at para. 31. In addition, Parliament has occupied much of the ground formerly covered by the common law such that there is a reduced need for a general anti-deprivation rule. Indeed, the many statutory protections already in place to safeguard the interests of creditors undermine any perceived policy need to expand the reach of the anti-deprivation rule for that purpose.

[51] Therefore, like Wakeling J.A., dissenting in the Court of Appeal below, I would hold that the anti-deprivation rule does not apply to transactions or contractual provisions which serve a *bona fide* commercial purpose. As the chambers judge (Alta Q.B., Edmonton 24-2169632, March 17, 2017, A.R., at pp. 9-10) and the Court of Appeal (2019 ABCA 32, 438 D.L.R. (4th) 195, at paras. 55 and 394-97) were unanimous in finding a *bona fide* commercial purpose behind the contractual provision at issue, I would allow the appeal and restore the order made at first instance.

II. Background

[52] My colleague provides a helpful summary of the essential facts in his reasons, and I am content to rely on it. I will therefore only highlight a few important aspects of the contractual relationships in this case.

[53] The appellant, Chandos Construction Ltd., hired Capital Steel Inc. to perform important structural steel subcontract work on a condominium project in St. Albert, Alberta ("Subcontract"). The appeal revolves around whether clause VII Q(d) ("clause Q(d)") of the Subcontract offends the anti-deprivation rule. Clause Q(d) is reproduced in my colleague's reasons. Capital Steel also provided a guarantee by which it agreed to repair and make good any defect in its work and all resulting damages that might appear as a result of any improper work: clause III, "Guarantee", A.R., at p. 155. In addition, Clause VII G of the Subcontract required Capital Steel to indemnify Chandos and hold it harmless "from any and all claims, costs, liabilities and causes of action" and for "any loss or damage" caused to Chandos or the owner of the condominium project by Capital Steel or any of Capital Steel's subcontractors, employees, agents, licensees, and permitees in carrying out the Subcontract. The same indemnity also applied between Capital Steel and the owner.

[54] The Stipulated Price Contract between Chandos and the owner-developer, Boudreau Developments Ltd., required Chandos to be "as fully responsible to the *Owner* for acts and omissions" of its subcontractors as it was for "acts and omissions of persons directly employed by" it: clause GC 3.7.1.3 (emphasis in original). Chandos also agreed that it would promptly correct defects or deficiencies in the work which appeared during the warranty period at its own expense: clause GC 12.3.4. As well, Chandos was obliged to correct or pay for damage resulting from such corrections: clause GC 12.3.5.

III. Issues

[55] The focus of these reasons is whether the anti-deprivation rule applies regardless of the parties' *bona fide* commercial purposes.

[56] Another issue raised by the parties is whether clause Q(d) is a valid liquidated damages provision or an unenforceable penalty clause. The chambers judge, Justice Nielsen, concluded that the clause was a valid liquidated damages provision. That finding was not disturbed on appeal, and I do not see any extricable error of law which would justify appellate interference with it. I therefore decline to address this issue further.

IV. Analysis

A. *The Anti-Deprivation Rule Does Not Apply Where a Transaction or Contractual Provision Serves a Bona Fide Commercial Purpose*

[57] Before embarking upon an analysis of whether the jurisprudence on the anti-deprivation rule has traditionally included a purpose element, I find it useful to clearly state what I mean by a "*bona fide* commercial purpose".

[58] The inquiry I propose is primarily objective and centres around the presence or absence of a legitimate commercial basis for a transaction or contractual provision. An objective approach dovetails with the approach taken in another important and related area of commercial law, the interpretation of contracts, where

"the goal of the exercise is to ascertain the objective intent of the parties": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 49. It also parallels this Court's approach to ascertaining the purpose behind commercial transactions in tax characterization cases. As this Court stated in *Symes v. Canada*, [1993] 4 S.C.R. 695, at p. 736:

> As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances.

See also *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, [2001] 2 S.C.R. 1082, at para. 54.

[59] Obviously, evidence of a lack of subjective good faith is relevant to such an inquiry; however, positive assertions of good faith, while relevant, are not determinative. Courts applying the anti-deprivation rule should (and do) have due regard to the parties' objective manifestations of purpose. In the case of the anti-deprivation rule, the primary means by which the parties objectively manifest their intentions is through the terms of the contractual agreements by which they bind themselves. Therefore, careful regard should be had to the terms of the contractual arrangements which are said to offend the anti-deprivation rule.

[60] I add that the leading English authority on the anti-deprivation rule also employs a similar approach to determining the purpose behind the transaction or

contractual provision at issue: *Belmont Park Investments Pty. Ltd. v. BNY Corporate Trustee Services Ltd.*, [2011] UKSC 38, [2012] 1 A.C. 383, at paras. 74-79, per Lord Collins; and para. 151, per Lord Mance.

[61] With this understanding in hand, I now turn to consider, as an empirical question, whether courts applying the anti-deprivation rule inquire into the presence or absence of such a purpose.

(1) Courts Applying the Anti-Deprivation Rule Inquire into the Existence of a *Bona Fide* Commercial Purpose

[62] As Canadian courts considering the anti-deprivation rule have often had recourse to English jurisprudence on the rule, I begin by briefly looking at whether the English jurisprudence has traditionally included a *bona fide* commercial purpose test. I then turn to a more thorough consideration of the Canadian jurisprudence to determine whether Canadian courts inquire into the presence or absence of a *bona fide* commercial purpose when applying the anti-deprivation rule.

(a) *English Jurisprudence*

[63] I do not intend to undertake an extended review of the English anti-deprivation rule in these reasons. The United Kingdom Supreme Court recently did so in *Belmont*, and I cannot hope to add much of value to the thorough analysis offered

in that decision. I will therefore confine my general comments on the English jurisprudence to *Belmont*.

[64] The respondent, Deloitte Restructuring Inc., argues that *Belmont* "shifted" the English common law from an effects-based test to a purpose-based test for the anti-deprivation rule (R.F., at para. 115). However, in my view, *Belmont* recognized that a purpose requirement has always been an element of the English anti-deprivation rule. Lord Collins undertook an extensive review of the English jurisprudence on the anti-deprivation rule: paras. 58-73. He found that, "where the rule has been applied, it has been an almost invariably expressed element that the party seeking to take advantage of the deprivation was intending to evade the bankruptcy rules": para. 75. Further, in the English authorities "where the either . . . or anti-deprivation rule was held not to apply, good faith and the commercial sense of the transaction have been important factors": para. 77. Lord Collins was thus able to conclude that the English jurisprudence reflected "an impressive body of opinion from some of the most distinguished judges that, in the case of the anti-deprivation rule, a deliberate intention to evade the insolvency laws is required": para. 78; see also paras. 152-53, per Lord Mance.

[65] I find Lord Collins's review of the English jurisprudence, as well as the conclusions of law he drew from it, to be authoritative characterizations of the English position on the anti-deprivation rule. I therefore cannot accept that *Belmont*'s recognition of a purpose requirement for the anti-deprivation rule was as novel as

Deloitte suggests. Further, as I demonstrate below, the Canadian jurisprudence on the anti-deprivation rule also supports the conclusion that a purpose requirement is not a novel feature of the anti-deprivation rule.

(b) *Canadian Jurisprudence*

(i) Supreme Court of Canada Jurisprudence

[66] While this appeal gives this Court its first opportunity to fully consider and apply the anti-deprivation rule, in three previous decisions the Court either commented in *obiter* on this area of the law or considered contractual arrangements which would have been subject to the anti-deprivation rule or the *pari passu* rule had the contracts in question been governed by the common law. On my reading, this Court's jurisprudence favours a *bona fide* commercial purpose test for the anti-deprivation rule.

[67] This Court had an opportunity to comment in *obiter* on the fraud upon the bankruptcy laws principle in *Hobbs v. The Ontario Loan and Debenture Company* (1890), 18 S.C.R. 483. A mortgage provided that the mortgagees leased the mortgaged property to the mortgagor and that the rent was equal to the principal payments under the mortgage. The issue was whether the rights created by the lease were enforceable as against a third party execution creditor.

[68] Chief Justice Ritchie (Taschereau J., as he then was, concurring) concluded that a sham lease in a mortgage which is not intended to create a *bona fide* landlord-tenant relationship is void as against assignees in bankruptcy: pp. 486-89. Justice Strong, as he then was (Fournier J., concurring) agreed: pp. 502-3 and 507. However, they disagreed as to the result. Chief Justice Ritchie found that there was a *bona fide* arrangement because there was no bankruptcy law in force, whereas Strong J. found that there was not such an arrangement because the principle has wider application outside of bankruptcy: pp. 485-87 and 508-9.

[69] The authorities on which Ritchie C.J. and Strong J. relied were based on the English fraud upon the bankruptcy laws principle. Chief Justice Ritchie relied heavily upon the decision of the English Court of Appeal in *Ex parte Voisey* (1882), 21 Ch. D. 442 (C.A.), quoting the reasons of Lord Brett, at pp. 459 and 461:

> . . . The only way in which it can cease to be a *bona fide* contract is if it was not intended to be acted upon between the parties at all, and was only a device to evade the bankruptcy laws. That would not be what is ordinarily called a fraud, but it would be what is called a fraud upon the bankruptcy laws, that is, an attempt to evade the bankruptcy laws in case of a bankruptcy. Now that attempted evasion, that want of *bona fides* with regard to the bankruptcy laws, must exist, if at all, at the moment when the contract is made . . . .
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> . . .
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> . . . the question is whether there was a real honest stipulation between the parties, intended to be acted upon whether there should be a bankruptcy or not, or whether it was a stipulation which they intended to be acted upon only for the purpose of defeating the bankruptcy law.

[70] Justice Strong also relied on *Ex parte Williams* (1877), 7 Ch. D. 138 (C.A.), the *ratio decidendi* of which he described as being that "any provision by a debtor that in the event of his becoming bankrupt or insolvent there shall be a different distribution of his effects from that which the law provides is void": p. 502. While noting that *Williams* was of limited value due to the lack of bankruptcy legislation in Canada, Strong J. went on to comment favourably upon the English cases which followed it, including *Voisey*. He described the law established by those authorities as being that, if it appears that the tenancy for which a mortgage provides is not intended by the parties to be a *bona fide* agreement, and is instead a sham or pretence, then such a lease is "void . . . as against the assignees in bankruptcy": p. 503. Justice Strong adopted these principles, adding that they must have a wider application beyond the bankruptcy context in order to protect third parties more generally.

[71] The separate opinion of Patterson J. is also noteworthy because he stated that the enforceability of the tenancy between the mortgagor and a third party depended in part on the "*bona fides* of the transaction": p. 543. He noted that the *bona fides* of a transaction "has usually been tested in England in the light of the bankruptcy law", and, while Canada did not have a bankruptcy law at that time, it did "not therefore follow that the intention with which the lease is made is to be disregarded": p. 543.

[72] In my view, the reasons of Ritchie C.J. and Strong and Patterson JJ. indicate this Court's nearly unanimous *obiter* approval both of the existence of a general fraud upon the bankruptcy laws principle, even if it could not be applied at the time, and of a *bona fide* commercial purpose test corresponding to that principle.

[73] This Court addressed a set of circumstances resembling those governed by the common law anti-deprivation rule in *Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois*, [1996] 1 S.C.R. 900. Mr. Dubois and Coopérants were the undivided co-owners of two immovables situated in Laval, Quebec. Their interests in the immovables were governed by two agreements in which they waived the right to demand a partition of the immovables for 35 years. Each agreement also provided that, in the event that one of the parties applied to a court for the appointment of a liquidator for the party's property, that party's interest in the immovable in question had to be sold to the counterparty. If the parties did not agree on the price, the defaulting party's interest would be sold to the counterparty at 75 percent of its fair market value, which was to be determined without regard to the fact that the immovable was held in undivided co-ownership. Subsequently, Coopérants applied to a court for the appointment of a liquidator due to insolvency, and Mr. Dubois sought to rely on the forced sale clause in their agreements.

[74] This Court held that the liquidator was bound by the clause because there was no evidence that the contractual method for determining the sale price resulted in

a price which was less than fair market value, nor was there any evidence that the clause gave Mr. Dubois an "unjust preference": para. 41.

[75] I caution against overreliance on *Coopérants* for the purposes of ascertaining the content of a common law rule. The agreements at issue were governed by the *Civil Code of Lower Canada*, not the common law, and the Court's comments regarding the enforceability of the clause in question were directed at how a court should exercise its discretion under what is now the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11. Nonetheless, *Coopérants* is significant for having recognized the importance of enforcing arrangements which reflect a *bona fide* commercial purpose. The Court noted that the clause at issue created an obligation to sell a unique, non-fungible and indivisible property in which Mr. Dubois, as co-owner, had a specific interest. The Court also observed that the agreements in which the clause was found included reciprocal obligations between the co-owners, which called for ongoing performance. This Court stated that "[i]t is advisable to respect such contracts and ensure that they are as stable as possible": para. 38. Thus, this Court acknowledged that the clause at issue served a *bona fide* commercial purpose which the law should strive to uphold, even if doing so granted a degree of preference over other creditors.

[76] Finally, this Court addressed a set of circumstances resembling those governed by the *pari passu* rule in *A.N. Bail Co. v. Gingras*, [1982] 2 S.C.R. 475. A contract between a general contractor and a subcontractor authorized the general

contractor to pay the subcontractor's suppliers directly in order to discharge obligations arising out of a construction project. The subcontractor entered into bankruptcy proceedings and the general contractor made use of the provision in question to pay one of the subcontractor's suppliers, which was a creditor of the subcontractor. This Court held that in the bankruptcy context such arrangements could not be used to supplant the *pari passu* distribution scheme in the *BIA*. This was so notwithstanding the general contractor's good faith.

[77] *Gingras* is consistent with the English approach to the *pari passu* rule. The House of Lords held in *British Eagle International Airlines Ltd. v. Cie Nationale Air France*, [1975] 1 W.L.R. 758 (H.L.), that the *pari passu* rule applies where the effect of a contract is that a bankrupt's assets would be distributed to the bankrupt's creditors otherwise than in accordance with the bankruptcy laws, notwithstanding the parties' legitimate commercial purposes. However, as I explain in detail below, it does not follow that the anti-deprivation rule must adopt a similar effects-based test. Certainly, the United Kingdom Supreme Court did not regard *British Eagle* as precluding it from holding that the English anti-deprivation rule includes a *bona fide* commercial purpose element: *Belmont*. Therefore, I do not view *Gingras* as undermining the existence of a *bona fide* commercial purpose test for the anti-deprivation rule.

[78] In summary, *Hobbs* and *Coopérants* include significant *obiter dicta* which are suggestive of a *bona fide* commercial purpose test for the common law

anti-deprivation rule. *Gingras* neither contradicts those *obiter dicta* nor departs from the law of England as stated in *Belmont* and *British Eagle*. Therefore, I am of the view that this Court's jurisprudence favours a *bona fide* commercial purpose test for the anti-deprivation rule — though, to be clear, this Court has not previously bound itself as a matter of *stare decisis* in this regard. My empirical inquiry must, therefore, live or die on the jurisprudence of the courts that have actually applied the common law anti-deprivation rule.

(ii) Superior Court and Appellate Jurisprudence

[79] On my reading of the jurisprudence, courts applying the anti-deprivation rule in Canada have not been content to rest their reasons for decision merely on a finding that the effect of a transaction or contractual provision was to deprive a bankrupt's estate of value. As I explain below, courts have looked past the effects of the arrangement and inquired into the presence or absence of a *bona fide* commercial purpose behind the deprivation. In the minority of cases where this discussion has not occurred, the absence of a *bona fide* commercial purpose has been readily inferable from the circumstances. These observations lead me to conclude that a *bona fide* commercial purpose element has a strong jurisprudential footing in Canadian law.

[80] The Ontario Court of Appeal, in *In Re Hoskins and Hawkey, Insolvents* (1877), 1 O.A.R. 379 (C.A.), applied the anti-deprivation rule to a lease which provided that upon the insolvency of the tenant, the current year's rent and the succeeding year's rent would be due and payable. The landlord argued that the

additional year's rent was intended as compensation for his loss of a tenant. If the test the Court of Appeal applied had been focused solely on the effects of the provision, it would not have had to address this argument. Nonetheless, it did. The court rejected the landlord's argument, noting that it was "discredited by the circumstance that a surrender by a tenant, who had become insolvent, imports advantage rather than loss" for the landlord: p. 384. At p. 385, the court quoted with approval the decision of Lord Chancellor Redesdale in *Murphy, a Bankrupt* (1803), 1 Ch. 44, at p. 49, which has often been cited in Canada:

> The question is, whether a person can be admitted to prove as a creditor, on the foundation of an instrument contrived for the purpose of defeating the effect of the bankrupt laws; where the only ground of the claim is an instrument executed for the purpose of giving a right against creditors, which would not exist against the bankrupt if he were solvent. All the cases in England have held this to be a fraud upon the bankrupt laws, which cannot be supported . . . [Emphasis added.]

[81] Applying *Murphy*, the Court of Appeal concluded that the provision stipulating the payment of an additional year's rent to the landlord was invalid. In essence, the court found that there was no legitimate commercial purpose for the landlord to receive what would effectively be a gratuitous payment of an additional year's worth of rent long after the tenancy had come to an end.

[82] The same Court of Appeal applied the anti-deprivation rule to void an agreement in *Watson v. Mason* (1876), 22 Gr. 574 (U.C. Ch.). A partnership and the creditors of an insolvent business entered into an arrangement which permitted the partnership to purchase the assets of the business, with the stipulation that, upon the

insolvency of the partnership, the partnership would then owe the creditors the balance of the business's unpaid debt. Justice Burton (as he then was) held that there was no authority to support the validity of an agreement "where the only ground of the claim is an instrument executed for the purpose of giving a right against creditors": p. 588 (emphasis added). Justice Patterson (then a member of the Court of Appeal) noted there was no evidence that the partnership had paid a discounted price on the assets in exchange for this *quid pro quo* and Burton J.A. was of the view that the partnership had paid the full value of the assets, rendering the contingent debt obligation essentially gratuitous. When I consider these comments in conjunction with the various judges' approving citations of English authorities referring to intention or purpose (pp. 583-84, for example), I take the court to have found that there was no legitimate commercial interest in conjuring the insolvent business's debt into existence upon the insolvency of the partnership after the partnership had already agreed to pay the creditors the full value of the goods which had belonged to the business.

[83] The anti-deprivation rule was also applied by Meyer J. in *Re Frechette* (1982), 138 D.L.R. (3d) 61 (Que. Sup. Ct.). The bankrupt was a shareholder in a private company. The shareholders' agreement provided for a right of first refusal should a shareholder voluntarily wish to dispose of his shares to a third party, and also included a right to purchase the shares of any shareholder who became bankrupt. The agreement further provided that the price to be paid on the forced sale of a

bankrupt's shares was to be 80 percent of the price which would otherwise be paid if the shares were sold voluntarily through the right of first refusal.

[84] Justice Meyer concluded that the provision requiring the sale of a bankrupt shareholder's shares for 80 percent of their value was contrary to public policy because it granted the shareholders a special reduction in the price to be paid for those shares. If the standard he was applying had looked only to the effects of the provision on bankruptcy, he could have ended his analysis there. However, he went on to consider the shareholders' purpose in entering into the arrangement.

[85] While Meyer J. accepted that the discount of 20 percent might have been agreed upon in good faith, he considered that it was essentially a gratuitous benefit granted by the shareholders to one another. Indeed, he analogized it to a "gift": p. 69. He observed that there "was no evidence before the court as to the existence of any consideration for such a reduction, other than a desire to confer a benefit on one's fellow shareholders in the event of one's bankruptcy": para. 20. In effect, this was a finding that there was no objectively ascertainable *commercial* interest behind the provision. A desire to give gifts to friends is plainly not a legitimate commercial interest which the law should protect over the interests of third party creditors in bankruptcy. Finally, I note that Meyer J. quoted and followed an English decision, *Borland's Trustee v. Steel Brothers & Co., Limited*, [1901] 1 Ch. 279, the significance of which I examine below when discussing another Canadian decision.

[86] Justice Saunders considered the anti-deprivation rule in *Re Knechtel Furniture Ltd.* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.). The bankrupt, Knechtel Furniture, had an employee pension plan that had been wound up on the company's bankruptcy with a surplus of $471,300, after all the beneficiaries had been fully paid in accordance with the terms of the plan. The plan stated that in the event of its termination, any surplus would be paid over to the company, provided, however, that, in the event that the company had become bankrupt or insolvent, the surplus would be allocated to the beneficiaries. The company's trustee in bankruptcy argued that the provision entitling the beneficiaries to the funds was contrary to public policy.

[87] The beneficiaries argued that the provision had not been inserted to defeat the bankrupt's creditors. They submitted that its purpose was to provide additional benefits to employees who would probably suffer great hardship if the plan were to be wound up after the company became bankrupt. In other words, they argued that the provision had a *bona fide* commercial purpose. Justice Saunders rejected this argument, not because he regarded it as irrelevant to his analysis, but rather because he found it "difficult to see why the hardship would necessarily be any less if the plan had been terminated when Knechtel was solvent": p. 264. In other words, he did not accept that there was a legitimate commercial interest in giving the beneficiaries what would amount to gratuitous pension benefits. He observed that the beneficiaries had already been paid their benefits in full under the plan, and that, if the plan had been terminated while the company was solvent, the beneficiaries would have had no entitlement to the surplus. As enforcing the provision would redirect funds which

would otherwise have gone into the bankrupt's estate, the provision was contrary to public policy.

[88] The anti-deprivation rule was also considered by Blair J. (as he then was) in *Canadian Imperial Bank of Commerce v. Bramalea Inc.* (1995), 33 O.R. (3d) 692 (C.J. (Gen. Div.)). Bramalea and the Canadian Imperial Bank of Commerce were in a partnership formed to develop and operate a shopping mall. A clause in their partnership agreement provided that, in the event of the insolvency of one of the partners, the solvent partner could purchase the insolvent partner's interest at the lesser of book value or fair market value. Bramalea entered into bankruptcy proceedings, and the bank sought to exercise its right under the partnership agreement. The book value of Bramalea's interest was estimated at $200,000, and the evidence suggested that the fair market value might exceed the book value by as much as $2 million to $3 million. Thus, the clause would have given the bank a rather staggering discount on the value of Bramalea's partnership interest. Justice Blair neither expressly accepted nor rejected these figures for the fair market valuation, but he did find that the difference in price was "more than minimal": p. 694.

[89] Justice Blair stated that it was "clear from the provisions of the partnership agreement itself that the parties had contemplated a transfer to one of the partners of the other partner's partnership interest, solely in the event of insolvency of the latter, at a price which was less than what could be obtained for that interest on the market": p. 695. Although he was at pains to point out that there was no

suggestion of a fraudulent or dishonest intent in this case, he also observed that the parties had intended to sell an asset at an undervalue. As a result, he found that the clause was contrary to public policy. Thus, while Blair J. did not expressly discuss whether there was an absence of an objective commercial purpose, he clearly did engage in a search for an objective purpose.

[90] In addition, I take Blair J.'s statement that the rule encompasses "fraud in the effect" as meaning no more than that a subjective intent to defraud the bankrupt's creditors does not have to be shown in order for the anti-deprivation rule to apply: p. 694. In *Belmont*, Lord Mance explained that references in the jurisprudence to "fraud" of the bankruptcy law are not references to fraud "in a strict sense" or to "morally opprobrious" conduct: para. 151. Lord Brett also made this point clear at p. 459 of *Voisey*. Thus, a showing of subjective dishonesty or deceit is unnecessary. However, Lord Mance, at para. 151 of *Belmont*, and Lord Brett, at p. 461 of *Voisey*, both held that the anti-deprivation rule requires an assessment of whether there was a legitimate purpose behind a transaction. I see nothing contradictory in holding that deceit, dishonesty, or impropriety need not be shown, while also holding that the anti-deprivation rule does not apply to transactions or contractual provisions which serve a *bona fide* commercial purpose. I therefore do not see Blair J.'s comments regarding "fraud in the effect" as inconsistent with the view I put forward.

[91] Further, Blair J., at p. 695, like Meyer J. in *Frechette*, at p. 68, quoted directly from the English case of *Borland*, in which Farwell J. stated the following in the context of a share purchase agreement:

> If I came to the conclusion that there was any provision in these articles compelling persons to sell their shares in the event of bankruptcy at something less than the price that they would otherwise obtain, such a provision would be repugnant to the bankruptcy law . . . . [p. 291]

This leaves open the question, however, of whether the repugnancy would arise because the provision would amount to a deprivation "in effect", notwithstanding the parties' *bona fide* intentions, or whether the sale at an undervalue would undermine the parties' claim that they had drafted the provision so as to serve legitimate commercial interests. I think the latter view reflects the better reading of Farwell J.'s reasons in *Borland*, to which I now turn.

[92] Mr. Borland was a shareholder in a private company which carried on business in Burma. The company's articles of association provided that each of the shareholders was "entitled to continue to hold the shares then held by him or any of them until he should die or voluntarily transfer the same or become bankrupt": p. 281. Mr. Borland was adjudicated bankrupt, the company attempted to force the sale of his shares, and the trustee of his estate resisted the sale, arguing that the provision was a fraud upon the bankruptcy laws.

[93] Justice Farwell found that the forced sale provision in the articles of association was not contrary to public policy. He found that the provision had been inserted *bona fide* and constituted a "fair agreement for the purpose of the business of the company": p. 291. Justice Farwell observed that the shares were difficult to value because they came with a number of restrictive clauses that made it "impossible to find a market value". He added that the price offered by the company likely represented the fair value of the shares, given that they were essentially incapable of valuation. The same share price applied to all shareholders and applied for sales of shares outside of bankruptcy as well as in bankruptcy.

[94] It was in this context that Farwell J. made the statement quoted by Blair J. in *Bramalea*. However, given Farwell J.'s observation that the shares were essentially impossible to value, his conclusion that the anti-deprivation rule did not apply depended more on his view that the arrangement was a *bona fide* commercial agreement than it did on establishing a fixed principle that the absence of evidence of a deprivation was determinative of the rule's application: see A. Ho, "The Treatment of *Ipso Facto* Clauses in Canada" (2015), 61 *McGill L.J.* 139, at p. 161. Therefore, to the extent that the courts in *Bramalea* and *Frechette* followed *Borland*, either they did so on a mistaken view of what it stands for, or (and I prefer this view) implicit in their reasons is the notion that the anti-deprivation rule does not apply to *bona fide* commercial agreements.

[95] The Ontario Court of Appeal relied on *Bramalea* to invalidate a contractual provision in *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, 2013 ONCA 95, 14 C.B.R. (6th) 276. Aircell and Bell were parties to an independent dealer agreement which provided that Bell could terminate the agreement on notice if Aircell defaulted on its payments to Bell for purchases of inventory. It further provided that, should the agreement be terminated for specified reasons, Bell's obligations to pay commissions "shall cease immediately": para. 8. Owing to financial difficulties, Aircell defaulted on its payments and then entered into bankruptcy proceedings. It owed Bell $64,000 for inventory, and Bell retained $188,981 worth of commissions it owed to Aircell. As Bell was entitled to set-off under the *BIA*, Aircell's trustee brought an action against Bell to recover only the difference between the commissions retained by Bell and the amounts which Aircell owed to Bell. The Court of Appeal found that the clause at issue provided "a windfall to . . . Bell": para. 12. Applying *Bramalea*, it held that the clause was unenforceable as contrary to public policy.

[96] The Court of Appeal described the test from *Bramalea* as being essentially effects-based. However, as indicated by my analysis of *Bramalea* above, that is an oversimplification of Blair J.'s reasons. Further, and I admit that the court did not discuss the case on this basis, it is implicit in the court's description of the effect of the clause as a "windfall" that the clause was offensive not only because it deprived Aircell's estate of value, but also because there was no legitimate commercial basis in bankruptcy for Bell to withhold payments which were in excess

of the debt it was owed by Aircell. I therefore do not view *Aircell* as inconsistent with my approach.

[97] The anti-deprivation rule was considered by Registrar Quinn in *Westerman (Bankrupt), Re*, 1998 ABQB 946, 234 A.R. 371, rev'd on other grounds 1999 ABQB 708, 275 A.R. 114. The bankrupt was a party to a partnership agreement which provided that a bankrupt partner could be expelled from the partnership and the partnership would then be obliged to pay that partner only 50 percent of his capital account. Registrar Quinn found that allowing the partnership to take 50 percent of the bankrupt's capital account would grant it an unjust preference, as any losses incurred by the partnership as a result of the expulsion of the bankrupt partner were "purely speculative". He therefore concluded that the partnership was not entitled to retain the funds. As Registrar Quinn did not address the commercial purpose behind the provision, it does not appear that any commercial purpose was offered. As the provision was to the effect that the partner's capital account could be settled at a 50 percent discount in the event of bankruptcy, an objective commercial purpose is not readily apparent. I therefore do not view *Westerman* as authority against my reading of the jurisprudence.

[98] In his reasons, Registrar Quinn expressed the view that *Coopérants* was at odds with *Bramalea*, *Knetchel*, and *Frechette*. However, as the preceding analysis demonstrates, the golden thread weaving its way through the tapestry of the Canadian jurisprudence is the presence or absence of an objective commercial purpose behind

the agreements under review. In *Coopérants*, there was such a purpose, whereas in *Bramalea*, *Knetchel*, and *Frechette*, there was not. Moreover, the analyses in *Coopérants*, *Bramalea*, *Knetchel*, and *Frechette* went past the question of whether the provisions in question had the effect of removing assets from the debtors' estates and extended to the legitimacy of the intentions behind them. This is also true of *Hoskins* and, arguably, of *Watson*, as well. Meanwhile, the more recent authorities applying the rule in which the parties' purposes are not expressly discussed — *Westerman* and *Aircell* — do not detract from my reading of the jurisprudence because they do not show any intent to break with past precedent and because an absence of a legitimate commercial purpose is discernable on the facts of those cases.

[99] In the weight of lower court cases in which the anti-deprivation rule was addressed, the rule has been found not to apply where the provision in question has a *bona fide* commercial purpose. When I consider this jurisprudence in light of *Hobbs* and *Coopérants*, I am led to the conclusion that a *bona fide* commercial purpose element has a strong jurisprudential footing in Canadian law. I therefore cannot accept my colleague's position that a *bona fide* commercial purpose test would amount to a change to the existing law: Rowe J.'s Reasons, at paras. 32 and 39. With respect, it is my colleague's adoption of a purely effects-based test which represents a break with the past. To declare that an absence of a *bona fide* commercial purpose is required in order to apply the anti-deprivation rule is to discover the law as it has always been — as it has been handed down to us in the reasoned opinions of the jurists who preceded us.

[100] Of course, the law could be incrementally developed away from this position. Courts may adapt the common law where they deem it necessary to keep the law in step with the dynamic and evolving fabric of society: see *R. v. Salituro*, [1991] 3 S.C.R. 654. In my view, when courts consider whether to introduce such innovations to the common law, they should base their decision making on sound legal principles and compelling considerations of public policy. Thus, I now turn to consider whether there is a principled legal basis for distinguishing between the *pari passu* rule, with its effects-based test, and the anti-deprivation rule, with its traditionally purpose-based test.

(2) There is a Principled Legal Basis for distinguishing between the Anti-Deprivation Rule and the *Pari Passu* Rule

[101] One of the reasons my colleague cites in favour of an effects-based test for the anti-deprivation rule is that it would be consistent with the test for the *pari passu* rule: Rowe J.'s Reasons, at para. 35. In my view, however, there is a principled legal basis upon which to distinguish the two rules: the anti-deprivation rule is based on a common law public policy, whereas the *pari passu* rule is based on an implied statutory prohibition in the *BIA*.

[102] The anti-deprivation rule and the *pari passu* rule form part of a more general and longstanding doctrine in the common law to the effect that an agreement that is contrary to public policy may be struck down as unenforceable: S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 562. This public policy

doctrine has at least two branches: (1) common law public policy; and (2) statutory public policy: Waddams, at para. 566. The common law branch concerns agreements struck down on the basis of a judicial apprehension of a public policy interest which outweighs the general public interest in the enforcement of contracts: e.g., *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 15-20. The statutory branch concerns agreements struck down because they are expressly or impliedly prohibited by statute: *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249, at paras. 20-26. On my reading of the jurisprudence, the anti-deprivation rule falls under the common law branch of the public policy doctrine, which includes a policy against agreements entered into for the purpose of defrauding or otherwise injuring third parties. I rest this conclusion on the following two observations about the jurisprudence.

[103] My first observation relates to the rule's origins. The early English authorities which underpin the Canadian anti-deprivation rule routinely described the agreements at issue as fraudulent, dishonest or evasive: see *Belmont*, at paras. 74-79, per Lord Collins; Ho, at pp. 151-52; R. J. Wood, "Direct Payment Clauses and the Fraud Upon the Bankruptcy Law Principle: *Re Horizon Earthworks Ltd. (Bankrupt)*" (2014), 52 *Alta. L.R.* 171, at p. 175. Lord Chancellor Eldon held that a term "adopted with the express object of taking the case out of reach of the Bankrupt Laws" was "a direct fraud upon the Bankrupt Laws" in *Higinbotham v. Holme* (1812), 19 Ves. Jr. 88, 34 E.R. 451, at p. 453. Justice Vaughan Williams held that an agreement that a debtor's interest in property would determine upon their bankruptcy was "evidence of

an intention to defraud [their] creditors" in *In re Stephenson*, [1897] 1 Q.B. 638, at p. 640. Vice Chancellor Wood stated that "no one can be allowed to derive benefit from a contract that is in fraud of the bankrupt laws" in *Whitmore v. Mason* (1861), 2 J. & H. 204, 70 E.R. 1031, at p. 1035. Lord James described the contractual arrangement which he found void as "a clear attempt to evade the operation of the bankruptcy laws" in *Ex parte Mackay* (1873), L.R. 8 Ch. App. 643, p. 647; see also *Voisey*, per Brett L.J. and *Murphy*, per Redesdale L.C., both quoted above. The earliest Canadian decisions, *Hobbs*, *Hoskins*, and *Watson*, are to similar effect.

[104] The reasoning employed by these courts appears to have turned on their apprehension that the arrangements at issue were aimed at an unlawful purpose which approximated fraud, not on a finding that they were impliedly prohibited by statute. The early common law courts applying the rule needed to analogize the public policy ground upon which they based their decisions to an established category, and the comparatively less sophisticated insolvency legislation in force at the time did not provide a basis for invalidating such contracts. In my view, this is why the jurisprudence is replete with references to "fraud" and similar terminology.

[105] My next observation relates to the mode of reasoning in anti-deprivation rule decisions. If the anti-deprivation rule were based on an implied prohibition in the relevant bankruptcy statute, one would expect both the English and the Canadian authorities to turn on an appreciation of Parliament's legislative intent as embodied in the wording of the relevant statute: see J. D. McCamus, *The Law of Contracts*

(2nd ed. 2012), at pp. 457 and 486. However, on my reading of those authorities, courts considering the application of the anti-deprivation rule have routinely recited the principles and policies articulated in prior authorities with little or no regard for the wording of the relevant statute in force. Thus, the rule is more in the nature of a judicially-apprehended public policy than an implied prohibition in the various insolvency statutes which have been enacted and revised throughout the centuries of the rule's trans-Atlantic existence. In this regard, it should be recalled that this Court adopted the early English authorities and then extended their reach to cases outside of the bankruptcy context in *Hobbs*, notwithstanding the fact that there was no bankruptcy legislation in force in Canada at the time. To me, this suggests that the public policy is judicially derived.

[106] My view, based on these two observations, is that the anti-deprivation rule falls under the common law branch of the public policy doctrine, which includes a policy against agreements entered into for the purpose of defrauding or otherwise injuring third parties: see McCamus, at p. 456; *Elford v. Elford* (1922), 64 S.C.R. 125; *Campbell River Lumber Co. v. McKinnon* (1922), 64 S.C.R. 396; *Zimmerman v Letkeman*, [1978] 1 S.C.R. 1097.

[107] My colleague appears to take the view that the anti-deprivation rule falls under the statutory branch of the public policy doctrine: Rowe J.'s Reasons, at para. 30. With respect, however, the provision on which my colleague relies, s. 71 of the *BIA*, is far from clear in this regard. Under s. 71, a bankrupt ceases to have any

capacity to dispose of or otherwise deal with their property only when a bankruptcy order is made or an assignment into bankruptcy is filed. It is not clear from its wording that this provision has any effect on the validity of an agreement entered into before that time. This ambiguity is particularly apparent in relation to agreements which qualify the bankrupt's interest in an asset from the outset, as is the case with Condition Q of the Subcontract. It is a well-established principle that the *BIA* does not grant a trustee any greater interest in a bankrupt's property than that enjoyed by the bankrupt prior to bankruptcy: *Giffen (Re)*, [1998] 1 S.C.R. 91, at para. 50; *Lefebvre (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, at para. 37; *Flintoft v. Royal Bank of Canada*, [1964] S.C.R. 631, at p. 634. The trustee "steps into the shoes" of the bankrupt and takes the bankrupt's property "warts and all": *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, [2008] 3 S.C.R. 166, at para. 50. With respect, my colleague breaks with this principle by, in effect, holding that s. 71 converts the bankrupt's qualified interest in an asset into an absolute or unqualified interest in the hands of the trustee. Although the common law may restrict parties' freedom to qualify a party's interest in the event of insolvency, there is nothing in the wording of s. 71 which purports to do so.

[108] Nor is the picture made any clearer when one considers the statutory context, which includes numerous provisions indicating that arm's length *bona fide* commercial transactions — even transfers of assets at an undervalue — are valid as against the trustee of the bankrupt's estate: *BIA*, ss. 95(1), 96(1), 97(1) and 99(1). Thus, it would appear that Parliament's objective of maximizing "global recovery for

all creditors" was not intended to be achieved at the expense of all *bona fide* agreements which may stand in the way of that goal: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 33. At the very least, then, s. 71 is ambiguous.

[109] Courts applying the statutory branch of the public policy doctrine "should be slow to imply the statutory prohibition of contracts, and should do so only when the implication is quite clear": *St. John Shipping Corp. v. Joseph Rank Ltd.*, [1957] 1 Q.B. 267, at p. 289. To approach the matter otherwise would introduce significant uncertainty into commercial affairs given the enormous body of statute law in force in modern times. Indeed, the modern approach to the statutory branch of the public policy doctrine has been to relax the rigidity of the classical doctrine by permitting the enforcement of contracts in appropriate cases even where they contravene the provisions of a statute: *Still v. M.N.R. (C.A.)*, [1998] 1 F.C. 549, at para. 37; *Transport North American*, at paras. 19-26. Therefore, the better approach, in my opinion, is to treat the anti-deprivation rule as falling under the common law branch of the public policy doctrine rather than adopting a strained interpretation of s. 71 of the *BIA*.

[110] In contrast with s. 71, the *pari passu* provision in the *BIA*, s. 141, establishes a very clear bright-line rule that "all claims proved in a bankruptcy shall be paid rateably": s. 141. This was the provision on which this Court rested its decision in *Gingras*, and it is substantially similar to s. 302 of the *Companies Act*,

1948 (U.K.), 11 & 12 Geo. 6, c. 38, on which Lord Cross relied in *British Eagle*. This clear and straightforward statutory language readily supports a conclusion that Parliament intended to prohibit a debtor from contracting with creditors for a different distribution of the debtor's assets in bankruptcy than that provided for in s. 141. Thus, the *pari passu* rule falls under the statutory branch of the public policy doctrine.

[111] In sum, the reason behind the different tests for the *pari passu* rule and the anti-deprivation rule lies in the difference in the juridical character of the two rules. The *pari passu* rule is based on an implied prohibition in the *BIA* that operates regardless of the parties' intentions, whereas the anti-deprivation rule has its origins in the common law public policy against agreements entered into for an unlawful purpose: see *Still*, at para. 22. There is therefore a principled legal basis for maintaining different tests for the two rules.

[112] It remains to be considered, however, whether sufficient policy considerations can be mustered to justify departing from the anti-deprivation rule's objective purpose test.

(3) The Weight of Public Policy Considerations Favours the *Bona Fide* Commercial Purpose Test Over the Effects-Based Test

[113] The anti-deprivation rule's common law character does not preclude it from operating in tandem with the *BIA* in support of Parliament's statutory objectives. Although the common law and statutory branches of the public policy doctrine are

distinct, they are not watertight compartments. It is prudent for courts applying the common law branch to take into account the policies embodied in legislation as a reflection of society's public policy concerns: Waddams, at para. 566. Therefore, the anti-deprivation rule's common law character does not preclude a court from taking into account Parliament's objective of maximizing global recovery for all creditors when considering how to formulate the anti-deprivation rule. What it does mean, however, is that Parliament's objectives must be weighed against the other policy interests protected by the common law when considering how best to formulate the rule.

[114] It may appear that my colleague and I differ on this point. However, in my view, our differences in approach flow from our disagreement about the legal nature of the anti-deprivation rule: Rowe J.'s Reasons, at para. 33. If I shared my colleague's view that the anti-deprivation rule should be understood as an implied statutory prohibition, then I would have no hesitation in agreeing that the inquiry should be more narrowly focused on selecting the test that best gives effect to Parliament's legislative intent. However, I see the anti-deprivation rule as a judicially derived public policy and, as a result, my approach is informed by Parliament's policy objectives as well as by the other interests and values protected by the common law.

[115] Freedom of contract is the general rule, and it can be displaced only by an "overriding public policy . . . that outweighs the very strong public interest in the

enforcement of contracts": *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 123, per Binnie J., dissenting, but not on this point. Therefore, I see the policy issue as being whether the effects-based test put forward by my colleague or the *bona fide* commercial purpose test confirmed, in my view, by the existing jurisprudence most accurately reflects the point at which the public policy furthered by the anti-deprivation rule outweighs the public interest in the enforcement of contracts. In my judgment, that point is reached only where there is no legitimate and objectively ascertainable commercial purpose for the deprivation in bankruptcy.

[116] The common law "places great weight on the freedom of contracting parties to pursue their individual self-interest": *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 70. The common law even accepts that "a party may sometimes cause loss to another . . . in the legitimate pursuit of economic self-interest": para. 70. In my view, a purely effects-based test gives too little weight to freedom of contract, party autonomy, and the "elbow-room" which the common law traditionally accords for the aggressive pursuit of self-interest: see *A.I. Enterprises*, at para. 31, quoting C. Sappideen and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at para. 30.120. On the other hand, adopting a purely subjective test may create significant uncertainty by introducing a vague standard which unduly restricts the scope of the anti-deprivation rule. A subjective purpose test would place too little weight on Parliament's objective of maximizing global recovery for all creditors. That is why, in my opinion, the middle path of following the objective *bona*

fide commercial purpose test is the best way to balance freedom of contract, the interests of third party creditors, and commercial certainty.

[117] My colleague fears that a purpose-based test would render the anti-deprivation rule ineffective because the rule would apply only in the clearest of cases: Rowe J.'s Reasons, at para. 36. However, as I demonstrated in my discussion of the Canadian jurisprudence, there is not a single Canadian decision applying the anti-deprivation rule in which an absence of a *bona fide* commercial purpose could not be discerned from the objective circumstances in the record. Indeed, the majority of the courts applying the rule have, in fact, inquired into the objective purpose behind the transaction or contractual provision in question rather than simply resting their decision on its effects. I therefore do not agree that retaining the objective purpose element would "threaten to undermine the statutory scheme of the *BIA*": Rowe J.'s Reasons, at para. 36. Further, this Court's jurisprudence establishes that the public policy doctrine "should be invoked only in clear cases": *In re Estate of Charles Millar, Deceased*, [1938] S.C.R. 1, at p. 7, quoting *Fender v. St. John-Mildmay*, [1938] A.C. 1, at p. 12. A more restricted scope for the anti-deprivation rule is therefore in keeping with this Court's jurisprudence on the public policy doctrine. It is also in line with the modern trend in the English cases, which has been to restrict rather than to broaden the scope of the anti-deprivation rule: *Lomas v. JFB Firth Rixson Inc.*, [2010] EWHC 3372 (Ch.), [2011] 2 B.C.L.C. 120, at para. 96, aff'd [2012] EWCA Civ. 419, [2012] 2 All E.R. (Comm.) 1076.

[118] My colleague also argues that an effects-based test is consistent with the American-style *ipso facto* provisions in the *BIA*: Rowe J.'s Reasons, at para. 35. These *ipso facto* provisions state that no one may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement by reason only of a person's insolvency: *BIA*, ss. 84.2 (individual bankruptcies), 65.1 (corporate proposals) and 66.34 (consumer proposals). I do not regard these *ipso facto* provisions as analogous to an effects-based test because they apply to contractual terms that are triggered on insolvency, regardless of the terms' effects. The test applied by these provisions is more aptly characterized as trigger-based, not effects-based. In addition, as Rowe J. observes, the statutory *ipso facto* provisions were enacted for a purpose different than that served by the anti-deprivation rule: Rowe J.'s Reasons, at para. 28. The *ipso facto* provisions are aimed at protecting debtors; the anti-deprivation rule, by contrast, protects creditors. I therefore do not view the statutory *ipso facto* provisions as relevant statements of public policy on the matter at hand.

[119] If regard is to be had to Parliament's policies enacted in the *BIA*, then this Court should take notice of Parliament's policy of upholding the validity of arm's length *bona fide* commercial transactions that have the effect of giving one creditor a preference over another or of depriving the bankrupt's estate of value: ss. 95(1)(a), 96(1) and 97(3). In addition, "good faith" continues to play a role in upholding the validity of protected transactions, which occur after the date of the initial bankruptcy event: ss. 97(1) and s. 99(1). In my view, these provisions reflect Parliament's policy

preference for upholding the validity of *bona fide* commercial arrangements, even when they have the effect of reducing the pool of assets available to a debtor's creditors in bankruptcy. Indeed, it would be a "significant departure from [the] bankruptcy principle to void transactions with a valid commercial purpose based on a mechanical application of a broad principle", such as the effects-based test favoured by my colleague: M. Grottenthaler and E. Pillon, "Financial Products and the Anti-Forfeiture Principle" (2012), 1 *J. Insolvency Inst. Canada* 139. In this regard, I agree with my colleague that courts should pay close attention to the policies which Parliament has enacted through legislation and should not develop the common law in a way that would create "new and greater difficulties": Rowe J.'s Reasons, at paras. 33 and 39, quoting *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 762. However, it is the adoption of an effects-based test in lieu of the traditional purpose-based test that offends these principles in this appeal.

[120] My colleague also states that a purpose-based test gives rise to uncertainty at the time of contracting because parties cannot know if a court will accept their *bona fide* commercial reasons: Rowe J.'s Reasons, at para. 34. However, given that the *bona fide* commercial purpose test is objective, purpose is discernable from the objective circumstances at the time of contract formation and can thus be determined just as readily as effects can under the effects-based test. Therefore, either standard provides the same measure of clarity. In addition, certainty in commercial affairs is typically better served by giving effect to, rather than invalidating, contracts

which were freely entered into, particularly when they serve commercial purposes and are not directed at an unlawful objective.

[121] I also do not share my colleague's view that applying a *bona fide* commercial purpose test would require a significantly more onerous analysis of the parties' intentions than that entailed by an effects-based test: Rowe J.'s Reasons, at para. 34. An objective assessment of purpose is inescapable on either standard. Like the purpose-based test, ascertaining the effects of a provision when applying an effects-based test would require an interpretation of the impugned contractual arrangement. The interpretation of a contract requires an objective assessment of the parties' intentions: *Sattva*, at para. 49. In addition, a test which requires a court to assess the parties' *bona fides* is not new in the realm of commercial law, especially in light of this Court's recognition of a general organizing principle of good faith performance in the common law of contract: *Bhasin*, at para. 33.

[122] Finally, my colleague argues that the anti-deprivation rule should involve an effects-based test in order to better protect the interests of creditors, because debtors are not properly incentivized to protect their creditors' interests when dealing with third parties: Rowe J.'s Reasons, at para. 37. However, one must take into account the full range of options available to creditors to protect their rights. For example, the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44, includes in s. 241 what this Court has described as a "broad oppression remedy" which provides a "mechanism for creditors to protect their interests from the prejudicial conduct of

directors": *Peoples Department Stores Inc. (Trustee of) v. Wise*, 2004 SCC 68, [2004] 3 S.C.R. 461, at para. 51; see also paras. 48-50. I view the oppression remedy, the directors' duty of care, the various anti-avoidance provisions in the *BIA* and in provincial statutes and the ability of creditors to bargain for contractual protections as alleviating any perceived need to extend the reach of the anti-deprivation rule.

[123] In conclusion, I am not persuaded that the policy considerations raised by my colleague are sufficient to override the otherwise strong countervailing public interest in the enforcement of contracts. There is a strong jurisprudential basis for concluding that the anti-deprivation rule has always included a *bona fide* commercial purpose element in Canada, and there is a principled legal basis for maintaining this distinct feature of the anti-deprivation rule as compared to the *pari passu* rule. I would therefore hold that the anti-deprivation rule does not apply to transactions or contractual provisions which serve a legitimate and objectively ascertainable commercial purpose.

B. *Paragraph (d) of Condition Q Furthers a Bona Fide Commercial Purpose*

[124] Nielsen J. found that clause Q(d) was a genuine pre-estimate of damages. He noted that Chandos would incur administration and management costs as a result of Capital Steel's bankruptcy and that it was at risk for future liabilities of Capital Steel. He added that the clause was not an attempt to contract out of the bankruptcy laws. He thus found that clause Q(d) served a *bona fide* commercial purpose. That finding was not disturbed on appeal, as the Court of Appeal was unanimous in its

view that clause Q(d) serves "legitimate commercial interests": paras. 55 and 394-97. The application of the anti-deprivation rule in this appeal could therefore be dealt with on the basis of the standard of review.

[125] However, Deloitte urges a different interpretation of the Subcontract, which, if persuasive, may call into question Nielsen J.'s finding of fact. Deloitte argues that clause Q(d) grants Chandos a sum which is essentially gratuitous or duplicative because clause Q(b) completely covers all costs to Chandos arising from Capital Steel's bankruptcy. Thus, it argues, the 10 percent fee arising from clause Q(d) is in addition to the full indemnity of Chandos arising from clause Q(b).

[126] One problem Deloitte faces is that the interpretation of a contract is generally considered to be a question of mixed fact and law reviewable on the palpable and overriding error standard: *Sattva*, at para. 50; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at paras. 21-24. There is an exception which permits correctness review where the contract at issue is "a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix . . . to assist in the interpretation process": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 24. While we are told that the Subcontract is a standard form contract, it is not suggested that it is widely used throughout the construction industry or that the interpretation of clause VII Q is of precedential value. It is therefore unclear that the interpretation of the Subcontract falls within the *Ledcor* exception. I

express no firm conclusion on the matter, however, because assuming, without deciding, that the interpretation of the Subcontract could be reviewed on the correctness standard, I am not persuaded by the interpretation of clause VII Q urged upon this Court by Deloitte.

(1) Clause VII Q Does Not Permit Double Recovery

[127] The overriding concern when interpreting a contract is to determine the objective intent of the parties and the scope of their understanding. The court must "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva*, at para. 47.

[128] Clause Q(b) provides that Chandos may recover from Capital Steel "any cost . . . arising from the suspension of this Subcontract Agreement or the completion of the Work by the Contractor, plus a reasonable allowance for overhead and profit". On its face, this appears to be a very broad basis for recovery. However, clause Q(d), the clause at issue, adds some ambiguity, because it provides that Capital Steel "shall forfeit 10% of the within Subcontract Agreement price to the Contractor as a fee for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period." It might be assumed that the specific matters mentioned in clause Q(d) would also fall under the general term in clause Q(b). Does Condition Q, then, permit Chandos to, in effect, double recover against Capital Steel? I answer this question in the negative, for three reasons.

[129] First, it is apparent from the ordinary and grammatical meaning of the words that clause Q(b) applies to different matters than clause Q(d). The focus of clause Q(b) is on the cost to Chandos of completing Capital Steel's unfinished structural steel work. By contrast, clause Q(d) applies after the work is completed as a fee for, among other things, Chandos having to monitor Capital Steel's work during the warranty period. As well, clause Q(b) applies to the cost to Chandos arising from the suspension of the Subcontract, whereas clause Q(d) covers the inconvenience to Chandos specifically of completing the work using alternate means, which would require the reallocation by Chandos of significant administrative and managerial resources as well as the reallocation of the risks assumed under the Subcontract (e.g. Condition G, "Indemnity"). Thus, the matters covered by clause Q(d) may be difficult to quantify in monetary terms, and so the parties agreed beforehand on a figure for them, while leaving clause Q(b) to cover the more direct and quantifiable costs.

[130] Second, if the grammatical and ordinary meaning does not resolve the matter, then there is an apparent conflict between clause Q(b) and clause Q(d). "[W]here there is an apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term": *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at p. 24; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 46. Thus, the general grounds for recovery listed in clause Q(b) should not be read as extending to the specific matters in clause Q(d), that is, "the inconvenience of

completing the work using alternate means" and "monitoring the work during the warranty period".

[131] Third, a court may deviate from the plain meaning of the words if a literal interpretation of the contractual language would lead to a commercially unrealistic or absurd result: *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 901. In my view, permitting double recovery under clause Q(b) would be commercially impractical and unrealistic. Therefore, clause Q(b) should be read so as to avoid such an absurdity.

[132] For these reasons, I disagree with the interpretation of Condition Q advanced by Deloitte. The 10 percent fee arising under clause Q(d) is not duplicative of the amounts which may accrue under clause Q(b). Nielsen J.'s finding that clause Q(d) furthers a *bona fide* commercial purpose is, as a result, left unimpeached. Nonetheless, it is worth briefly exploring the objective commercial basis for the provision to show why it is important that the law give effect to such a clause.

(2) Paragraph (d) of Condition Q Advances a Legitimate and Objectively Ascertainable Commercial Interest

[133] In my view, it is significant that the Subcontract included ongoing obligations on the part of Capital Steel that were unperformed at the time of its bankruptcy. The bankruptcy of a party with an unperformed or ongoing obligation under a contract is likely to necessitate a commercial rearrangement of rights in order

to protect the legitimate interests of the counterparty because the party's bankruptcy is likely to undermine the counterparty's assurance of ongoing performance or to change the risk allocation under the contract: Grottenthaler and Pillon; see also *Lomas* (2010), at paras. 108-10; *Lomas* (2012), at paras. 88-91. There are therefore ample legitimate commercial reasons for rearranging contractual rights in such circumstances.

[134] An important element of the Subcontract is that it created a general contractor-subcontractor relationship between two parties in the construction industry. The construction industry generally operates in a pyramid-like structure, with the owner or developer at the top of the pyramid, a general contractor or contractors one level down, subcontractors under them, and possibly further sub-subcontractors: J. Westeinde, "Construction is 'Risky Business'" (1988), 29 *C.L.R.* 119. Generally, payment flows down the pyramid once the work has been completed. Thus, the insolvency of a subcontractor during the construction of a project can have major ramifications up and down the pyramid structure, causing costly delays and fundamentally altering the allocation of risk created by the web of contractual relationships involved.

[135] Capital Steel had significant unperformed obligations under the Subcontract at the time of its bankruptcy. It had agreed to "repair and make good any defect in its work and all resulting damages that might appear as the result of any improper work or defective materials" it furnished: clause III. The operative period

for this guarantee corresponded to the period specified in the Stipulated Price Contract, which was one year from the date of substantial performance: clause GC 12.3.1. However, Capital Steel's bankruptcy occurred before it had even completed its own work under the Subcontract, let alone before the date of substantial performance of the entirety of the project. Therefore, the Subcontract was still executory at the time of its bankruptcy.

[136] In this case, Capital Steel's bankruptcy exposed Chandos to significant risks under the Stipulated Price Contract. In it, Chandos had agreed to be "as fully responsible to the *Owner* for acts and omissions" of Capital Steel, or a replacement subcontractor, as it was for "acts and omissions of persons directly employed by" it: clause GC 3.7.1.3 (emphasis in original). Chandos had also agreed that it would promptly correct defects or deficiencies in the work which appeared during the warranty period at its own expense: clause GC 12.3.4. As well, Chandos was required to correct or pay for damage resulting from such corrections: clause GC 12.3.5. Owing to its bankruptcy, Capital Steel was not available to monitor or correct its work during the warranty period. Chandos therefore had to do so or face liability to the owner under the Stipulated Price Contract. Thus, a fee for monitoring the work during the warranty period is legitimate.

[137] A general contractor's role is essentially to oversee and coordinate the construction of a project by various subcontractors according to a set schedule. It is evident that a subcontractor's bankruptcy during the construction of the project would

require the general contractor to redirect significant administrative and management resources in order to respond, for example by seeking a substitute subcontractor willing to complete a job already partially performed by another company. The general contractor would also incur administrative and management costs from mitigating the fallout up and down the pyramid. Undoubtedly, costly delays would ensue as well. Thus, a fee for the inconvenience of completing the work using alternate means is also legitimate.

[138] As to the quantum of the fee, 10 percent of the Subcontract price, Nielsen J. found as a fact that this was a genuine pre-estimate of damages, and I am content to rely on this finding: A.R., at pp. 9-10. In my view, this amount is not extravagant in light of the importance of the structural steel work to the project, the Stipulated Price Contract's total value of $56,852,453.45, and the fact that the risks reallocated to Chandos by Capital Steel's bankruptcy were likely difficult to state in monetary terms. I do not see in clause Q(d) any intent on the part of Chandos or Capital Steel to avoid the operation of bankruptcy laws or to prejudice Capital Steel's creditors. There is, therefore, a *bona fide* commercial purpose behind clause Q(d).

V. Conclusion

[139] As clause Q(d) furthers a *bona fide* commercial purpose, I would dispose of this appeal by holding that provisions of this kind do not offend the anti-deprivation rule. I therefore conclude that clause Q(d) is enforceable against the

trustee of Capital Steel's estate in bankruptcy. As a result, I would allow the appeal and restore the original order made at first instance.

Appeal dismissed with costs throughout, CÔTÉ J. *dissenting.*

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