Court File No.: CV-12-9545-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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 3113736 CANADA LTD. 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

FACTUM
OF DOMFOAM INC.

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PART I - OVERVIEW

1. In 2012, 4037057 Canada Inc., (the "**Purchaser**"), purchased all the assets, undertakings and properties of the applicant Domfoam International Inc. (now known as 4362063 Canada Limited) (the "**Vendor**"), with certain identified exceptions. Specifically, the purchase agreement stated that in addition to receivables and inventories, and save for a list of "*Excluded Assets*", the Purchaser was buying "*all other property, assets and rights, real or personal, tangible or intangible, owned by the Vendor or to which they are entitled…*"

2. The purchase agreement was approved by this Court, and the transaction closed. The purchase preserved the employment of the Vendor's workforce.

3. The property at issue in this matter, being the proceeds of a chose-in-action owned by the Vendor prior to the sale, was not an "*Excluded Asset*". By virtue of the definition of "Purchased Assets" in the executed agreement, the chose-in-action was *included* in the sale, and belongs to the Purchaser. This dispute therefore can, and should, be resolved by reference to the text of the executed agreement, understood objectively, in keeping with the direction of the Supreme Court of Canada.

4. The dispute came into being in 2018, when the Vendor received US $3.7 million in proceeds from that chose-in-action. The applicant did not tell the Purchaser about the payment. Instead, it moved without notice to the Purchaser and obtained an order from this Court for the distribution of the proceeds to the applicant's creditors. After the Purchaser learned of the order, it moved to set it aside. The applicant resisted for a year, but then consented to the setting-aside of the order.

5. The Vendor's claim to the proceeds is predicated upon a retrospective assertion made by one of the Vendor's lawyers about the subjective intention of the Vendor's president and chief executive officer with respect to the term "*BASF Receivables*" in the purchase agreement. According to the lawyer, the Vendor intended that term to include a chose-in-action against Dow Chemical, rather than merely receivables owed by BASF.

6. The subjective intent of one party to a contract is legally irrelevant to the interpretation of that contract. Further, there is *no evidentiary basis* for the applicant's proposed re-writing of the purchase agreement. The applicant's president testified under cross-examination that <u>all</u> the applicant's assets had been sold to the Purchaser.

PART II – THE FACTS

The Nature of the Negotiations

7. The negotiations between the Vendor and the Purchaser commenced in the fall of 2011. They were conducted by counsel: for the Purchaser, Jacques Vincent ("**Vincent**"), and for the Vendor, the firm of Minden Gross, and specifically David Ullmann ("**Ullmann**"), Raymond Slattery ("**Slattery**") and Tim Dunn ("**Dunn**").[1]

8. The negotiations always contemplated a sale of all the Vendor's assets to the Purchaser, save for certain limited and explicitly-specified exceptions.[2] The Purchaser and the Vendor are agreed on this point: on January 25, 2012, Tony Vallecoccia ("**Vallecoccia**"), the president and CEO of the Vendor throughout the relevant period, swore an affidavit in this proceeding in which

[1] Affidavit of Jacques Vincent sworn September 13, 2018, Motion Record, Volume I, Tab 2, (the "**Vincent Affidavit**"), pg. 8, para. 11; concerning representation, see the correspondence generally

[2] Vincent Affidavit, pg. 10, para. 22 and pg. 12, para. 34

he described negotiations with "*an entity familiar with its business who is proposing to purchase the business of Domfoam on a going concern basis".*[3]

The Meaning of "BASF Receivables"

9. On December 16, 2011, after discussions had been underway for approximately a month, Ullmann told Vincent (a) that the Vendor had been a claimant in a class action against "BASF"; (b) that as a result of the settlement of that class action by BASF, the Vendor was to receive the sum of approximately $642,000; (c) that that $642,000 receivable was available for purchase by the Purchaser; but (d) that the Vendor may choose not to offer the $642,000 receivable for sale to the Purchaser, because the Vendor may decide that it needs that money for use in the negotiation of a Canadian class action settlement in which the Vendor was a defendant.[4]

10. Vincent incorporated this information into a draft asset purchase agreement dated December 22, 2011 ("**APA #1**")[5], which was sent to the Vendor on that date. In APA #1, the "*BASF Receivables*" were among the assets to be purchased by the Purchaser. The Receivables were to be purchased at a discount rate of 60%, and thus for the sum of $385,200. Section 2.9(c) of APA #1 ("*BASF Receivables*") ("**Section 2.9**") stated, in total:

> ***As of December 16, 2011, the Purchaser has been informed*** *that the Vendor was entitled to payments from BASF in lieu of a settlement out of court by BASF of class actions in the amount of approximately six hundred forty two thousand dollars ($642,000).*
>
> *The portion of the Purchase Price attributed to the BASF Receivables is three hundred eighty five thousand and two hundred dollars ($385,200) calculated at a discount rate of 60%.*

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3 Affidavit of Tony Vallecoccia sworn January 25, 2012, at paras. 22-24, Exhibits Marked at Tony Vallecoccia's Cross-Examination held November 16, 2018, ("**Exhibits Brief**"), Tab 1, pgs. 19-20

4 Transcript of the Cross-Examination of Jacques Vincent taken November 12, 2018, (the "**Vincent Transcript**"), at pgs. 24-25, Q. 93-94; Vincent Affidavit, pgs. 11-12, paras. 29-32

5 Vincent Affidavit, pg. 8, para. 12 and Exhibit "A"

> *The purchase of the BASF Receivables is conditional upon production by the Vendor of all the supporting documents related to said BASF Receivables and the completion of its assignment from the Vendor to the Purchaser as of the Closing Date.*
>
> ***If the Vendor does not want to sell the BASF Receivables** because it would be used by the Vendor in the negotiation of the settlement out of court of the Canadian class actions instituted against the Vendor, **the Purchaser would then agree to withdraw its offer to purchase said BASF Receivables** and the Purchase Price would be reduced by the amount attributed to the BASF Receivables.*[6]

11. Section 2.9 required the Vendor to produce "*all the supporting documents related to said BASF Receivables*" because the Purchaser's knowledge of the BASF Receivables was at that time limited to Ullmann's statements to Vincent, ("*the Purchaser has been informed*"), and the Purchaser wished to perform due diligence on this aspect of the proposed purchase.

12. Neither the Vendor nor Minden Gross told Vincent, at that time, or at any time, (a) that $642,000 was the aggregate of funds due from BASF *and* another defendant in the class action, Huntsman International LLC ("**Huntsman**") [7]; (b) that the $642,000 represented an aggregate of funds due to the Vendor, the applicant A-Z Sponge & Foam Products Ltd. ("**A-Z**") and the applicant 3113736 Canada Ltd. ("**Valle Foam**"), rather than to the Vendor alone; or (c) that Section 2.9, as drafted by Vincent, was inaccurate because it made statements contrary to those made in (a)-(b), above.

13. On January 6, 2012, Dunn of Minden Gross sent Vincent a blacklined version of APA #1 which did not include any revisions to section 2.9, or any comment to the effect that there were inaccuracies therein. The blacklined version also retained (i.e., did not amend) the definition of

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[6] Vincent Affidavit, Exhibit "A", pg. 29, emphasis added
[7] Vincent Transcript at pg. 11, Q. 43-44 and pg. 27, Q. 102-103

"BASF Receivables" ("*has the meaning set out in section 2.9*") given in section 1.1 of APA #1.[8]

The U.S. Class Action

14. During the period beginning with the commencement of negotiations in November 2011 and concluding with the closing of the purchase transaction on March 26, 2012 (on which more below), (the "**Relevant Period**"), the actual facts concerning the "class action" against "BASF" were as follows.

(a) The Vendor was a class member in an anti-trust class-action that had been pending in the United States District Court for the District of Kansas since 2004 under the name *In Re: Urethane Anti-Trust Litigation* (the "**US Class Action**"). The defendants were Bayer AG, Bayer Corporation, Bayer MaterialScience LLC (the "**Bayer Defendants**"), BASF SE and BASF Corporation (the "**BASF Defendants**"), the Dow Chemical Company ("**Dow**"), Huntsman International LLC (again, "**Huntsman**") and Lyondell Chemical Company ("**Lyondell**").[9]

(b) The Bayer Defendants had settled the US Class Action as against them in 2008 (the "**Bayer Settlement**"). The last distribution of settlement funds paid by the Bayer Defendants to class members had been made on August 25, 2011. The Vendor had received its share of these funds well in advance of the execution of the Final APA (as defined below).[10]

(c) The BASF Defendants had settled the US Class Action as against them in December 2011. The Vendor had not yet received its share of the settlement funds (the "**BASF Receivables**") as at the execution or approval by this Court of the Final APA.[11]

(d) The US Class Action was continuing against Dow.[12]

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8 January 6, 2012 email from Dunn to Vincent, with attached blacklined APA

9 Affidavit of Tony Vallecoccia sworn October 18, 2018, Responding Motion Record, Tab 1, (the "**Vallecoccia Affidavit**"), pg. 3-4, para. 9 and Exhibit "B", pgs. 18-19

10 Vallecoccia Affidavit, pgs. 4-5, paragraph 13 and Exhibit "D"

11 Vallecoccia Affidavit, pg. 5, para. 14 and Exhibit "E"; Vincent Transcript, at pgs. 24-25, Q. 93

12 Vallecoccia Affidavit, pg. 5, para. 16 and Exhibit "B", pgs. 18-19

15. By mid-December 2011, Vincent knew the Vendor had received money from Bayer in settlement of a class action: Ullmann and the Vendor had told him so. That money was irrelevant to the negotiation because the Vendor had already received it.[13] Vincent was *not* told that Bayer and BASF were defendants in the same class action, and he did not believe that to be the case. He was entirely unaware that Dow was also a defendant in the "BASF" class action, and that that class action was continuing against Dow.[14]

The Canadian Class Action

16. During the Relevant Period, there was a parallel Canadian class proceeding against the Bayer Defendants, the BASF Defendants, Dow, Huntsman, and Lyondell (the "**Canadian Class Action**"). Neither Ullmann nor Vincent was aware of this Canadian Class Action at the time, and so they did not discuss it, or negotiate its withdrawal or exclusion from the purchase transaction.

CCAA Protection

17. Negotiations between Vendor and Purchaser ended on January 9, 2012.[15] On January 12, 2012, the Vendor and the other applicants obtained protection under the *CCAA*. Deloitte & Touche Inc. was appointed monitor of the applicants (the "**Monitor**"). The applicants had been rendered insolvent by declining business and by fines, exceeding $12 million, imposed by the Competition Tribunal after they pled guilty to colluding with other manufacturers of foam products to fix or control the price for those products.[16]

18. The very next day, on January 13, 2012, Ullmann contacted Vincent to see if the

[13] Vincent Transcript, pg. 23, Q. 84-87
[14] Vincent Affidavit, pg. 12, paras. 32-33; Vincent Transcript, pg. 71, Q. 239, pg. 46, Q. 155
[15] Vincent Affidavit, pg. 8, para. 13
[16] Vincent Affidavit, pg. 9, paras 14-16; Vallecoccia Affidavit, Exhibit "F", pg. 51, para. 5

Purchaser was interested in continuing negotiations to purchase the Vendor's assets.[17] Vincent and Ullman spoke again on January 16, 2012. Contrary to an assertion later made by Ullmann, there was no discussion of the future proceeds of the US Class Action possibly being left with the Vendor because they were "difficult to value". Instead, Ullmann proposed that the Vendor pay the Purchaser to collect the Vendor's receivables, by way of allowing the Purchaser to keep a percentage of any of the receivables collected by the Purchaser, instead of the Vendor purchasing them. (The Purchaser never agreed to this.)

The Sales Process

19. At the end of January 2012, the applicants, including the Vendor, commenced a sales process respecting their assets (the "**Sales Process**"). This process was undertaken in consultation with the Monitor and with the approval of this Court. All the Vendor's assets, properties and undertakings were unambiguously made available for purchase. The applicants' "*Sale Process*" document formally invited "*offers to purchase **all** of their assets, properties and undertakings…*"[18] The applicants' "*Conditions of Sale*" document stated in part that the applicants were "*inviting offers to purchase **all of the assets, properties and undertakings** of… Domfoam (the "Domfoam Property").*[19] Vallecoccia, the CEO of the Vendor, swore an affidavit in support of the motion seeking Court approval of the Sale Process that described that process as being to "*market **the assets** of the Applicants for sale*."[20] When asked under oath

[17] Vincent Affidavit, pg. 9, para. 19
[18] "Sale Process", Exhibit Brief, Tab 1, pg. 81, emphasis added
[19] "Conditions of Sale", Exhibit Brief, Tab 1, pg. 84, emphasis added
[20] Affidavit of Tony Vallecoccia sworn January 25, 2012, Exhibit Brief, Tab 1, pg. 14, para. 2, emphasis added

whether any of the Vendor's assets had *not* been put up for sale, he answered that he couldn't think of any.[21]

20. In none of the material filed with this Court, or given by the applicants to potential offerors, or given by the Vendor to the Purchaser, was there any mention of a chose-in-action owned by the Vendor, or potential future proceeds from the US Class Action, being excluded from the Sale Process, or being unavailable for purchase.

The Withdrawal of the Purchaser's Offer for the BASF Receivables

21. At some point between January 16 and February 22, 2012, Ullmann told Vincent that the Vendor needed the BASF Receivables to use in settlement of the Canadian class action against the Vendor.[22]

22. On February 22, 2012, the Purchaser made another offer to the Vendor, through a second draft asset purchase agreement ("**APA #2**"). As in APA#1, the APA #2 contemplated the purchase of all the Vendor's assets with certain listed exclusions.[23] In APA#2, section 2.9(c) ("*BASF Receivables*") said only "*Withdrawn*",[24] as due to the Vendor's election to retain the BASF Receivables, the Purchaser had withdrawn its offer for that asset.[25]

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[21] Transcript of the Cross-Examination of Tony Vallecoccia on his affidavit sworn October 16, 2018 taken November 16, 2018 (the "**Vallecoccia Transcript**") at page 29, Q. 101

[22] Vincent Affidavit, pg. 12, para.31;

[23] Vincent Affidavit, Exhibit "B", pg. 118, 148, and 155

[24] Vincent Affidavit, Exhibit "B", pg. 124

[25] Vincent Affidavit, pg. 12, para. 31. In keeping with the Vendor's election, there were subsequently occasional references in Monitor's Reports or affidavits by Vallecoccia to "*the Companies hav[ing] agreed to assign certain proceeds of an unrelated class action known as the U.S. Urethane Antitrust Litigation in an amount up to $200,000*" to a settlement fund respecting the Canadian class action against the applicants: First Report of the Monitor dated January 25, 2012, at paragraph 41

23. In 2012, both Ullmann and Vallecoccia referred to the proceeds of the class action as being from BASF alone. Vallecoccia swore an affidavit in this proceeding in which he stated that there was "*a further substantial amount due from a litigation settlement… in connection with* ***a class action with BASF*** *[…]* ***This receivable*** *was not sold to Domfoam Newco [the Purchaser] and remains an asset of Domfoam."*[26] On March 5, 2012, Ullmann spoke to the Monitor, and in his handwritten note of that conversation, said "*BASF – Coming in spring for $200,000 which gets given to class action*". The next day, March 6, 2012, Ullmann sent Vincent a blacklined version of APA #2 which did not include any material revisions to the revised section 2.9. The blacklined version also did not seek to alter or expand the definition of "*BASF Receivables*" ("*has the meaning set out in section 2.9*") given in section 1.1 of APA #2.

The Final APA

24. The Vendor and the Purchaser eventually executed the final asset purchase agreement ("**the Final APA**") on March 8, 2012. The purchase price was approximately US $3.7 million.[27] Concerning the assets purchased, the relevant terms of the Final APA were as follows.

> (a) *Section 2.1*: "*the Vendor shall sell to the Purchaser and the Purchaser shall purchase from the Vendor the Purchased Assets on the Closing Date*."[28]
>
> (b) *Section 1.1 (hh)*: '"*Purchased Assets" means the right, title and interest of the Vendor in and to the assets described in Schedule 1.1(hh), provided that the Purchased Assets shall not include any Excluded Assets*".[29]

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[26] Affidavit of Tony Vallecoccia sworn June 12, 2012, Exhibit G to the Vallecoccia Affidavit, Responding Motion Record, Tab 1(G), pg. 55, para. 41, emphasis added
[27] Vincent Affidavit, page 10, paras. 19 and 24, and Exhibit "C"
[28] Vincent Affidavit, Exhibit "C", pg. 203
[29] Vincent Affidavit, Exhibit "C", pg. 200

(c) *Schedule 1.1(hh) "Purchased Assets"*: *1. All assets, undertakings and properties of the Vendor* ***of every nature and kind whatsoever****,* ***and wherever situated****, including without limitation the following…1.12* ***All other tangible and intangible assets*** *and property used in connection with the Business…1.16* ***all other property, assets and rights, real or personal, tangible or intangible, owned by the Vendor or to which they are entitled*** *but excluding the Excluded Assets*".[30]

(d) *Section 1.1(t):* "*Excluded Assets" has the meaning set out in Section 2.2*".[31]

(e) *Section 2.2:* "*The Purchased Assets shall not include…those assets of the Vendor that are listed or described in Schedule 2.2 on the date hereof and those assets of the Vendor which are added to such Schedule 2.2 by the Purchaser during the Interim Period (collectively, the "Excluded Assets"*).[32]

(f) *Schedule 2.2*: "*The Purchaser acknowledges and agrees that the following assets shall be considered excluded from this transaction":* accounts payable, except as otherwise provided; tax losses, except as otherwise provided; cash on hand or on deposit; debts due to the Vendor from any shareholder, director, officer or employee; certain equipment leases; shares in Valle Foam; and shares in A-Z.[33]

25. The chose-in-action then being pursued against Dow in the US Class Action was not an "*Excluded Asset*" in the Final APA.[34] Section 1.1 (e.1) of the Final APA stated that ""*BASF Receivables" has the meaning set out in Section 2.9*". Section 2.9 ("*Purchase Price*") stated that the property at 2.9(c) (the BASF Receivable) was "*Withdrawn*", and that $300,000 was being paid for "*All other Purchased Assets*".[35]

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[30] Vincent Affidavit, Exhibit "C", pg. 230, emphasis added
[31] Vincent Affidavit, Exhibit "C", pg. 199
[32] Vincent Affidavit, Exhibit "C", pg. 203
[33] Vincent Affidavit, Exhibit "C", pg. 237
[34] Vincent Affidavit, pg. 12, paras. 33-34 and Exhibit "C", pg. 237
[35] Vincent Affidavit, Exhibit "C", pgs. 198 and 205-206

26. The Final APA contained an entire agreement clause (section 7.9): "[*t]his Agreement and the attached Schedules constitute the entire agreement between the parties with respect to the subject matter and supersede all prior negotiations and understandings*" (the "**Entire Agreement Clause**").[36]

Court Approval of the Final APA, and the End of the Relevant Period

27. As a result of the Sale Process, Valle Foam and A-Z entered agreements for the sale of certain of their assets. These sales were not as comprehensive as that described in the Final APA: the successful offer for Valle Foam did not include accounts receivable, and the successful offer for A-Z included only assets used in relation to A-Z's business at a certain address.[37] When describing for this Court the offers made with respect to the Vendor, Valle Foam and A-Z, the Monitor's language emphasized the breadth of the Purchaser's offer, relative to the successful offers for Valle Foam and A-Z: *only* the Purchaser had offered to buy "*A/R, inventory, **and other assets***".[38]

28. The Final APA (together with the APAs for the assets of Valle Foam and A-Z) was approved by this Court, pursuant to a Sale Approval and Vesting Order dated March 16, 2012.[39] The Final APA was assigned by the Purchaser to 8032858 Canada Inc. (now Domfoam Inc.) (hereinafter "**Domfoam**"), and then closed, on March 26, 2012.[40] The Purchaser's purchase of the Vendor's business on a going-concern basis preserved the employment of approximately 200 people.

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[36] Vincent Affidavit, Exhibit "C", pg. 223
[37] Supplemental Report to the Third Report of the Monitor, dated March 13, 2012, at pages 2-4 and Exhibit A
[38] Supplemental Report to the Third Report of the Monitor, dated March 13, 2012, at Exhibit A, emphasis added
[39] Vincent Affidavit, Exhibit "D", pg. 278-279
[40] Vincent Affidavit, page 11, para. 26 and Exhibit "F", pg. 391

29. On March 26, 2012, Vallecoccia, for the Vendor, executed an "*Election Respecting the Acquisition of a Business or Part of a Business*" for the purposes of the Goods and Services Tax. The Election stated that the Purchaser had purchased "***[a]ll assets,** undertakings and properties of the Vendor of every nature and kind whatsoever**"*** including "***all other property**, assets and rights, real or personal**, tangible or intangible**, owned by the Vendor or to which they are entitled but excluding the Excluded Assets."*

The Vendor Decides that the Vendor Kept the Chose-in-Action

30. Eleven months after the closing of the Final APA, Vallecoccia swore an affidavit in which, (thirty-seven paragraphs in), he stated, on advice from Ullmann, "*that one of the defendants, The Dow Chemical Company in the US Polyol litigation has refused to settle",* and that a settlement or a trial award *"could result in further funds being payable to the Applicants*."[41] This was the first time that Dow was mentioned as a defendant in the US Class Action (either in material provided by the Vendor to the Court, or in communication with the Purchaser or Domfoam) and the first time that the Vendor had claimed that the Vendor's chose-in-action against Dow had *not* been conveyed to the Purchaser by the Final APA.

31. Vincent, Domfoam's lawyer, was on the service list when this affidavit was served. He testified that when he was served with material in this proceeding after the Final APA had closed, he would read the Notice of Motion to see if there was relief sought that might affect Domfoam. If there was not (and there never was), he would read no further. As a result, he did not read Vallecoccia's affidavit. Vincent/Domfoam was removed from the service list in the fall of 2015 by

[41] Affidavit of Tony Vallecoccia sworn February 22, 2013, Exhibit "H" to the Vallecoccia Affidavit, Responding Motion Record, Tab 1, pgs. 22-23, para. 37

the Vendor or the Monitor.[42] The Vendor did not make its claim to the chose-in-action against Dow, or its proceeds, directly to Domfoam until the summer of 2018 (on which more below).

The Vendor Takes the Money and Moves Without Notice

32. The US Class Action Litigation went to trial against Dow in 2013. On May 15, 2013 (fourteen months after the Final APA was approved by this Court), the US District Court for the District of Kansas entered judgment against Dow in the amount of US $1.06 billion, plus interest. Dow appealed. The appeal was dismissed on September 29, 2014. On March 9, 2015, Dow launched a further appeal; the parties settled on February 25, 2016, (almost four years after approval of the Final APA). As part of the settlement, Dow agreed to pay US $835 million to the class members.[43]

33. On March 21, 2018, (six years after approval of the Final APA), the Vendor received a cheque from the US Class Action fund in the amount of US $3,741,639.62 (the "**2018 Dow Proceeds**" or the "**Dow Settlement**").[44] The Vendor did not remit these funds to Domfoam, or even tell Domfoam that they had been received.[45] Instead, the Vendor obtained an order, without notice, approving the distribution of the net 2018 Dow Proceeds, in the amount of US $3,470,000, to the Vendor's creditors.[46]

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[42] Affidavit of Jacques Vincent sworn November 12, 2018, Supplementary Motion Record, Tab 1, para. 3(c). Vallecoccia repeated his claim to the Dow proceeds in four other affidavits served before Vincent's removal from the service list. Over the years, the Monitor would cite Vallecoccia's sworn statements on this point in its Reports to the Court.
[43] Vallecoccia Affidavit, pg. 5, para. 16 and Exhibit "B", pg. 19
[44] Vincent Affidavit, pg. 15, para. 44 and Exhibit "G", pg. 487
[45] Vincent Affidavit, pgs. 12-13, paras. 35-38
[46] Order of Justice Wilton-Siegel dated May 29, 2018 (the "**Order**"), Motion Record, Volume II, Tab 3

34. As mentioned above, Domfoam had been removed from the service list in 2015, and so did not receive the notice of motion or the record.[47] Further, the notice of motion did not seek a distribution of any funds to the creditors of the applicants, with the result that no one on the service list received notice of the applicants' intent to obtain that relief."[48]

35. The evidentiary support for the applicants' motion was the affidavit of Vallecoccia sworn May 22, 2018. His affidavit was silent about the sale of the Vendor's assets in 2012.[49] Also placed before Justice Wilton-Siegel on the return of the motion was the seventh report of the Monitor dated July 12, 2013. The Monitor did not opine on the entitlement of the Vendor to the 2018 Dow Proceeds. Instead, the Monitor merely stated:

> *Mr. Vallecoccia's affidavit sworn July 11, 2013 provides that the Domfoam [i.e., the Vendor's] US Urethane Claim was specifically excluded from the Domfoam assets purchased by 4037057 Canada Inc…Accordingly, the net proceeds of the Domfoam US Urethane Claim…should be available for distribution to the creditors of Domfoam…*[50]

36. In apparent reliance upon Vallecoccia's affidavit, Justice Wilton-Siegel made the Order *inter alia* approving the distribution of the net 2018 Dow proceeds, in the amount of $3,470,000. Shortly thereafter, Domfoam learned of the settlement with Dow, demanded payment of the 2018 Dow Proceeds, and was ignored. Upon learning of the Order, Domfoam immediately moved for an order setting it aside.[51] The Vendor vigorously opposed the motion for a year, and then consented to the setting aside of the Order during a Chambers appointment. Justice Koehnen later awarded Domfoam its costs of the motion in the amount of $54,888.73.[52]

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[47] Affidavit of Jacques Vincent sworn November 12, 2018, Supplementary Motion Record, Tab 1, para. 3(c); Vincent Transcript at pgs. 63-64, Q. 209-213
[48] Vincent Affidavit, Exhibit "H", pgs. 493 and 558-559
[49] Vincent Affidavit, Exhibit "H", pgs. 499-506
[50] Seventh Report of the Monitor dated July 12, 2013, at para. 34, Motion Record, Volume II, pg. 576
[51] Vincent Affidavit, pgs. 12-13, paras. 35-38
[52] Endorsement of Justice Koehnen dated October 8, 2020

The Proceeds of the Canadian Class Action

37. In October 2019, Domfoam received a cheque in the amount of $1.39 million, as proceeds of the Canadian Class Action. Domfoam advised the Vendor that it had received the cheque.[53] The Vendor asserts that those funds also belong to it. There is no evidence of any sort that the proceeds of a chose-in-action in the Canadian Class Action were excluded from the Final APA.

Vallecoccia's Evidence

38. The Vendor's position is predicated primarily upon Vallecoccia's assertions concerning the intention behind, and meaning of, the APAs. The weakness of Vallecoccia's evidence is apparent from the remarkable paragraph 5 of the Vallecoccia Affidavit:

> *The APAs refer to something called the "BASF Receivables". **I am reminded by counsel for the Applicants**, **David Ullmann**, who was counsel at the time and continues to be, **that it was intended** for the "BASF Receivables" to refer and encompass all receivables payable to 436 [the Vendor] from the US Class Action…*[54]

39. Vallecoccia then gave a multi-page description of the manner in which the proceeds of the US Class Action were purportedly treated during the negotiation of the Final APA, and the progress of that Class Action.[55] He made no mention of the Canadian Class Action.

40. Vallecoccia's evidence disintegrated utterly when he was cross-examined. He testified:

(a) that he did not know what the term "BASF Receivables" meant [56];

(b) that he wasn't aware that BASF had owed the Vendor money at the relevant time[57];

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[53] Affidavit of Mindy Tayar affirmed July 27, 2020, Motion Record (returnable August 18, 2020), Exhibits "N"-"O"
[54] Vallecoccia Affidavit, pg. 2, para. 5, emphasis added
[55] Vallecoccia Affidavit, pgs. 2-5, paras. 6-16
[56] Vallecoccia Transcript at page 56, Q. 211-212
[57] Vallecoccia Transcript at pages 33-35, Q. 113-120

(c) that all of the assets of Domfoam International Inc. were sold (to the Purchaser)[58];

(d) that he "*wasn't aware in 2011 or '12*" that there had been a settlement with Bayer, Huntsman, Lyondell "*or anybody*" [59];

(e) that he didn't recall a class action in the United States against Dow Chemical[60]; and

(f) that he *did not know* whether paragraph 22 of his Affidavit sworn in response to this motion (in which he had deposed that the Vendor's estate was entitled to the Dow Settlement) was correct.[61]

41. Vallecoccia's Affidavit makes the secondary argument that the proceeds of the US Class Action "*were not marketed for sale in the sales process in these proceedings*"[62] and "*were assets of the Applicants' estates*."[63] This assertion is contradicted by the first paragraph of the Monitor's Sale Process document, which invites "*offers to purchase all of [the applicants'] assets, properties and undertakings*", without exception.[64] The Conditions of Sale document contained similar language. Vallecoccia testified, both before and after the sale, that all of the Vendor's assets were sold.[65]

Ullmann's Evidence

42. The Vendor's position is secondarily predicated upon Ullmann's assertion that the 2018 Dow Proceeds were excluded from APA #1. Ullmann does not point to any documentary

[58]Vallecoccia Transcript at pages 43-44, Q. 150-155
[59] Vallecoccia Transcript at pages 56-57, Q. 213-217
[60] Vallecoccia Transcript at page 47, Q. 165
[61] Vallecoccia Transcript at pages 47-49, Q. 165-172
[62] Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 7, paragraph 20
[63] Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 8, paragraph 22
[64] "Sales Process", Exhibit "B" to the Affidavit of Tony Vallecoccia sworn January 25, 2012, Exhibit 1 to the Cross-Examination of Tony Vallecoccia on November 16, 2018
[65] Vallecoccia Transcript at page 29, Q. 101

evidence which supports this assertion. He will therefore claim that he and Vincent verbally agreed, in advance of the Final APA, that "*the Purchaser was not buying Domfoam's claims in the US Class Action from the Applicants*." Vincent will testify that this conversation never occurred, and that he did not even *know* that there were existing "*claims in the US Class Action*" (as opposed to the receivable due from BASF) at the time of the Final APA. He will further testify that any such claims would be captured by Schedule 1.1(hh) of the Final APA, "*Purchased Assets*".

43. The Vendor does not have evidence to support its assertion that the proceeds of the Dow Settlement were not sold to the Purchaser. The evidence is to the contrary.

PART III – THE ISSUES AND THE LAW

44. The issues before this Honourable Court are as follows.

1. What are the "BASF Receivables"?

2. Does the law permit the term "BASF Receivables" to be interpreted according to Vallecoccia's lawyer's advice to Vallecoccia concerning what Vallecoccia believed "BASF Receivables" to mean during the negotiations, eight years ago?

3. Did the 2018 Dow Proceeds become the Vendor's property because Vallecoccia said the Vendor was entitled to them?

ISSUE ONE: THE MEANING OF "BASF RECEIVABLES"

45. The Supreme Court of Canada has described the basic approach to contractual interpretation as follows: a decision-maker "*must read the contract as a whole, giving the words*

used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[66]

46. The Vendor has not argued that the definitions of "*Purchased Assets*" or "*Excluded Assets*" in the Final APA should be altered so as to accommodate its claim to the Dow Settlement funds. Instead, the Vendor's argument is that the term "*BASF Receivables*" in the APAs includes not simply the BASF Receivables but all the fruits of the US Class Action, (and apparently those of the Canadian Class Action).[67] The argument is predicated upon the Vendor's lawyer's "remind[er]" to Vallecoccia of Vallecoccia's own intent during negotiations, some nine years ago.[68] The cross-examination established beyond any doubt that Vallecoccia had none of the knowledge concerning the APAs or the US Class Action that he had sworn to in his affidavits. Indeed, his evidence was that all the Vendor's assets had been sold to the Purchaser.

47. The meaning of the term "*BASF Receivables*" in section 2.9(c) of the APAs is objectively clear, and was known to the parties at the time the Final APA was executed. APA #1 described the "*BASF Receivables*" as a specific liquidated sum ($642,000) already due "*from BASF*" as a result of "*a settlement out of court by BASF*" that had occurred by December 16, 2011. This specific liquidated sum was to be purchased by the Purchaser at a 60% discount ($385,200).[69]

48. For the Vendor's argument to succeed, "*BASF*" must mean "*BASF*, *Dow and possibly others as well*", "*Receivables*" must mean "*choses-in-action as well*", and no meaning can be given to the specific sum of $642,000 or to the specific sum of $385,200. *"As of December 16,*

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[66] *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53, ("***Sattva***") at paragraph 47; see also paragraph 57
[67] Vallecoccia Affidavit, page 2, paragraph 5
[68] Vallecoccia Affidavit, Responding Motion Record, Tab 1, page 2, paragraph 5
[69] Vincent Affidavit, Motion Record, Volume I, Tab 2, Exhibit "A", page 29

2011 […], the Vendor was entitled to payments from BASF in lieu of a settlement out of court by BASF" can remain, but an additional passage must be read in, as follows: "*and at some point in the future, the Vendor may become entitled to payments in unknown amounts from class actions in the US and Canada, as a result of judgments against or settlements with parties which cannot now be identified*". There is simply no documentary evidence from the period preceding the execution of the Final APA which supports this wholescale re-writing of the agreement between the parties.

49. For these reasons, there is no ambiguity about the term "*BASF Receivables*" to be resolved by this Court. As Hall's *Canadian Contractual Interpretation* explains, in a passage cited approvingly by the Court of Appeal for Ontario, "*ambiguity is to be determined by an objective evaluation of whether there are two or more reasonable interpretations",* and *"means something more than the mere existence of competing interpretations".*[70]

50. Further, the treatment of the "*BASF Receivables*" in APA #1 is consistent with the legal definition of a "receivable". The most considered analysis of the term was conducted by the New Zealand Court of Appeal, in a 2013 insolvency case. The Court concluded that the term "*accounts receivable*" means "***a monetary obligation*** *that is not evidenced by chattel paper, an investment security, or by a negotiable instrument",* that *"a "monetary obligation" is an* ***existing legal obligation on another party to pay an identifiable monetary sum****",* and that *"[a]* ***mere***

[70] Quoted in *Amberber v IBM Canada Ltd.*, 2018 ONCA 571 at paragraph 45, emphasis added; the British Columbia Court of Appeal used almost identical language in *Water Street Pictures Ltd. v Forefront Releasing Inc.*, 2006 BCCA 459 at paragraphs 26 and 27; see also *473807 Ontario Ltd. v. TDL Group Ltd.*, 2006 CanLII 25404 (ONCA) at paras. 63-66 (*contra proferentum* has no role in "*straightforward commercial transaction [in which] both sides were represented by experienced, commercial lawyers*", and there is no ambiguity in the contract)

right to claim will not be included *within the definition until it is converted into a legally enforceable obligation by a judgment of a court."*[71]

51. In fact and in law, then, the term "*BASF Receivables*" in the Final APA cannot include a hypothetical, unascertained and unliquidated amount, (rather than an existing monetary obligation), that might become due from Dow, (not BASF), at some point after the execution of the Final APA (and that was, therefore, not legally enforceable when the Final APA was executed). Concerning Dow, all the Vendor possessed when the Final APA was executed was a "mere right to claim" (a chose-in-action), which right was not an Excluded Asset in the Final APA, and which right was therefore transferred by the Vendor to the Purchaser, and by the Purchaser to Domfoam.

52. Stated differently, a "right to claim" or chose-in-action against Dow is an intangible: in the words of the Court of Appeal, a chose-in-action is "*an incorporeal right to something not in one's possession*", which can "*only be claimed or enforced by action*".[72] Schedule 1.1(hh) of the Final APA *("Purchased Assets")* stated that the Purchaser obtained "*all other property, assets and rights, real or personal, tangible or intangible, owned by the Vendor or to which they are entitled…"*[73]

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[71] *Strategic Finance Limited (in receivership & in liquidation) et al v Bridgeman et al*, [2013] NZCA 357 at paragraphs 82-85, emphasis added
[72] *Ontario (Attorney General) v. Royal Bank*, (1970) 11 DLR (3d) 257 (OCA) at paragraph 9; Section 1 of the *Personal Property Security Act* defines "*intangible*" as "*all personal property, **including choses in action**, that is not goods, chattel paper, documents of title, instruments, money or investment property"* (emphasis added)
[73] Vincent Affidavit, Exhibit "C", pg. 230

ISSUE TWO – THE APPLICABLE LAW OF CONTRACTUAL INTERPRETATION

53. A retrospective description of Vallecoccia's (or Vallecoccia's lawyer's) thinking during the negotiations is irrelevant for three reasons. Firstly, it offends a basic principle of contractual interpretation, as established by the Supreme Court of Canada: that since contractual interpretation is an objective exercise, the factual matrix consists only of those facts and circumstances that were or reasonably ought to have been within the knowledge of both parties at or before the date of contracting, and that *"[e]vidence of one party's subjective intention therefore "has no independent place" when considering the circumstances surrounding the formation of a contract*".[74]

54. Secondly, it is excluded from consideration by the Entire Agreement Clause. The Court of Appeal has held that entire agreement clauses limit the expression of the parties' intentions to the written form, and that "*such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere"*.[75]

55. Lastly, by arguing that the Vallecoccia's (or Ullmann's) supposed subjective intent requires the expansion of "*BASF Receivables*" to include a different party (Dow), a different class of asset (a chose-in-action), an additional lawsuit (the Canadian Class Action), and a different time period (the future), the Vendor is demanding exactly the kind of re-writing explicitly forbidden by the Supreme Court in *Sattva*: *"[w]hile the surrounding circumstances are relied upon in the*

[74] *S.A. v Metro Vancouver Housing Corporation*, 2019 SCC 4 at paragraph 30
[75] *Soboczynksi v Beauchamp*, 2015 ONCA 282, at paragraphs 43-45, application for leave to appeal dismissed, [2015] S.C.C.A. No. 243

interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement." [76]

ISSUE THREE: THE EFFECT OF THE VENDOR'S POST-CLOSING CLAIMS TO THE DOW SETTLEMENT

56. The Vendor asserts that it has an estoppel defence based upon Vallecoccia's post-closing claims to the Dow Proceeds. Although it has never been clearly articulated, the Vendor's argument seems to be that because Vincent was served with motion records containing affidavits in which Vallecoccia asserted that the proceeds of any judgment against, or settlement with, Dow in the US Class Action would belong to the Vendor, the Purchaser had notice of the Vendor's claim to the Dow Settlement, and, having made no objection to that claim until 2018, is estopped from denying the correctness of that claim. This defence is relevant *only* if the chose-in-action against Dow *was* conveyed to the Purchaser in the Final APA. (If the Vendor's interpretation of "*BASF Receivables*" is correct, then the chose-in-action was not conveyed, and nothing said by the parties after the March 2012 closing of the Final APA would be of significance.) The Vendor's legal argument therefore amounts to the following. On five occasions, the Vendor claimed ownership of the Purchaser's property; the Purchaser had the opportunity to learn of that claim; the Purchaser did not object to the claim until the Vendor actually gained possession of the Purchaser's property, and tried to deal with it as the Vendor's own; by that time, the Purchaser had, as a result of the Vendor's claims, lost ownership of the property, and the Vendor had gained ownership of the property.

[76] *Sattva*, at paragraph 57; see also paragraph 47

57. In short, the Purchaser's silence has allegedly converted Vallecoccia's erroneous claim to the Dow Settlement into *actual property rights* in the Dow Settlement. There is no legal doctrine which supports this assertion.

Estoppel Generally

58. The leading case on estoppel is the Supreme Court's decision in *Ryan v Moore*.[77] Therein, the Court approved the following statement of the "*one general principle*" of estoppel: *"[w]hen the parties to a transaction proceed on the basis of an underlying assumption […] on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so."*[78]

59. In *Ryan*, the Supreme Court held that "*estoppels are to be received with caution and applied with care".*[79] The Court of Appeal for Ontario recently repeated that warning, holding that *"[a]lthough the doctrine of estoppel cannot vary the terms of a contract*", it may operate to prevent a party from relying on the terms of the contract to the extent necessary to protect the reasonable reliance of the other party, and so has the potential to undermine the certainty of contract "*and must be applied with care, especially in the context of commercial relationships between sophisticated parties represented by counsel*."[80]

60. The Vendor is, by its estoppel argument, not trying to prevent the Purchaser from relying on one of the terms of the Final APA, (such as the time-is-of-the-essence clause), or even trying

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[77] 2005 SCC 38 ("***Ryan***")
[78] *Ryan* at paragraph 51, quoting Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.)
[79] *Ryan*, at paragraph 50
[80] *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499, ("***Grasshopper"***), at paragraph 54, leave to appeal dismissed *KL Solar Projects LP, et al. v. Independent Electricity System Operator*, 2021 CanLII 10734 (SCC)

to vary the terms of that contract (which would be forbidden). It is going much farther: it is asserting that the Final APA *does not matter*, at least in relation to the Dow Settlement. That the Vendor conveyed the chose-in-action against Dow in the Final APA is irrelevant, the thinking goes, because the Purchaser's non-response to Vallecoccia's 2013-2015 affidavits effected a re-conveyance of the chose-in-action to the Vendor. This argument cannot succeed under any of the following doctrines.[81]

(i) Estoppel by Convention

61. *Ryan* established that this branch of estoppel has three elements. (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly). (2) A party must have acted in reliance on such shared assumption, its actions resulting in a change of its legal position. (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.[82]

62. The first requirement, that of a shared assumption, is the key. The Court of Appeal has held that without a shared assumption there can be no reliance, no detriment, and hence no need for equitable relief.[83] Although the shared assumption can arise out of silence, it must

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[81] See generally *Canadian Superior Oil Ltd. et al v Hambly et al,* [1970] S.C.R. 932 ("***Superior Oil***") at page 937
82 *Ryan*, at paragraph 59
83 *Grasshopper*, at paragraph 57

necessarily be "*unambiguous and unequivocal*"[84]. As the Supreme Court put it in *Ryan*, the parties must be of *"a like mind*" [85]: each must be aware of the assumption of the other, and communicate assent to it. It is not enough that each of the parties acts on an assumption not communicated to the other.*[86]*

63. The Court of Appeal has recently provided an example of an enforceable shared assumption. In *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited[87],* the majority of the panel held that the parties had shared an assumption concerning when a buy-sell option could be triggered. The evidence relied upon by the majority consisted of multiple letters among counsel, a settlement agreement and its drafts, and the pleadings and evidence of the parties. The party denying the estoppel had explicitly affirmed the shared assumption in writing, multiple times, over many years, and before the Court.[88]

64. The Court of Appeal has also provided a recent example of when a shared assumption did not arise. In *Grasshopper*, the Court of Appeal affirmed a decision by Justice Hainey in which he held that a bulletin mailed by the respondent Independent Electricity System Operator to the appellant energy companies had not established a shared assumption, *to wit* that the appellants' contracts would not be terminated in accordance with terms of the contracts between the parties. The appellants pointed out that the bulletin said that failure to achieve operation by the contractual date would result in a letter (rather than termination). Grant Huscroft J.A., speaking for the panel, acknowledged this fact, but observed that since the bulletin also made plain that

84 *Grasshopper*, at paragraph 56
85 *Ryan*, at paragraph 61
86 *Ryan*, at paragraph 62
87 2021 ONCA 201 ("***Fram***")
88 *Fram*, at paragraphs 151-172

the respondent was maintaining its rights under the contract, it precluded a conclusion that there was a shared assumption.[89]

65. In this case, the mutually-communicated shared assumption advocated by the Vendor would have to be a mistaken one, (because the issue of estoppel arises only if the chose-in-action was conveyed), being that the chose-in-action against Dow remained the property of the Vendor after the closing of the Final APA. There is no "*unambiguous and unequivocal*" evidence of "*mutual assent*" to this state of affairs. The evidence, to the contrary, is that Vincent did not know that the chose-in-action against Dow existed until 2018, and did not read the affidavits in which Vallecoccia made his claims (because the motions concerning which the affidavits were sworn did not affect the Purchaser). Similarly, Terry Pomerantz, the principal of the Purchaser, testified that he did not learn about the lawsuit against Dow, or its proceeds, until 2018.[90] Further, neither Vincent nor Ullmann knew of the Canadian Class Action, or of the chose-in-action that the Vendor would assert in that proceeding, at the time that the Final APA was executed. These facts are fatal to the Vendor's defence, as the Purchaser cannot be deemed to have assented, and to have communicated assent, to a state of affairs *it did not know existed*, such that an estoppel is made out. This was established by *Canadian Superior Oil Ltd. et al v Hambly et al*,[91] a decision of the Supreme Court of Canada.

66. *Superior Oil* concerned an oil and gas lease granted by Hambly to the plaintiff. The plaintiff wished the lease to continue in force; Hambly argued it had been terminated. The plaintiff alleged that Hambly was estopped from so arguing due to his conduct, both passive ("*in standing by*

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[89] *Grasshopper*, at paragraph 63
[90] Transcript of the Examination under Rule 39.03 of Terry Pomerantz taken on April 22, 2019, at p. 68, Q.210 – p. 74, Q. 229
91 [1970] S.C.R. 932 (again, "***Superior Oil***")

from 1958 to 1965 and allowing the appellants to believe that no advantage would be taken of the appellants' default") and active *("by positive acts that encouraged the appellants to continue in that belief")*. The Alberta Court of Appeal held that an estoppel by acquiescence could not be made out, because i) it was requisite in law that "*the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff",* and ii) that *"[t]here can be no doubt that the respondent Hambly did not know that he had the right to treat the petroleum and natural gas lease as terminated*".[92] Martland J., speaking for the Supreme Court in dismissing the plaintiff's appeal, quoted with approval the bulk of the Court of Appeal's analysis on this point when concluding that estoppel could not be made out.[93] The analysis applies squarely here: the Purchaser did not know that it had purchased a chose-in-action against Dow, so cannot have acquiesced in the Vendor taking the proceeds of that chose-in-action.

(ii) Estoppel by Representation

67. Estoppel by representation requires a positive representation made by the party whom it is sought to bind, with the intention that it shall be acted on by the party with whom he or she is dealing, the latter having so acted upon it as to make it inequitable that the party making the representation should be permitted to dispute its truth, or do anything inconsistent with it.[94] Estoppel by representation is not available to the Vendor. In *Ryan*, the Supreme Court held that "*estoppel by representation cannot arise from silence unless a party is under a duty to speak***."**

92 (1969), 3 D.L.R. (3d) 10 at pages 15-16
93 *Superior Oil* at pages 937-939
94 *Ryan*, at paragraph 5; see also *Fram*, at paragraph 134, citing *Superior Oil* at pages 939-40

Silence or inaction will be considered a representation only if "***a legal duty*** *is owed by the representor to the representee to make a disclosure, or take steps*".[95]

68. Even if Vincent had, on behalf of the Purchaser, read and appreciated Vallecoccia's post-closing assertions of entitlement to the Dow Settlement, (which did not occur), the Purchaser would not have been under *a legal duty* to make a disclosure, or take steps, as a result. Vallecoccia had not tried to convert the Purchaser's property, and thereby deprive the Purchaser of its rights; he had simply articulated the Vendor's intent to do so in the future, if circumstances permitted. When the Purchaser learned that the Vendor had *actually* converted the 2018 Dow Proceeds, the Purchaser immediately demanded the funds and then came to this Court to claim those Proceeds. As soon a duty to speak arose, the Purchaser spoke.

69. The Vendor cannot pass the second aspect of the test for estoppel by representation either, as it cannot establish that it relied upon a representation by the Purchaser in order to change its (the Vendor's) legal position. The evidence filed by the Vendor to support its argument for reliance is that of third parties: the affiant is the lawyer for claimants in class actions against the Vendor, which claimants purportedly made settlement decisions based on statements made in certain of the Monitor's Reports, themselves made in reliance upon statements made by Vallecoccia in his post-closing affidavits (on advice from Ullmann) concerning the Vendor's entitlement to the Dow Settlement.[96] This "broken telephone" defence, in which the purportedly

[95] *Ryan*, at paragraph 76, emphasis added

[96] Affidavit of Luciana P. Brasil affirmed December 4, 2020, Supplementary Motion Record of the Applicants, Tab 1, at paras. 1, 15 and 25; with respect to the Monitor's Reports, see for example the Seventh Report of the Monitor dated July 12, 2013, at para. 34, Motion Record, Volume II, pg. 576, which is relied upon at paragraph 25(b) of the Brasil Affidavit, and in the majority of the other Monitor's Reports she cites.

reliant are third parties who have *never communicated* with the Purchaser, much less received a representation from it, cannot deny the Purchaser its contractual rights.

(*iii*) *Promissory* Estoppel

70. Promissory estoppel involves a promise by one party not to rely on its strict contractual rights.[97] The promise must be clear.[98] Where such a promise has been made with an intention that the other party will rely on it, and that party relies on the promise to his or her detriment, the party who made the promise is estopped from acting inconsistently with it. As with a shared assumption, the party who made the promise may be precluded from resiling from it to the extent necessary to protect the position of the party who has relied on the promise to his or her detriment.[99] In this case, the Purchaser never promised not to rely on the terms of the Final APA. As set out above, the Vendor did not rely on any such promise by the Purchaser, and so has suffered no detriment. Promissory estoppel does not aid the Vendor.

(iv) Laches

71. The leading authority on laches is the Supreme Court's decision in *M. (K.) v. M. (H.)*,[100] which confirmed that laches is a defence to an equitable (not a legal) claim, applicable when the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo.[101]

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97 *Grasshopper*, at paragraph 67
98 *Grasshopper*, at paragraph 70
99 *Grasshopper*, at paragraph 67
100 [1992] 3 S.C.R. 6 ("***M. (K.)***")
101 *M. (K.)* at paragraph 98

72. The Purchaser is asserting a legal claim, so laches is inapplicable. Assuming for the sake of argument that it is not, the Vendor's case turns on acquiescence, not reliance (as the weakness of its evidence on reliance demonstrates). Taking the Vendor's case at its highest, the sense of acquiescence relevant in this case is "*after the deprivation of her rights and in the full knowledge of their existence, the plaintiff delays. This leads to an inference that her rights have been waived.*" [102] However, acquiescence of this (or any) kind cannot be made out: the Purchaser brought the within motion *immediately* upon learning of the deprivation of its rights by the Vendor. Vallecoccia's statements that the Vendor *intended* to violate the Purchaser's rights in the future, even if known to the Purchaser, would not be relevant to a laches analysis.

PART IV – ORDER SOUGHT

73. The Purchaser requests a declaration that the proceeds of the US and the Canadian Class Actions are the property of the Purchaser, an order directing the Monitor to pay the 2018 Dow Proceeds to the Purchaser, a declaration that all further proceeds received by the Vendor from the US or the Canadian Class Action are to be paid to the Purchaser as and when received by the Vendor or the Monitor herein, and costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

FRED TAYAR
COLBY LINTHWAITE

OF COUNSEL FOR DOMFOAM INC.

Date: May 7, 2021

102 *M. (K.)* at paragraph 100

SCHEDULE "A"

Authorities Cited

1. *Creston Moly Corp. v Sattva Capital Corp.*, 2014 SCC 53
2. *Amberber v IBM Canada Ltd.*, 2018 ONCA 571
3. *Water Street Pictures Ltd. v Forefront Releasing Inc.*, 2006 BCCA 459
4. *473807 Ontario Ltd. v. TDL Group Ltd.*, 2006 CanLII 25404
5. *Strategic Finance Limited (in receivership & in liquidation) et al v Bridgeman et al*, [2013] NZCA 357
6. *Ontario (Attorney General) v. Royal Bank*, (1970) 11 DLR (3d) 257 (OCA)
7. *S.A. v Metro Vancouver Housing Corporation*, 2019 SCC 4
8. *Soboczynksi v Beauchamp*, 2015 ONCA 282, leave to appeal dismissed, [2015] S.C.C.A. No. 243
9. *Ryan v Moore*, 2005 SCC 38
10. *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499, leave to appeal dismissed *KL Solar Projects LP, et al. v. Independent Electricity System Operator*, 2021 CanLII 10734 (SCC)
11. *Canadian Superior Oil Ltd. et al v Hambly et al,* [1970] S.C.R. 932
12. *Fram Elgin Mills 90 Inc. v. Romandale Farms Limited,* 2021 ONCA 201
13. *Canadian Superior Oil Ltd. et al v Hambly et al,* (1969), 3 D.L.R. (3d) 10
14. *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6

SCHEDULE B

Statutes and Regulations Cited

Personal Property Security Act, **RSO 1990, c P.10**

Definitions and interpretation

1 *(1) In this Act,*

[…]

“intangible” means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments, money or investment property; (“bien immatériel”)

Court File No.: CV-12-9545-00CL

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 3113736 CANADA LTD., 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding Commenced at Toronto

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