COURT OF APPEAL FOR BRITISH COLUMBIA

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

Date: 20211008
Docket: CA47585

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

-and-

In the Matter of the *Business Corporations Act*, S.B.C. 2002, c. 57, as Amended

-and-

In the Matter of the Plan of Compromise and Arrangement of Port Capital Development (EV) and Evergreen House Development Limited Partnership

Between:

Port Capital Development (EV) Inc. and Evergreen House Development Limited Partnership

Respondents
(Petitioners/Applicants)

And

1296371 B.C. Ltd.

Appellant
(Respondent/Applicant)

And

Centura Building Systems (2013) Ltd. and Solterra Acquisitions Corp.

Respondents
(Respondents)

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

2021 BCCA 382 (CanLII)

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

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

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

2021 BCCA 382 (CanLII)

Written Reasons by:
The Honourable Madam Justice Newbury

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

2021 BCCA 382 (CanLII)

2021 BCCA 382 (CanLII)

Summary:

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

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

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

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

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

proposal that contained no provision for a compromise or arrangement to be voted on by debtors' creditors. They also emphasized the chambers judge's description of the proposal as "speculative".

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

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

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

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

Reasons for Judgment of the Honourable Madam Justice Newbury:

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

[2] 129 appeals an order of a judge of the Supreme Court of British Columbia who dismissed 129's application for court approval of certain steps and transactions relating to the debt structure of Port Development (EV) Inc. and Evergreen House Development Limited Partnership (collectively, the "Petitioners"). Having rejected

2021 BCCA 382 (CanLII)

that proposal, the judge approved an offer from the respondent Solterra Acquisitions Corp. ("Solterra") to purchase the assets of the Petitioners on the terms set forth in Schedule B to the "Approval and Vesting Order" granted on June 15, 2021. A division of this court granted 129 leave to appeal the orders (see 2021 BCCA 319.) The division also ordered that the appeal be heard by a division of five judges given that the appellant intended to ask this court to reconsider and, if necessary, overrule *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*. 2008 BCCA 327 ("*Maple Bay"*.)

2021 BCCA 382 (CanLII)

Factual Background

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

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

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

[6] In May 2020, CMLS stopped funding construction and demanded payment of its loan. In short order, the Petitioners commenced proceedings under the *CCAA*. In their pleading, they sought relief of the kind usually sought under the *Act*, including an order authorizing them to file with the Court a "plan or plans of compromise and

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

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

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

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

[10] Of the three liquidation proposals, Solterra's Backup Offer featured the highest purchase price. The purchase proceeds would pay the interim loan and

2021 BCCA 382 (CanLII)

administration charges in full; the balance would be paid to CMLS, leaving it with a shortfall of about $576,000. There would be no money remaining for Aviva or the other creditors.

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

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

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

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

2021 BCCA 382 (CanLII)

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

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

2021 BCCA 382 (CanLII)

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

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

The Chambers Judge's Reasons

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

> a) Under the Solterra and Landa cash offers, the Interim Lending Facility and priority professional fees would be paid. In addition, CMLS would suffer a shortfall to varying degrees: Solterra Offer #1 — $3.2 million shortfall; Landa Offer #3 — $1.7 million shortfall; and Solterra Backup Offer — a shortfall in excess of $500,000;

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

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

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances. [Emphasis added.]

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

2021 BCCA 382 (CanLII)

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

> The salient details of the 129 Revised Offer are as follows:
>
> a) $24.96 million would be raised, as follows:
>
> i. $14.7 million from Domain [Domain Mortgage Company];
>
> ii. $8 million in pre-sale deposits (including a $2.8 million deposit held for Ms. Reyes) to be released and advanced to 129;
>
> iii. $2.15 million to be loaned from 126 [1260780 B.C. Ltd., a company controlled by Mr. Reyes' mother] to 129;
>
> iv. 129, as the Junior Lender, then loans these amounts to "Newco", a company to be incorporated by Domain to hold the CMLS security;
>
> v. Pre-payments to Domain ($105,000),
>
> b) $24.96 million would be used, as follows:
>
> i. Payment in full of the Interim Lending Facility ($1.3 million) and CCAA secured professional fees ($507,000) [i.e., the Administration Charge];
>
> ii. Purchase and assignment of the CMLS loan and security ($21.3 million) to Newco, thus saving Mr. Reyes from his covenant;
>
> iii. Fees and various holdbacks ($1.5 million), including a six-month interest reserve for Domain ($851,250); and
>
> iv. Payment of Break Fee/Expense Reimbursement to Landa and Solterra (total $250,000).
>
> It is quite apparent that the 129 Offer has evolved substantially since May 7, 2021 until its current iteration on June 4, 2021 under the 129 Revised Offer (including by an increased consideration amount). The Monitor confirms that most of the conditions relating to the 129 Revised Offer have now been satisfied, save for customary funding conditions. That was not the case as of May 25, 2021 and, indeed, some conditions were only satisfied on the eve of this hearing.
>
> There are some unique features under the 129 Revised Offer relevant to the existing stakeholder interests:
>
> a) The $16 million in pre-sale contracts are to remain intact (unlike the Landa and Solterra Offers);
>
> b) Subordinate security interests after Domain in first ranking position are: second, 129 as the Junior Lender to hold security in respect of the pre-sale deposits in a sharing arrangement with Aviva; third, Aviva for any balance owed; fourth, 126 for the $2.15 million loan; and fifth, 129 for the balance owed to it. Effectively,

2021 BCCA 382 (CanLII)

this allows Aviva to maintain some hope of recovery under its secured loan as opposed to an immediate exposure of $8.6 million (subject to any recovery against the $8 million cash deposits held) under the Landa/Solterra Offers. Mr. Reyes benefits from this potential reduction or elimination of his personal exposure to Aviva; Ms. Reyes avoids litigation with Aviva over her pre-sale deposit;

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

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

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

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

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

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

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

2021 BCCA 382 (CanLII)

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

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

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

> In particular, the Revised 129 Offer:
>
> a) proposes to pay-out the DIP Lender and CMLS in full;
>
> b) improves the security value of the Aviva charge and provides Aviva with the prospect of a full or material recovery; whereas all other offers will result in no, or minimal, recovery to Aviva leaving it with collateral remedies against the Uninsured Presale Deposits and guarantors; and
>
> c) avoids likely litigation with respect to the Uninsured Presale Deposits by converting those deposits into a secured position against Terrace House Project.

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

A Redemption?

[20] The judge rejected the argument that 129's offer was effectively a "redemption" of the CMLS mortgage. (At paras. 56–7.) I note parenthetically that she

2021 BCCA 382 (CanLII)

may have been under the impression (which was not unreasonable given the unclear wording of the proposal) that neither the Petitioners nor Aviva was to pay out the mortgage. We are advised by counsel, however, that it was and is intended that 129 would make funds (to be advanced by the new lender) available *to the Petitioners*, who would in turn pay out CMLS in full. The mortgage would then be assigned to Domain, 129 and 126.

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

Interim Financing?

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

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

2021 BCCA 382 (CanLII)

The judge observed:

> 129 (in place of the Petitioners) seeks to authorize the Petitioners to not just refinance the existing debt with the existing priorities, but increase that secured debt against the Project. The net effect of the "refinancing" is to convert the debt under the Interim Lending Facility and the professional fees into the CMLS secured charge and also add millions of dollars of secured debt on the Project (to be accommodated within the increased limit of $25 million).
>
> The New Loan Facility also significantly alters the commercial terms of the CMLS debt and security, including by substantially increasing the interest rate on the secured loan. Without a court order, any modifications to the CMLS security have no effect on existing charges: *Land Title Act*, R.S.B.C. 1996, c. 25, ss. 1 (definitions of "charge" and "encumbrance") and 206(2). [At paras. 63–4; emphasis added.]

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

> ... Without notice and the opportunity to make submissions, it is difficult to properly assess whether any creditor would be materially prejudiced in consideration of s. 11.2(4)(f). Centura alleges "material" prejudice, noting that despite being presently "out of the money" under its lien, the lien claimants may have a preference that a new developer acquire the Project. Centura argues that, in some instances, suppliers can have leverage aside from their lien claims, including because they are required to sign off on completion for engineering reports and permits, or because their work is sufficiently advanced that hiring a replacement is economically impractical. [At para. 71; emphasis added.]

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

2021 BCCA 382 (CanLII)

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

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

A Sale?

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

Appropriateness

[26] Having set forth what the 129 offer was *not*, the chambers judge turned at para. 78 of her reasons to the crux of the application before her — the question of

2021 BCCA 382 (CanLII)

whether the offer was "appropriate" in the circumstances. In essence, she said, 129's plan was to:

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

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

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

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

2021 BCCA 382 (CanLII)

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

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

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

[31] The chambers judge in the case at bar also noted *Re North American Tungsten Corporation Ltd.* 2015 BCSC 1376, in which the Court suggested that the debtor company must as a "prerequisite" show "that it has at least 'a kernel of a

2021 BCCA 382 (CanLII)

plan'". (At para. 26.) The Court cited the decision of Fitzpatrick J. in *Re Azure Dynamics Corporation* 2012 BCSC 781. In that instance, an initial stay granted under the *Act* was about to expire but the petitioners were in the process of trying to find new or additional financing. They had held discussions with "various interested parties" concerning either refinancing, recapitalization or a sale. In these circumstances, the judge rejected the notion that there was not the "kernel of a plan" or, as she put it, "some sense of what the petitioners intend to do so as to give the court and, obviously, the stakeholders, some comfort that there is some utility in continuing further with these proceedings." (At para. 13.)

2021 BCCA 382 (CanLII)

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

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

Having also found that the petitioner company was acting in good faith and with due diligence, she declined to lift the stay. (See also *Re Quest University Canada* 2020

BCSC 318 at paras. 108–9; *Callidus Capital Corp. v. CarCap Inc.* 2012 ONSC 163; *Re Hayes Forest Services Limited.* 2008 BCSC 1256.)

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

> ... All Mr. Reyes speaks of is securing the new construction financing and then restructuring the limited partnership interests.
>
> Specifically, there is no evidentiary foundation in Mr. Reyes' Affidavits to support the statement at para. 34 of 129's notice of application that 129 will use the "breathing space" under a further stay of proceedings to "permit some, or potentially full, recovery by Aviva and the Other Creditors".
>
> Centura also points to other issues arising from the feasibility of completing the Project with the pre-sale purchase contracts intact. Centura notes that, even if the "new construction financing" is obtainable, which is speculative at best, Mr. Reyes will also have to solve his liability problems with Aviva in that context. It is anyone's guess that the completion of the Project is still feasible while also allowing for a full credit of over $16 million from the pre-sale deposits (which would reduce sale revenues). There is no evidence as to how that might be addressed. [At paras. 87–9; emphasis added.]

[34] The chambers judge was of the view that Mr. Reyes was "only seeking to allow *himself* some 'breathing space' by borrowing money against the Project, by satisfying or keeping the secured creditors at bay while he seeks a better overall resolution than an outright sale that would crystallize his exposure [presumably on personal guarantees] to CMLS and Aviva." She continued:

> ... He seemingly requires that this Court assist him in freezing the rights of the Petitioners' creditors while he seeks to do so. There is nothing to suggest that Mr. Reyes is seeking to obtain relief from this Court for the purposes of resolving the current creditor claims against the Petitioners within the context of these *CCAA* proceedings.
>
> In other words, Mr. Reyes seeks the benefit of these proceedings — including the continuation of a stay against all creditors and with the potential for further

2021 BCCA 382 (CanLII)

> relief, with the consent of Domain – with no true intention to address those creditor claims in the future. [At paras. 90–1; emphasis added.]

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

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

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

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

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

On Appeal

Grounds of Appeal

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

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

2021 BCCA 382 (CanLII)

> (b) determining that it was not appropriate to grant the 129 Application because there was no evidence of an intention to propose a plan of arrangement or compromise to creditors; and
>
> (c) approving the Solterra backup Offer in the face of the 129 Refinancing, which [refinancing] results in a materially better outcome for the stakeholders and is more consistent with the remedial purpose of the *CCAA.*

Standard of Review

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

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

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

2021 BCCA 382 (CanLII)

> discretion by the judge in endeavoring to balance the various interests. . . . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. [At paras. 53–4; emphasis added.]

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

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

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

New Evidence

[42] We have before us four motions to adduce new evidence on appeal. These attest to the "dynamic" nature of *CCAA* proceedings, even at the appellate level. The first motion was filed by the Monitor to adduce the evidence of a legal assistant, Ms. Petrakis. Exhibited to her affidavit was a letter from Mr. Bell of Ernst & Young to all counsel concerning difficulties faced by the Monitor in obtaining property

2021 BCCA 382 (CanLII)

insurance for the project. The existing insurance was set to expire on September 30, 2021. Mr. Bell advised that the insurance broker for the project had declined to extend the insurance beyond that date and that accordingly, there was a "significant risk" the development would not be insured after that date.

[43] This affidavit also exhibited a letter dated September 13, 2021 from counsel for the Monitor to counsel for 129 and Mr. Reyes advising that the loan that was to have been made by Domain to 129 as part of the 129 refinancing had not closed by September 10 as anticipated. The Monitor requested an update on the status of the financing and 129's ability to meet its commitments to CMLS and Desjardins in the circumstances. Finally, the Monitor requested that 129 provide stakeholders with a "written update on whether any of the other outstanding conditions to the 129 Refinancing have now been satisfied."

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

[45] Mr. Reyes' second affidavit, sworn September 1, 2021, referred to by counsel as "Affidavit #6", was a further update. He deposed that the pre-sale purchasers of units in the project had provided irrevocable directions authorizing the use of their deposits in the proposed refinancing transaction and extending the termination dates of their directions to December 31, 2021. Domain had also committed to extend the condition removal date in its loan commitment letter to September 30, 2021 and in

2021 BCCA 382 (CanLII)

that regard had executed an "Amendment to the Third Revised Commitment Letter" dated September 1, 2020. Mr. Reyes continued:

> Based on the updated payouts provided by the Monitor, an additional $900,000 (approximately) is estimated to be required to provide sufficient funding to complete the proposed refinancing as it was originally contemplated on June 8, 2021 (as described in paragraph 12 of my third affidavit).
>
> The additional funding requirements will be satisfied by:
>
> (a) additional funding from 129 in the amount of at least $480,000; and
>
> (b) allocating any additional amounts required from the Convertible Loan (as defined in my fourth affidavit) to be provided by 126.
>
> I am advised by Luz Consuelo Reyes, the sole director and officer of 126, and verily believe that 126 consents to allocating a portion of the Convertible Loan to the refinancing transaction.
>
> 129 is raising funds to cover the additional funding requirements. However, at a minimum, 129 has secured $480,000 from a further loan commitment by Domain. The loan will be in the principal amount of $1,675,000, is expected to close on or about September 10, 2021, and proceeds from this loan will be paid as follows:
>
> (a) to repay existing debt in the amount of $1,117,706;
>
> (b) to pay certain fees and interest reserves to Domain in the amount of approximately $75,000; and
>
> (c) the balance, to be funded to 129 for use in connection with the refinancing transaction. [At paras. 7–10.]

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

[47] The final item of proposed new evidence was an email dated September 21, 2020 (the date of the hearing in this Court) sent by Mr. Schultz, counsel for 129, to all counsel in this matter in response to the Monitor's request for an update. With respect to insurance, it confirmed that Aviva had offered to provide general property

2021 BCCA 382 (CanLII)

insurance for a term of six months commencing September 30, 2021. This amount was to be funded from the working capital funds that would be available under the 129 transaction and would satisfy the insurance condition contained in Domain's commitment letter. With respect to the status of the "additional financing", Mr. Schultz advised:

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

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

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

> New evidence is admitted in "rare" or "exceptional" circumstances: see *Animal Welfare International Inc. v. W3 International Media Ltd.*, 2015 BCCA 148 at para. 10 and *Fotsch* at para. 20, respectively. In *Jens* at para. 29, the Court used "rare" and "exceptional" interchangeably.
>
> This high standard is on account of the importance of certainty and finality in trial judgments: *Fotsch* at para. 21; *Struck* at para. 37. Nevertheless, it is contrary to the "interests of justice" to have a decision that is inconsistent with the known facts: *Jens* at para. 30; *Animal Welfare* at para. 12; *Island Savings Credit Union v. Brunner*, 2014 BCCA 449 at para. 25.

2021 BCCA 382 (CanLII)

> One recognized "exceptional" circumstance, where new evidence may be admitted, was described by the Court in *Fotsch*:
>
> > [21] Circumstances which might permit the admission of new evidence include where the judge made assumptions about future events but new evidence establishes those assumptions to be incorrect. See *North Vancouver (District) v. Lunde*, (1998), 60 B.C.L.R. (3d) 201 (C.A.) at paras. 25–26.
>
> In *United States of America v. Wilson*, 2010 BCCA 85 at para. 34, the Court described this "assumption" category as the "main exception" to the general inadmissibility of new evidence on appeal. [At paras. 32–35.]

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

Financial Comparison of the Offers

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

2021 BCCA 382 (CanLII)

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

2021 BCCA 382 (CanLII)

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

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

[52] It will be noted that the "materially better outcome" of 129's proposal commented upon by the Monitor has improved since the hearing below: the amount of Domain's new loan has increased; Aviva's prospects for the recovery of its $8 million are improved; the 'conditionality' of several of the steps has diminished or been removed, with the result that the proposal is less 'speculative'; the prospects of purchasers who have paid deposits for units in the Project have improved to some extent; and adequate working capital seem to be assured for the next few months. As mentioned earlier, Mr. Reyes stated in his Affidavit #6 that he expected to "raise

further funds from the limited partners of the Petitioners, and other investors, after the refinancing transaction completes and certain amendments to the limited partnership agreement can be made." In this court, counsel for 129 acknowledged that it may become necessary at that later stage to seek a compromise with unsecured creditors, but that that stage had not been reached and may be unnecessary if the new construction financing is successful.

Overview of Parties' Positions

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

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

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

2021 BCCA 382 (CanLII)

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

> Specifically, there is no evidentiary foundation in Mr. Reyes' Affidavits to support the statement at para. 34 of 129's notice of application that 129 will use the "breathing space" under a further stay of proceedings to "permit some, or potentially full, recovery by Aviva and the Other Creditors".
>
> Centura also points to other issues arising from the feasibility of completing the Project with the pre-sale purchase contracts intact. Centura notes that, even if the "new construction financing" is obtainable, which is speculative at best, Mr. Reyes will also have to solve his liability problems with Aviva in that context. It is anyone's guess that the completion of the Project is still feasible while also allowing for a full credit of over $16 million from the pre-sale deposits (which would reduce sale revenues). There is no evidence as to how that might be addressed. [At paras. 88–9.]

[57] Thus while 129 characterizes its proposal as "clearly superior" to the Solterra Backup Offer, the respondents discount it as an attempt by the Petitioners "to avoid a sale of their assets at the conclusion of a sale process on the purported basis of a right of redemption and a faint hope plan to salvage their business."

Objective(s) of the CCAA

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

[59] I do not intend to recount at length the history of the *Act*, which has been amended several times after wide-ranging commissions were carried out by parliamentary committees and other experts over the years: see A. Nocilla, "The

2021 BCCA 382 (CanLII)

History of the Companies' Creditors Arrangement Act and the Future of Re-structuring Law in Canada*",* (2014) 56 *Can. Bus. L. J.* 73 at 77–86. It is well-known that the *Act* was introduced during the Depression to permit Canadian companies to reorganize or restructure their debt in order to avoid the travails of bankruptcy. Nocilla writes:

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

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

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

2021 BCCA 382 (CanLII)

CCAA itself and second on their "inherent or equitable" jurisdiction: see *Century* at paras. 64–5.

[61] One example of the exercise by a court of its equitable jurisdiction in the *CCAA* context was the appointment of monitors, who were likened to interim receivers: see *Re Northland Properties Ltd.* (1988) 69 C.B.R. 266 (B.C.S.C.) at 277. Court approval of interim financing is a more obvious example of the evolution of the court's jurisdiction under the *Act* in accord with its broadening objectives: even *prior to the enactment of s. 11.2 in 2009*, courts regularly approved such financing as a necessary part of facilitating restructurings aimed at continuing the debtor's business as a going concern while more permanent solutions were sought. Although there was initially some debate (see, e.g., *Re Fairview Industries Ltd.* (1991) 11 C.B.R. (3rd) 71 (N.S.T.D.)) concerning the jurisdictional basis for the granting of such orders *without an arrangement or compromise*, the practical need for "breathing space" (including the need to obtain professional assistance) usually meant immediate injections of cash were necessary. Responsive interim financing orders became commonplace: see *United Used Auto & Truck Parts Ltd. v. Aziz* 2000 BCCA 146; *Re Hunters Trailer & Marine Ltd.* 2001 ABQB 546; *Re Skydome Corp.* (1998) 16 C.B.R. (4th) 118 (Ont. Gen. Div.); *Re Starcom International Optics Corp.* (1998) 3 C.B.R. (4th) 177 (B.C.S.C.); *Re Royal Oak Mines Inc.* (1999) 7 C.B.R. (4th) 293 (Ont. Gen. Div.); *Re Stelco Inc.* (2004) 48 C.B.R. (4th) 299 (Ont. S.C.J.).

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

> Prior to 2009, the courts found authority for granting super-priority charges or interim financing under both the *CCAA* and their inherent jurisdiction. The British Columbia Court of Appeal in *United Used Auto* held that the effective achievement of the *CCAA*'s objectives requires a broad and flexible exercise

2021 BCCA 382 (CanLII)

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

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

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

> I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the court, not to make orders which contradict a statute, but to "fill in the gaps in legislation so as to give effect to the objects of the *CCAA*, including the survival program of a debtor until it can present a plan" …
>
> ...
>
> It is very common in *CCAA* restructurings for the court to approve the sale and disposition of assets during the process and before the Plan if formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The *CCAA* is designed to be a flexible instrument and it is that very flexibility which gives it its efficacy. ...
>
> In the spirit of that approach, and having regard to the circumstances of this case, I am satisfied not only that the Court has the jurisdiction to make the approval and related orders sought, but also that it should do so. There is no realistic alternative to the sale and transfer that is proposed, and the

2021 BCCA 382 (CanLII)

> alternative is a liquidation/bankruptcy scenario which, on the evidence would yield an average of about 44% of the purchase price which the two agencies will pay. To fore go that purchase price—supported as it is by reliable expert evidence—would in the circumstances be folly, not only for the ordinary creditors but also for the Transfusion Claimants, in my view.
>
> While the authorities as to exactly what considerations a court should have in mind in approving a transaction such as this are scarce, I agree with Mr. Zarnett that an appropriate analogy may be found in cases dealing with the approval of a sale by a court-appointed receiver. In those circumstances, as the Ontario Court of Appeal has indicated in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at p. 6, the Court's duties are,
>
> > (i) to consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
> >
> > (ii) to consider the interests of the parties;
> >
> > (iii) to consider the efficacy and integrity of the process by which offers are obtained; and,
> >
> > (iv) to consider whether there has been unfairness in the working out of the process.
>
> I am satisfied on all such counts in the circumstances of this case. [At paras. 43–8; emphasis added.]

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

> Counsel to the Applicants further submits that *CCAA* courts have repeatedly noted that the purpose of the *CCAA* is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":
>
> > The purpose of the *CCAA* is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.
>
> Counsel to the Applicants further submits that the *CCAA* should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and

2021 BCCA 382 (CanLII)

> further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the *CCAA* will be met.
>
> ...
>
> Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a *CCAA* proceeding. *Re Boutique San Francisco Inc.* (2004), 7 C.B.R. (5th) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5th) (Alta. Q.B.) at para. 75.
>
> ...
>
> ... The *CCAA* is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.
>
> I therefore conclude that the court does have the jurisdiction to authorize a sale under the *CCAA* in the absence of a plan. [At paras. 33–4, 41, and 47–8; emphasis added.]

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

> ... providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company … [Authorities omitted].
>
> Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). ...
>
> That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "has the simultaneous objectives of maximizing creditor recovery, preservation of going-concern value where possible, preservation of jobs and communities affected by the firm's financial distress ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those

2021 BCCA 382 (CanLII)

> objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc*., 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70). [At paras. 40–42; emphasis added.]

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

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

2021 BCCA 382 (CanLII)

Compromises

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

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

[70] In emphasizing unsecured creditors' "*rights*", I note that one of the issues before the Court in *Callidus* was whether it was open to the supervising judge to approve a litigation funding agreement ("LFA") that would provide interim financing in the *CCAA* proceeding. The creditors argued that the proposed LFA was a "plan of arrangement" and therefore had to be put to a creditors' vote under ss. 4 or 5 prior to receiving court approval. The Supreme Court rejected that argument for reasons set

2021 BCCA 382 (CanLII)

forth at paras. 100–104. It suggested that although "arrangement" and "compromise" are very broad terms, they do have some limits and require, "at minimum, some compromise of creditors' rights." In the Court's words:

> For example, in *Crystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:
>
> > A "plan of arrangement" or a "compromise" is not defined in the *CCAA*. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the *BIA*. Under the *CCAA*, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
> >
> > (*Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169, at para. 50)
>
> Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them, a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*. [At paras. 101–02; emphasis added.]

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

2021 BCCA 382 (CanLII)

Maple Bay

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

> The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Re Fairview Industries Ltd.* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (S.C.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of *Re Ursel Investments Ltd.* (1990), 2 C.B.R. 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the *CCAA* because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.
>
> ... I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors. [At paras. 31–2; emphasis added.]

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

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

> The *CCAA* is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act – to preserve the *status quo* while the debtor prepares a plan that

2021 BCCA 382 (CanLII)

> will enable it to remain in business to the benefit of all concerned – will be furthered by granting a stay so that the *means* contemplated by the Act – a compromise or arrangement – can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives. [At para. 26; emphasis by underlining added.]

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

[74] Obviously, the facts of the case at bar are also very different from those of *Maple Bay*. 129 has made a complex and substantive proposal to which the two secured creditors have agreed. Evidently they are satisfied that the proposal represents the best outcome realistically available to protect Terrace House as an ongoing project. The proposal will not alter the rights of the Other Creditors; they never had any "right" to block the Petitioners' granting security that would rank ahead of them; and whichever proposal goes ahead, the result for them will be the same. 129's proposal was within the parameters of the SISP approved by the chambers judge and would appear now to have a decent chance of achieving the *CCAA*'s overarching objective and the more specific objectives described in *Callidus*. If the second stage of the proposal does not materialize, it will be open to the Petitioners to seek a compromise at that time. As it is, however, the first stage avoids the adverse effects of the liquidation deals proposed by Solterra and Landa.

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

2021 BCCA 382 (CanLII)

compromise is proposed, the court may order a meeting of creditors or a class thereof; and under s. 6, if the compromise is approved and sanctioned by the court, it is binding on the creditors or class, subject to the conditions described in s. 6.

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

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

The Chambers Judge's Exercise of Discretion

[77] I also find that the absence of a planned compromise in this case should not have weighed as a *'crucial'* factor in the chambers judge's exercise of her discretion in determining appropriateness under s. 11. We must of course accord a high degree of deference to the chambers judge's exercise of discretion, but I believe, with respect, that she erred in principle in this regard. Giving primary importance to the statutory purpose stated in the *CCAA*'s long title seems to run contrary to the evolution of the *CCAA* and its objectives described above, and to the evolution of the complex and innovative 'solutions' that now characterize *CCAA* applications. Like the Court in *Winnipeg Motor Express*, I consider the objectives of the *Act* now to be both more fundamental and broader than the title of the *Act* would suggest and to "go beyond the circumstances of a formal plan of arrangement." I conclude that the chambers judge erred in principle in giving primary importance to this factor.

2021 BCCA 382 (CanLII)

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

> ... Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit. [At para. 70; emphasis added.]

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

> ... Mr. Reyes is only seeking to allow *himself* some "breathing space" by borrowing money against the Project, by satisfying or keeping the secured creditors at bay while he seeks a better overall resolution than an outright sale that would crystallize his exposure to CMLS and Aviva. He seemingly requires that this Court assist him in freezing the rights of the Petitioners' creditors while he seeks to do so. There is nothing to suggest that Mr. Reyes is seeking to obtain relief from this Court for the purposes of resolving the current creditor claims against the Petitioners within the context of these *CCAA* proceedings.
>
> In other words, Mr. Reyes seeks the benefit of these proceedings — including the continuation of a stay against all creditors and with the potential for further relief, with the consent of Domain – with no true intention to address those creditor claims in the future. [At paras. 90–1; emphasis added.]

[80] With respect, without an adverse credibility finding it cannot be inferred that Mr. Reyes is only seeking to avoid a liquidation sale because it would "crystallize his exposure to CMLS and Aviva," that he is not seeking relief in order to resolve "the

2021 BCCA 382 (CanLII)

current creditor claims against the Petitioners" within the context of the *Act*, or that he is otherwise acting "with no true intention to address those creditor claims in the future." To the contrary, as I have already indicated, 129's proposal is clearly superior to the cash purchase offers, viewed from the viewpoint of all the stakeholders. It is true that Mr. Reyes is a guarantor of the CMLS mortgage, but according to the documents in evidence, he will also be guaranteeing the Domain loan. Even if this were not the case, many debtor companies under the *CCAA* are owned or controlled by persons who have very substantial financial stakes in the restructuring or refinancing, but there is nothing untoward about that fact. Just as creditors act in their own interests, so do controlling shareholders of debtor companies. (Directors are, of course, a different matter.) Mr. Reyes is also a controlling shareholder of 129, which is obviously lending funds as part of the refinancing. Clearly, he is not ridding himself of a burden of debt as a result of this restructuring. The statements I have reproduced from paras. 90 and 91 above are, in my view, simply incorrect and should not in principle have informed the judge's exercise of her discretion under s. 11.

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

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

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

2021 BCCA 382 (CanLII)

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

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

> Specifically, there is no evidentiary foundation in Mr. Reyes' Affidavits to support the statement at para. 34 of 129's notice of application that 129 will use the "breathing space" under a further stay of proceedings to "permit some, or potentially full, recovery by Aviva and the Other Creditors".

and at para. 90:

> ... There is nothing to suggest that Mr. Reyes is seeking to obtain relief from this Court for the purposes of resolving the current creditor claims against the Petitioners within the context of these *CCAA* proceedings. [Emphasis added.]

[85] Earlier in these reasons I quoted at some length from Mr. Reyes' affidavit evidence, including his expression of hope that after some "breathing space" has been obtained, he will be in a position to locate construction financing that will enable the project to go ahead as planned. To say that there is "nothing" to suggest he is attempting to resolve the claims of creditors ignores this for no reason that the judge has provided.

[86] The rights of the secured creditors are "resolved" by 129's plan and in any event, it presents the best solution as compared to the liquidation offers. It is much

2021 BCCA 382 (CanLII)

more than the “kernel of a plan”. In summary, unless the chambers judge was implying a lack of good faith in describing Mr. Reyes as having “no true intention” to address creditor claims in the future, she erred in ignoring the “evidentiary foundation” for 129’s proposal.

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

Disposition

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

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

> a. leave is granted to adduce the new evidence tendered at the hearing of the appeal
>
> b. the chambers judge’s orders dismissing the “129 Application” and approving the “Solterra Backup Offer” are set aside;
>
> c. the order sought by 129 approving the 129 Refinancing is granted on the same terms as were sought before the chambers judge, except as follows (using capitalized terms as defined in the draft order sought by 129):
>
> i. increasing the maximum amount under the New Loan Facility to $25,900,000;
>
> ii. changing the date of the Domain Commitment Letter to July 30, 2021;
>
> iii. adding repayment of the CMLS Facility to the permitted uses of the Working Capital Facility; and
>
> iv. continuing and extending the stay of proceedings to and including April 30, 2022;

2021 BCCA 382 (CanLII)

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

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

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Goepel"

I agree:

"The Honourable Madam Justice Dickson"

I agree:

"The Honourable Mr. Justice Voith"

2021 BCCA 382 (CanLII)