COURT OF APPEAL FOR ONTARIO

CITATION: Urbancorp Cumberland 2 GP Inc. (Re), 2020 ONCA 197
DATE: 20200311
DOCKET: C66812

Pepall, Lauwers, van Rensburg, Zarnett and Thorburn JJ.A.

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF a plan of compromise or arrangement of Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., Edge Residential Inc., and Westside Gallery Lofts Inc.

Kevin D. Sherkin and Jeremy Sacks, for the appellants, Toro Aluminum (A Partnership), Speedy Electrical Contractors Ltd., and Dolvin Mechanical Contractors Ltd.

Kenneth D. Kraft and Neil S. Rabinovitch, for the respondent, Guy Gissin, in his capacity as the Israeli Court Appointed Functionary Officer of Urbancorp Inc.

Adam M. Slavens and Jonathan Silver, for the respondent, Tarion Warranty Corporation

Robert J. Drake, for Fuller Landau Group Inc.

Hart Schwartz, for the intervener, the Attorney General of Ontario

Heard: October 3, 2019

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice, dated November 27, 2018.

Zarnett J.A.:

OVERVIEW

[1] Those involved in the construction industry add value to real estate by their provision of work and materials. In order to protect them against the risk of non-

payment and the unjust enrichment of others, Ontario enacted the *Construction Lien Act*, R.S.O. 1990, c. C.30 (the "CLA"), now the *Construction Act*, R.S.O. 1990, c. C.30, with a comprehensive scheme of liens, holdbacks, and trusts. One situation where the need for protection can be most acute is when contractors have improved a real estate project, have not been paid, and the owner becomes insolvent. Insolvency, however, is a federal matter, with its own processes and priorities.

[2] This case concerns the scope and effectiveness of s. 9(1) of the CLA in an insolvency proceeding.[1] Subsection 9(1) of the CLA provides for a trust over sale proceeds of property in favour of unpaid contractors.

[3] The Cumberland Group, a residential condominium developer, was granted insolvency protection under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and continued under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). It owned unsold condominium units in a project it constructed. The appellants, Toro Aluminum (A Partnership), Speedy Electrical Contractors Ltd., and Dolvin Mechanical Contractors Ltd., had supplied work and material to these units. They were owed significant unpaid sums.

[1] As noted above, the CLA has been amended and renamed the *Construction Act*, but s. 9(1) remains unchanged. For consistency, these reasons refer to s. 9(1) of the old CLA.

[4] The condominium units were ultimately sold during the insolvency proceedings. As a result of the sale, the appellants claimed that a trust arose over the proceeds to the extent of the amounts owing to them, which would give them an effective priority for these amounts. The motion judge rejected the trust claim, reasoning that he was bound to reach that conclusion due to the court-appointed Monitor's involvement in the sale and this court's decision in *Re Veltri Metal Products Co*. (2005), 48 C.L.R. (3d) 161 (Ont. C.A.).

[5] The appellants obtained leave to appeal the motion judge's decision. This court granted leave and, as the correctness of *Veltri* was in issue, it also convened a five-judge panel.

[6] For the reasons that follow, I would allow the appeal.

[7] In summary, the trust created by s. 9(1) of the CLA can be effective in a CCAA sales process. It would only be displaced under the doctrine of paramountcy if it conflicted with a specific priority created under the CCAA. In this case, nothing displaces the operation of the s. 9(1) trust over the proceeds to the extent of the amounts owed to the appellants.

[8] I do not interpret *Veltri* as standing for the proposition that the substantial involvement of the CCAA Monitor in the sales process prevents a s. 9(1) trust from arising. *Veltri* was correctly decided on its facts, which were very different from this case. On these facts, the s. 9(1) trust arose.

FACTS

(I) The Cumberland Group and Edge Project

[9] The Cumberland Group consisted of a number of related entities: Edge on Triangle Park Inc. (“Triangle”), Edge Residential Inc. (“Residential”), Bosvest Inc., (“Bosvest”), Urbancorp Cumberland 2 L.P., and Urbancorp Cumberland GP Inc.

[10] Triangle was the registered owner and developer of a residential condominium development municipally located at 2-6 Lisgar Street, consisting of two towers and 665 residential units (the “Edge Project”). Triangle held legal title in trust for Bosvest, which held the beneficial interest in trust for Urbancorp Cumberland 2 L.P.

[11] In 2011, Triangle began construction on the Edge Project and entered into agreements with the appellants to provide labour and materials for the project. Between May and July 2015, Triangle sold the vast majority of the condominium units.

[12] In July 2015, Triangle transferred 32 residential units, parking spots, and storage units to Residential for $2. Residential also held these units in trust for Bosvest, and ultimately for Urbancorp Cumberland 2 L.P. Given that there was no change in beneficial ownership, there is no suggestion here that this transfer affected the rights of the appellants.

(II) The Insolvency Proceedings

[13] In 2016, each member of the Cumberland Group filed a Notice of Intention to Make a Proposal under s. 50.4(1) of the BIA. On April 29, 2016, Fuller Landau Group Inc. was named as Proposal Trustee. At the time of the BIA filing, Triangle and Residential collectively held title to 37 residential condominium units, 5 retail units, 22 storage units, and 16 parking spots.

[14] During the BIA Proposal proceedings:

- the Proposal Trustee was authorized by the court to open one or more bank accounts on behalf of Triangle and Residential, manage their receipts and disbursements, and monitor their cash flows;
- Triangle, Residential, and their shareholder, directors and officers were prohibited from taking steps with respect to the business or assets of either company, except under the direction of the Proposal Trustee; and
- The Proposal Trustee was authorized under an Approval and Vesting Order dated August 24, 2016, and a Sales Process Order dated August 24, 2016, to conduct a sales process for the condominium assets of the Cumberland Group (discussed in more detail below).

[15] On October 6, 2016, an order was made granting the Cumberland Group members protection under the CCAA (the “Initial Order”). The Initial Order continued the BIA Proposal proceedings under the CCAA, appointed the Proposal Trustee as Monitor, and directed that the sales process authorized under the Approval and Vesting Order and Sales Process Order be continued in the CCAA proceedings. The Initial Order also authorized the creation of certain

priority charges, including a charge for the fees and expenses of the Monitor and its counsel, and a charge to secure repayment of money advanced to fund operations during the CCAA proceedings, known as debtor-in-possession ("DIP") financing.

[16] At the time of the CCAA filing, the appellants were owed $3,864,428.72 for work they had supplied to the condominium project.

(III) The Sale of the Condominium Units

[17] Pursuant to the Approval and Vesting Order and the Sales Process Order, the sales process was continued after the CCAA filing. A total of 32 residential units, 5 retail condominium units, 7 parking spots, and 4 storage units were sold. For the units registered in Triangle's name, each agreement for the sales stipulated the vendor as "Edge on Triangle Park Inc. as represented by the Fuller Landau Group Inc. solely in its capacity as Proposed (sic) Trustee of Triangle..." It was implicit in the parties' positions that a similar form was used for units registered in Residential's name.

[18] On closing of a unit sale, when the Monitor was satisfied the purchaser's obligations were fulfilled, it was required to deliver to the purchaser a certificate in a prescribed form. That delivery, pursuant to a provision of the Approval and Vesting Order as continued under the CCAA, vested in the purchaser "all of the right, title, and interest of the respective Cumberland Group entity (Triangle or

Residential, as the case may be) together with any beneficial interest of any Cumberland Group entity…" The Approval and Vesting Order also provided that the vesting of title in the purchaser would be free and clear of certain claims and encumbrances on the units. The proceeds of the sales were ordered to stand in the place of the units in order to determine the priorities of those claims and encumbrances, as though the units had not been sold.

[19] Of the funds received on the sales (in excess of $11 million), some were used to fund the CCAA proceedings and repay the DIP financing under a Cash Funding Order, dated March 16, 2017. No party objected to that order or the payments under it.

[20] After those payments, and as of October 11, 2018, $6,093,715.17 from the sales remained in bank accounts that were opened by the Monitor in Triangle's name ($641,553.71) and Residential's name ($5,452,161.46). Funds were deposited into each account depending on which entity held registered title to the unit being sold. The Monitor estimated that $1,846,751.71 was owing to the mortgagees of the units, whose rights against the sale proceeds were preserved. The net proceeds remaining from the sales, after that mortgage indebtedness, was $4,246,963.46.

THE DECISION BELOW

[21] The appellants claimed that, pursuant to s. 9(1) of the CLA, a trust had arisen in their favour by virtue of the sales. Section 9 of the CLA provides:

> 9(1) Where the owner's interest in a premises is sold by the owner, an amount equal to,
>
> (a) the value of the consideration received by the owner as a result of the sale,
>
> less,
>
> (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,
>
> constitutes a trust fund for the benefit of the contractor.
>
> (2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner's use or to any use inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to the improvement.

[22] The Monitor brought a motion under the CCAA for a determination by the court of whether the sale proceeds were impressed with a trust in the appellants' favour.

[23] The motion judge held that they were not. Relying on *Veltri*, he found that a s. 9(1) trust could not arise on these facts because the sale proceeds were not received by the "owners" of the premises, but rather a CCAA Monitor. He stated that "[r]egardless of whether one could argue that *Veltri* does not give sufficient

recognition to the position of lien claimants, the Court of Appeal has ruled that the prerequisites of a ss. 7 or 9 trust are not met where a Monitor ultimately receives the proceeds of sale to be held for creditors." He drew attention to the court orders giving the Monitor in this case control over the sales process and its proceeds, as well as the limitations placed on the Cumberland Group entities. Despite the fact that the debtor in *Veltri* had no equity in the funds realized on the sales, the motion judge did not consider *Veltri* to be distinguishable. Ultimately, he concluded: "[h]ere, the Monitor controlled the sale and proceeds completely. *Veltri* applies and binds me."

THE PARTIES' POSITIONS

[24] For the proceedings in this court, in addition to appealing the motion judge's decision, the appellants served a Notice of Constitutional Question: Does s. 9 of the CLA continue to have application following a bankruptcy or initial order under the CCAA? The Attorney General of Ontario intervened on that question.

[25] On appeal, the appellants submit that the elements in s. 9(1) of the CLA are satisfied. They argue that each condominium sale was a sale by Triangle or Residential as "the owner" because the sale agreements were entered into on their behalf by the Monitor as a representative. They note that it was Triangle or Residential's interest in the units that was sold, and that the consideration from the sales was "received" by each of them as "owner" since the sale proceeds

were deposited into bank accounts opened for them. The appellants also note, crucially, that the "value of the consideration" exceeded both the expenses of the sale and the amount of mortgage indebtedness, resulting in a positive balance that could constitute a trust fund for their benefit.

[26] Accordingly, the appellants submit that the motion judge reached the wrong conclusion when he denied their s. 9(1) trust claim. They argue that this court's decision in *Veltri* did not mandate that result since it was distinguishable. If not distinguishable, they argue that it was wrongly decided. Finally, the appellants submit—supported by the Attorney General—that a BIA or CCAA proceeding does not prevent the recognition of a s. 9(1) trust, and that the constitutional question should therefore be answered by recognizing the validity of a s. 9(1) trust in an insolvency.

[27] The respondents, the Israeli Court Appointed Functionary Officer and Tarion Warranty Corporation, do not argue that a CLA trust can never be recognized in an insolvency, but that the extent to which it can be is more limited than the appellants suggest. They submit that, on these facts, and given the various court orders in this insolvency, the motion judge was correct not to give effect to the assertion that a s. 9(1) trust arose. Like the motion judge, they say that the condominium sales were not made "by the owner" given the Monitor's control over Triangle and Residential's activities, especially with respect to the

sales process. They further note that the proceeds of sale were not "received by the owner" but rather by the Monitor on behalf of creditors. Accordingly, they take the position that *Veltri* was correctly decided and properly applied by the motion judge.

[28] I will first address the constitutional question since it provides the context in which to consider the other issues, namely the correctness and applicability of *Veltri* and whether a s. 9(1) trust arose in this case.

ISSUE ONE: THE CONSTITUTIONAL QUESTION

(I) The Context

[29] Under the CLA, a s. 9(1) trust is triggered by the receipt of proceeds of a sale of premises that have been improved by a contractor's labour or materials. The question of whether a s. 9(1) trust is effective in insolvency can therefore arise in two situations. The first is when the sale precedes the insolvency filing, but the proceeds remain in the insolvent's possession when the filing occurs. In that circumstance, the question would be whether those funds continue to be held in a trust that will be recognized in the insolvency, or whether, upon insolvency, they lose that character and form part of the debtor's assets to be dealt with in the insolvency. The second situation, which is the one applicable here, is when the sale that triggers the assertion of a s. 9(1) trust takes place after the insolvency filing.

[30] Although the Constitutional Question is broadly worded, it is important to limit the discussion to the context of this case, in which it has arisen.

(II) The Decision in *Guarantee*

[31] The starting point for the analysis is *The Guarantee Company of North America v. Royal Bank of Canada*, 2019 ONCA 9, 144 O.R. (3d) 225, a decision of a five-judge panel of this court. *Guarantee* considered the statutory trust created under s. 8(1) of the CLA in the context of a bankruptcy. Subsection 8(1) of the CLA deems amounts owing to or received by the contractor, on account of the contract price of an improvement, to constitute a trust fund for the benefit of subcontractors who supplied services or materials to the improvement. In *Guarantee*, the contractor became bankrupt. After the bankruptcy, its Receiver was paid amounts owing under contracts that the contractor had performed. The Royal Bank of Canada ("RBC"), as a secured creditor of the bankrupt, claimed the amounts received to be part of the assets of the bankrupt divisible among its creditors. Subcontractors and employees of the contractor, on the other hand, claimed the amounts received to be funds held in trust and excluded from the property of the bankrupt.

[32] Writing for the court, Sharpe J.A. noted that s. 67(1)(a) of the BIA excludes property held in trust by the bankrupt from property of the bankrupt that is divisible among its creditors. However, this exception applies only if the trust

satisfies the three certainties of general trust law. As the Supreme Court of Canada held in *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, a statutory trust created by a province that does not meet the requirements of general trust law is ineffective in bankruptcy as a matter of federal paramountcy, but a statutory trust created by provincial legislation that does meet those requirements is effective: see *Guarantee*, at paras. 36 and 47.

[33] Under this framework, Sharpe J.A. concluded that the statutory trust created by s. 8(1) of the CLA satisfied the requirements for a trust under general principles of trust law—certainty of intention, certainty of object, and certainty of subject matter. He found that certainty of intention to create a trust could be found in the Legislature's requirement that the funds be held in trust, regardless of the actual intention of the trustee. He also found that, although one effect of a s. 8(1) trust is to protect construction contract monies in bankruptcy, s. 8(1) is not in pith and substance legislation in relation to bankruptcy; the priority-creating effects of s. 8(1) are purely incidental to a broader purpose of the legislation to "protect the rights and interests of those engaged in the construction industry and to avoid the unjust enrichment of those higher up the construction pyramid": *Guarantee*, at para. 32. The s. 8(1) trust was therefore the proper subject-matter of provincial legislation: *Guarantee*, at paras. 30 and 32.

[34] Accordingly, there was no conflict between the language or purpose of the BIA (which excluded property held in trust from the definition of property of the bankrupt) and s. 8(1) of the CLA (which created the kind of trust the BIA contemplated) such that paramountcy would render the provincial trust inoperative. Giving effect to a s. 8(1) trust in a bankruptcy did not conflict with or frustrate the purpose of the BIA, which was to provide for the distribution of the bankrupt's remaining assets (that is, those existing after giving effect to trusts in favour of other persons): *Guarantee*, at para. 38. As a consequence, a s. 8(1) trust was effective in a bankruptcy to preserve assets subject to that trust for its beneficiaries; the funds were not property of the bankrupt to be distributed to its creditors: *Guarantee*, at para 103.

(III) The Effectiveness of a s. 9(1) Trust in Insolvency

[35] In my view, the same reasoning applies to a s. 9(1) trust under the CLA. Section 9 is part of a series of provisions, including ss. 7 and 8, which provide for trusts in favour of specified persons (contractors or subcontractors) over specified funds in the hands of owners (s. 7), contractors (s. 8), and owners who are vendors (s. 9). The effect of s. 9(1) may include the protection of trust beneficiaries on the insolvency of the trustee (by giving them a priority over creditors), but to the extent that it creates a trust under the general law of trusts, it may do so effectively without conflict with the BIA.

[36] Subsection 9(1) of the CLA creates a trust which comports with the general law of trusts. There is certainty of subject matter: s. 9(1) identifies precisely the subject matter of the trust as the value of the consideration on a specific sale by the owner of the owner's interest, less expenses of the sale and the amount necessary to discharge mortgage indebtedness. There is certainty of object: s. 9(1) identifies precisely the object of the trust as unpaid contractors who supplied work and material to the improvement which was sold. There is also certainty of intention: s. 9(1) deems the creation of a trust and s. 9(2) requires that trust funds not be appropriated to any purpose inconsistent with the trust: see *Guarantee*, at para. 20.

[37] Applying the decision in *Guarantee*, if a s. 9(1) trust may be effective under the CLA when the insolvency is subject to the BIA, it follows that it may be effective when the insolvency is subject to the CCAA. The BIA and CCAA are both part of Parliament's scheme for the regulation of insolvency, and to the extent possible, they should be interpreted to afford analogous entitlements to creditors: *Century Services Inc. v. Canada (Attorney General*), 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 23. Analogous entitlements would mean, at a minimum, that creditors of the insolvent would have no greater right to assets held by the insolvent in trust than they would in bankruptcy.

[38] Of course, analogous entitlements do not connote identical entitlements: *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at paras. 50-51. But to the extent there are relevant differences in the statutes, they lean toward an even broader recognition of provincially created trusts in the CCAA than under the BIA. Under the BIA, a provincial statutory trust granting priority to its beneficiaries is ineffective in bankruptcy if it does not meet the requirements of a trust under general trust law. Under the CCAA, however, even provincial trusts that do not meet those requirements may continue to apply (except for deemed trusts in favour of Her Majesty: CCAA, s. 37).

[39] For example, *Indalex* dealt with the statutory deemed trust in favour of pension plan members under s. 57 of Ontario's *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA"), and the priority given to the beneficiaries of that trust over secured creditors under Ontario's *Personal Property Security Act*, R.S.O. 1990, c. P.10 (the "PPSA").

[40] In rejecting an argument that those provincially created priorities were ineffective in the debtor's CCAA proceeding because they did not create a trust

that would be effective in bankruptcy, Deschamps J. stated (in a portion of her judgment concurred in by all other members of the court[2]), at paras. 51-52:

> In order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements. Yet this does not mean that courts may read bankruptcy priorities into the *CCAA* at will. Provincial legislation defines the priorities to which creditors are entitled until that legislation is ousted by Parliament. Parliament did not expressly apply all bankruptcy priorities either to *CCAA* proceedings or to proposals under the *BIA*. Although the creditors of a corporation that is attempting to reorganize may bargain in the shadow of their bankruptcy entitlements, those entitlements remain only shadows until bankruptcy occurs. At the outset of the insolvency proceedings, Indalex opted for a process governed by the *CCAA*, leaving no doubt that although it wanted to protect its employees' jobs, it would not survive as their employer. This was not a case in which a failed arrangement forced a company into liquidation under the BIA. Indalex achieved the goal it was pursuing. It chose to sell its assets under the *CCAA*, not the *BIA*.
>
> The provincial deemed trust under the *PBA* continues to apply in *CCAA* proceedings, subject to the doctrine of federal paramountcy (*Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3, [2004] 1 S.C.R. 60, at para. 43). The Court of Appeal therefore did not err in finding that at the end of a *CCAA* liquidation proceeding, priorities may be determined by the *PPSA*'s scheme rather than the federal scheme set out in the *BIA*.

[2] See the reasons of Cromwell J. (McLachlin C.J. and Rothstein J. concurring) at para. 242 and the dissenting reasons of Lebel J. (Abella J. concurring) at para. 265. See, also, the Headnote to the decision under the heading "2. *Priority Ranking*".

[41] As this passage from *Indalex* makes clear, there is one important exception to the recognition of provincial trusts (in favour of persons other than Her Majesty) in a CCAA proceeding: a provincial trust can lose its effect under the CCAA to the extent the doctrine of paramountcy requires that result.[3]

(IV) Paramountcy Considerations

[42] A party relying on paramountcy must "demonstrate that the federal and provincial laws are in fact incompatible by establishing either that it is impossible to comply with both laws or that to apply the provincial law would frustrate the purpose of the federal law": *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 75. Moreover, the Supreme Court "has in fact applied the doctrine of paramountcy in the area of bankruptcy and insolvency to come to the conclusion that a provincial legislature cannot, through measures such as a deemed trust, affect priorities granted under federal legislation": *Indalex*, at para. 56.

[43] As the court further noted in *Indalex*, at para. 57, a conclusion that paramountcy trumps a provincial priority is not to be reached lightly:

> [I]n considering whether the *CCAA* court has, in exercising its discretion to assess a claim, validly affected a provincial priority, the reviewing court should remind itself of the rule of interpretation stated in

[3] It is not necessary to decide whether there are any circumstances in which a s. 9(1) trust might lose its effect under the BIA because of specific priorities in the BIA or specific processes under it.

> *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307 (at p. 356), and reproduced in *Canadian Western Bank* (at para. 75):
>
> > When a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes.

[44] In *Indalex*, the question was whether a provincial statutory deemed trust for pension benefits could prevail over the first priority given by the CCAA court to DIP financing, which the CCAA authorized: *Indalex*, at para. 48. The doctrine of paramountcy required that DIP financing have priority even though paramountcy had not been "invoked" when the order giving the DIP financing priority had been made. The application of paramountcy did not depend on such an invocation*: Indalex*, at paras. 54-55. Accordingly, Deschamps J. concluded, at para. 60:

> In this case, compliance with the provincial law necessarily entails defiance of the order made under federal law. On the one hand, s. 30(7) of the *PPSA* required a part of the proceeds from the sale related to assets described in the provincial statute to be paid to the plan's administrator before other secured creditors were paid. On the other hand, the Amended Initial Order provided that the DIP charge ranked in priority to "all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise" (para. 45). Granting priority to the DIP lenders subordinates the claims of other stakeholders, including the Plan Members. This court-ordered priority based on the *CCAA* has the same effect as a statutory priority. The

> federal and provincial laws are inconsistent, as they give rise to different, and conflicting, orders of priority. As a result of the application of the doctrine of federal paramountcy, the DIP charge supersedes the deemed trust.

(V) Conclusion on the Constitutional Question

[45] Based on the decisions in *Guarantee* and *Indalex*, it is clear that the s. 9(1) trust under the CLA may be effective on insolvency. In my view, given this conclusion, nothing prevents the trust from arising on a sale which takes place after a *CCAA* filing has occurred. However, as *Indalex* points out, a statutory trust may not be given effect if doing so would conflict with a specific priority in the CCAA, or an order giving effect to that specific priority, such that paramountcy would require that the trust be considered inoperative in whole or part. Before considering whether that occurred here, I turn to the question of the decision in *Veltri.*

ISSUE TWO: VELTRI

[46] In my view, *Veltri* was correctly decided, but it has been cited and criticized for a much broader proposition than it actually stands for.

(I) What *Veltri* Decided

[47] *Veltri* addressed claims by construction lien claimants that a sale during *Veltri*'s insolvency proceedings yielded funds that were subject to trusts under ss.

7(1), 7(2), 7(3) or 9(1) of the CLA. Several factual components of that case are important:

- The lien claimants had provided work or materials to a specific property that *Veltri* had leased;
- The sale which generated proceeds was of all of Veltri's assets which included, but was not limited to, the leasehold interest;
- There was no evidence that the leasehold interest had any value or that any of the purchase price was allocated to the leasehold interest; and
- Veltri's lenders had security over all of Veltri's assets, and the debt to the secured creditors exceeded the purchase price of the assets.

[48] It was in this context that the court in *Veltri* rejected the trust claims under ss. 7(1), (2) and (3) of the CLA. Subsection 7(1) creates a trust fund for amounts received by an owner that are to be used in the financing of an improvement. There was no evidence in *Veltri* that any funds advanced were to be used in the financing of any improvement in respect of the leasehold interest, so this claim failed: *Veltri*, at para. 23.

[49] Subsections 7(2) and (3) create a trust over amounts certified as payable to a contractor or unpaid when substantial performance has been declared by the court, to the extent such amounts are in the owner's hands or received by the owner. In rejecting those claims, the court held that the prerequisites of amounts "in the owner's hands" or "received by the owner" were not met. Writing for the court, Cronk J.A. stated, at paras. 28-29:

Veltri's lenders have a general security interest in all or substantially all of Veltri's assets. Paragraph 12 of the Sale Order provided that the sale proceeds were to "stand in place and stead" of Veltri's assets without prejudice to any claim being advanced against them as could have been advanced against the assets. Thus, the sale proceeds were substituted for Veltri's assets and are subject to the claims of Veltri's secured creditors. It is important to emphasize that the appellants have no claim to Veltri's assets. Rather, their claims are trust claims under the Act in respect of the proceeds of the sale of Veltri's assets. The sale proceeds, however, are insufficient to pay the claims of Veltri's secured creditors in full and a significant shortfall will result (in excess of $10 million (U.S.) in the case of funds owed to Comerica).

The court-approved sale of Veltri's assets included the sale of Veltri's leasehold interest in the Lakeshore Plant, the premises upon which the appellants' work was performed. The asset sale to Ventra could not have taken place in the face of the claims of Veltri's secured creditors without the consent of those creditors and court approval, and the sale was subject to the terms imposed by the court. Under these terms, the gross proceeds of sale were applied in payment of specific items and, thereafter, the net sale proceeds, which stood in substitution for Veltri's fully secured assets, were paid to the Monitor. Thus, Veltri had no interest in or right to any of the net sale proceeds ultimately paid to and now held by the Monitor. At best, Veltri was a conduit for the receipt by the Monitor of the sale proceeds. Accordingly, the sale proceeds are not trust monies "in [Veltri's] hands" or "received by [Veltri] as owner", as is required to trigger the trust provisions of ss. 7(2) and 7(3) of the Act. This distinguishes this case from *Structural Contractors Ltd. v. Westcola Holdings Inc.* (2000), 48 O.R. (3d) 417 (Ont. C.A.), leave to appeal to S.C.C. dismissed, [2000] S.C.C.A. No. 460 (S.C.C.) and similar cases. [Emphasis added.]

[50] I do not read these conclusions as turning on freestanding considerations of the Monitor having been involved in the sale, or the proceeds having been paid to the Monitor. In my view, the operative factors were that the sale in question was of assets that extended beyond the leasehold interest; that all of the assets sold were subject to the creditors' security; that the assets could not be sold without the creditors' consent; that the court order permitting the sale preserved the ability of those secured creditors to claim against the proceeds; and that the secured creditors were owed more than the amount received on the sale. Under these circumstances, Veltri "had no interest in or right to any of the net sale proceeds", and its temporary receipt of proceeds for the purpose of paying them to the Monitor (who had the responsibility of using them to pay the claims of the secured creditors) did not mean that the sale proceeds were trust monies in Veltri's hands or received by Veltri as owner under ss. 7(2) and (3) of the CLA.

[51] I am fortified in this conclusion by the way the court in *Veltri* dealt with the s. 9(1) claim. The court rejected that claim, noting that there was no showing that Veltri's leasehold interest had any value and no allocation of any part of the sale proceeds to that leasehold interest. Furthermore, and for the same reasons as given above, the temporary receipt of funds (in which Veltri had no interest) for the purpose of paying them to the Monitor (who would then pay secured creditors

entitled to them) did not qualify as consideration received by the owner as a result of the sale of the leasehold interest: *Veltri*, at para 35.

[52] Stepping back from the precise language used in *Veltri*, on its facts, no s. 9(1) trust could arise because the amounts received from the sale of all the property was less than the amount to discharge the lenders' security over them, and no amount was shown to be proceeds of the sale of the leasehold interest. A s. 9(1) trust only arises if the value of the consideration received by the owner from the sale of premises, which have been improved by the work or materials of the contractor, exceeds the amount of mortgage indebtedness. No trust arises if the value of the consideration is zero, or if the mortgage debt is equal to or greater than any sale proceeds.

[53] Accordingly, *Veltri* does not stand for the proposition that the control by a CCAA Monitor of a sales process, or the receipt by the Monitor of the proceeds of sale, without more, prevents a s. 9(1) trust arising when the proceeds of sale of the improvement are shown to have a positive value that exceeds the mortgage debt on the property. That fact pattern was simply not present in *Veltri*.

(II) The Deemed Receipt Rule Criticism

[54] *Veltri* has been criticized for ignoring the "deemed receipt" rule. Under it, for the purpose of determining whether a trust arises pursuant to legislation analogous to the CLA, the receipt of funds by an assignee or other

representative of the person required to hold funds in trust is treated in the same way as if the person had itself received the funds: see *Minneapolis-Honeywell Regulator Co. v. Empire Brass Manufacturing Co*., [1955] S.C.R. 694; Duncan W. Glaholt, "Veltri Metal Products: The Death of Minneapolis Honeywell" (2006), 48 C.L.R. (3d) 171.

[55] In *Royal Bank v. Wilson* (1963), 42 W.W.R. 1 (Man. C.A.), the deemed receipt rule was described, at p. 13, when considering a statutory trust in favour of subcontractors which arises on receipt by the contractor of money properly owing to it under the contract:

> [A]ny money *properly owing* to [the contractor] *on account of the contract price*, and *paid* to [the contractor], or to its trustee in bankruptcy, or into court, for distribution, or to an assignee, is *received* by [the contractor] and is impressed with the trust. [Emphasis in original.]

[56] I do not doubt that the deemed receipt rule is part of the law of Ontario. I note that it was implicitly applied in *Guarantee*, as the party receiving the payments found to be subject to a s. 8(1) trust was the Receiver of the insolvent contractor: *Guarantee*, at para. 6.

[57] However, in my view, the deemed receipt rule has nothing to do with the reasoning or result in *Veltri*. The rule equates amounts properly owing to a person and received by the person's assignee as being subject to the trust as if

the person had received the funds directly. In *Veltri*, no amount was properly owing to *Veltri* from the asset sale that was attributable to the leasehold interest or that exceeded the mortgage debt. There was no amount to which the trust could attach. There was nothing to which the deemed receipt rule could be applied.

(III) Conclusion on *Veltri*

[58] In my view, the decision in *Veltri* does not require the rejection of the appellants' trust claim.

ISSUE THREE: DID A S. 9(1) TRUST ARISE IN THIS CASE?

[59] For ease of analysis, I repeat the requirements in s. 9(1):

> 9(1) Where the owner's interest in a premises is sold by the owner, an amount equal to,
>
> (a) the value of the consideration received by the owner as a result of the sale,
>
> less,
>
> (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,
>
> constitutes a trust fund for the benefit of the contractor.
>
> (2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner's use or to any use inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to the improvement.

(I) Factors Supporting the Finding of a Trust

[60] Unlike *Veltri*, this is a case where what was sold were exclusively units that were, within the meaning of the CLA, premises to which improvements had been made through the work and materials supplied by the appellants.

[61] In this case, the sales of the units that took place were sales “by the owner”. The agreements of purchase and sale were made by Triangle or Residential as represented by Fuller Landau, solely in its capacity as Proposal Trustee/Monitor of Triangle or Residential. That Triangle or Residential entered into the agreements through a representative does not detract from the fact that it was they who entered into the sale agreements as vendors. What was contracted to be sold were units registered in their names, that is, premises legally owned by them, and there is no dispute that they were effective agreements to convey the beneficial ownership in the premises of the other Cumberland Group members.

[62] When the agreements were completed, what was transferred to the purchasers was all of the right, title and interest of the Cumberland Group in the unit. In other words, the sale by the owner was of the owner’s interest, notwithstanding that it occurred in an insolvency process. This result follows from the CCAA itself, under which sales must be authorized by the court, but what is authorized is nevertheless a sale by the debtor:

> **36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[63] Unlike *Veltri*, the value of the consideration received on the sale was attributable to the sale of premises to which the improvement had been made. The value of the consideration exceeded the mortgage debt. And the value of the consideration was received by the owner, as it was deposited into bank accounts that had been opened for Triangle or Residential in accordance with their registered ownership of the units sold. The fact that the accounts into which the proceeds of sale were paid also received amounts from other sources does not detract from the certainty of the trust, since the amounts subject to the trust were separately accounted for and can be readily identified: *Guarantee*, at paras. 6 and 86.

(II) Other Factors Do Not Displace the Trust

[64] I agree with the motion judge that there is an important sense in which the Monitor controlled the sales process and the funds received. The orders granted or continued in the CCAA proceeding made the Monitor the decision maker (subject to court approval) for the Cumberland Group and specifically gave it the power to conduct, supervise and direct the sales process. But neither the BIA

Proposal proceedings nor the CCAA proceeding ended the existence of the Cumberland Group members, or vested their property in the Monitor.

[65] The Initial Order in the CCAA proceeding expressly stated: that the Cumberland Group "shall remain in possession and control of their current and future assets" (at para. 5); that the Monitor was appointed as an officer of the court to monitor the business and affairs of the Cumberland Group (at para. 29); and that the Monitor could cause or direct the Cumberland Group to do various things, but employees of the Cumberland Group remained theirs and not the Monitor's (at paras. 30 and 33).

[66] Similarly, the Sales Process Order approved Residential or Triangle, through the Proposal Trustee, entering into agreements as vendors to list the units for sale (at para.15) and approved the form of agreements which made Triangle or Residential vendors (at para. 17). The Approval and Vesting Order approved the delivery by the Monitor of certificates on closing to vest the right, title and interest of the Cumberland Group in the purchasers (at para. 3).

[67] But the issue under s. 9(1) of the CLA is not who makes decisions for the owner in respect of making a sale, conveying its interest, or depositing its funds. It is simply whether the owner, regardless of who decides for it, had made a sale of its interest and received funds that exceeded mortgage indebtedness and the expenses of sale. Accordingly, the control the Monitor had over the process does

not detract from the conclusion that the owner sold its interest and received consideration in excess of expenses and mortgage debt.

[68] Nor, in my view, is the conclusion that the s. 9(1) trust arose affected by the fact that, under the Cash Funding Order, amounts were paid from sales proceeds for the expenses of the CCAA proceedings and to repay the DIP loans.

[69] First, such payments were not, in this case, inconsistent with the trust obligation since the extent of the trust is the $3,864,428.72 owed to the appellants. Even after the payments that have been made, more than the amount required to be held in trust is being held.

[70] Second, charges may be created under the CCAA which, as a matter of paramountcy, will take priority over a provincial statutory trust. The DIP Financing Charge in this case, as in *Indalex*, was given priority over "all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise". (As noted above, no objection was taken to the payments on account of the DIP financing in this case.) But paramountcy renders the provincial trust inoperative only to the extent required to deal with the conflict, that is, by yielding priority to the DIP Financing Charge. The trust does not become wholly inoperative.

[71] Finally, the provisions of paragraph 5 of the Approval and Vesting Order do not defeat that trust. Paragraph 5 provides that "for the purposes of determining

the nature and priority of Claims, the net cash proceeds from the sale of the Vacant Unit, if any, shall stand in the place and stead of the Vacant Unit, and…all Claims and Encumbrances shall attach to the net cash proceeds from the sale of the Vacant Unit with the same priority…as if the Vacant Unit had not been sold."

[72] If this paragraph were read as meaning that, for all purposes, no sale of the units took place, it would arguably prevent the trust from arising because the trust is dependent on a sale having occurred. However, in my view, the Approval and Vesting Order cannot be read that way. This paragraph refers to a defined set of "Claims" and "Encumbrances"; the Order specifies that the purchaser will take title free and clear of them. Encumbrances are listed on Schedule B to the Approval and Vesting Order and are specific registered encumbrances. Claims is a broader term, but paragraph 3 of the Approval and Vesting Order makes it clear that they are claims that would or may otherwise have affected the purchaser or the purchaser's title to the unit. It is those matters that are to be dealt with, as among the holders of the Claims and Encumbrances, and to determine their priority, "as if the Vacant Unit had not been sold".

[73] The trust which arises on a sale as contemplated in s. 9(1) of the CLA is not one of the Claims referred to in the Approval and Vesting Order, or one of the Encumbrances listed in Schedule B. The trust is not something which would or may have affected title to the unit or the purchaser. The trust is not a claim

against the unit; it does not exist until after there has been a sale and net proceeds. The Approval and Vesting Order does not purport to direct that, for all purposes, all claims, including claims that a trust has arisen against the proceeds of sale when received by the vendor, are to be determined as if no sale took place.

[74] Subsection 9(1) of the CLA is valid provincial legislation. Before a determination is made that its provisions become inoperative because of a conflict with a federal exercise of power, the federal exercise of power is to be interpreted with the goal that both it and the provincial legislation operate: *Indalex,* at para. 57. Nothing in paragraph 5 of the Approval and Vesting Order requires that it be read more broadly than its actual terms, nor would doing so be consistent with this interpretive principle. Paragraph 5 does not prevent the trust from coming into force.

CONCLUSION AND DISPOSITION

[75] Accordingly, I would allow the appeal, set aside the order of the motion judge, and substitute an order that a s. 9(1) trust under the CLA applies to the sum of $3,864,428.72 held in the accounts of Triangle and Residential, for the benefit of the appellants, pro-rata in accordance with the amounts owing to each.

[76] No party seeks costs of the appeal against any other party to this appeal. If necessary, the parties may make written submissions within ten days regarding payment of costs of the appeal from the Estate of the Cumberland Group.

Released: “S.E.P.” March 11, 2020

“B. Zarnett J.A.”
“I agree. S.E. Pepall J.A.”
“I agree. P. Lauwers J.A.”
“I agree. K. van Rensburg J.A.”
“I Agree. Thorburn J.A.”