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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 3113736 CANADA LTD. 4362063 CANADA LTD., and A-Z SPONGE & FOAM PRODUCTS LTD.

(the "**Applicants**")

FACTUM OF DOMFOAM INC.
(ON ITS MOTION RETURNABLE AUGUST 18, 2020)

August 13, 2020

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TO THE SERVICE LIST

PART I - OVERVIEW

1. In 2012, Domfoam Inc. ("**Domfoam**"), purchased the assets, rights and undertakings of one of the applicants, with certain limited exclusions. The purchase agreement was approved by this Court. In 2018, that applicant received US $3.7 million in proceeds from class-action proceedings that had been litigated since 2004. The applicant's chose-in-action in those proceedings had been sold to Domfoam. The proceeds belonged to Domfoam.

2. The applicant did not tell Domfoam about the payment. Instead, it moved without notice to Domfoam and obtained an order from this Court for the distribution of the proceeds to the applicant's creditors. After Domfoam learned of the order, it moved to set it aside. After resisting for more than a year, the applicant consented to the setting-aside of the distribution order.

3. This motion seeks Domfoam's costs of the motion to set aside the order. The motion also seeks the striking of an affidavit filed by the applicant, as sanction for the applicant's failure to deliver an affidavit of documents ordered by this Court, and an order that the applicant may not submit further evidence respecting that adjudication, in keeping with another Court order respecting the evidence to be filed by the applicant on Domfoam's motion. Finally, Domfoam seeks an order for security for its costs of the adjudication of the entitlement to the proceeds, on the basis that the applicant is without funds to satisfy a costs award.

4. The underlying issue is whether there is any merit to the applicant's claim to these, and future, proceeds of the class action. There is not. For Domfoam to succeed, the purchase agreement must mean what it says, read within the context of the surrounding circumstances, per the guidance of the Supreme Court of Canada. For the applicant to succeed, the purchase agreement must be re-written, further to a lawyer's retrospective statement concerning the subjective intent of another individual, so as to make those proceeds the property of the applicant. Specifically, the term "*BASF Receivables*" in the purchase agreement must be expanded to include "*choses-in-action (not receivables) which may generate future proceeds from U.S. class action proceedings against Dow Chemical in which the Vendor is a class member*".

5. There is *no evidentiary basis* for the applicant's proposed re-writing of the purchase agreement. The evidence is all in Domfoam's favour: the applicant's principal and guiding mind has testified under oath that he believed that all the applicant's assets had been sold to Domfoam.

PART II – THE FACTS

The Agreement[1]

6. During the winter of 2011, 4037057 Canada Inc. (the "**Purchaser**") offered to purchase the assets of the applicant Domfoam International Inc. (now known as 4362063

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[1] References herein are, in part, to material that was before Justice Wilton-Siegel on November 29, 2018. These materials have been made available to the Court on this motion. The affidavits before Justice Wilton-Siegel (those of Jacques Vincent sworn September 13 and November 12, and that of Tony Vallecoccia sworn October 16, 2018) are also reproduced, without exhibits, in Domfoam's Motion Record on this motion, dated July 27, 2020. (Domfoam's motion record respecting the 2018 motion before Justice Wilton-Siegel is hereinafter the "**2018 Motion Record**". The Vendor's responding record on the 2018 motion is hereinafter the "**2018 Responding Record**". Domfoam's motion record respecting this motion is hereinafter the "**2020 Motion Record**").

Canada Limited) (the "**Vendor**"). The offer was embodied in a draft asset purchase agreement dated December 22, 2011 ("**APA #1**").[2]

7. Negotiations ensued, but ended on January 9, 2012.[3] On January 12, 2012, the Vendor and the other applicants obtained protection under the *CCAA*. They had been rendered insolvent by declining business and by fines, exceeding $12 million, imposed by the Competition Tribunal for collusion and price-fixing in respect of foam and related products.[4]

8. The applicants, including the Vendor, thereafter commenced a sale process respecting their assets, in which they formally invited "*offers to purchase all of their assets, properties and undertakings…*"[5]

9. The Purchaser made another offer through a second draft asset purchase agreement ("**APA #2**"). As in APA#1, the second APA excluded certain assets that the Purchaser did not wish to buy.[6]

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[2] Affidavit of Jacques Vincent sworn September 13, 2018 (the "**Vincent Affidavit**"), 2018 Motion Record, Volume I, Tab 2, page 8, paragraph 12 and Exhibit "A". (Also at Tab 5 in the 2020 Motion Record.)
[3] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, page 8, paragraph 13
[4] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, page 9, paragraphs 12-16; Affidavit of Tony Vallecoccia sworn October 18, 2018 (the "**Vallecoccia Affidavit**"), 2018 Responding Record, Exhibit "F", page 51, paragraph 5. (Also at Tab 7 in the 2020 Motion Record.)
[5] "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
[6] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "B", page 61

10. The Vendor and the Purchaser eventually executed the final asset purchase agreement ("**the Final APA**") on March 8, 2012. The purchase price was approximately $3.7 million.[7]

11. 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."[8]

(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".[9]

(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…1.16 **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".[10]

(d) *Section 1.1(t):* "Excluded Assets" has the meaning set out in Section 2.2".[11]

(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").[12]

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[7] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, page 10, paragraphs 19 and 24, and Exhibit "C"
[8] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 203
[9] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 200
[10] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 230, emphasis added
[11] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 199
[12] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 203

(f) *Schedule 2.2*: "This 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 Industries (1995) Inc.; and shares in A-Z Sponge & Foam Products Ltd.[13]

12. Tony Vallecoccia ("**Vallecoccia**"), the president and CEO of the Vendor when the Final APA was negotiated and executed, later testified:

> *101 Q. Now, when you -- when I say you, I mean the corporation, the numbered company. When you've put its assets up for sale,* ***were there any assets that you can recall that were not put up for sale, any of the assets of the company?***
>
> *A. I don't know what* ***– I can't think of any assets that wouldn't be sold.*** *[...].*[14]

13. The Final APA contained an entire agreement clause: "*[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**").[15]

14. The Final APA was subsequently approved by this Court, pursuant to a Sale Approval and Vesting Order dated March 16, 2012.[16] The Final APA was assigned by the

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[13] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", page 237
[14] 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, emphasis added, 2020 Motion Record at Tab 8
[15] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "C", clause 7.9, page 223
[16] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "D", pages 278-279

Purchaser to 8032858 Canada Inc. (now Domfoam Inc.) (again, "**Domfoam**") on March 26, 2012.[17]

The U.S. Class Action

15. At the time that the Final APA was approved by this Court:

(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 (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 ("**Huntsman**") and Lyondell Chemical Company ("**Lyondell**").[18]

(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.[19]

(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 of the Final APA. The Vendor told the Purchaser that the proceeds of the BASF Settlement would be approximately $642,000.[20] That number is significant for the reason set out below.

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[17] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, page 11, paragraph 26 and Exhibit "F", page 391
[18] Vallecoccia Affidavit, 2018 Responding Motion Record, Tab 1, pages 3-4, paragraph 9 and Exhibit "B", pages 18 and 19
[19] Vallecoccia Affidavit, 2018 Responding Motion Record, Tab 1, pages 4-5, paragraph 13 and Exhibit "D"
[20] Vallecoccia Affidavit, 2018 Responding Motion Record, Tab 1, page 5, paragraph 14 and Exhibit "E"; Transcript of the Cross-Examination of Jacques Vincent on his affidavit sworn September 13, 2018 taken November 12, 2018, (the "**Vincent Transcript**"), at pages 24-25, Q. 93

(d) The US Class Action was continuing against Dow.[21] The chose-in-action being pursued against Dow was not listed as an "Excluded Asset" in the Final APA.[22]

16. The BASF Receivables were the subject of negotiation between the Vendor and the Purchaser, and were eventually excluded from the Final APA, (i.e. the right to the specific liquidated amount due to the Vendor from BASF stayed with the Vendor after the purchase), as follows.

(a) In APA #1, the "BASF Receivables" were among the assets to be purchased by the Purchaser. Section 2.9(c) of APA #1 ("BASF Receivables") 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%.*
>
> *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 the 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.*[23]

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[21] Vallecoccia Affidavit, 2018 Responding Motion Record, Tab 1, page 5, paragraph 16 and Exhibit "B", pages 18 and 19

[22] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, page 12, paragraphs 33 and 34 and Exhibit "C", page 237

[23] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "A", page 29, emphasis added

(b) In APA#2 and the Final APA, section 2.9(c) ("BASF Receivables") said only "Withdrawn",[24] in accordance with the last paragraph of section 2.9(c) in APA #1, above: the Vendor had elected to use the BASF Receivables in the settlement of Canadian litigation, so the Purchaser had withdrawn its offer for that asset.[25]

17. It is therefore clear that in 2012, when the Final APA was executed, the $642,000 was that element of the BASF settlement to which the Vendor was entitled, and that that sum constituted the "BASF Receivables". Stated differently, the $642,000 could not have been a chose-in-action which would, after four further years of litigation against Dow, lead to an entitlement to a much larger amount (US $3.7 million).

18. The US Class Action Litigation went to trial against Dow in 2013. On May 15, 2013 (i.e. 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.[26]

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[24] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, Exhibit "B", page 124 and Exhibit "C", page 206
[25] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, page 12, paragraph 31
[26] Vallecoccia Affidavit, 2018 Responding Motion Record, Tab 1, page 5, paragraph 16 and Exhibit "B", page 19

The Vendor Takes the Money and Moves Without Notice

19. 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**"). This represents one instalment of the distribution due (in the aggregate, the "**Dow Settlement**").[27]

20. The Vendor did not remit these funds to Domfoam, or even tell Domfoam that they had been received.[28] Instead, the Vendor obtained an order, without notice, approving the distribution of the net 2018 Dow Proceeds, in the amount of $3,470,000, to the Vendor's creditors.[29]

21. Domfoam had been removed from the service list in this proceeding in 2015, and so did not receive the notice of motion or the record.[30] 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. (The notice of motion sought an order "*substantially in the form contained at Tab 3…extending the Stay Period…and approving the Monitor's report, conduct and fees.*"[31] The order contained at Tab 3 said nothing about a distribution of funds.)[32]

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[27] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, page 15, paragraph 44 and Exhibit "G", page 487
[28] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, pages 12-13, paragraphs 35-38
[29] Order of the Honourable Justice Wilton-Siegel dated May 29, 2018 (the "**Distribution Order**"), 2018 Motion Record, Volume II, Tab 3
[30] Affidavit of Jacques Vincent sworn November 12, 2018, at paragraph 3(c), 2020 Motion Record, Tab 6, page 225; Vincent Transcript at pages 63-64, Q. 209-213
[31] Vincent Affidavit, 2018 Motion Record, Volume II, Tab 2, Exhibit "H", page 493
[32] Vincent Affidavit, 2018 Motion Record, Volume II, Tab 2, Exhibit "H", pages 558-559

22. The evidentiary support for the applicants' motion was the affidavit of Vallecoccia sworn May 22, 2018. Again, Vallecoccia had been the president and CEO of the Vendor when the Final APA was negotiated and executed. His affidavit was silent about the purchase of the Vendor's assets in 2012.[33] Also placed before Justice Wilton-Siegel on the return of the motion was the seventh report of the Monitor dated July 12, 2013. Concerning the Dow Settlement, the Monitor relied entirely upon Vallecoccia, stating, at paragraph 34:

> *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…*[34]

23. In apparent reliance upon this evidence, Justice Wilton-Siegel made the Distribution Order *inter alia* approving the distribution of the net 2018 Dow proceeds, in the amount of US $3,470,000.[35]

24. Shortly thereafter, Domfoam learned of the settlement with Dow, demanded payment of the 2018 Dow Proceeds, and was ignored. Upon learning of the Distribution Order, Domfoam immediately moved for an order setting it aside (the "**Domfoam Motion**").[36]

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[33] Vincent Affidavit, 2018 Motion Record, Volume II, Tab 2, Exhibit "H", pages 499-506
[34] Seventh Report of the Monitor dated July 12, 2013, 2018 Motion Record, Volume II, page 576
[35] 2018 Motion Record, Volume II, Tab 3, pages 562-565
[36] Vincent Affidavit, 2018 Motion Record, Volume I, Tab 2, pages 12-13, paragraphs 35-38

25. On July 24, 2018, Justice Wilton-Siegel ordered the parties to schedule the hearing of the Domfoam Motion.[37] On October 27, 2018, Justice Hainey endorsed a schedule for delivery of material and examinations in relation to the Domfoam Motion.[38] The Vendor did not comply with that schedule.[39]

Vallecoccia's Evidence

26. The Vendor's position respecting the 2018 Dow Proceeds is predicated entirely upon Vallecoccia's lawyer's assertions concerning the intention behind, and meaning of, the APAs. The weakness of the evidence is apparent from the remarkable paragraph 5 of Vallecoccia's affidavit sworn October 16, 2018 (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…*[40]

27. Vallecoccia's evidence disintegrated utterly when he was cross-examined. Concerning the meaning of the term "BASF Receivables":

> *211 Q. Let's go back to the start of your affidavit at paragraph six for a moment. You say there that in APA No. 1, Exhibit A to the Vincent affidavit, the purchase price included a value for the BASF receivables as defined in the APA. Now, what did you understand that definition to be? **Do you have any understanding of what BASF receivables consisted of?***
>
> ***A. No.***[41]

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[37] Affidavit of Mindy Tayar affirmed July 27, 2020 (the "**First Tayar Affidavit**"), 2020 Motion Record, Exhibit "A", Tab A, pages 15-16
[38] First Tayar Affidavit, 2020 Motion Record, Exhibit "B", Tab B, pages 17-18
[39] First Tayar Affidavit at paragraph 5-6 and Exhibits "D"-"E", 2020 Motion Record, Tabs D-E
[40] Vallecoccia Affidavit, 2018 Responding Motion Record, Tab 1, page 2, paragraph 5, emphasis added
[41] Vallecoccia Transcript at page 56, Q. 211, emphasis added, 2020 Motion Record at Tab 8

28. Concerning the BASF Receivables generally:

> *113 Q. It says there [in section 2.9 (c) of APA #1]: "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 $642,000." I take it, sir, that the prospective offeror or purchaser was informed of that either by your company or by the monitor? In other words, by Deloitte?*
>
> *A.* ***I wasn't aware that B[A]SF at that time owed us money.***
>
> *114 Q. You weren't aware that they owed the money?*
>
> *A. No.*
>
> *115 Q. I see.* ***Do you know now with the benefit of hindsight that they in fact had settled litigation and agreed to pay $642,000?***
>
> *A.* ***I wasn't aware of that.*** *We know we pay the bills to B[A]SF. Why they owe us money? Did they charge us too much? I don't know. We have no rebate program.*
>
> *116 Q.* ***This relates to a settlement out of court****, is what it says, by BASF. BASF was involved in a class action in the U.S. They were sued. Do you know that?*
>
> *A. I found out after I saw this.* ***I didn't know at the time.***[42]

29. Concerning whether the Vendor had "intended" to retain the right to any of the proceeds of the US Class Action:

> *101 Q. Now, when you -- when I say you, I mean the corporation, the numbered company. When you've put its assets up for sale,* ***were there any assets that you can recall that were not put up for sale, any of the assets of the company?***
>
> *A. I don't know what –* ***I can't think of any assets that wouldn't be sold.*** *The company didn't own the real estate, so equipment and receivables.*[43]
>
> *[...]*
>
> *155 Q.* ***All of the assets of Domfoam International Inc. were sold.***

[42] Vallecoccia Transcript at pages 33-34, Q. 113-116, emphasis added, 2020 Motion Record at Tab 8
[43] Vallecoccia Transcript at page 29, Q. 101, emphasis added, 2020 Motion Record at Tab 8

Correct?

A. ***Yes.***[44]

30. Concerning the Dow Settlement:

165 Q. […] If I were to suggest to you that there was a lawsuit, a class action in the United States against Dow Chemical, you don't recall one way or the other?

A. ***No. I wouldn't recall that.***

[…]

169 Q. If you want to ***open up your affidavit*** *[sworn October 16, 2018] again, please, sir, to paragraph 22 and read that to yourself, please. [The paragraph asserts that the Vendor's estate was entitled to the Dow Settlement.]*

A. I wasn't aware that that was being –

170 Q. Right. Have you had a chance to read the whole paragraph?

A. Yeah. "The judgment was upheld on appeals."

171 Q. Yes.

A. "Be expected to be met to the applicants. These receivables were sent to the applicant's estates." [Phon.] ["[S]ignificant distributions were expected to be made to the Applicants…[T]hese receivables were assets of the Applicants' estates."]

172 Q. That is what it says, yes. ***Now, do you know what you just read is correct?***

A. ***I don't know.***[45]

31. The Vendor simply does not have evidence to support its assertion that the proceeds of the Dow Settlement were not sold to Domfoam.

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[44] Vallecoccia Transcript at pages 43-44, Q. 150-155, emphasis added, 2020 Motion Record at Tab 8
[45] Vallecoccia Transcript at pages 47-49, Q. 165-172, emphasis added, 2020 Motion Record at Tab 8

32. Eleven days after the destructive cross-examination of Vallecoccia, nine days after the Vendor had completed its cross-examination of Domfoam's affiant, and two days before the hearing of the Domfoam's Motion by Justice Wilton-Siegel, the Vendor brought a motion to Wilton-Siegel J. in which it sought leave of the Court to introduce further evidence on Domfoam's Motion.[46] Specifically, the Vendor sought leave to examine two witnesses pursuant to Rule 39.03. The Vendor's motion caused the adjournment of the Domfoam Motion, which Wilton-Siegel J. anticipated would be "*for a relatively short period of time*".[47] In his reasons for decision, His Honour allowed the examination of the Vendor's principal, Terry Pomerantz, but did not permit the introduction of any further testimony.[48] Justice Wilton-Siegel specifically held:

> *[54] More generally, [the Vendor] urges the Court to have regard to the fact that these proceedings take place in the larger context of the CCAA proceedings of the applicant. The Monitor has joined [the Vendor] in urging appropriate attention to this consideration.* ***In effect, each says that, because the viability of the Plan effectively turns on a ruling favourable to [the Vendor] in the Purchaser's Motion and that an unfavourable ruling will have adverse financial consequences to the large number of creditors of [the Vendor], the Court should permit an exhaustive review of all matters of potential relevance to [the Vendor]'s position on that Motion****. While I am sympathetic to the position of the creditors, particularly given the timing of the Purchaser's Motion relative to the creditors' approval of the Plan,* ***I am not persuaded that these considerations have any relevance for the present motion****. In particular, any issue of timing is more properly considered, if relevant, on the determination of the Purchaser's Motion.*[49]

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[46] First Tayar Affidavit at Exhibit "H", 2020 Motion Record, Tab H, pages 32-33

[47] Endorsement of Justice Wilton-Siegel dated February 13, 2019, ("**Reasons of Wilton-Siegal J.**"), Exhibit H to the First Tayar Affidavit, 2020 Motion Record, Tab H, at paragraph 47

[48] Reasons of Wilton-Siegel J., Exhibit H to the First Tayar Affidavit, 2020 Motion Record, Tab H, at paragraphs 54-56, emphasis added

[49] Reasons of Wilton-Siegel J., Exhibit H to the First Tayar Affidavit, 2020 Motion Record, Tab H, at paragraph 54, emphasis added

33. Seven months later, on September 11, 2019, the Vendor asked Justice Conway to convert the Domfoam Motion to a trial.[50] Her Honour has not yet decided this issue.[51] The Vendor's assertion that the Domfoam Motion "*was later effectively converted to a trial of an issue or a hybrid form of motion*" by Justice Conway[52] is not correct. Her Honour's last endorsement on the matter said that if the dispute did not settle at mediation, the parties were to:

> *...return to a 1 HR CC before me (to be scheduled through the CL office) for directions as to how this motion will proceed and what evidence (written and VV) will be put before the Court.*[53]

34. During the September 11, 2019 appearance, and after resisting for more than a year, the Vendor told Justice Conway that it would consent to the setting-aside of the order for the distribution of the 2018 Dow Proceeds to the Vendor's creditors (the "**Vendor's Consent**").[54]

35. On October 7, 2019, Justice Conway conducted a further Chambers appointment. Counsel for the Vendor requested that the Vendor and Domfoam exchange affidavits of documents, attend mediation, and (again) that there be a trial of the issue of whether the Vendor is entitled to the funds which are the subject matter of the Domfoam Motion.

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[50] Endorsement of Justice Conway dated September 11, 2019, Exhibit K to the First Tayar Affidavit, 2020 Motion Record, Tab K, page 102
[51] Endorsement of Justice Conway dated September 11, 2019, Exhibit K to the First Tayar Affidavit, 2020 Motion Record, Tab K, page 102; Endorsement of Justice Conway dated October 7, 2019, Exhibit M to the First Tayar Affidavit, 2020 Motion Record, Tab M, pages 111-112
[52] Responding and Cross-Motion Factum of the Applicants (the "**Vendor's Factum**") at paragraph 9, page 3
[53] Endorsement of Justice Conway dated October 7, 2019, Exhibit M to the First Tayar Affidavit, 2020 Motion Record, Tab M, pages 111-112
[54] Endorsement of Justice Conway dated September 11, 2019, Exhibit K to the First Tayar Affidavit, 2020 Motion Record, Tab K, page 102

Justice Conway ordered that the parties were to exchange affidavits of documents within 45 days, and that the parties were to attend a mediation.[55]

36. Domfoam served its affidavit of documents in November 2019.[56] The Vendor has never served an affidavit of documents.[57]

37. In the Twenty-First Report of the Monitor dated October 18, 2019,[58] the Monitor reported that the Vendor obtained protection from its creditors in 2012[59], that "*all of the assets utilized by the Companies [including the Vendor] have been sold*", that certain of the proceeds of those sales have been distributed to creditors[60], and that the admitted claims against the Vendor exceed $27 million[61]. The Monitor also stated that due to Domfoam's claim to the 2018 Dow Proceeds (and a similar claim by the purchaser of the applicant A-Z Foam), the Monitor had "*suspended payment of professional fees attributable to Domfoam and A-Z Foam from the Dow Settlement Funds held by the Monitor…[and] in the meantime, all such fees will be paid from the Valle Foam estate…*"[62].

PART III – THE ISSUES AND THE LAW

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

1. Should Domfoam have its costs of the Domfoam Motion?

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[55] Endorsement of Justice Conway dated October 7, 2019, Exhibit M to the First Tayar Affidavit, 2020 Motion Record, Tab M, pages 111-112
[56] First Tayar Affidavit at paragraph 16 and Exhibit "Q", 2020 Motion Record, Tab Q, pages 122-130
[57] First Tayar Affidavit at paragraphs 17-20 and Exhibits "R"-"U", 2020 Motion Record, Tabs R-U
[58] First Tayar Affidavit at Exhibit "V", 2020 Motion Record, Tab V
[59] First Tayar Affidavit at paragraph 23 and Exhibit "V", 2020 Motion Record, Tab V, paragraph 1, page 150
[60] First Tayar Affidavit at paragraph 23 and Exhibit "V", 2020 Motion Record, Tab V, paragraph 4, page 150
[61] First Tayar Affidavit at paragraph 23 and Exhibit "V", 2020 Motion Record, Tab V, paragraph 22, page 154
[62] First Tayar Affidavit at paragraph 23 and Exhibit "V", 2020 Motion Record, Tab V, paragraph 59, page 165

2. Should the Vallecoccia Affidavit be struck as sanction for the Vendor's breach of the order for the delivery of an affidavit of documents?

3. Should the Vendor be precluded from submitting further evidence on the adjudication (in whichever form) of Domfoam's entitlement to the Proceeds?

4. Should the Vendor be ordered to post security for Domfoam's costs of that adjudication?

ISSUE ONE: THE COSTS OF THE DOMFOAM MOTION

39. After opposing the Domfoam Motion for more than a year, through the preparation of affidavits, the conduct of cross-examinations, the delivery of facta, and multiple appearances before the Court, the Vendor consented to the setting-aside of the order for the distribution of the 2018 Dow Proceeds to the Vendor's creditors. This setting-aside had been the primary relief sought by Domfoam.[63] Indeed, if that order had *not* been set aside, the rest of Domfoam's Motion would have been moot: Domfoam could hardly obtain a declaration that the 2018 Dow Proceeds were its property if those proceeds had already been ordered to be distributed to other entities. Domfoam is therefore entitled to its costs of the Motion.

40. In *Markle v. Toronto (City)*[64], Justice Nordheimer awarded the costs of class-action certification motion which had, ultimately, been consented-to by the defendant.

> *4 In terms of the costs of the motion, the defendant submits that there should be no costs of the motion because it consented to the certification, that it did so early on thereby facilitating the process and that the issues on the certification motion were not complicated. While all of those points are valid,* ***the fact remains***

[63] Notice of Motion of Domfoam Inc., 2018 Motion Record, Tab 1, page 1
[64] (2004) C.C.P.B. 69 (Ont. Sup. Ct.) (***"Markle"***)

> ***that while ultimately the defendant did consent, it did so only after the certification record had been prepared and cross-examintions conducted. The plaintiffs were put to the costs and expense of this effort and they are entitled, in that they have been successful in achieving certification, to the costs associated with that success.*** *It seems to me that the reasons raised by the defendant in its opposition to a costs award are really matters that go more toward the quantum of the costs than they do to the appropriate award of those costs.*[65]

41. It is not relevant that the second aspect of the Domfoam Motion, the issue of Domfoam's entitlement to the Proceeds, has yet to be decided. In *Ledore Investments Ltd. v. Murray*,[66] Justice Stinson dealt with the costs of an abandoned motion for summary judgment, a situation analogous to the one before this Court. (Distribution of the proceeds pursuant to a Court order would have terminated this dispute). The party resisting the award of costs had argued:

> *17 […] that a party who is awarded costs in relation to a motion is entitled to the costs relating to the work and expenditures necessitated solely by the motion, but not for work and expenditures which would have been necessary in any event in the litigation. Secondly, he further submitted […] that where a lot of material used in relation to a motion will prove useful at later stages in a lawsuit, the costs award on a motion should provide for compensation for work done in relation to the motion, but not for every bit of research and investigation. Thirdly he submitted […]* ***that the time and disbursements incurred on the summary judgment motion were inexplicably intertwined with the time and disbursements to be incurred in relation to the trial of the action and that accordingly it would be more appropriate for the matter of costs to be left to the determination of the trial judge.***[67]

42. Justice Stinson dismissed these arguments.

> *19 [I]n my view, it would be improper and potentially unfair to limit a costs award in favour of a party who successfully resists a motion for summary judgment to work that would be of no use in the ongoing proceeding. Put another way,* ***a party who incurs legal expenses for work performed in responding to a summary judgment motion should be entitled to recover those expenses as part of its***

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[65] *Markle*, at paragraph 4, emphasis added
[66] (2002), 58 O.R. (3d) 627 (Ont. Sup. Ct.) (***"Ledore"***)
[67] *Ledore*, at paragraph 17, emphasis added

> ***costs on the summary judgment motion even if that same work may assist the party in the continuing proceeding.***
>
> *20 This is not to say that double recovery should be permitted. To the contrary, double recovery should not be allowed.* ***The proper way to approach the problem of avoiding double recovery, however, is to make sure that the same costs are not claimed a second time*** *(that is, as part of the recovery of costs after trial) instead of refusing to grant recovery when they are first incurred (that is, as part of responding to the summary judgment motion). [...]*
>
> *21* ***To decline to award costs incurred in responding to a summary judgment motion on the basis that they would subsequently be incurred in any event is, in my view, to gaze into a hazy crystal ball in an attempt to predict the uncertain future path of the lawsuit.*** *In my view, such an approach is neither reliable nor fair to a party who is entitled to be compensated now for the expenses it has certainly incurred...*[68]

43. Domfoam therefore requests its costs of the Motion in the amount of $54,883.73, as detailed in Domfoam's Costs Outline.[69]

ISSUE TWO: THE VALLECOCCIA AFFIDAVIT SHOULD BE STRUCK

44. The Vendor submitted to the Court that affidavits of documents must be exchanged. The order it sought was made, and yet the Vendor has not, some eight months after the passing of the relevant deadline, served an affidavit of documents. In response to this motion, the Vendor's affiant did not say that the Vendor would *ever* serve an affidavit of documents.[70] This conduct entitles Domfoam to an order striking the affidavit filed by the Vendor on the Domfoam Motion (the Vallecoccia Affidavit), pursuant to Rule 60.12.

> ***60.12*** *Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,*

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[68] *Ledore*, at paragraphs 19-21, emphasis added; see also *Inzola Group Limited v The Corporation of the City of Brampton*, 2017 ONSC 3822, at paragraphs 15- 27

[69] First Tayar Affidavit at paragraph 12 and Exhibit L, 2020 Motion Record, Tab L

[70] Affidavit of Linc Rogers sworn August 9, 2020 (the "**Rogers Affidavit**"), Responding and Cross-Motion Record of the Vendor, Tab 2, at paragraphs 20-23

[…]
(c) dismiss the party's proceeding or strike out the party's defence; or

(d) make such other order as is just.

45. The order sought would not end the dispute, as the striking of a claim or defence would, and therefore does not represent an extreme response to a continuing breach of this Court's order.

46. The Vendor's explanation for its breach of Justice Conway's order, as articulated in the Vendor's factum, is that *"[t]he sole remaining director of Domfoam [Vallecoccia] suffered serious medical issues which robbed him of his capacity to swear the Affidavit of Documents"*.[71] There is no evidence in the Court record to support this assertion. To the contrary, the evidence is that since January 20, 2020, various lawyers for the Vendor have made a series of increasingly dire and conclusory *unsworn* statements about Vallecoccia's health, but have, despite a series of written and verbal requests from Domfoam, persistently declined to produce *actual medical evidence* of the alleged incapacity.[72] The evidence concerning Vallecoccia's condition filed by the Monitor on its motion for the appointment of a CRO consisted entirely of hearsay, and even that says nothing about Vallecoccia being "*robbed…of his capacity*":

> *The Monitor has previously been advised by counsel to the Companies that counsel to the Companies is unable to obtain instructions from the Companies through Mr. Vallecoccia. On April 16, 2020, counsel to Mr. Vallecoccia advised that* ***he no longer feels capable of continuing his duties as a director****. Counsel to Mr. Vallecoccia advised that it will be difficult to obtain a signed resignation from*

[71] Vendor's Factum, at paragraph 18
[72] Affidavit of Mindy Tayar affirmed August 12, 2020, Supplementary Motion Record of Domfoam Inc. (returnable August 18, 2020) at paragraphs 15 and Exhibits "C" to "J".

Mr. Vallecoccia and that ***Mr. Vallecoccia has requested that he be removed as a director of the Companies.***[73]

47. The support cited by the Vendor's Factum for its "*robbed..of his capacity*" argument is paragraph 22 of the Rogers Affidavit.[74] That paragraph simply quotes from a letter written by counsel to the Vendor to counsel for Domfoam.[75] In other words, counsel for the Vendor is citing counsel for the Vendor as evidence.

48. If the Vendor claims it has a legitimate reason for its breach of a Court order it requested, it is incumbent upon the Vendor to substantiate that claim with evidence. Bare assertions by counsel, no matter how many times repeated, are not evidence.

ISSUE THREE: THE VENDOR SHOULD BE PROHIBITED FROM SUBMITTING FURTHER EVIDENCE

49. The Vendor's request that Justice Conway convert the Domfoam Motion to a trial is a collateral attack on Justice Wilton-Siegel's February 2019 order, for the following reasons.

50. On the day scheduled for the hearing of the Domfoam Motion, the Vendor asked for leave to obtain and submit further evidence on that motion. Justice Wilton-Siegel granted the request in part, and denied the balance. His Honour believed that by so doing he was delaying the hearing of the Domfoam Motion for only a short period, and explicitly

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[73] Twenty-Second Report of the Monitor dated April 22, 2020, First Tayar Affidavit at Exhibit "W", 2020 Motion Record, Tab W, paragraph 61, page 185, emphasis added
[74] Vendor's Factum at paragraph 18
[75] Rogers Affidavit, Responding and Cross-Motion Record of the Vendor, Tab 2, at paragraph 22

rejected a request by the Vendor for "*an exhaustive review of all matters of potential relevance*" to the Domfoam Motion.[76] The Vendor subsequently went before a different judge and asked that the Domfoam Motion (which Wilton-Siegel J. was to hear as a motion) be converted to a trial, which conversion would allow the Vendor to expand the evidentiary record, so manifestly unfavourable to it, which was before the Court. This expansion would be contrary to the submissions made by the Vendor to Justice Wilton-Siegel (that it needed only two further examinations, one of which it received) and contrary to Justice Wilton-Siegel's order. Such conduct should not be permitted by this Court.

ISSUE FOUR: THE VENDOR SHOULD POST SECURITY FOR DOMFOAM'S COSTS

51. The Vendor is insolvent and judgment-proof. There are no assets in its estate to satisfy a costs award if it is unsuccessful. Accordingly, the Monitor has reported to the Court that the fees and disbursements of the lawyers acting for the Vendor, of the Monitor, of the Monitor's lawyer, and of the Vendor's chief restructuring officer are being paid from the estate of *another* applicant company ("**Valle Foam**").[77]

52. A company in receivership may be ordered to post security for costs.

> *19* ***The courts have ordered a party in bankruptcy or receivership to provide security for costs in appropriate circumstances*** *(see B & W Building Maintenance Ltd. v. Superstein (1991), 2 C.B.R. (3d) 21 (Alta. Master)). In the case at the bar, it would appear that the only source of funds to pay costs awarded against Lido would be assets secured in favour of the bank and any recovery resulting from the counterclaim would be for the sole benefit of the bank. It would accordingly appear to me to be an appropriate case in which to order security for costs to be provided and I so order.*[78]

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[76] Reasons of Wilton-Siegel J., Exhibit H to the First Tayar Affidavit, 2020 Motion Record, Tab H, at paragraphs 47 and 54-56

[77] First Tayar Affidavit at paragraph 23 and Exhibit "V", 2020 Motion Record, Tab V, paragraph 59, page 165

[78] *Loblaw Companies Limited v Lido Industrial Products Limited*, (1993), 19 C.P.C. (3d) 183 (Ont. Court of Justice) at paragraph 19, per Ground J.

> *7* ***An unusual feature of this case is that the plaintiff, in June 1999, prior to the injunction-motion and in separate proceedings, applied for relief pursuant to the Companies' Creditors Arrangement Act****, R.S.C. 1985, c.C.-36 ("CCAA") concurrent with a filing in the United States under Chapter 11 of the United States Bankruptcy Code. [...]*
>
> *8* ***The defendants certainly are entitled to an order for security for costs*** *and, in the circumstances, although it is rare for the security to be set in the manner requested by the defendants, [i.e. on a solicitor and client scale, in a lump sum] I think it is just to do so. I do not see anything in rule 39.09(3) which precludes this court from fixing costs on the solicitor and client scale and there is nothing in rule 56.01 which requires the security to be of the pay-as-you-go variety. Because of the complex nature of the CCAA proceedings, with cross-border insolvency protocol involved and many parties vying for the assets of the plaintiff,* ***I regard it to be important that the complete, potential liability of the plaintiff for costs be ascertained and secured now*** *so that the parties are spared the considerable expense involved in further motions for increased security [...]*[79]

53. This case is analogous to an interpleader application. The Monitor is holding funds claimed by both the Vendor and Domfoam. The Monitor, like a sheriff or lawyer in an interpleader application, asserts no interest in those funds. Sub-rule 56.01(2) of the security for costs rule establishes that:

> *(2) Subrule (1) ["Where Available"] applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs.*

54. It has long been the law that where one of the "active claimant[s]" to an interpleader application is insolvent, it may be ordered to post security for costs. The Vendor is indisputably an "active claimant" and insolvent, and so the result should be the same here.[80]

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[79] *Philip Services Corp. v. Green*, (1999), 92 A.C.W.S. (3d) 585 (Ont. Sup. Ct.) at paragraphs 7-8, emphasis added; see also *Livent Inc. (Receiver of) v Deloitte & Touche*, 2011 ONSC 648 (company in receivership ordered to post security)

[80] *Knickerbocker Trust Company of New York et al v Webster*, (1896) 17 P.R. 189, (O.C.A.) at paragraphs 6-16; *Farley v Pedlar*, (1901) 1 O.L.R. 570 (Ont. Sup. Ct.) at paragraph 6; *Boyle v McCabe*, (1911) 19 O.W.R. 540 (Ont. Sup. Ct.) at paragraph 4; *Lever v Harrietha*, (1971) 4 N.S.R. (2d) 306 (N.S. Sup. Ct.) at paragraph 9; *Porter v Scotia Life Insurance Co.*, 2010 ONSC 1653 at paragraph 22

55. The Vendor's argument is that *if* Domfoam can convince the Court that Valle Foam should be liable for a costs award made against the Vendor, then Valle Foam has funds to satisfy that award, and so security should not be posted by the Vendor.[81] This is a dodge. Domfoam does not have a claim against Valle Foam, and Valle Foam has not participated in this dispute in any way except by funding the Vendor, the Monitor and the CRO. The Vendor knows this, and is cynically attempting to take the matter through trial while judgment-proof by gesturing at the bank account of another company. In other words, the Vendor is trying to turn evidence of its inability to pay a costs award into a reason it should not have to post security for such costs.

56. The requirements of Rule 56.01 are therefore satisfied. Domfoam seeks an order for payment into court of security for its costs in the amount of $213,132.90 (inclusive of the costs of the underlying motion sought above of $54,883.73).[82]

PART IV – ORDER SOUGHT

57. Domfoam respectfully requests:

1. an order that the Vendor pay Domfoam's costs of its motion to set aside the order of Justice Wilton-Siegel dated May 29, 2018, in the amount of $54,888.73;

2. an order striking the affidavit of Tony Vallecoccia sworn October 16, 2018;

3. an order enjoining the Vendor from filing further evidence in response to Domfoam's Motion, regardless of the form that adjudication finally takes;

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[81] Vendor's Factum at paragraph 30

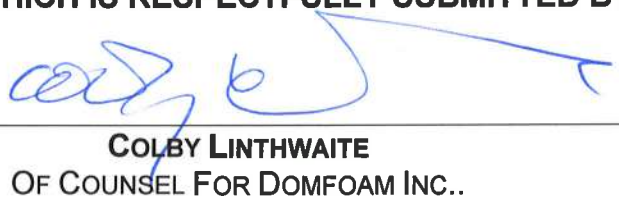
82 First Tayar Affidavit at paragraph 23 and Exhibit X, 2020 Motion Record, Tab X

4. an order that the Vendor pay security for Domfoam's costs of this proceeding in the amount of $213,132.90 into Court; and

5. costs of this motion

August 13, 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY



COLBY LINTHWAITE
OF COUNSEL FOR DOMFOAM INC..

SCHEDULE "A"

Authorities Cited

1. *Markle v. Toronto (City)* (2004) C.C.P.B. 69 (Ont. Sup. Ct.)
2. *Ledore Investments Ltd. v. Murray*, 2002), 58 O.R. (3d) 627 (Ont. Sup. Ct.)
3. *Inzola Group Limited v The Corporation of the City of Brampton*, 2017 ONSC 3822
4. *Loblaw Companies Limited v Lido Industrial Products Limited*, (1993), 19 C.P.C. (3d) 183 (Ont. Court of Justice)
5. *Philip Services Corp. v. Green*, (1999), 92 A.C.W.S. (3d) 585 (Ont. Sup. Ct.)
6. *Livent Inc. (Receiver of) v Deloitte & Touche*, 2011 ONSC 648
7. *Knickerbocker Trust Company of New York et al v Webster*, (1896) 17 P.R. 189, (O.C.A.)
8. *Farley v Pedlar*, (1901) 1 O.L.R. 570 (Ont. Sup. Ct.)
9. *Boyle v McCabe*, (1911) 19 O.W.R. 540 (Ont. Sup. Ct.)
10. *Lever v Harrietha*, (1971) 4 N.S.R. (2d) 306 (N.S. Sup. Ct.)
11. *Porter v Scotia Life Insurance Co.*, 2010 ONSC 1653

SCHEDULE "B"

Statutes Cited

R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE

RULE 56 SECURITY FOR COSTS

WHERE AVAILABLE

56.01 *(1) The court, on motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just where it appears that,*

(a) the plaintiff or applicant is ordinarily resident outside Ontario;

(b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;

(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

1. Factors in Discretion

57.01 *(1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,*

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

FAILURE TO COMPLY WITH INTERLOCUTORY ORDER

60.12 *Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,*

(a) stay the party's proceeding;

(b) dismiss the party's proceeding or strike out the party's defence; or

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 60.12.

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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