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Tim Hill, Q.C.
Direct Dial: (902) 460-3442
Facsimile: (902) 463-7500
E-mail: thill@boyneclarke.ca

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Halifax Regional Municipality

99 Wyse Road, Suite 600
Dartmouth
NS Canada B3A 4S5

Correspondence:
P.O. Box 876
Dartmouth Main
NS Canada B2Y 3Z5

T 902.469.9500
F 902.463.7500
www.boyneclarke.ca

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Honourable Justice Glen G. McDougall
Supreme Court of Nova Scotia (Halifax)
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord:

Re: **Victory Farms Inc. ("VFI") and Jonathan Mullen Mink Ranch Limited ("JMMR") (Applicants) and the *Companies' Creditors Arrangement Act* ("CCAA") – Distribution Motion**

Please accept this as the submission of the Applicants to the submissions of North American Fur Auctions Inc. ("NAFA") and American Legend Cooperative ("ACL"), both dated August 16, 2017.

Submission of NAFA

The Applicants have little to add to the submission of NAFA.

It is respectfully suggested that should an Order be granted approving the reports, activities and conduct of the Monitor to date, as sought by the Monitor, then the qualification contained in Justice Morawetz decision in *Target Canada Co*[1]., should be inserted into any Order issued.

Submission of ALC

The Court's attention is drawn to the correspondence of counsel for ALC to the Court dated September 15 and September 21, 2016, and the correspondence to the Court of

[1] 2015 ONSC 7574

counsel for NAFA, also dated September 21, 2016. These submissions related to the dispute brought before you upon the application of the Applicants for Debtor in Possession ("DIP") financing in September last. Essentially, ALC argued that there should be a clause included in the DIP Order making it clear that nothing in that Order, or any other Order in the CCAA proceedings, would be taken to restrict the right of ALC under the October 9, 2015 Subordination and Intercreditor Agreement between ALC and NAFA ("the Intercreditor Agreement"). NAFA opposed such a provision.

Ultimately, the Court declined to insert any such term in the Order.

Now ALC is asking this Court to "punt" the question of priority to monies in the CCAA proceeding to another Court, in another jurisdiction, for reasons reflected in ALC's submissions nearly a year ago. Essentially, ALC has sat on its claim for a year, and now seeks to prolong these proceedings by suggesting that the Ontario courts become involved on the issue of priority to certain of the sale proceeds.

The core issue is the interpretation of the Intercreditor Agreement. In terms of the CCAA proceeding, the question is a simple one: whether under the terms of the Intercreditor Agreement the purchase price of the AgriStability payment received during the pendency of the CCAA proceeding should be credited to NAFA or to ALC?

This issue is squarely within the jurisdiction of the court supervising the CCAA process. As noted in Houlden & Morawetz[2]:

> As a superior court of general jurisdiction, the Ontario Superior Court of Justice has all of the powers that are necessary to do justice between the parties. Except for provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law in civil matters: *Re Intertan*

[2] Houlden and Morawetz Bankruptcy and Insolvency Analysis, N§59 — Jurisdiction of Courts [Tab 1]

Canada Ltd. (2009), 2009 CarswellOnt 324, 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List])

Specifically, the interpretation of a contractual dispute is ordinarily resolved by the CCAA court. One example of this is *Romspen Investment Corp.* v. *Ponderosa Peachland Development Limited Partnership*[3] which involved a priorities dispute between two major secured creditors. The solution was to hold a summary trial to resolve that dispute.

In seeking to have the Ontario courts resolve the issue ALC relies upon *Diavik Diamond Mines Inc.* v. *Tahera Diamond Corp.*[4] However, it should be noted that this case involved the interpretation of statutes peculiar to Nunavet, and dissimilar in application to those in Ontario. That is certainly not the situation in the case at bar.

It is respectfully submitted that the issue of entitlement to the proceeds of sale of the AgriStability payment received during the pendency of these proceeds[5] is one clearly within the competence and jurisdiction of the CCAA court, and should be adjudicated within the four walls of these proceedings.

It should be noted the issue is not complicated. The Intercreditor Agreement[6] is simple. The question of priorities is a simple one to adjudicate. Evidence would be by affidavit, there being no material dispute of fact. Presumably a half day of argument would suffice. ALC will rely on the wording of the Intercreditor Agreement *simpliciter*. NAFA will argue that AgriStability is incapable of being assigned, and is, in essence, insurance directly related to its secured mink.

Nothing precludes ALC from proceeding in Ontario, although one might reasonably wonder how jurisdiction would reside in Ontario (neither contracting party is in Ontario, and the assignment agreement between the Applicants and ALC has a State of

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[3] 2016 BCSC 84
[4] 2009 NUCA 3
[5] The sum of $447,136, discounted at a 1% discount rate between the date of closing and anticipated receipt: Schedule "F" to the Stalking Horse Asset Purchase Agreement
[6] Exhibit "A" to the Affidavit of Dale Theisen

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Washington governing law clause).

It is the position of the Applicants that the matter should be dealt with by this court in the manner proposed, and that in the interim the Monitor retain the sum of $447,136 of the sale proceeds pending the Court's determination of the issue of entitlement to same.

All of which is respectfully submitted.

BOYNECLARKE LLP

Tim Hill, Q.C.

HMANALY N§59
Houlden & Morawetz Analysis N§59

Houlden and Morawetz Bankruptcy and Insolvency Analysis

Companies Creditors Arrangement Act
Section 9

L.W. Houlden and Geoffrey B. Morawetz

N§59 — Jurisdiction of Courts

N§59 — Jurisdiction of Courts

See s. 9

See Madam Justice Georgina Jackson and Janis Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in *Annual Review of Insolvency Law, 2007* (Toronto: Carswell, 2008).

Below are cases that deal with specific aspects of the jurisdiction of the court in *CCAA* proceedings.

Section 9(1) is similar to the definition of "locality of a debtor" in s. 2(1) of the *Bankruptcy and Insolvency Act*, see *ante*. Section 9(1) gives three bases of jurisdiction: (1) the province where the head office of the company is located in Canada; (2) the province where the chief place of business is located in Canada; and (3) if the company has no place of business in Canada, the province where any assets of the company are situated.

Where the head office of a company was located in Manitoba and most of its assets were also located in that province, it was held that an application under the *CCAA* should have been brought in Manitoba and that the courts of Saskatchewan had no jurisdiction to receive it: *Re Oblats de Marie Immaculee du Manitoba* (2002), 34 C.B.R. (4th) 76, 2002 CarswellSask 287, 2002 SKQB 161 (Sask. Q.B.).

The Ontario Court of Appeal held that the lower court erred in removing two directors from the board of a debtor corporation under *CCAA* proceedings when it concluded that there was reasonable apprehension that the newly appointed directors might favour certain shareholders and not have the best interests of the corporation at heart. The Court of Appeal held that the court's discretion under s. 11 of the *CCAA* does not give authority to remove the directors and that any such authority could only be exercised under corporations law where the court finds oppression: *Re Stelco Inc.* (2005), 2005 CarswellOnt 1188, [2005] O.J. No. 1171, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142 (Ont. C.A.). However, the court may order that a director or person acting in such capacity be removed if the court is satisfied that the director is or is likely to unreasonably impair the debtor's ability to complete a viable plan of compromise or arrangement: s. 11.5(1). For a discussion, see N§107(1) "Court Order Removing Directors".

The court has exercised its jurisdiction to refuse conditions on a court-approved sale process and allowed a monitor to proceed with an offer, even where a new offer arising following the bid deadline could have preserved jobs, since this would amount to an unfairness in the working out of the sale process to the detriment of the current purchaser and the secured creditors; interfere with the efficacy and integrity of the sale process; and prefer the interests of one party over others. In determining the appropriateness of the sale process, the court will consider whether the monitor made a sufficient effort to get the best price and did not act improvidently; the interests of all parties; and whether there is any unfairness in the process: *Re Tiger Brand Knitting Co.* (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.).

Where the Ontario Superior Court of Justice exercised its jurisdiction to find that a corporation could successfully bring an oppression application to amend a proposal and set aside a unanimous shareholders' agreement, the Court held that should it

be found in error of its finding that the corporation was an oppressed complainant within the meaning of the *OBCA*, it was satisfied that it was appropriate to draw on the inherent jurisdiction of the court under the *BIA* to terminate the USA and approve the proposal in order to prevent one shareholder from blocking a restructuring that is in the best interests of the stakeholders. The court held that the use of inherent jurisdiction under the *BIA* must be read with caution, however, in the circumstances, it was not extending the concept of inherent jurisdiction; rather, it was preventing one shareholder with no economic interest from holding all of the debtor's stakeholders hostage and preventing a reorganization. In that respect, although most of the case law regarding inherent jurisdiction relates to the general language of the *CCAA* as opposed to the more specific language of the *BIA*, the considerations applicable to the court's exercise of jurisdiction under the *CCAA* were also applicable under the *BIA* and in the circumstances of the case, there was no practical reason for a distinction to be made between the two statutes: *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 2005 CarswellOnt 1963, 10 C.B.R. (5th) 192, 5 B.L.R. (4th) 271 (Ont. S.C.J.); leave to appeal to C.A. allowed (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]). For a discussion of the oppression findings, see F§68 "Use of Oppression Remedy to Recover Property of the Bankrupt".

The test on a motion to stay a proceeding on the basis of *forum non conveniens* is that the moving party must establish that there is clearly a more appropriate forum than the forum chosen by the plaintiff. The court's decision to stay an action on the basis of *forum non conveniens* is to be exercised sparingly; and if, after considering all of the factors, there is not a single most appropriate forum, the forum chosen by the plaintiff will prevail: *BNP Paribas (Canada) v. BCE Inc.* (2006), 2006 CarswellOnt 4982, 24 C.B.R. (5th) 233 (Ont. S.C.J.).

The Ontario Court of Appeal held that on a proper interpretation, the *CCAA* permits the inclusion of third party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring, based on: the open-ended flexible character of the *CCAA*, which signals a flexible approach to application of the statute in new situations; the broad nature of the term "compromise or arrangement" used in the statute, which provides the entrée to negotiations between parties affected and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning a plan; and the express statutory effect of the double-majority vote and court sanction, which affords the necessary protection to creditors that may be deprived of certain of their property and civil rights as a result of the process, at the same time rendering the plan binding on all creditors, including those unwilling to accept certain portions of it. It is not necessary to go beyond the general principles of statutory interpretation in this case as it is implicit in the language of the *CCAA* that the court has authority to sanction plans incorporating third party releases that are reasonably related to the proposed restructuring: *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 2008 ONCA 587 (Ont. C.A.); leave to appeal to S.C.C. dismissed (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.).

See Janis Sarra, "Restructuring of the Asset-backed Commercial Paper Market in Canada", *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009); Mario Forte, "*Re Metcalf*: A Matter of Fraud, Fairness and Reasonableness. The Restructuring of the Third-Party Asset-Backed Commercial Paper Market in Canada", (2009) 17 *International Insolvency Review* 211.

As a superior court of general jurisdiction, the Ontario Superior Court of Justice has all of the powers that are necessary to do justice between the parties. Except for provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law in civil matters: *Re Intertan Canada Ltd.* (2009), 2009 CarswellOnt 324, 49 C.B.R. (5th) 232 (Ont. S.C.J. [Commercial List]). For a discussion of this case, see N§93 "Debtor in Possession (DIP) Financing, Generally".

Where a debtor company sought authorization to file a plan of arrangement under the *CCAA* that provided for the cancellation of all its shares and the issuance of new equity in favour of a current shareholder and DIP lender ("the shareholder/lender"), the court held that it had no authority to make such an order under the *CCAA* as it was in conflict with provisions of the Québec *Companies Act (QCA)* under which the debtor was registered. The debtor sought a vote of creditors but not existing shareholders who would effectively see their shares expropriated without compensation for the benefit of the shareholder/lender. The court held that it could give direction outside of approving a plan of arrangement as part of its role in supervising *CCAA* proceedings. Section 49 of the *QCA* specifies that where an arrangement is proposed that affects the rights of shareholders, the court may order a meeting of shareholders, who then vote on the arrangement; however, the court observed that no where does the *QCA* specify that the court may impose changes to the articles of a Québec registered corporation. While there is no provision in the *QCA* similar to ss. 173 and 191 of the *Canada Business Corporations Act (CBCA)* expressly referring to the *BIA* and similar legislation, the court held that it must still consider whether changes are in

accordance with applicable law and are fair and reasonable to all stakeholders, including shareholders. The court held that in the absence of a comprehensive plan of arrangement, it would not exercise its authority in a vacuum, and here, it appeared that the shares continued to have value. The court held that it was far from certain that the special treatment sought by the shareholder/lender was not unfairly prejudicial to other shareholders. The court noted that shareholders of an insolvent company may not be able to block a plan of arrangement, but a plan should not be a pretext for expropriating their claims. Although a court may have to interfere with shareholders' rights in the context of a *CCAA* plan, it can only do so within the limits of the applicable statutory provisions governing the debtor corporation. Moreover, the court held that it could not assess the fairness, equity and reasonableness of a plan that was not yet before it. Finally, the court held that ss. 45 to 52 of the *QCA* set out the manner in which shareholder rights may be modified in a corporate restructuring; and while the requirements are outdated, the court is bound to apply them; there is no legislative gap. The court concluded that the proposed share reorganization could not be ratified as it was in contravention with s. 49 of the *QCA*: *Re Shermag Inc.* (2009), 2009 CarswellQue 2487, 59 C.B.R. (5th) 95 (Que. S.C.).

The British Columbia Court of Appeal upheld two decisions in proceedings under the *CCAA* involving a development. The appeals were brought by "pre-sale purchasers" of residential condominiums. The appellants argued that they had certain remedial rights under the *Real Estate Marketing and Development Act*, which were sufficient to give them status as creditors in the *CCAA* proceeding, and which could not be overridden by orders under the *CCAA*. The Court held that there was nothing in the *Real Estate Marketing and Development Act* that suggested that the legislature intended that the "identity of the developer" changes if corporate ownership and control change. The appellant also claimed they were creditors under the plan on the basis that they were entitled to rights and remedies under the *Real Estate Marketing and Development Act*. Levine J.A. held that the appellants had no rights of rescission or to return of their deposits because their pre-sale agreements were unenforceable under the *Real Estate Marketing and Development Act*; thus, there was no basis for them to claim that they were creditors. The appellate court found no error in the supervising judge's approval of an extension of the completion date of the pre-sale agreements because of construction delays, observing that the customary way of determining delay claims is after the project has been completed. In this case, there was not that luxury, and the court proceeded to decide them and ordered the extension: *Re Jameson House Properties Ltd.* (2009), 2009 CarswellBC 1904, 57 C.B.R. (5th) 21 (B.C. C.A.).

The court will exercise its equitable jurisdiction where equity requires a remedy. The applicable principle is "equity considers done what ought to be done". Where a shareholder had previously purchased two years of the debtor company's expected income tax refunds in order to assist cash flow needs of the debtor company, and the debtor company subsequently entered *CCAA* proceedings before it had provided the shareholder with the necessary transfer document for the refund, it would be inequitable for the company to take advantage of its own breach in failing to deliver the document and then contend that because of that failure, its requirement to hold the tax refund in trust did not arise. The court held that the transfer was deemed in equity to have been delivered at the time of the agreement and the tax refund was thus held in trust for the shareholder and its payment to him was not a preference as it was not the company's asset: *Re Grant Forest Products Inc.* (2009), 2009 CarswellOnt 6099, 58 C.B.R. (5th) 127; additional reasons at (2009), 2009 CarswellOnt 8080 (Ont. S.C.J. [Commercial List]).

The Supreme Court of Canada held that it agreed with the analysis by Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (G.R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters.", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), at p. 42). When given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives; and in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called on to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs: *Re Ted Leroy Trucking Ltd.* (2010), 2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60 (S.C.C.). For a full discussion of this

case, see N§101 "Claims under the *Excise Tax Act*".

The British Columbia Supreme Court granted initial *CCAA* protection to a group of entities involved in the business of designing, manufacturing, and selling custom super yachts. A supplier had commenced an action and obtained judgment in the Federal Court *in rem* against a partially built vessel and *in personam* against the debtor, and the vessel had been arrested the Federal Court action. Two other creditors commenced *in rem* actions in the Federal Court against the vessel and filed caveats against its release from arrest, but had not obtained judgment. The creditors all opposed the *CCAA* application on the basis that the court had no jurisdiction to stay *in rem* maritime law proceedings in the Federal Court, that the *CCAA* proceedings would place the B.C. court in conflict with the Federal Court and that there was no ongoing business to be protected by the *CCAA* proceedings. A creditor also commenced two proceedings in the B.C. court by which he claimed recovery of $20 million paid under a vessel construction agreement and also issued a bankruptcy application as against the debtor. Another creditor commenced proceedings in the U.S. District Court in Seattle, Washington to arrest another vessel owned by the debtor, but it took no proceedings beyond the arrest of that vessel. Justice Pearlman was of the view that although the value of the debtors' assets exceeded their liabilities, they had been unable to meet their current financial obligations as they fell due and were therefore insolvent. The debtors applied for *CCAA* protection in order to seek financing estimated at $8 million to complete construction of the yacht in dispute or to sell it in order to facilitate their restructuring. Justice Pearlman accepted the views of several parties that more value was likely to be realized if the yacht was completed and concluded that *CCAA* protection would enable the debtors to develop a plan that would add value to the vessel, facilitate the orderly payment of creditors and potentially carry on the business, which at peak production employed 100 workers. The court was satisfied that circumstances existed that justified the initial order. Justice Pearlman was of the view that, as a matter of comity between two Canadian superior courts each exercising its own jurisdiction, an order by the B.C. court directing the Federal Court to stay its proceedings was neither appropriate nor necessary. The principles of comity which should apply between a provincial superior court exercising jurisdiction under the *CCAA* and a Federal Court exercising its jurisdiction, with both courts working cooperatively and each exercising its own jurisdiction, should be able to avoid any insuperable conflict between their respective jurisdictions. One court, by exercising its jurisdiction, does not entirely occupy the field to the exclusion of the jurisdiction of the other court. The jurisdiction of the Federal Court with respect to matters of maritime law, once it has been invoked, does not automatically preclude the exercise by the B.C. court of its jurisdiction under the *CCAA*. At this stage, the court was simply being asked to make a time-limited stay and initial order; and the priorities between and among the various creditors would have to be determined, but at a later stage. The appropriate course is that the B.C. court, as a matter of comity, request the recognition and aid of the Federal Court with respect to an initial order under the *CCAA*. In the result, Pearlman J. found that the applicants should have the opportunity to present a viable plan for restructuring and for the orderly payment of their creditors. The initial order was granted with a request being made for the assistance of the Federal Court to recognize the initial stay: *Sargeant III v. Worldspan Marine Inc.* (2011), 2011 CarswellBC 1444, 82 C.B.R. (5th) 102 (B.C.S.C. [In Chambers]).

The debtor, an operator of a natural gas facility, filed *CCAA* proceedings, and the court held that it had jurisdiction to determine whether or not an agreement was suspended as the issue went to the integrity of the *CCAA* process and the court's role is to ensure that aggressive creditors are not given an advantage to the prejudice of less aggressive creditors. Leave to appeal was not granted; the Court of Appeal held that the chambers judge was uniquely positioned to understand the import of the issue in the *CCAA* context and its relationship to the claims of other creditors: *Re SemCanada Crude Co.* (2010), 2010 CarswellAlta 2459, 76 C.B.R. (5th) 1 (Alta. C.A.).

In a cross-border proceeding, where the position taken by a party (insurer) appeared to be an attempt to circumvent the effect of jurisdictional rulings made following applications that the insurer participated in and in which it had taken inconsistent positions, the court held that the insurer's conduct was worthy of rebuke as it ran counter to the process undertaken by all parties since the inception of the insolvency proceeding. The insurer was ordered to pay special costs to all parties: *Re Pope & Talbot Ltd.* (2010), 2010 CarswellBC 3621, 74 C.B.R. (5th) 281 (B.C.S.C.).

Four related companies successfully applied for an application under the *CCAA*. The court dismissed a motion to remove one of the entities from the proceeding as it would be prejudicial to the restructuring, and the entity had been properly classified as under the control of the debtor within the meaning of s. 3(3) of the *CCAA*. The applicant did not satisfy the requirements for injunctive relief pending resolution of the dispute as it had not established a strong *prima facie* case, or even the weaker threshold of a serious issue to be tried. The court found that it had jurisdiction over all issues in dispute, including a claim for breach of contract, and it was a more appropriate forum than Ghana. The burden rested on the party bringing the motion to establish that Ghana was a more appropriate forum and the court held that a strong case must be shown before a forum

2016 BCSC 84
British Columbia Supreme Court

Romspen Investment Corp. v. Ponderosa Peachland Development Limited Partnership

2016 CarswellBC 179, 2016 BCSC 84, [2016] B.C.W.L.D. 1943, 262 A.C.W.S. (3d) 922

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

In the Matter of a Plan of Compromise or Arrangement of Ponderosa Peachland Development Limited Partnership, Treegroup Ponderosa Development Corp. and 0817642 B.C. Ltd.

Romspen Investment Corporation, Petitioner and Ponderosa Peachland Development Limited Partnership, Treegroup Ponderosa Development Corp. and 0817642 B.C. Ltd., Respondents

Fitzpatrick J.

Heard: November 25, 2015; November 26, 2015
Judgment: January 21, 2016
Docket: Vancouver S144265

Counsel: Steven Dvorak, Matthew Nied, for Romspen Investment Corporation
Simon Coval, Kibben Jackson, for Ponderosa Fund

Subject: Contracts; Insolvency; Property

Related Abridgment Classifications

Contracts

VIII Rectification or reformation
VIII.1 General principles

Headnote

Contracts --- Rectification or reformation — General principles

Developer of golf course and residential real estate sought and obtained creditor protection under Companies' Creditors Arrangement Act — Since that time, developer had, with support of its major creditors, continued construction and marketing of development and sales of certain strata lots had been approved by court from time to time — Priority dispute arose between major secured creditors RIC and TPF — Both claimed first priority against certain, as yet unsold, lands in development pursuant to priority agreement executed by them on January 15, 2012 ("Interlender Agreement") — Summary trial was held to resolve that dispute — As preliminary matter, TPF sought rectification of Interlender Agreement as it related to lot numbers over which each party was to obtain first ranking mortgage security — Rectification was granted — Only reason for change in effect of interlender agreement arose from unilateral decision of surveyor to change lot numbering in subdivision plan — Change in lot numbering resulted in Interlender Agreement not reflecting true allocation of lots over which TPF was to have priority — There was common continuing intention on part of RIC and TPF as to allocation of

priority lots to TPF and that Interlender Agreement did not reflect that true intention — Order for rectification of Interlender Agreement was appropriate.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

Bank of Montreal v. Vancouver Professional Soccer Ltd. (1987), 15 B.C.L.R. (2d) 34, 1987 CarswellBC 174 (B.C. C.A.) — followed

McPeake v. Canada (Attorney General) (2012), 2012 BCSC 132, 2012 CarswellBC 200, (sub nom. *McPeake v. R.)* 2012 D.T.C. 5042 (Eng.), [2012] 4 C.T.C. 203 (B.C. S.C.) — followed

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009
App. B, s. 2(2)(c) — referred to

HEARING regarding rectification of contract.

***Fitzpatrick J.*:**

Introduction

1 The subject matter of this proceeding is a golf course and residential real estate development in Peachland, British Columbia. In June 2014, the respondent debtors (the "Developer"), sought and obtained creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). Since that time, the Developer has, with the support of its major creditors, continued construction and marketing of the development and sales of certain strata lots have been approved by the Court from time to time.

2 At the commencement of this proceeding, a priority dispute arose between the major secured creditors, being the petitioner, Romspen Investment Corporation ("Romspen"), and The Ponderosa Fund (the "Fund"). Both claim first priority against certain, as yet unsold, lands in the development pursuant to a priority agreement executed by them on January 15,

2012 (the "Interlender Agreement"). This summary trial was intended to resolve that dispute. In large part, the resolution of the issues will dictate who will have control over the future course of the development in this or other realization proceedings.

3 As a preliminary matter, the Fund sought rectification of the Interlender Agreement as it relates to the lot numbers over which each party was to obtain first ranking mortgage security. At the conclusion of the hearing, I granted the relief sought with reasons to follow, which are outlined below.

4 The more substantive issue at the summary trial arose from Romspen's application as to the interpretation of the Interlender Agreement as to it and the Fund's respective rights of enforcement, both in relation to the subject lands and with respect to each other. Since the hearing, Romspen has indicated an intention to apply to re-open the summary trial on this issue and introduce new evidence. As such, a determination of the issue will be delayed. That application and this court's ultimate decision on that application and the interpretation of the Interlender Agreement will follow in due course.

The Rectification Issue

Background

5 The Developer established the Fund in July 2010, pursuant to an Amended and Restated Trust Agreement. By that agreement, the Developer intended to raise funds from the subscription of units in the Fund via a public offering. The Developer's original plan was to obtain secured financing for the development of the lands from the Fund; however, by late 2010, the Developer realized that the Fund would not be able to raise all the requisite financing.

6 On February 4, 2011, Romspen issued a commitment letter (the "Commitment Letter") to the Developer by which Romspen was to provide financing of $31 million (the "Romspen Indebtedness"). The Commitment Letter anticipated that security would be granted to Romspen, including a first-ranking mortgage on the development lands (the "Romspen Security").

7 The Commitment Letter contemplated the execution of a priority agreement between Romspen and the Fund. Specifically, clause 23 of the Commitment Letter provided that, upon execution of the priority agreement, the Fund would have priority over the "future phase lands", with Romspen retaining priority over the "Phase 1 lands":

> Lender will agree to reasonable provisions to postpone its security to facilitate Borrower's ability to raise those funds necessary to complete construction and servicing of Phase 1, if Borrower chooses to raise such funds by way of debt. ... Lender will further agree to postpone its security to the "Ponderosa Fund" mortgage provided (i) the financial terms of such debt are reasonable to Lender; (ii) such mortgage is to be registered only on future phase lands; and (iii) such mortgage provides the future phase lands shall not have access to or be developed prior to the Phase 1 lands.
>
> [Emphasis added.]

Neither "future phase lands" nor "Phase 1 lands" were defined in the Commitment Letter.

8 The Romspen Security was registered against all of the development lands in late February 2011.

9 During the negotiations of the priority agreement between the Fund and Romspen, all parties, including the lawyers acting for both Romspen and the Fund, had access to the Developer's Ponderosa Phase 1 Parcel Map (the "Parcel Map").

10 The Parcel Map depicted the six development lots to be created upon subdivision. Keith Thompson, solicitor for the Fund and the Developer, was tasked with negotiating the priority agreement with Romspen. He states that the Parcel Map identified the "Phase 1" and "Future Phase" lands contemplated in the Commitment Letter. The "Phase 1" lands were identified as Parcels 1 to 4, being the Townhouse Parcel, Alpine Single Family Parcel, and two Golf Parcels. The "Future Phase" lands were identified as Parcels 5 and 6, being the Vineyard Parcel and Village Centre Parcel. This same lot numbering was to be used throughout the negotiation and finalization of the priority agreement.

11 Mr. Thompson understood that Parcels 1 to 4 were to be developed as "Phase 1" because they had access to roads and services from the adjacent municipal lands. Parcels 5 and 6 were the "Future Phase" lands because they required construction of a road into the village centre as well as other servicing. Parcel 5 (the Vineyard), was intended for a vintner for the purpose of attracting tourists to the village centre, which was considered a lower priority.

12 In March 2011, Mr. Thompson, on behalf of the Fund, began negotiations with Romspen by its solicitor Greg Umbach.

13 Mr. Thompson, in negotiating the priority agreement, understood that the final subdivision plan would be ready in early April 2011 in advance of the closing scheduled for mid-April 2011. In that way, it was anticipated that the subdivision plan would be ready to be appended to the final priority agreement as Schedule D. He decided that, pending completion of the subdivision plan, a "placeholder" document would be inserted in the priority agreement as Schedule D so that the final version of the subdivision plan could be slip-sheeted when available.

14 On March 11, 2011, Mr. Thompson forwarded the first draft of the priority agreement to Mr. Umbach. The "placeholder" document appended as Schedule D was the Parcel Map.

15 In mid-March 2011, Mr. Thompson and another Owen Bird solicitor met with Mr. Umbach. They provided Mr. Umbach with the Parcel Map and a copy of a prior, lapsed subdivision plan which had been prepared but never filed (the "Lapsed Plan"). They advised Mr. Umbach as to: the identity of the "Future Phase" lands; that the definition of the priorities in the draft priority agreement was based on the Parcel Map; that the priority agreement would be held by the parties until the subdivision plan was finalized and attached to the priority agreement; and, that the Lapsed Plan did not have the same numbering as the Parcel Map, but the final subdivision plan would reflect the numbering on the Parcel Map. Mr. Thompson states that Mr. Umbach expressed no concerns about this "practical solution" addressing the fact that a final version of the subdivision plan was not yet available. Although not directly on point, Mr. Umbach states that no agreement was ever reached that the development would proceed in accordance with the Parcel Map.

16 In March or early April 2011, it became apparent that the final version of the subdivision plan would not be ready before the filing of the Fund's prospectus, which needed to include the priority agreement as a material agreement. Mr. Thompson states that he and Mr. Umbach agreed to use the Lapsed Plan as the "placeholder" at Schedule D because it would conform with the proposed definition of "Subdivision Plan" which was initially drafted as "...a subdivision plan *substantially* in the form of the plan attached as Schedule D to this Agreement" (emphasis added). The rationale for using the Lapsed Plan was to use a document that actually looked like a subdivision plan, rather than the Parcel Map which was a development drawing.

17 The word "substantially" was used in the definition of "Subdivision Plan" arising from Mr. Umbach's concerns that the boundaries on the Lapsed Plan might not match the boundaries on the Parcel Map, such that Romspen's priority on the "Phase 1" lands might not be properly outlined on the Lapsed Plan by reason of the Lapsed Plan identifying a portion of the "Future Phase" lands as incorporating a portion of the "Phase 1" lands. In addition, Mr. Umbach revised the definition of "Subdivision Plan" to refer to Romspen's right to review and approve it in its sole discretion given outstanding concerns regarding the yet to be finalized subdivision plan.

18 The first executed version of the priority agreement was signed on April 14, 2011, and filed on SEDAR on April 15, 2011 (the "First Priority Agreement"). The document attached as Schedule D to that agreement was the Lapsed Plan. The First Priority Agreement continued to use the parcel numbering from the Parcel Map and did not use the numbering in the Lapsed Plan.

19 Also on April 15, 2011, the Developer and the Fund filed the prospectus for the initial public offering of units in the Fund (the "Prospectus"). Consistent with the Commitment Letter, the Prospectus stated at page 26:

> *Interlender Agreement*
>
> The Interlender Agreement sets out the agreement between the Trust and Romspen concerning the priority of their respective security and the distribution of net income of the Limited Partnership. ... The Limited Partnership intends to

> file the Subdivision Plan in April, 2011 and at that time the Trust Mortgage will have a first ranking charge over Parcels 5 and 6, a second ranking charge over Parcels 1, 3 and 4, and a third ranking charge over Parcel 2. Romspen will have a first ranking charge over Parcels 1, 2, 3, and 4 and a second ranking charge over Parcels 5 and 6. ... The parties have also agreed that all net income of the Limited Partnership will be applied to repay the Romspen Loan.

20 Under the heading "Subdivision Plan", the Prospectus shows the Parcel Map. It identifies Parcels 1 to 4 as the Townhouse Parcel, Alpine Single Family and two Golf Parcels and describes them as the initial phase of the development. It identifies Parcels 5 and 6 as the Vineyard and Village Centre Parcels and states that they "will be developed in subsequent phases".

21 Beginning in May 2011, Lloyd Aasen began to separately represent the Fund; after the closing of the public offering on June 2, 2011, Owen Bird's retainer was solely with the Developer.

22 Romspen and the Fund negotiated and executed two later minor amendments to the First Priority Agreement in May 2011, but no change arose regarding the numbering of the parcels and the priority assigned to those parcels. From Mr. Aasen's perspective, his negotiations in relation to the priority agreements did not involve the priorities and parcel designations that had been established in the First Priority Agreement, as he regarded those matters as "substantially settled".

23 In October 2011, the Developer and Romspen agreed to increase the financing to $41 million. Romspen sought the Fund's consent to this increase. Arising from that request, the Fund requested changes to the First Priority Agreement, as amended, and further negotiations ensued.

24 As stated above, the Interlender Agreement was executed by Romspen and the Fund on January 15, 2012 and then filed in the Land Title Office. By this time, the subdivision plan was prepared but not yet fully executed or filed in the Land Title Office. A draft version of what was to become the final subdivision plan was inserted as Schedule D to the Interlender Agreement.

25 Raymond Janzen, the professional surveyor who created the subdivision plan, selected a new lot numbering scheme to reflect his view of the most orderly, continuous and efficient lot numbering arrangement for the new lots. In doing so, he changed one of the Golf Parcels to Parcel 6 and changed the Village Centre Parcel to Parcel 4. His choice of numbering was not based on instructions or directions from the Developer, Romspen, the Fund or any other party; rather, it solely reflected his professional decision as a surveyor. In changing the lot numbering, the surveyor was unaware that the selection of lot numbering was relevant to the priority of the Fund and Romspen's respective security.

26 At the time, the change in lot numbering was not noticed by the Developer, the Fund or Romspen or their solicitors. Mr. Aasen's final version of the Interlender Agreement did not attach any subdivision plan and he is not aware who attached the draft subdivision plan as Schedule D prior to its registration. He only received the subdivision plan subsequent to registration of the Interlender Agreement. Mr. Aasen indicated that although it was hard to read, he was able to confirm that the layout appeared to be substantially the same as negotiated between the parties. He did not, however, notice the surveyor's change in the lot numbering.

27 On May 29, 2012, the Developer filed the final subdivision plan in the Land Title Office (the "Subdivision Plan"). But for the change in the assignment of Parcels 4 and 6, the Subdivision Plan is consistent with the parties' agreement concerning priorities.

28 In mid-June 2013, Mr. Aasen became aware of the error in Schedule D to the Interlender Agreement. His firm wrote to Mr. Umbach identifying the error and requested that Romspen sign all documents necessary to correct the error. Also in June 2013, the Developer acknowledged that Schedule D to the Interlender Agreement was "wrong". Finally, on October 31, 2013, Mr. Thompson wrote to Mr. Umbach also pointing out the error and requesting that Romspen sign documentation to correct it.

29 Mr. Umbach responded to Mr. Thompson that Romspen did not necessarily agree that there was an error but, in any event, the matter should be held in abeyance pending further restructuring efforts by the Developer. Finally, in June 2014, the Fund's lawyer made a further request for Romspen's cooperation in correcting the error, without success.

The Law

30 Both Romspen and the Fund agree that the issue that arises is one of mutual mistake, as opposed to unilateral mistake on the part of the Fund. This particularly arises since there is no suggestion that Romspen was aware of Mr. Janzen's switch of the parcel numbers and the resulting error prior to its execution of the Interlender Agreement.

31 The law of rectification for mutual mistake has been recently summarized by this court in *McPeake v. Canada (Attorney General)*, 2012 BCSC 132 (B.C. S.C.):

> [16] Rectification is an equitable remedy that courts may apply to various legal documents that stand as instruments expressing intended legal relations. Rectifiable documents can include contracts ... Rectification does not change the intended legal relation: it would not, for example, change the essence of the agreement between contracting parties. Rather, rectification changes an instrument's mistaken expression of that intention. Rectification is restorative, not "retroactive": "[Rectification] is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other" (*Performance Industries*, para. 31). Since rectification restores a truth to an instrument's expression, it acts, in time, from the point of instrument formation forward.
>
> [17] The party seeking rectification bears the onus. For the court to exercise its equitable jurisdiction to rectify a document, a petitioner must satisfy the court that the request to rectify merely aligns the document with the true intentions underlying it, and that the aspects to be rectified are mistakes that obstruct the true intentions behind the document's formation. Long before Binnie J. discussed rectification in *Performance Industries*, Vice-Chancellor W. M. James wrote in *Mackenzie *v. Coulson*, (1869) *L.R. 8 Eq. 368 at 375, "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts."

32 The governing test for rectification for mutual mistake was set out in *Bank of Montreal v. Vancouver Professional Soccer Ltd.* (1987), 15 B.C.L.R. (2d) 34 (B.C. C.A.) at 36-37, in that the applicant seeking rectification must establish:

> 1. that the written instrument does not reflect the true agreement of the parties; and
>
> 2. that the parties shared a common continuing intention up to the time of signature that the provision in question stand as agreed rather than as reflected in the instrument. ...

33 The Fund bears the onus of proving that it meets the test set out in *Vancouver Professional Soccer* on a balance of probabilities: *McPeake* at paras. 19-20.

Discussion and Conclusion

34 The evidence of Mr. Thompson, Mr. Aasen and the Fund's representative, Iain MacKay, is overwhelmingly to the effect that it was always the intention of the parties that the parcels over which the Fund was to have priority were to be the "Vineyard Parcels" and the "Village Centre Parcels". It was these very lots which were identified as the "Future Phase" of the development. These two lots were identified on the Parcel Map and thereafter incorporated into the Prospectus as Parcels 5 and 6. In addition, throughout all versions of the priority agreement, these two lots were identified as Lots 5 and 6 respectively, arising from the Parcel Map numbering.

35 The evidence also clearly establishes that the only reason for the change in the effect of the Interlender Agreement arose from the unilateral decision of the surveyor, Mr. Janzen, to change the lot numbering in the Subdivision Plan, a draft of which was appended to the Interlender Agreement. It was only as a result of this change that the priority lot which was to be assigned to the Fund on the Village Centre Parcel (Parcel 6), became a priority lot on one of the Golf Course Parcels (Parcel 4).

36 As a result, the change in the lot numbering in the Subdivision Plan resulted in the Interlender Agreement not reflecting the true allocation of the lots over which the Fund was to have priority, namely the Vineyard Parcel and Village Centre Parcel, which are indicated as Parcels 5 and 6 on the Parcel Map and 5 and 4 on the Subdivision Plan.

37 Romspen's evidence does not suggest in any fashion that it held any contrary intention regarding the assigned priority on the lots when it signed the Interlender Agreement, other than what was originally intended by the parties in April 2011 when the negotiations on the priority agreement first arose. Indeed, despite having initially opposed this relief, Romspen's counsel indicated at the hearing that he then had no instructions to oppose the relief sought.

38 In conclusion, it is my view that the Fund has met the test to justify rectification of the Interlender Agreement and related documentation to correct the reference to the Parcel numbers. In short, I am satisfied that there was a common continuing intention on the part of Romspen and the Fund as to the allocation of the priority lots to the Fund and that the Interlender Agreement did not reflect that true intention. As such, an order for rectification of the Interlender Agreement is appropriate.

39 Romspen also sought an order that, if the Interlender Agreement was rectified, the Interlender Agreement would be "otherwise unaffected". The rationale for doing so was stated to be based out of an abundance of caution and to avoid unintended consequences.

40 In my view, this further provision is not necessary. The relief granted on the rectification issue is discrete and relates only to the lot numbering issue, as I describe above. I see no basis upon which this order could be seen or interpreted as affecting any other aspect of the Interlender Agreement.

Disposition

41 Accordingly, I granted the declaration sought by the Fund to rectify the Interlender Agreement such that:

a) the Parcels for which the Fund subordinates and postpones the Fund Indebtedness and Security to the Romspen Indebtedness and Security (as those terms are defined in the Interlender Agreement) are Parcels 1, 2, 3 and 6, and not Parcels 1, 2, 3 and 4; and

b) the Parcels for which Romspen subordinates and postpones the Romspen Indebtedness and Security to the Fund Indebtedness and Security (as those terms are defined in the Interlender Agreement) are Parcels 4 and 5 and not Parcels 5 and 6.

42 I also granted an order that the parties execute and deliver new documentation, as necessary, to give effect to the rectification of the Interlender Agreement, in order to allow a modification of the Interlender Agreement to be registered at the Land Title Office and at any other public record.

43 Finally, the Fund sought an award of costs against Romspen in respect of its rectification application which I grant on a party and party basis. However, the Fund indicated that it may wish to seek special costs or party and party costs on Scale C. In that event, I ordered that the Fund was to apply to do so within 30 days of November 26th. Subsequently, in light of the upcoming application to re-open the summary trial, on December 11, 2015, I ordered that any application for special costs or Scale C costs on the rectification issue can be addressed at that same time.

Order accordingly.