SUPERIOR COURT OF JUSTICE

COUNSEL SLIP/ ENDORSEMENT FORM

COURT FILE NO.: CV-24-00715153-00CL **HEARD:** February 3, 2025

NO. ON LIST: 2

TITLE OF PROCEEDING: EXPORT DEVELOPMENT CANADA v. ANTAMEX INDUSTRIES ULC

BEFORE: JUSTICE W.D. BLACK

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

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For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info

ENDORSEMENT OF JUSTICE BLACK:

Overview and Context

[1] This was a motion by Deloitte Restructuring Inc. ("Deloitte") in its capacity as court-appointed receiver (in such capacity, the "Receiver") of all of the assets, undertakings and property (the "Property") acquired for or used in connection with the business of Antamex Industries ULC ("Antamex"), for an order directing and ordering the Sureties (as defined in the materials and below), to make the payment that the Receiver asserts is contemplated and required by paragraph 5 of the Ancillary Relief Order (again as defined) that I made on March 5, 2024.

[2] Some context is required.

A. Antamex

[3] Antamex was in the business of designing, manufacturing, supplying and installing modular glass facades for multi-story buildings, with operations throughout North America. EDC was a senior secured creditor of Antamex.

B. The Sureties

[4] Certain of Antamex's construction contracts were bonded by Aviva Insurance Company of Canada ("Aviva"), Nationwide Mutual Insurance Company ("Nationwide") and/or Euler Hermes North America Insurance Company ("Euler" and together with Aviva and Nationwide the "Sureties"). In connection with and as a condition of issuing the bonds, the Sureties required Antamex and others to execute certain indemnity and security agreements in favour of the Sureties.

C. Adjournment of Initial Application Hearing

[5] On February 22, 2024, the applicant Export Development Canada ("EDC") filed an application to appoint Deloitte as Receiver, without security, of the Property, including all proceeds thereof. The application was initially heard on February 27, 2025.

[6] At that time, Antamex (supported by the Sureties) requested a 2-week adjournment of the hearing to allow Antamex to engage in discussions with the Sureties about the possibility of the Sureties providing funding to Antamex. EDC did not consent to the adjournment, on the basis that the Sureties disclosed no clear objective and offered no protection of EDC's interest during the proposed adjournment period.

[7] Rather than granting a 2-week adjournment as requested by Antamex, I instead granted a 1-week adjournment in order to provide Antamex with an opportunity to pursue interim financing from the Sureties, and directed that the discussions should also include what assurances and consideration could be provided to EDC to give it comfort about extending the adjournment to March 12, 2024 (as Antamex was requesting).

D. Negotiations re Further Adjournment

[8] Of note, on March 4, 2024 Antamex delivered a proposal to EDC setting out the Sureties' proposed terms of a further adjournment to March 12, 2024. The Sureties proposed that:

> "[The Sureties] to pay an amount up to $1,000,000 CAD into the Antamex bank account(s) promptly following March 12, 2024 in the event the Sureties do not commit to providing financial support to Antamex by March 12, 2024. Such amount will be equal to the verified amount disbursed by Antamex during the adjournment period of March 4, 2024 to March 12, 2024."

[9] Based on the submissions that I had heard on February 27, 2024 and the parties' reports about their negotiations up to and including March 4, 2024, in addition to appointing Deloitte on March 4, 2024 as receiver over the so-called EDC Collateral and related materials (a portion of the overall Property located primarily in the United States), I held that:

> "b. The Sureties are to pay an amount up to $2 million CAD into the Deloitte trust account immediately following March 12, 2024 in the event the Sureties do not commit, by March 12, 2024, to providing necessary and sufficient financial support to Antamex."

[10] I directed the parties to agree on a form of order to reflect the results summarized in my March 4, 2024 endorsement.

[11] The following day, March 5, 2024, Antamex requested a further adjournment to March 12, 2024. I wrote a further endorsement on March 6, 2024, in which I granted two orders, the contents of which were then agreed among the parties: the "Partial Appointment Order" appointing Deloitte as receiver of the EDC Collateral; and, the "Ancillary Relief Order."

E. Paragraph 5 of the Ancillary Relief Order

[12] The Ancillary Relief Order contained, at paragraph 5, the following:

> "5. THIS COURT ORDERS that, in the event the Sureties do not commit, by March 12, 2024, to providing necessary and sufficient financial support to the Debtor, the Sureties shall pay to the Receiver, in trust for the benefit of the Debtor's receivership estate, an amount equal to the lesser of (a) CAD $2 million and (b) the total of all expenditures made by the Debtor between February 27, 2024 and March 12, 2024, inclusive. The Debtor shall provide to EDC and the Receiver reasonable access to the books and records of the Debtor for the purpose of verifying the amount of such expenditures and disbursements."

[13] It is noteworthy that the language of my March 4 endorsement, and in particular the language of paragraph 5 of the Ancillary Relief Order, largely replicates and tracks the language of the Sureties' March 4 proposal. The additional language confirming that the amount would be the lesser of $2 million and the total expenditures during the Adjournment Period (defined below) is self-evidently for the benefit of the Sureties, capping their exposure, and was a product of the ongoing negotiation between the parties.

[14] Between March 5, 2024 and March 12, 2024, EDC and the Receiver awaited the expected proposal from the Sureties to provide "necessary and sufficient financial support" to Antamex, but received no such funding proposal on or before March 12, 2024.

[15] In my endorsement of March 12, 2024, I confirmed the advice from counsel to the Sureties that "the sureties were now prepared to support a receivership but that certain mechanics had yet to be worked out. Counsel for the Sureties suggested that another 24 hours to attempt to work out the necessary mechanics would be helpful, notwithstanding the acknowledged intention that today's hearing would be peremptory." In the circumstances I agreed to adjourn the application for another 24 hours, to March 13, 2024.

[16] The Sureties sent a letter to counsel for EDC on March 13, 2024 (the "March 13 Letter") approximately an hour before the hearing convened that day. As the letter itself stated, it was not a commitment to fund Antamex as a going concern, but provided "proposed terms on which the Sureties were prepared to fund the receivership of Antamex with a view to the Receiver operating Antamex's business until the completion of the bonded projects."

[17] The Receiver determined and advised the Sureties that the March 13 Letter was incapable of acceptance including because it did not account in any material way for additional costs and risks to the Receiver and to Antamex's estate if the Receiver elected to operate Antamex's business. Despite further discussions between the Receiver and the Sureties, the Sureties did not submit any further or revised proposal to address the Receiver's concerns.

F. March 13 Order

[18] On March 13, 2024, I granted an amended and restated receivership order (the "Appointment Order"), expanding Deloitte's role to Receiver to all of the Property of Antamex, on an unopposed basis.

[19] Following the granting of the Appointment Order, the Receiver reviewed Antamex's books and records to determine the amount owing by the Sureties pursuant to the Ancillary Relief Order on account of expenditures and disbursements made during the period February 27, 2024 to March 12, 2024 (the "Adjournment Period"). The Receiver determined, and it is not contested, that the actual expenditures and disbursements made in the Adjournment Period by Antamex exceeded CAD $2 million.

G. Receiver's Request for Payment and Sureties' Response

[20] On April 25, 2024 the Receiver's counsel wrote to the Sureties to request the payment of $2 million into the Receiver's trust account in accordance with the terms of the Ancillary Relief Order.

[21] In a May 14, 2024 letter, and by and large before me in this motion, the Sureties, in refusing to pay the $2 million, took the position that:

(a) The Sureties had committed to provide financial support to Antamex on terms and conditions that would have permitted Antamex to continue to operate, complete its bonded projects and make the necessary monthly payments to EDC;

(b) The reason the financing commitment was rejected by EDC was because it did not contemplate the immediate repayment of the EDC loan; and,

(c) Deposits made during the Adjournment Period should be taken into account in determining whether or not the $2 million payment required by paragraph 5 of the Ancillary Relief Order should be made and that, in light of the deposits, "it is inequitable for the Receiver to seek recovery for disbursements made during the Adjournment Period."

[22] The parties continued thereafter to disagree about the appropriate interpretation and effect of paragraph 5 of the Ancillary Order, and ultimately the Receiver brought this motion for advice and direction from the court.

Overview of the Receiver's Position

[23] The Receiver suggests that the matter comes down to two questions:

(a) Did the Sureties commit, by March 12, 2024, to providing necessary and sufficient financial support to Antamex?

(b) Should the Sureties be excused from their obligations under paragraph 5 of the Ancillary Relief Order on the basis of receipts collected by Antamex in the Adjournment Period or on the basis of whether or not certain disbursements may have been paid by the Receiver if appointed earlier?

[24] The Receiver maintains that the answer to both of these questions is "no" and that paragraph 5 of the Ancillary Relief Order is clear and unambiguous and should be enforced as written.

[25] As noted above, the language of paragraph 5 of the Ancillary Relief Order was largely based on the Sureties' proposal for an adjournment from March 4 to March 12, 2024, and the terms on which the Sureties adjournment proposal was premised.

[26] There was an exchange of further proposals following from the Sureties' proposal, the conclusion of which was that the amount of $1 million included in the Sureties' proposal was increased to $2 million (as specified in the agreed language of paragraph 5 of the Ancillary Relief Order). There were otherwise no substantive changes to the concept underlying the Sureties' proposal nor to the language in that proposal.

Preliminary Observations

[27] In my view, it is significant that the language of paragraph 5 of the Ancillary Relief Order was considered and negotiated between and among the parties, and was based on and closely followed the concept and language that the Sureties themselves proposed.

[28] It is also noteworthy that these parties were and are all sophisticated commercial actors; as between EDC and Deloitte, on one hand, and the Sureties on the other, it cannot be credibly claimed that there was an imbalance of bargaining power, or that one side or the other had the wherewithal to impose its will or take advantage of the counterparty.

[29] While of course the court may take surrounding context into account in appropriate circumstances, equally the court can and should rely on the plain meaning of the words in the document to which the parties agreed. Where the words and their meaning is clear, particularly where the parties are sophisticated commercial actors like these, there is no imperative to reach for extrinsic contextual factors to construe the parties' bargain.

[30] With that backdrop, I turn now to consider the specific arguments the parties make. In discussing those arguments below, I refer to the arguments on one side as the Receiver's arguments. I should note that counsel for EDC supported the Receiver's submissions and made brief additional arguments on that side.

As such where I refer to the Receiver's arguments it should be understood that I am also referring to the position of EDC.

Details of the Receiver's Argument

[31] The Receiver first points out that the Ancillary Relief Order requires that the Sureties commit, by March 12, 2024, to providing necessary and sufficient financial support to Antamex. The Receiver argues that "Whether or not any commitment was made by the Sureties by March 12, 2024 is an objective question of fact. A commitment was either received by Antamex on or before March 12, 2024, or it was not."

[32] On this issue, the Receiver acknowledges that the Sureties delivered a "Support Agreement" to Antamex on March 7, 2024. However, that Support Agreement was explicitly not a commitment to fund Antamex, and at the time of its delivery the Sureties were expressly "continuing to consider whether a funding commitment will be made." The Sureties also delivered a proposed Intercreditor Agreement to EDC and the Receiver which contained no commitment or proposal to provide financial support to Antamex.

[33] Thus, it appears clear that no funding proposal was delivered by the Sureties to either the Receiver or EDC on or before March 12, 2024. The March 13 Letter, the only proposal ever delivered to the Receiver or EDC, was delivered on March 13, 2024, after the deadline set out in the Ancillary Relief Order and after all parties had agreed that the Receiver would be appointed.

[34] As such, the Receiver notes, the Sureties did not commit by March 12, 2024 to providing financial support to Antamex.

[35] It is difficult to gainsay the Receiver's argument based on the bare chronological facts; the Sureties' proposal was delivered after the deadline in the Ancillary Relief Order. That said, the parties, it appears, were in ongoing discussions at various points in the Adjournment Period and, on March 12, I expressly agreed to allow the Sureties another 24 hours. While the fact that their proposal was late does not help the Sureties, I set that tardiness to the side while I consider the Receiver's other arguments.

[36] Next in that lineup is the Receiver's contention that the March 13 Letter did not, in any event, provide an offer of "necessary and sufficient financial support" to Antamex.

[37] The Receiver asserts that, once again, the question is an objective one, and that either the March 13 Letter proposed to fund Antamex on terms that were necessary and sufficient, or it did not. In emphasizing the objectivity of the inquiry, the Receiver responds to the Sureties' argument that the March 13 Letter was rejected because it did not contemplate immediate repayment of the EDC loan. The Receiver maintains that it does not rely on EDC's subjective views of the March 13 Letter in its determination of whether or not the March 13 Letter provided necessary or sufficient support.

[38] The Receiver notes that the March 13 Letter was not in fact a proposal to fund Antamex, which is an explicit threshold requirement in paragraph 5 of the Ancillary Relief Order (which requires "financial support" for "the Debtor"). The Receiver argues that the March 13 Letter was instead "an incomplete and imprecise proposal to fund the receivership proceeding of Antamex with a view to the Receiver operating Antamex's business until the completion of the 'Bonded Projects.'"

[39] The Receiver asserts that this distinction is telling; "in order to constitute 'necessary and sufficient support,'" the Receiver says "the March 13 Letter needed to adequately account for the additional costs and risks that the Receiver and the estate would incur in operating Antamex's business." The Receiver argues that "any proposal that did not account for such additional costs and risks was incapable of acceptance in the context of the receivership."

[40] Among other omissions, the Receiver says that the March 13 Letter did not specify which bonded projects that Sureties intended to ask Antamex to complete, and/or how many employees and what machinery the Receiver would be required to retains for such purpose.

[41] The Receiver emphasizes, fairly in my view, that as a court-appointed officer it has a duty to maximize value for all stakeholders, and that in the Receiver's opinion and business judgment, which is entitled to deference, the proposal in the March 13 Letter did not do so.

[42] I find no clear evidence before me that the Sureties' proposal in fact provided "necessary and sufficient support" as required.

[43] The crux of the Receiver's argument is that to interpret an order the court must use accepted principals of statutory and contractual interpretation. It argues that the "preferred interpretation" of an order is the "judicious meaning, consistent with the text (read in context)." That means, according to Moir J. in *Royal Bank v. Robertson*, 2016 NSSC 176 (cited with approval by Kristjanson J. in *Kuang v. Young*, 2023 ONSC 2429) that "The words of an order "are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the…[order], the object of the…[order] and the intention of the…[court]."

[44] The Receiver argues that paragraph 5 of the Ancillary Relief Order is clear, unambiguous and unequivocal. The paragraph explicitly requires, if the Sureties failed to provide necessary and sufficient financial support to Antamex, that they would be obliged to pay the lesser or CAD $2 million or the total expenditures and disbursements made by Antamex in the Adjournment Period.

[45] As noted above, the Receiver also emphasizes that paragraph 5 of the Ancillary Relief Order was not imposed on the Sureties. Rather, paragraph 5 is a direct and largely duplicative product of the Sureties' own proposal to EDC, made in order to persuade EDC to consent to a further adjournment of the application. As they bargained for, the Sureties got the benefit of the full two-week adjournment to consider whether or not to fund Antamex's ongoing business. The Receiver asserts that the Sureties now seek to avoid paying the cost of exactly what they proposed and bargained for.

[46] The Receiver adds that the text of paragraph 5 of the Ancillary Relief Order was also a product of the collective efforts of the Sureties, EDC and the Receiver to craft an order that clearly sets out when payment from the Sureties would be required, and how to calculate that payment. It appears that, relative to the agreed metric of expenditures and disbursements, Antamex paid approximately $3.5 million in disbursements during the Adjournment Period. While therefore the required payment of CAD $2 million is already considerably less than what would be required to recoup all such expenditures, the Receiver points out that the deal reflected in paragraph 5 of the Ancillary Relief Order could "easily have worked against Antamex's estate if, instead of approximately $3.5 million of disbursements, Antamex had made $5 million or $10 million of disbursements."

[47] I take the Receiver's point to be that there were risks for each side in the agreement negotiated, and that it is not open to the Sureties to resile from that agreement based on a retrospective perception that they agreed to pay too much.

[48] On that note, the Receiver argues that by now seeking to introduce into the equation the amounts that Antamex received during the Adjournment Period, the Sureties are seeking to change the deal after the fact. It would have been open to the Sureties, at the time of the negotiation, to bargain to pay the lower of $2 million or "net disbursements or expenditures," and thereby to have Antamex's receipts during the Adjournment Period taken into account. They clearly did not do so, and cannot now, the Receiver argues, rewrite the agreement.

[49] Likewise, the Receiver argues, it is not open to the Sureties to now insist that disbursements that would have to be made if the Receiver had been appointed at the outset of the Adjournment period should not be taken into account.

[50] Not only was this not the bargain, the Receiver maintains, but to introduce these additional parameters would require the court to embark on analyzing an array of factors simply not contemplated by the plain language of the provision at issue, introducing complexity and uncertainty that is not necessary nor efficient. It would require the court to judge the character and necessity of each individual expenditure (or receipt), an exercise simply not envisioned in the plain words of the agreement the parties made.

[51] This is exactly the type of extrinsic evidence that, as counsel for EDC put it, need not be relied upon where, as here, the plain meaning of the language agreed between the parties, is clear.

[52] The Receiver also argues that, while not labelled as a "consent order" per se, the Ancillary Relief Order effectively amounts to one. It was collectively and carefully crafted by the parties, and was the product of a bargain that the Sureties proposed and concluded with EDC in order to obtain EDC's consent to a further adjournment.

[53] A consent order, the Receiver says, "is a contract and can only be amended when it does not express the real intention of the parties or where there is fraud" (citing *Chitel v. Rothbart*, 1984 CarswellOnt 358).

Details of the Sureties' Response

[54] The Sureties, for their part, dispute that paragraph 5 of the Ancillary Relief Order is akin to a consent order.

[55] They note that although the language of the order was agreed, the agreed language was an attempt to construe the words of my endorsement in relation to a disputed adjournment.

[56] The Sureties argue that, even if the adjournment order could be considered a consent order, it is nonetheless appropriate for the court to take into account, in interpreting the order, the "context and surrounding circumstances" in which the order was made.

[57] They point to the familiar strain of caselaw, articulated for example by the Court of Appeal for Saskatchewan in *Campbell v. Campbell*, 2016 SKCA 39, to the effect that court orders (like contracts) are "not interpreted in a vacuum." As the court said in that case:

> "[55] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted."

[58] Focusing on the latter factor – the circumstances in which the order was granted – the Sureties urge that I in turn should focus on what they say was the relevant consideration when I made the order. That is, that the Sureties had been directed to consider "what assurance and consideration could be provided to EDC to address the concern about the erosion of cash on hand should the Sureties require an extension of the adjournment beyond March 4, 2024."

[59] The Sureties point out that in their proposal, their rationale for making the adjournment proposal was expressly stated:

> "Accordingly, to address EDC's concern without affording it a windfall, the negotiated quantum of any reimbursement by the Sureties ought to consider the amount actually disbursed from the Antamex bank accounts during the applicable Adjournment Period and the amount of any prejudice to EDC."

[60] This is really the essence of the Sureties' argument. In effect they say that the whole point of their proposal was simply to ensure that EDC would not be prejudiced by the erosion of Antamex's cash position during the Adjournment Period.

[61] That being the goal, which the Sureties say is a critical part of the surrounding circumstances to be taken into account, they argue that to interpret the meaning of paragraph 5 of the Ancillary Relief Order, I ought to take into account what actually happened in terms of prejudice to EDC. They urge that if I take into account receipts during that timeframe, and amounts that would have been incurred regardless of the adjournment, then I will find no harm or prejudice to EDC, and no reason to enforce what was in effect only a potential payment required of up to CAD $2 million.

[62] In a nutshell, the Sureties say that they "made clear their intention in making the Adjournment Proposal" which was to address the net prejudice to the Antamex estate," and that "EDC also made its intention clear in its submissions to the court regarding its concern about the potential erosion of the case on hand at the February 27, 2024 hearing."

Analysis and Conclusions

[63] In my view, the Sureties' argument invites what the caselaw makes clear ought not to be imported into the analysis. That is, assuming for the sake of argument that it was the Sureties' subjective intention and interpretation that they would only be on the hook for any net amount of erosion of Antamex's cash during the Adjournment Period, I do not find that subjective intention in the language of paragraph 5. Nor is it evident even from the surrounding circumstances that this was the Sureties' intention.

[64] The clear and unambiguous language of paragraph 5, in my opinion, confirms that, in consideration for an additional week to consider whether and to what extent to fund Antamex, the Sureties agreed to pay the lesser of CAD $2 million or the amount of Antamex's disbursements and expenditures during the Adjournment Period.

[65] That interpretation not only emerges with clarity from the language used in paragraph 5, but it is entirely consistent with what the Sureties themselves proposed (albeit that the amount changed, as a result of ongoing discussions and submissions, from CAD $1 million to $2 million).

[66] As the author of the proposal, it was open to the Sureties to specify (or at least propose) that the relevant disbursements and expenditures were to be net of receipts, or that only certain types of expenditures should be taken into account.

[67] They did not do so.

[68] Moreover, and in terms of surrounding circumstances, they did not do so notwithstanding that they say the surrounding circumstances were such that all concerned knew that only "net prejudice" was compensable; if that was the case one would expect a clear articulation of that proposition in the context of the discussion of terms, and there is no evidence of any such statement. I understand that the Sureties say that this notion was evident in the language of their proposal confirming that the key concern was the amount of prejudice to EDC. In my view, the agreed language of paragraph 5, interpreted in the way that I have, equally serves to address any potential prejudice to EDC. In other words, it does not follow from the Sureties focus on prejudice that the quantification of such prejudice necessarily includes the evaluation and calculation of a host of unspecified factors to arrive at a net number.

[69] In my view, the plain meaning of the language at issue is in fact clear, and, because the expenditures are agreed to have exceeded CAD $2 million, the Sureties are therefore obliged to pay CAD $2 million to the Receiver.

Issue re Without Prejudice Communications

[70] I should note that there was an argument between the parties about whether or not I should take into account, in determining what paragraph 5 means, the contents of an email exchange between the parties at a certain point, stated to be without prejudice. The Sureties argued that despite the "without prejudice" label, the contents of the exchange make clear that it was not without prejudice at all, and that its contents show that the Receiver/EDC's position was aligned with that of the Sureties.

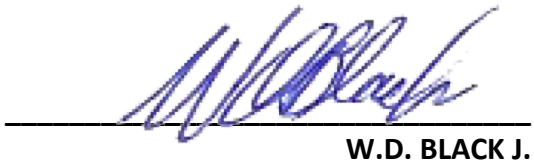
[71] In my view, leaving aside whether or not it would be appropriate in the circumstances to treat the communications as being "with prejudice", the exchange would in any event suffer from the same shortcomings that preclude me from considering the Sureties peripheral subjective thoughts about what the bargain was or was not. A party's subjective observations about the meaning of the language of the order, unless recorded in the text of the order, or unless shown to have had a direct influence on the formulation of the language at issue, have no meaningful impact on the interpretive exercise.

[72] As such, the email exchange in question does not alter my conclusion that the Sureties are liable to pay CAD $2 million.

Interest and Costs

[73] Interest should run on that principal amount from April 25, 2024, the date by which the parties had agreed that the relevant expenditures and disbursements exceeded CAD $2 million and the Receiver requested payment.

[74] Costs should follow the event. It does not appear that either side uploaded a costs outline to Case Center. I ask that the parties attempt to agree on costs. If they cannot do so within two weeks of the date of release of this decision, then I may be spoken to about a procedure to make that determination.



W.D. BLACK J.

RELEASED: FEBRUARY 18, 2024