Court File No.: CV-17-11846-00CL

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 SEARS CANADA INC.,
CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC.,
THE CUT INC., SEARS CONTACT SERVICES INC.,
INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC.,
INITIUM TRADING AND SOURCING CORP.,
SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC.,
2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC.,
1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

BOOK OF AUTHORITIES OF OXFORD PROPERTIES GROUP

(Motion to Appoint Arbitrator, Returnable September 20, 2018)

September 19, 2018

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TO: THIS HONOURABLE COURT
AND TO: THE SERVICE LIST

Court File No.: CV-17-11846-00CL

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Applicants

INDEX

Tab 1

2003 CarswellOnt 2992
Ontario Superior Court of Justice

Axa Insurance v. Belair Direct Insurance Co.

2003 CarswellOnt 2992, [2003] O.J. No. 3059, [2003] O.T.C. 716, 124 A.C.W.S. (3d) 420

AXA INSURANCE (Applicant) and BELAIR DIRECT INSURANCE COMPANY (Respondent)

Siegel J.

Heard: July 23, 2003
Judgment: July 23, 2003
Docket: 03-CV-248524CM2

Counsel: Marie-Helene Belanger for Applicant
Ryan M. Naimark for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Public
Related Abridgment Classifications
Alternative dispute resolution
IV Arbitrators
IV.1 Appointment
IV.1.b Appointment by court
Headnote
Alternative dispute resolution --- Arbitrators — Appointment — Appointment by court
Table of Authorities
Cases considered by *Siegel J.*:
AXA Insurance Co. v. Markel Insurance Co. of Canada (2001), 2001 CarswellOnt 288, 9 M.V.R. (4th) 74, 140 O.A.C. 109, 26 C.C.L.I. (3d) 199, (sub nom. *Axa Insurance v. Markel Insurance Co. of Canada*) [2001] I.L.R. I-3967 (Ont. C.A.) — considered
Statutes considered:
Arbitration Act, 1991, S.O. 1991, c. 17
s. 10(1) — considered

s. 11(1) — referred to

***Siegel J.*:**

1 The applicant seeks the appointment of an arbitrator under sub-section 10(1) of the *Arbitration Act* S.O. 1991, c.17. The Act provides discretion to this Court without giving any guidance as to the principles to be applied in making the appointment.

2 The applicant proposed Mr. Jonathan Fidler as its first choice. The parties agree he is well qualified. However, the respondent objects on two grounds. The first is that Mr. Fidler previously decided a case on a similar issue as an arbitrator. That decision was upheld by the Court of Appeal and reported as *AXA Insurance Co. v. Markel Insurance Co. of Canada*, [2001] O.J. No. 294 (Ont. C.A.). In that case, Mr. Fidler found in favour of the applicant in the present motion. The respondent also suggests that Mr. Fidler is not independent for purposes of sub-section 11(1) of the Act because the daughter of his business partner is engaged on the file at the law firm advising the respondent. As to this

latter allegation, the applicant says there is no conflict of interest and is prepared to waive any rights it might otherwise have to assert the existence of a conflict.

3 In my view, neither of these objections justifies a decision that Mr. Fidler is not independent for purposes of sub-section 11(1) of the Act. I want to state that nothing in these proceedings suggested that Mr. Fidler was other than well qualified or that he would not, if appointed, fulfill his duties in an impartial professional manner.

4 However, I do not believe it is appropriate, in the exercise of the Court's discretion under sub-section 10(1) of the Act, to appoint a nominee in circumstances where the opposing party has objected publicly to such an appointment.

5 An appointment of one party's nominee in the face of public resistance by the other party risks injecting an extraneous element of hostility into the arbitration process and, albeit unconsciously in most cases, into the deliberation process of the arbitrator. Given the availability of other qualified arbitrators, I believe this risk to be unnecessary. For this reason I decline to appoint the applicant's preferred nominee.

6 As the parties have been unable to agree on a selection notwithstanding the Court's strong encouragement to do so during a break in this morning's proceedings, the Court proposes to establish the following process.

7 Each party is to submit a short brief containing two proposed nominees to the Court together with a curriculum vitae and, at their option, a written submission, not exceeding one page in length per nominee, setting out its reasons for appointing such individuals. Each party is also entitled to include, at their option, written submissions, again not exceeding one page in length per nominee, setting out any objections to the opposing party's nominees. Each party shall, therefore, have 15 days to deliver their submissions to the other party and shall be required to file their written submissions with the Court within 25 days of the date of this endorsement.

8 Upon receipt of these submissions, unless the Court is of the view that none of the nominees is suitably qualified, the Court will appoint an arbitrator from among the nominees.

9 Nothing in these reasons is to be taken as precluding the applicant from proposing Mr. Rudolf or Mr. Dempster. With respect to Mr. Dempster, the respondent has raised the same issue of a potential conflict relating to Ms. Malach's involvement in the case as for Mr. Fidler. It also says Mr. Dempster does not generally undertake arbitrations but restricts his activities to mediations. I do not propose to address these issues at the present time. Any such objections will be considered by the Court if Mr. Dempster is nominated by the applicant.

10 With respect to the respondent's list of nominees, the applicant opposes the appointment of one of the nominees based on a corporate policy not to seek the appointment of that individual on arbitration matters. The Court should not seek to impose the appointment of that individual for the same reason it has declined to appoint the applicant's preferred nominee. With respect to the remaining names, the applicant's counsel indicated that she would not recommend any of these individuals as her firm had no experience with any of them. This may be a consideration for the respondent in identifying its proposed nominees. However, the respondent shall be at liberty to propose any of those remaining individuals if it so chooses.

11 Costs are reserved to be dealt with in the decision with respect to appointment of the arbitrator.

Tab 2

2008 CarswellOnt 8763
Ontario Superior Court of Justice

Gasmo Investments Inc. v. 112660 Ontario Inc.

2008 CarswellOnt 8763, 177 A.C.W.S. (3d) 28

Gasmo Investments Inc. (Applicant) and 112660 Ontario Inc. (Respondent)

Echlin J.

Heard: September 16, 2008
Judgment: September 16, 2008
Docket: 08-CV-349322PD2

Counsel: Chris Maggirias for Applicant
Vusumzi M.N. Msi for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Public
Related Abridgment Classifications
Alternative dispute resolution
IV Arbitrators
IV.1 Appointment
IV.1.e Miscellaneous
Headnote
Alternative dispute resolution --- Arbitrators — Appointment — General principles
Table of Authorities
Statutes considered:
Arbitration Act, 1991, S.O. 1991, c. 17
s. 10 — referred to

***Echlin J.*:**

1 This is an application seeking guidance in the appointment of an arbitrator under a lease first entered into on December 1, 1996 between the Applicant and the Respondent Company. The first term ended nearly 2 years ago and the parties have still not been able to agree on an arbitrator. Section 17.17 of the lease indicates that it shall be governed by the *Arbitration Act* and section 10 of that statute indicates that this Court may make the determination, from which there is no appeal.

2 When I broached the suggestion that I order that their proposed arbitrators determine a third party, both counsel indicated that they would prefer that I make the determination. I shall do so.

3 The issue is simple. Mr. Maggirias urged that I should strongly prefer retired Justice Ground as a representative of ADR Chambers as a result of the importance of procedural fairness to the process. Mr. Msi urged that technical experience was an important factor that Mr. Edwardh or three others would bring to the table.

4 Mr. Maggirias was unable to establish to my satisfaction that those he proposed had considerable technical experience in this field, nor was he able to satisfy me that those proposed by Mr. Msi would be unable to deliver procedural fairness, if such is required [albeit I feel strongly that it should be delivered regardless of whether it's required].

5 Mr. Msi convinced me that Mr. Edwardh has the requisite experience in both the technical field (*vis* his experience in appraising) but also with respect to the process of ADR — (*vis* his membership and involvement in arbitrations dating back to 1989).

6 I therefore order that Mr. Grant Edwardh, C. Arb., be appointed as arbitrator pursuant to section 17.17 of the house in question and determine the minimum rent for the 5-year renewal period commencing December 1, 2006.

7 Costs shall follow the event. I award $2,500.00 in costs inclusive of G.S.T. and disbursements to the respondent payable by the Applicant by 12:00 noon on September 30, 2008, an amount not objected to by Mr. Maggirias.

End of Document

Tab 3

2018 ONSC 4075
Ontario Superior Court of Justice

ICP v. JCP

2018 CarswellOnt 10642, 2018 ONSC 4075, 295 A.C.W.S. (3d) 235

ICP (Applicants) and JCP (Respondents)

JCP (Applicants) and ICP (Respondents)

Wilton-Siegel J.

Heard: June 19, 2018
Judgment: June 29, 2018
Docket: CV-18-00598028-00CL, CV-18-597907-00CL

Counsel: Chris G. Paliare, Andrew Lokan, for Applicants
Earl A. Cherniak, Jason Squire, for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial
Related Abridgment Classifications
Alternative dispute resolution
IV Arbitrators
IV.1 Appointment
IV.1.b Appointment by court
Headnote
Alternative dispute resolution --- Arbitrators — Appointment — Appointment by court
Applicants gave notice of intention to sell all of their investment in company — Respondents purported to accept offer — Both sides served notice to arbitrate resulting dispute but raised and framed issues differently — In addition, applicants sought appointment of named individual as sole arbitrator while respondents sought appointment of named individual to panel of three arbitrators that would include applicants' nominee — Parties applied for directions — Order accordingly — While notices raised certain common issues, applicants' notice was limited to operation of provisions of company's shareholders' agreement including validity of respondents' acceptance while respondents' notice also alleged breach of confidentiality, asserted partner-like obligations and sought relief under another shareholders' agreement — Primary concern was to give effect to previous agreements between parties without giving one strategic advantage over other — Additional issues raised by respondents were directed to be determined in separate arbitration — Arbitration of issues raised in applicants' notice was ordered to proceed before panel of three arbitrators — Three-member panel panel was consistent with language in shareholders' agreement and with parties' post-contractual conduct — Applicants' nominee was not opposed by respondents and, therefore, confirmed — Respondents' nominee was opposed by applicants and not confirmed on basis nominee's participation as member of previous arbitration panel was sufficient to give rise to reasonable apprehension of bias — Respondents' alternative nominee was confirmed — In accordance with past practice, two chosen arbitrators were directed to appoint third.
Table of Authorities
Cases considered by *Wilton-Siegel J.*:
Angle v. Minister of National Revenue (1974), [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544, 2 N.R. 397, 1974 CarswellNat 375, 28 D.T.C. 6278, 1974 CarswellNat 375F (S.C.C.) — followed
Haas v. Gunasekaram (2016), 2016 ONCA 744, 2016 CarswellOnt 16116, 62 B.L.R. (5th) 1 (Ont. C.A.) — followed
R. v. Nolin (1982), [1982] 6 W.W.R. 1, 29 C.R. (3d) 373, 1 C.C.C. (3d) 36, 17 Man. R. (2d) 379, 1982 CarswellMan 112 (Man. C.A.) — referred to

Toronto Standard Condominium Corp. No. 2130 v. York Bremner Developments Ltd. (2014), 2014 ONSC 96, 2014 CarswellOnt 200 (Ont. S.C.J.) — followed

Statutes considered:

Arbitrations Act, R.S.O. 1990, c. A.24

Generally — referred to

s. 9 — considered

s. 10(1) — pursuant to

s. 10(2) — considered

APPLICATION for directions concerning arbitration.

***Wilton-Siegel J.*:**

1 On these applications, each of the applicants seek the appointment of an arbitrator pursuant to the Court's authority under s. 10(1) of the *Arbitrations Act*, *1991*, S.O. 1991, c.17 (the "Act").

Factual Background

2 Each of the parties has served a notice to arbitrate with respect to matters arising in respect of a notice dated September 18, 2017 of the ICP to sell all of their investment in QCo (the "ICP Offer") and the JCP's purported acceptance of the ICP Offer on March 17, 2018 (the "JCP Acceptance").

3 The ICP seek the appointment of the Hon. Lee Ferrier Q.C. as sole arbitrator to determine the dispute described in their notice to arbitrate dated April 19, 2018 (the "ICP Notice").

4 The JCP seek the appointment of the Hon. Douglas Cunningham Q.C. to an arbitration panel of three arbitrators, to which Mr. Ferrier would be the ICP nominee. Under the JCP proposal, these two appointees would choose a chair and the panel would determine the dispute described in the JCP notice of April 25, 2018 (the "JCP Notice"). The JCP also propose that, if the panel concluded that section 7.3 of the QCo Shareholders Agreement (the "QSA") requires the issues with respect to the QSA to be arbitrated before a single arbitrator, the chair of the panel would be appointed for such purpose.

5 In this Endorsement, the ICP Notice and the JCP Notice are collectively referred to as the "Notices".

The ICP Notice

6 The ICP Notice was delivered pursuant to section 7.3 of the QSA. The ICP Notice identified the following issues for arbitration:

(1) Whether the alleged short comings of the JCP Acceptance or the promissory note delivered in connection therewith (the "Note") constituted a rejection by the JCP of the ICP Offer giving rise to an option in favour of the ICP pursuant to section 2.3 of the QSA;

(2) In the event the answer to #1 is in the affirmative, is the ICP option to purchase all of the JCP investment in QCo?

(3) In any event, what are the appropriate and commercially reasonable terms of the Note required to make such effective as payment pursuant to sections 2.2 and 2.3 of the QSA?

(4) Should the time period in section 2.3 of the QSA be tolled from the date of the JCP Acceptance until the date of the final determination of the arbitration? and

(5) Should the running of a second ICP offer dated November 2017 to sell all of their shares in QCo be tolled from the date of the JCP Acceptance until the date of the final determination of the arbitration?

The JCP Notice

7 The JCP Notice was served pursuant to both section 7.3 of the QSA and section 8 of the agreement among the shareholders of PCo (the "PSA"). The JCP Notice sought the following relief in the arbitration:

(1) A declaration that the JCP Acceptance was a valid and binding acceptance pursuant to section 2.2 of the QSA;

(2) A declaration that the Note meets all the requirements of section 2.2 of the QSA;

(3) A declaration that the sale of ICP's investment in QCo closed on March 17, 2018, being the date of the JCP Acceptance;

(4) In the alternative, a declaration that the ICP Offer was not made in accordance with the provisions of section 2.1 of the QSA because it did not properly reflect the NAV of QCo's common shares and, accordingly, the ICP have no rights under section 2.3 of the QSA even if the JCP Acceptance is not a valid acceptance;

(5) A declaration that the ICP infringed their confidentiality obligations under section 4(c) of the PSA and under the QSA in their communications with the Hospitals of Ontario Pension Plan ("HOOP") in seeking to sell their investment in QCo to HOOP; and

(6) An order restraining the ICP from making any further disclosures to third parties contrary to section 4(c) of the PSA.

8 In addition, in its reply factum on this application, the JCP amended the JCP Notice to include a further request for a declaration that IC, and MCo acting as the agent for or alter ego of IC, (collectively, the IC Respondents") have breached their obligations under sections 1(b), 3(b) and 5(a) of the PSA by refusing to meet, mediate without preconditions, or otherwise engage constructively in resolving the disputes over the JCP Acceptance and the Note in a manner that preserves the existing ownership structure and management of QCo, PCo and the corporate group that PCo controls. IC is the only ICP member that is bound by the PSA, although IC is not a shareholder of PCo.

9 The JCP assert that, under sections 1(a) and 3(b) of the PSA, the ICP Respondents were under an obligation to endeavour to ensure the stability of ownership and orderly management succession at the senior levels of the corporate group controlled by PCo. The JCP argue that, therefore, the IC Respondents owed quasi-partnership obligations to the JCP under section 5(a) of the PSA which states that PCo, while organized as a corporation, will be operated, to the extent practical, as a business partnership. The JCP assert that, in proceeding to assert the claim in the ICP Notice, the IC Respondents breached the provisions of the PSA set out above, as well as sections 6.4(c), 7.1 and 7.2 of the QSA. The foregoing claims, to the extent that they seek relief contemplated by the PSA, are herein collectively referred to as the "JCP partnership claims".

10 It is significant for the present proceedings that the JCP does not seek a consolidation order respecting the two arbitrations. The ICP submit that consolidation cannot occur without the consent of the parties. They effectively envisage a hearing of the issues raised in both Notices, other than such confidentiality issues and the JCP partnership claims, before a sole arbitrator appointed under section 7.3 of the QSA.

Preliminary Observations

11 The following considerations inform the conclusions below.

12 First, there are broadly three common issues between the issues raised in the Notices:

1. Whether the "Purchasing Shareholders" for the purposes of sections 2.1 to 2.3 of the QSA must include all of the parties to the QSA other than the "Selling Shareholders"?;

2. What are the terms of any note, delivered in payment of the investment of a QSA shareholder pursuant to sections 2.1 to 2.3, that are required to satisfy the provisions of section 2.2 thereof?; and

3. Whether the ICP's calculation of the NAV of the QSA shares complied with the provisions of section 2.1 of the QSA?

Any determination of the issues in this proceeding must provide, or allow for, a procedure that would avoid the possibility of conflicting determinations of these issues.

13 Second, the court must have regard to the competence — competence principle as codified in s. 17 of the Act and as articulated by the Court of Appeal in *Haas v. Gunasekaram*, 2016 ONCA 744 (Ont. C.A.) at paras. 14-15 and further described in *Toronto Standard Condominium Corp. No. 2130 v. York Bremner Developments Ltd.*, 2014 ONSC 96 (Ont. S.C.J.) at paras. 16-21.

14 In this regard, the ICP raise a number of issues regarding the JCP claims respecting the alleged breach of confidentiality obligations by the IC Respondents. These comprise the following:

1. That there is no evidence of any breach of confidentiality obligations under either the PSA or the QSA;

2. That there is no evidence of any damage suffered as a result of the alleged breach;

3. That the purpose of the arbitration is an inquiry rather than arbitration of a dispute;

4. That the arbitration may be premature if the ICP parties succeed in the arbitration contemplated by the ICP Notice;

5. That neither of the two issues identified by the JCP as requiring an arbitral panel to consider both the PSA and the QSA — ownership stability and the ICP's alleged breach of confidentiality obligations — require an arbitral jurisdiction derived from the PSA: and

6. That the arbitration panel would not have jurisdiction over MCo pursuant to section 8 of the PSA as MCo is not a party to the PSA.

15 In my view, it is premature for the Court to decide any of these issues raised by the ICP nor is it appropriate to take the ICP's position on these issues into consideration in determining the arbitration panel to address them. The Court should give effect to the competence — competence principle in respect of these issues to the extent an arbitration panel is appointed to arbitrate the JCP's claims under the PSA. Accordingly, such arbitration panel, rather than the Court, should address its own jurisdiction to arbitrate these issues raised in the JCP Notice.

16 Third, each of the parties argues that their proposal is the most practical solution in the present circumstances. The Court should, however, as much as possible, seek solely to give effect to the agreements previously reached between the parties and avoid giving one party a strategic advantage over another under the guise of accepting one party's view of the more "practical solution" over that of the other party. In this regard, the following considerations are relevant.

17 First, a principal concern of the ICP is that the JCP seeks a process that will delay a determination by the arbitration panel thereby subjecting it to the risk of a market decline in the event it is successful in its claim that it has the right to buy out the entire position of the JCP in QCo. In broad terms, the ICP suggest that a panel of three arbitrators will take longer to deliberate than a panel of one. They also suggest that the evidentiary requirements to determine the JCP allegations of breach of confidentiality obligations and of the JCP partnership obligations will further delay a determination of the

issues raised in the JCP Notice. This is a legitimate concern, although I am not certain that I accept the underlying market risk as conceived by the ICP. The ICP concern for timing must, however, be balanced against the right of the JCP to raise all issues relevant to its position on the operation of sections 2.1 to 2.3 of the QSA.

18 Second, the ICP say that arbitration of the issues raised in the JCP Notice will be more expensive that an arbitration before a single arbitrator limited to the issues raised under both Notices pertaining to sections 2.1 to 2.3 of the QSA. Given the amount at issue in these proceedings, this is not a material consideration and it is therefore disregarded.

19 Third, the ICP assert that their process would be more efficient than the process proposed by the JCP. This appears to be based on: (1) the assumption that an appointment of a single arbitrator is more efficient than a panel of three; and (2) more particularly, on the nomination of Mr. Ferrier as the sole arbitrator given his involvement in the most recent arbitration in which the issues regarding the JCP Acceptance were raised but not decided for jurisdictional reasons.

20 I think the first proposition is questionable, apart from the timing considerations already mentioned. In practice, the efficiency of an arbitration panel depends on the approach of the parties and the direction of the arbitrator, rather than the bare number of arbitrators. I acknowledge, however, that the claim of breach of the confidentiality obligations described above and the JCP partnership claims may entail a more extensive evidentiary base and therefore add some time to the arbitration process. With respect to the second proposition, while there may be some modest benefit flowing from Mr. Ferrier's previous involvement, I do not see this as a material consideration. The issues under the QSA are not so complicated that a new panel could not apprise itself or themselves of the issues and evidence with the assistance of the parties in a timely manner.

Analysis and Conclusions

21 I propose to address the relief sought in these applications by addressing the following three questions in order:

1. What is the proper subject of the arbitration(s) raised by the Notices?

2. What is the appropriate size of the arbitration panel?

3. Who should be the member(s) of the arbitration panel?

The Arbitrations Raised by the Notices

22 The two Notices before the Court reflect different conceptions of the issues between the parties. The ICP suggest that the issues between the parties are all addressed in the ICP Notice and that the additional issues raised in the JCP Notice are included simply in an effort to support the JCP claim for a panel of three arbitrators. There may be some truth to this view, although the JCP are entitled to raise the quasi-partnership obligations as a potential consideration in the interpretation of sections 2.1 to 2.3 of the QSA, as discussed below.

23 For its part, the JCP suggest that the JCP Notice is broader than the ICP Notice and subsumes the issues raised in the ICP Notice. However, the situation is more complex and must be analyzed otherwise.

24 The ICP Notice raises issues that are limited to the operation of sections 2.1 to 2.3 of the QSA including without limitation the validity of the JCP Acceptance. It pertains solely to matters under the QSA. The JCP Notice principally pertains to such matters as well, although it goes beyond a defence to the ICP claims as the ICP suggests. It also purports to engage two matters that are based on claims of breach of provisions of the PSA for which relief is sought in an arbitration established under section 8 of the PSA — the issues pertaining to confidentiality and the assertion that specific provisions under the PSA impose partner-like obligations on the IC Respondents. Moreover, the JCP partnership claims are asserted both with a view to obtaining relief under the provisions of the PSA and as obligations of the IC Respondents that the JCP say should inform the interpretation of sections 2.1 to 2.3 of the QSA.

25 In my view, the issues raised in the JCP Notice should therefore be addressed in separate arbitrations under the QSA and the PSA as follows: (1) an arbitration under the QSA with respect to the rights and obligations of the JCP and the ICP thereunder in respect of the JCP Acceptance; and (2) an arbitration under the PSA with respect to the rights and obligations of the JCP and the IC Respondents under the PSA in respect of the confidentiality issues, insofar as they are arbitral, and the JCP partnership claims to the extent that relief is sought under the PSA based on the provisions of that agreement. In short, the proper approach requires separate arbitrations of the disputes arising under the QSA asserted by both parties and of any remaining disputes arising under the PSA asserted by the JCP.

26 On this basis, the appropriate disposition of the issues before the Court in these applications is to appoint an arbitrator to arbitrate the issues between the parties under the QSA pertaining to the ICP Offer and the JCP Acceptance separately from the remaining issues asserted by the JCP for which relief is sought under the PSA. To be clear, it is the Court's expectation that, on this basis, all issues pertaining to the JCP Acceptance and the ICP Offer would be addressed in the arbitration under the QSA and that, to the extent necessary, the Notices would be amended accordingly. It is also the Court's expectation that the issues to be addressed in that arbitration would include the JCP assertion of the relevance of the alleged quasi-partnership obligations of the IC Respondents for the interpretation of sections 2.1 to 2.3 of the QSA. The arbitration would not, however, extend to consideration of the JCP partnership claims to the extent that the JCP seek relief under the provisions of the PSA based on a breach of the any provisions of that agreement. In this regard, I agree with the ICP that the Court cannot mandate a process that effectively consolidates disputes under the PSA with disputes under the QSA without the consent of the parties.

The Size of the Arbitration Panel

27 The parties take different positions on the size of the panel contemplated by section 7.3 of the QSA. The ICP say that s. 9 of the Act applies to mandate a single arbitrator. The JCP say that the language of section 7.3, as well as past practice, indicate an intention of the parties that any dispute under the QSA would be arbitrated before a panel of three arbitrators.

28 In section 7.3 of the QSA, the parties agreed:

> " . . . to resolve material disagreements through binding arbitration exercised through the appointment of a mutually respected business colleague, failing which a panel of arbitrators will be appointed and function in accordance with the rules of arbitration prescribed by the Province of Ontario."

29 Section 9 of the Act provides that an arbitration panel shall be composed of one arbitrator "[i]f the arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal."

30 In earlier proceedings that led to the appointment of Mr. Ferrier as the arbitrator of a dispute between the parties regarding the validity of the ICP Offer, Dunphy J. determined that the language of section 7.3 of the QSA required the appointment of a single arbitrator. He reasoned that section 9 of the Act applied. Pursuant to s. 10(2) of the Act, the decision of Dunphy J. was not appealable.

31 On this hearing, the ICP assert that this matter is *res judicata* as between the parties as a matter of issue estoppel. The JCP submit that the matter was not fully argued before Dunphy J. They say, in particular, that both the ICP and the JCP had accepted the appointment of panels of three arbitrators in all previous arbitrations between the parties under section 7.3 of the QSA.

32 The leading Canadian decision on issue estoppel remains *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, 47 D.L.R. (3d) 544 (S.C.C.), in which at p. 554 Dickson J. confirmed the requirements for issue estoppel as follows:

> . . . (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and, (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised their privies . . . .

33 It is an important requirement of the operation of issue estoppel that a decision which is said to create the estoppel have been a final decision. In this regard, there is case law that suggests that a decision that is not appealable cannot be considered to be final and therefore cannot create issue estoppel: see Donald J. Lange, *The Doctrine of Res Judicata in Canada*, (Markham: LexisNexis, 2015) at pp. 106 et seq. As suggested by a commentator referred to in that text at page 107, the inability to appeal makes the application of *res judicata* unjust if not illogical.

34 While the circumstances in which this principle has been applied differ from the present, I think that it is nevertheless applicable in this case. Moreover, it is arguable that the concern for finality that grounds issue estoppel is less relevant in respect of this issue than in the usual circumstances insofar as the flexibility to establish a panel that is appropriately responsive to the nature of the issue to be arbitrated may be more in keeping with the intentions of the parties.

35 In any event, in the absence of any right to appeal the ruling of Dunphy J., I am of the opinion that the issue of the size of the panel contemplated by section 7.3 of the QSA is not *res judicata*. The Court therefore has the authority to revisit the issue *de novo* in the context of the arbitration described above.

36 While I accept that the language of section 7.3 of the QSA is potentially subject to conflicting interpretations, I think that, on a balance of probabilities, it must refer to a panel of three arbitrators for two reasons — the reference to "arbitrators" in section 7.3 and the post-contractual conduct of the parties — which I will address in turn.

37 First, section 7.3 expressly refers to "arbitrators" in the plural. The wording rules out a panel comprised of a sole arbitrator. Given that any panel other than an odd number would be unusual at best, if not unworkable, and also given that a panel of greater than three would be highly unusual, I think it is clear that the parties must therefore have intended a panel of three. If any other panel size had been contemplated, given the unusual nature of such a panel, they would have made such a choice express in the language of section 7.3.

38 In addition, section 7.3 expressly refers to arbitration before a single arbitrator who is a "mutually respected business colleague", failing which a "panel of arbitrators" will be appointed. This strongly indicates an intention that, if it is not possible to agree upon a single arbitrator, the deadlock would be resolved by the establishment of a panel to which each would be entitled to appoint a nominee of their choosing and the remaining panel member would be appointed in accordance with the Act.

39 Second, as mentioned, the historical practice of the parties has been to conduct arbitrations between them under the QSA before a panel of three arbitrators, other than the most recent panel appointed by Dunphy J. In my view, this is post-contractual conduct that reflects the intentions of the parties that arbitrators under section 7.3 shall proceed before panels of three arbitrators comprised of a nominee of each of the parties and a third arbitrator agreed upon by the two nominees or appointed under the Act. This view is reinforced by the absence of any legal objection to a panel so constituted in the case of the earlier arbitrations prior to the hearing before Dunphy J.

40 Given the foregoing, I also conclude that section 9 of the Act is not applicable in the present circumstances. Section 9 provides that an arbitration panel shall be composed of one arbitrator "[i]f the arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal." In this case, section 7.3 refers to arbitration before a "panel of arbitrators", that is, before "arbitrators" in the plural. By using the plural term, the parties clearly indicated that the number of arbitrators was to be more than one. On its own, this is arguably sufficient to exclude the operation of section 9. On this basis, section 9 does not apply because the logical alternative to a sole arbitrator, being a panel of three, is effectively specified in section 7.3. In any event, for the reasons set out above, I am of the opinion that section 7.3 of the QSA does specify that the panel of arbitrators shall be comprised of three persons with the result that section 9 of the Act does not apply.

41 Accordingly, I conclude that the arbitration contemplated by the Notices should be conducted before a panel of three arbitrators.

The Members of the Arbitration Panel

42 The remaining issue is the composition of the arbitration panel. As mentioned, the ICP has nominated Mr. Ferrier. The JCP does not oppose his nomination as a member of a panel of three arbitrators. His nomination is therefore confirmed.

43 The JCP has nominated Mr. Cunningham. This nomination is opposed by the ICP. Mr. Cunningham is a highly experienced and respected arbitrator with a considerable background in commercial arbitrations. I am reluctant not to appoint him to the arbitration panel. I have no doubt that Mr. Cunningham would approach the arbitration with impartiality.

44 Nevertheless, there are special circumstances in this case. The issue for the Court is whether there is a basis for a finding of a reasonable apprehension of bias in the sense that an informed person, viewing the matter realistically and practically — having thought the matter through — would conclude that a person in Mr. Cunningham's position might be perceived as not being able to approach this arbitration with a totally fresh and open mind: see *R. v. Nolin*, [1982] M.J. No. 29 (Man. C.A.) at para. 2

45 Mr. Cunningham was a member of an earlier arbitration panel that addressed other matters between these parties. While those matters are not related to the specific issues to be arbitrated in the present proceedings, that arbitration panel made findings of credibility that were unfavourable to IC. In these circumstances, there is a reasonable apprehension of bias arising in two contexts: (1) in making any necessary credibility findings in these arbitrations; and (2) in the actual decision, insofar as the earlier credibility findings may unconsciously influence the decision.

46 Accordingly, I do not think that it is appropriate in the present circumstances to appoint Mr. Cunningham to the arbitration panel.

47 The JCP submit that, in the circumstances in which the Court does not appoint Mr. Cunningham as the JCP nominee, it should appoint Mr. Charles Scott as its nominee. The ICP also oppose the appointment of Mr. Scott. The ICP do not, however, propose anyone else. I note that I have advised the parties of my association with Mr. Scott and no objection was raised regarding my consideration of him as an appointee to the arbitration panel.

48 In my view, it is appropriate to nominate Mr. Scott as the JCP nominee for the following reasons. First, I do not think that there can be a reasonable apprehension of bias based solely on his involvement at a previous law firm between 1972 and 1998 on behalf of a predecessor of the corporate group controlled by QCo and PCo as such predecessor existed at that time. There is no suggestion that, in such capacity, Mr. Scott acted for any of the members of the JCP or the ICP personally. The interests of the parties are separate and distinct from the interests of the corporate group which they collectively control. There is also no suggestion that there is any issue of confidential information pertaining to either of the parties that would have been obtained in any earlier retainer on behalf of that corporate group which, in any event, was, at the latest, twenty years ago. Second, the ICP say that Mr. Scott's previous firm declined the retainer for the JCP in these applications because of Mr. Scott's association, although he was not being retained personally. Apart from the fact that there is a suggestion that it took this action because of some relationship with IC rather than JC in which Mr Scott was not involved, which may negative any reasonable apprehension of bias on its own if correct, the reason for this decision is not in evidence. In the absence of a more complete understanding of the circumstances giving rise to that decision, I cannot conclude that this action demonstrates a reasonable apprehension of bias.

49 Accordingly, I conclude that Mr. Scott should be appointed as the JCP nominee to the arbitration panel.

Conclusion

50 Based on the foregoing, I therefore appoint Mr. Ferrier and Mr. Scott to the arbitration panel and direct that, in accordance with past practice, these two individuals are to select a third arbitrator who will act as the chair of the panel. The foregoing determination does not address the appointment of a separate arbitration panel to address the remaining issues raised by the JCP Notice that pertain to compliance with the PSA and that would be arbitrated pursuant to section 8 of the PSA. It is not clear to the Court whether the JCP seeks the appointment of such a separate panel in the circumstances of the Court's decision in this Endorsement. If it does so, the JCP should advise the ICP and the Court in order that the Court can address a procedure for resolution of this matter. As neither party is substantially successful in these proceedings given the relief sought by each, each party shall bear its own costs of these applications in accordance with the agreement between them.

Issues to be arbitrated specified and arbitrators appointed.

End of Document

Tab 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Richmond-John Centre Inc. v. Dover Corp. (Canada) Ltd. | 1991 CarswellOnt 618, [1991] O.J. No. 2034, 22 R.P.R. (2d) 243, 30 A.C.W.S. (3d) 262 | (Ont. Gen. Div., Nov 19, 1991)

1983 CarswellOnt 732
Ontario Supreme Court, Court of Appeal

G. Ford Homes Ltd. v. Draft Masonry (York) Co.

1983 CarswellOnt 732, [1983] O.J. No. 150, [1983] O.J. No. 3181, 1 D.L.R. (4th) 262, 22 A.C.W.S. (2d) 232, 2 O.A.C. 231, 2 C.L.R. 210, 43 O.R. (2d) 401

G. FORD HOMES LTD. v. DRAFT MASONRY (YORK) CO. LTD.

Blair, Morden and Cory JJ.A.

Judgment: October 21, 1983

Counsel: *D.J. McGhee*, for plaintiff-respondent.
D.H. Creighton, for defendant-appellant.

Subject: Contracts
Related Abridgment Classifications
Construction law
II Contracts
II.6 Breach of terms of contract
II.6.c Breach of warranty
II.6.c.i Implied contractual warranty
II.6.c.i.B By contractor
Headnote
Construction Law --- Breach of terms of contract — Breach of warranty — Implied contractual warranty — By contractor
Building contracts — Supply and installation of staircase — Failure to comply with Ontario Building Code — Term requiring compliance with Ontario Building Code to be implied into contract.
The defendant was the builder of two two-storey homes and the plaintiff was the fabricator and installer of residential staircases. The plaintiff orally agreed to supply and install two circular staircases for the two homes being built. The staircases were installed but did not meet the minumum headroom requirement specified in the Ontario Building Code. The architect's plans, which indicated that the required headroom was to comply with the Code, were available on site and were offered to the plaintiff who chose to ignore them. The houses were framed in so that measurements could be taken. At trial, the plaintiff's claim for the cost of the supply and installation of the staircases was dismissed. An appeal to the Divisional Court was allowed. The defendant further appealed to the Court of Appeal.
Held:
The appeal was allowed.
The plaintiff was an "expert" in the manufacture and installation of stairs and it would be natural and reasonable in the circumstances of the case for the defendant to rely upon the plaintiff to supply and install staircases in compliance with the Ontario Building Code. Accordingly, there must be an implied term that the staircases could be and would be installed so as to comply with the Code. Alternatively, or additionally, a term should be implied that both the work and materials would be reasonably fit for the purpose for which they were required.

Table of Authorities

Cases considered:

CCH Can. Ltd. v. Mollenhauer Contr. Co., [1976] 1 S.C.R. 49, 51 D.L.R. (3d) 638 — *distinguished*

Hart v. Bell Telephone Co. of Can. (1979), 26 O.R. (2d) 218, 10 C.C.L.T. 335, 102 D.L.R. (3d) 465 (C.A.)*followed*

Independent Broadcasting Authority v. EMI Elec. Ltd. (1980), 14 Build. L.R. 1 (H.L.) — *followed*

Laliberté v. Blanchard (1980), 31 N.B.R. (2d) 275, 75 A.P.R. 275 (C.A.) — *followed*

Lewis v. Todd, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 34 N.R. 1 — *followed*

Moorcock, The (1889), 14 P.D. 64 — *followed*

Myers (G.H.) Co. v. Brent Cross Service Co., [1934] 1 K.B. 46 — *followed*

Young & Marten Ltd. v. McManus Childs Ltd., [1969] 1 A.C. 454, [1968] 2 All E.R. 1169 (H.L.) — *followed*

Authorities considered:

Hudson's Building and Engineering Contracts (10th ed., 1979), pp. 274-75.

APPEAL to the Court of Appeal from a decision of the Divisional Court which reversed a trial decision dismissing the plaintiff's claim for the cost of the supply and installation of a staircase.

The judgment of the Court was delivered by *Cory J.A.* (orally):

1 The respondent, G. Ford Homes, orally agreed to supply and install two circular staircases for two homes which the appellant, Draft Masonry, was building. The point in issue on this appeal is whether there was an implied term of the contract for the supply and installation of the staircases that they would comply with the requirements of the Ontario Building Code.

Factual background

2 Something must be said of the facts of this case to understand the problem.

3 The appellant was building two single family two-storey homes on adjacent lots in the Township of Scugog. These were large homes having a floor area of approximately 3,000 square feet; they were priced at $239,900 and they were described by both parties as luxury homes. The appellant contractor had earlier built a number of homes following the same plans. In none of these homes had there been any problem with the stairs. The architect's plans for the home were available on the site.

4 The respondent fabricates and installs residential staircases. Mr. Di Donato, an officer of the appellant company, called Mr. Ford, an officer of the respondent (Ford) to see if it could provide and install circular staircases in the homes. Mr. Ford attended at the homes. At that time they had reached a stage of the construction where they were framed in. Di Donato offered to show the architectural plans for the homes to Ford. He declined to see those plans. It is significant that the plans clearly indicate the required headroom at the top of the stairs, which would comply with the Ontario Building Code requirements. Mr. Ford did, however, make some measurements. He offered a selection of three types of staircases to Mr. Di Donato. Mr. Di Donato selected one of the three. The price was agreed upon as were certain minor structural changes necessary to permit the stairs to be installed.

5 The stairs were, in due course, delivered and installed. There is no fault found with the material used in the stairways. Unfortunately they did not comply with the Ontario Building Code regulation for the headroom was 1-1/2 inches short of the specified minimum. As a result, the appellant was required by the building inspector to take out the staircases and install others which complied with the Ontario Building Code. The removal of the staircases and the installation of new ones gave rise to this claim.

Result at trial and in the Divisional Court

6 Ford brought an action to recover the cost for the supply and installation of the services. At trial the Ford claim for the two circular staircases was dismissed.

7 Ford then appealed the result to the Divisional Court. That Court gave effect to Ford's contentions and allowed it the full amount of its claim together with interest. It held that there could be no obligation upon the respondent Ford unless the appellant placed reliance upon it with regard to the staircases and made Ford aware of that reliance. On the facts the Divisional Court found that "there was no vestige of such a reliance on the record of the case".

8 With deference, we cannot agree with either of the conclusions of the Divisional Court.

Implied terms of contracts

9 When may a term be applied on a contract? A Court faced with that question must first take cognizance of some important and time-honoured cautions. For example, the Courts will be cautious in their approach to implying terms to contracts. Certainly a Court will not rewrite a contract for the parties. As well, no term will be implied that is inconsistent with the contract. Implied terms are as a rule based upon the presumed intention of the parties and should be founded upon reason. The circumstances and background of the contract, together with its precise terms, should all be carefully regarded before a term is implied. As a result, it is clear that every case must be determined on its own particular facts. With these principles firmly in mind it is appropriate to consider some texts and recent cases dealing with the issue.

10 For almost a century it has been recognized that a term will be implied in a contract in order to give it business efficacy: see The Moorcock (1889), 14 P.D. 64. The basis upon which a term of a contract will be implied has been extended by decisions of the English Court of Appeal and the House of Lords. Hudson's Building and Engineering Contracts (10th ed., 1979), pp. 274-5, gives us a useful summary of the law pertaining to when terms will be implied in a contract:

> It is submitted that a contractor undertaking to do work and supply materials impliedly undertakes:
>
> (a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;
>
> (b) to use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind. (In the case of goods not described, or not described in sufficient detail, it is submitted that there will be reliance on the contractor to that extent, and the warranty in (c) below will apply);
>
> (c) *that both the work and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation* (this obligation is additional to that in (a) and (b), and only becomes relevant, for practical purposes, if the contractor has fulfilled his obligations under (a) and (b)).

(Emphasis added.)

11 Young & Marten Ltd. v. McManus Childs Ltd., [1969] 1 A.C. 454, [1968] 2 All E.R. 1169, is a decision of the House of Lords. Two principles emerge from the speeches given in the course of that case. The first is that the common law principles codified in the Sale of Goods Act apply to contracts for the provision of work and materials sometimes referred to as contracts for work and services. Thus, the provisions pertaining to the Sale of Goods Act and codified in that Act are equally applicable to contracts for the provision of work and materials. Secondly, it is determined that unless the cirumstances of a particular case are sufficient to specifically exclude it, there will be implied into a contract for the supply of work and materials a term that the materials used will be of merchantable quality and that those materials will be reasonably fit for the purposes for which they were intended.

12 Independent Broadcasting Authority v. EMI Electronics Ltd. (1980), 14 Build. L.R. 1, was a further decision of the House of Lords. That decision followed Young & Marten, supra, and added something further. It was to the effect

that in the absence of any term (express or implied) negativing the obligation, one who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose. Such a design obligation was said to be consistent with the statutory law regulating the sale of goods.

13 The principle enunciated in Young & Marten Ltd. has been considered and adopted in appellate courts in Canada. In Ontario, in Hart v. Bell Telephone Co. of Can. (1979), 26 O.R. (2d) 218, 10 C.C.L.T. 335, 102 D.L.R. (3d) 465 (C.A.) (on the general issue of when warranties will be implied). In Laliberté v. Blanchard (1980), 31 N.B.R. (2d) 275, 75 A.P.R. 275 (C.A.), Chief Justice Hughes specifically followed Young & Marten Ltd. and relied upon a quotation from Lord Justice DuParcq, which was favourably referred to in that case. The words of Lord Justice DuParcq appear in Myers (G.H.) Co. v. Brent Cross Service Co., [1934] 1 K.B. 46:

> ... the true view is that a person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.

The foregoing principles are most attractive and compelling.

14 On behalf of the appellant reliance was placed on CCH Can. Ltd. v. Mollenhauer Contr. Co., [1976] 1 S.C.R. 49, 51 D.L.R. (3d) 638. The reasons given by the Supreme Court of Canada do not include a reference to the Young & Marten decision. In our view, the scope of the decision in the CCH case is narrow. It determined that the contract under consideration by the Court, by its terms and its reference to the use of a specific type of brick, excluded an implied term that those bricks would be fit for the purposes intended. In the case before us it cannot be said that the appellant specified a particular staircase, but rather, he was simply offered a choice of three by the respondent, one of which he chose. In our opinion, the CCH case is not applicable to the facts presently before us.

Application of principles to this case

15 In applying the principles to this case it is important to bear in mind the following. In this case the appellant contractor acquired material and services from Ford, the respondent subcontractor. It was the subcontractor that was "expert" in the manufacture and installation of stairs. When the contract was negotiated the house plans were offered to Ford who chose to ignore them. The houses were framed in so that measurements could be taken to ensure that the stairs complied with the provisions of the Ontario Building Code. The respondent was, as it should have been, fully aware of the requirements of the Building Code. No one would have a better knowledge of the dimensions of its products than Ford. No one else could better appreciate whether they could be installed in the house and comply with the Code. It would be natural and reasonable in the circumstances of this case for the appellant to rely upon Ford to supply and install the staircases in compliance with the Ontario Building Code. It would be unrealistic to come to any other conclusion. The trial Judge inferentially found that there was such a reliance. That can be ascertained from the following excerpts from his reasons. At p. 230 he said:

> It is a most unfortunate situation but I place the fault on the plaintiff [Ford] for failing to have the stairs installed in such a manner that they do not contravene the Building Code.

Further, the following appears at p. 231:

> The houses in question were luxury type homes of approximately 3,000 square feet and the selling price was $239,000 odd if I recollect correctly; $239,900. This being so I am of the opinion that the defendants were entitled to have the staircase installed which was satisfactory and which would not interfere or would not contravene the structural requirements of the Building Code and also that any structural change that was required might interfere with the proper installation of a railing or bannister on the upper floor and over all the visual or cosmetic effect of this defect.

And lastly, at p. 231:

... in my view the defendants were entitled to insist on strict compliance ... that is their entitlement ...

16 These findings were well substantiated by the evidence. In those circumstances the Divisional Court, sitting as an appellate Court, was not justified in ignoring those findings; rather, it was bound to accept them: see, for example, Lewis v. Todd, [1980] 2 S.C.R. 694, 14 C.C.L.T. 294, 34 N.R. 1.

17 On the facts of this case there must of necessity be an implied term that the staircase could be and would be installed so as to comply with the Ontario Building Code. There could be no business efficacy to the contract without such a term. It is no contract to have stairs installed that must, by requirements of the law, be taken out for failure to comply with the Code. To sanction the installation of such a staircase in contravention of the Code would be tantamount to sanctioning an illegal contract. On the basis of the principle enunciated in the Moorcock case, supra, the term should be implied in the contract that the stairs would comply with the Code.

18 Alternatively or additionally a term should be implied that both the work and materials will be reasonably fit for the purpose for which they were required. Such a term must be implied unless the circumstances of the contract are such as to exclude any such obligation: see Young & Marten, supra. No such exclusion appears, from the circumstances of the contract, in this case. The work and materials supplied could not be reasonably fit for the purpose for which they were required unless they complied with the provisions of the Ontario Building Code.

19 In the circumstances, the appeal will be allowed with costs here and in the Divisional Court. The order of the Divisional Court will be set aside and the judgment at trial restored.

Appeal allowed.

Tab 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hope v. Parkdale No. 498 (Rural Municipality) | 2016 SKCA 19, 2016 CarswellSask 78, 476 Sask. R. 10, 666 W.A.C. 10, 263 A.C.W.S. (3d) 229, 396 D.L.R. (4th) 84, 48 M.P.L.R. (5th) 91 | (Sask. C.A., Feb 10, 2016)

2004 SCC 75, 2004 CSC 75
Supreme Court of Canada

Pacific National Investments Ltd. v. Victoria (City)

2004 CarswellBC 2673, 2004 CarswellBC 2674, 2004 SCC 75, 2004 CSC 75, [2004] 3 S.C.R. 575, [2004] S.C.J. No. 72, [2005] 3 W.W.R. 1, 135 A.C.W.S. (3d) 156, 206 B.C.A.C. 99, 245 D.L.R. (4th) 211, 327 N.R. 100, 338 W.A.C. 99, 34 B.C.L.R. (4th) 1, 3 M.P.L.R. (4th) 1, 42 C.L.R. (3d) 76, J.E. 2004-2165, REJB 2004-80300

Pacific National Investments Ltd., Appellant v. Corporation of the City of Victoria, Respondent

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: June 15, 2004
Judgment: November 19, 2004
Docket: 29759

Proceedings: reversing *Pacific National Investments Ltd. v. Victoria (City)* (2003), 2003 BCCA 162, 2003 CarswellBC 535, 11 B.C.L.R. (4th) 234, 223 D.L.R. (4th) 617, 36 M.P.L.R. (3d) 222, 23 C.L.R. (3d) 181, 180 B.C.A.C. 104, 297 W.A.C. 104 (B.C. C.A.); reversing *Pacific National Investments Ltd. v. Victoria (City)* (2002), 2002 BCSC 41, 2002 CarswellBC 1429 (B.C. S.C.); reversing *Pacific National Investments Ltd. v. Victoria (City)* (2002), 2002 BCSC 1185, 2002 CarswellBC 1898, 217 D.L.R. (4th) 248, 32 M.P.L.R. (3d) 235, 20 C.L.R. (3d) 251 (B.C. S.C.)

Counsel: L. John Alexander for Appellant
Guy E. McDannold for Respondent

Subject: Civil Practice and Procedure; Public; Restitution; Torts; Contracts; Municipal
Related Abridgment Classifications
Equity
IV Relief from unconscionable transactions
IV.1 Unconscionable or improvident transactions
IV.1.f Unjust enrichment
Municipal law
XV Development control
XV.3 Development agreements and conditions
XV.3.b Recovery of money paid
Restitution and unjust enrichment
I General principles
I.2 Requirements for unjust enrichment
I.2.b Deprivation corresponding to enrichment
Restitution and unjust enrichment
II Benefits conferred under mistake
II.1 Mistake of fact
II.1.c Recovery of expenditures
Restitution and unjust enrichment

IV Benefits conferred under ineffective transactions
IV.4 Breach, repudiation or abandonment of contract
IV.4.b Innocent party seeking relief

Headnote

Equity --- Relief from unconscionable transactions — Unconscionable or improvident transactions — Unjust enrichment
Municipality that "down-zoned" waterfront property which real estate developer began to develop, pursuant to agreement whereby municipality would re-zone lots to permit residential and commercial use, had no right in equity to retain benefit of works and improvements carried out by developer without paying for them.
Municipal law --- Development control — Development agreements and conditions — General
Municipality that "down-zoned" waterfront property which real estate developer began to develop, pursuant to agreement whereby municipality would re-zone lots to permit residential and commercial use, had no right in equity to retain benefit of works and improvements carried out by developer without paying for them.
Restitution --- General principles — Bars to recovery — No deprivation corresponding to enrichment
Municipality that "down-zoned" waterfront property which real estate developer began to develop, pursuant to agreement whereby municipality would re-zone lots to permit residential and commercial use, had no right in equity to retain benefit of works and improvements carried out by developer without paying for them.
Restitution --- Benefits conferred under ineffective transactions — Breach, repudiation or abandonment of contract — Innocent party seeking relief
Municipality that "down-zoned" waterfront property which real estate developer began to develop, pursuant to agreement whereby municipality would re-zone lots to permit residential and commercial use, had no right in equity to retain benefit of works and improvements carried out by developer without paying for them.
Restitution --- Benefits conferred under mistake — Mistake of fact — General
Municipality that "down-zoned" waterfront property which real estate developer began to develop, pursuant to agreement whereby municipality would re-zone lots to permit residential and commercial use, had no right in equity to retain benefit of works and improvements carried out by developer without paying for them.
Equity --- Redressement à l'égard d'une transaction inique — Transactions iniques ou imprévoyantes — Enrichissement sans cause
Municipalité ayant modifié le zonage des terrains riverains que le promoteur immobilier avait commencé à aménager conformément à une entente selon laquelle la municipalité devait modifier le zonage pour permettre des usages résidentiels et commerciaux, elle n'avait aucun droit en equity de bénéficier, sans les payer, des travaux et des améliorations effectués par le promoteur.
Droit municipal --- Contrôle de l'aménagement — Ententes et conditions d'aménagement — En général
Municipalité ayant modifié le zonage des terrains riverains que le promoteur immobilier avait commencé à aménager conformément à une entente selon laquelle la municipalité devait modifier le zonage pour permettre des usages résidentiels et commerciaux, elle n'avait aucun droit en equity de bénéficier sans payer des travaux et des améliorations effectués par le promoteur.
Restitution --- Principes généraux — Obstacles au recouvrement — Absence d'appauvrissement correspondant à l'enrichissement
Municipalité ayant modifié le zonage des terrains riverains que le promoteur immobilier avait commencé à aménager conformément à une entente selon laquelle la municipalité devait modifier le zonage pour permettre des usages résidentiels et commerciaux, elle n'avait aucun droit en equity de bénéficier sans payer des travaux et des améliorations effectués par le promoteur.
Restitution --- Avantages conférés en vertu de transactions nulles et sans effets — Manquement, répudiation ou abandon du contrat — Partie innocente demandant réparation
Municipalité ayant modifié le zonage des terrains riverains que le promoteur immobilier avait commencé à aménager conformément à une entente selon laquelle la municipalité devait modifier le zonage pour permettre des usages résidentiels et commerciaux, elle n'avait aucun droit en equity de bénéficier sans payer des travaux et des améliorations effectués par le promoteur.
Restitution --- Avantages conférés à cause d'une erreur — Erreur de fait — En général

Municipalité ayant modifié le zonage des terrains riverains que le promoteur immobilier avait commencé à aménager conformément à une entente selon laquelle la municipalité devait modifier le zonage pour permettre des usages résidentiels et commerciaux, elle n'avait aucun droit en equity de bénéficier sans payer des travaux et des améliorations effectués par le promoteur.

The plaintiff, a real estate developer, purchased approximately 200 acres of waterfront land that the defendant municipality wished to redevelop for residential and commercial uses. The plaintiff and the city entered into an agreement which provided for the plaintiff to build roads, parkland, walkways and a new seawall. The cost of the extra works and improvements was $1.08 million. It was a condition precedent to the plaintiff's obligations that the city would re-zone the two lots from the existing industrial designation to permit residential and commercial uses appropriate to carrying out the plaintiff's development plans.

By an amending by-law, the city subsequently "down-zoned" the lots to permit only one-storey commercial buildings. As a result, a substantial amount of approved retail, residential and commercial space on the waterfront could not be built. The plaintiff brought action against the city for breach of contract and, in the alternative, unjust enrichment. The contractual claim was ultimately rejected on the basis that the city lacked the statutory authority to make the zoning commitments it did. The matter was remitted to trial on the unjust enrichment claim. The trial judge found that the city had been unjustly enriched by the extra works and improvements and awarded the plaintiff $1.08 million. The Court of Appeal set aside the trial judge's decision on the basis that there was no deprivation and dismissed the action. The plaintiff appealed.

Held: The appeal was allowed.

The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. The test for unjust enrichment has three elements: (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff, and (3) an absence of juristic reason for the enrichment. In this case, the city obtained $1.08 million worth of roads, parkland and walkways and a new seawall, wholly at the plaintiff's expense. These works and improvements were in excess of what the city could lawfully demand under s. 989 of the Municipal Act. The city's present argument that the extra amenities it demanded were not an enrichment but a burden because of the cost of their upkeep was not credible. Using the straightforward economic approach, the plaintiff had suffered a corresponding deprivation of $1.08 million. It was required to spend funds to provide the amenities and to give up extra parkland out of the lots it purchased. The plaintiff was not required to subsidize municipal amenities from the profits earned elsewhere on the project in the absence of some legal requirement.

There are two stages to the juristic reason inquiry. At the first stage, a claimant must show there is no juristic reason within the established categories that would deny it recovery. On proving that none of these limited categorical reasons exist, the plaintiff will have made out a prima facie case of unjust enrichment. At the second stage, the onus shifts to the defendant to rebut the prima facie case by showing there is some other valid reason to deny recovery. In the absence of a convincing rebuttal, the transfer of wealth will be reversed. It is at this stage that the court should have regard to the reasonable expectation of the parties and public policy considerations.

The city successfully argued in the first appeal that the sale of zoning was ultra vires, and therefore incapable of giving rise to a cause of action for breach of contract. It could not now rely on the contractual arrangements, which in their relevant parts flowed from its ultra vires demand, to defeat the plaintiff's claim. The trial judge found the extra works and undertakings given in exchange for the ultra vires zoning commitment to be clearly separate and identifiable. The cost was $1.08 million. There was therefore no difficulty on the facts in distinguishing between the city's lawful entitlement and the ultra vires extras.

The city's success in the first appeal knocked out of contention the juristic reason on which it now primarily relied. First, as a matter of equity, it was not necessary for the plaintiff to try to set aside the entirety of its contractual arrangements with the city. It need only isolate the provisions relating to the ultra vires demand, and show why the city ought not to be allowed to rely on them as a defence to a claim in unjust enrichment. Secondly, the trial judge found that the ultra vires arrangements rested on a common mistake as to the city's legal authority to make zoning commitments.

Equity looks to substance rather than to form. Here, the substance of the problem to be remedied was clearly identified as $1.08 million worth of improvements, which were found to be the fruits of an ultra vires demand. The city sought to

enjoy an unjustified windfall at the plaintiff's expense. The remedy sought was to reverse the wrongful transfer of wealth by ordering reimbursement of that amount to the plaintiff. The equitable doctrine has the remedial flexibility to reverse an enrichment the trial judge found to be manifestly unjust.

The trial judge found that both the city and the plaintiff assumed the city had the legal authority to provide an implied undertaking to keep the zoning in place for a reasonable time to allow completion of the plaintiff's project. As a result, the parties purported to contract for the extra works and improvements under a common mistake of law as to the enforceability of their agreement. It was clear that the plaintiff would not have undertaken the extra works and improvements without the zoning assurances it thought it had contracted for. Accordingly, the plaintiff had negatived the contractual provisions as a juristic reason permitting the city to retain the extra works and improvements without paying for them.

Section 914 of the Local Government Act did not authorize the city to retain without payment the $1.08 million enrichment, since the claim was not based on "the adoption of an official community plan or [zoning] bylaw." The plaintiff's cause of action for unjust enrichment was complete when it put in place the extra works and improvements in the mistaken belief that its contract with the city was enforceable. Section 215(3) of the Land Title Act did not assist the city, either, as that would allow the city to do indirectly what would be ultra vires if done directly. The agreements could not be relied upon by the city as a juristic reason to keep the works and improvements without paying for them.

The plaintiff did not offer a "sweetener" for something it got. It offered consideration for an implied undertaking that the city was able to repudiate. Nor did the claim for unjust enrichment depend on the down-zoning. It depended on the fact that the city obtained $1.08 million worth of extra works and improvements at the plaintiff's expense to which, after securing a court order declaring that it had no power to do what it purported to undertake to do, the city had no legitimate entitlement.

The city had not discharged its onus under stage two of the "juristic reason" inquiry to show that allowing the claim of unjust enrichment would frustrate the reasonable expectation of the parties. The trial judge found that neither the city nor the plaintiff expected the extra works and improvements to be donated. The reasonable expectation was that they would be paid for out of the profits from those parts of the project that the plaintiff was prevented from building. The city now owned the works, and it was consistent with the parties' "reasonable" expectations that the plaintiff be reimbursed for their cost.

The grant of an equitable remedy in this case would not frustrate the legislative purpose in making such zoning commitments unenforceable. The redevelopment, as planned, was thought to be in the overall best interest of the municipality. It would not be good public policy to have municipalities making development commitments, then not only have them attack those commitments as illegal and beyond their own powers, but also allow them to scoop a financial windfall at the expense of those who contracted with them in good faith. The city had no right in equity to retain the benefit of the extra works and improvements carried out by the plaintiff without paying for them. The trial judgment requiring the city to pay the plaintiff $1.08 million was restored.

La demanderesse, un promoteur immobilier, a acquis environ 200 acres de terrains riverains que la municipalité défenderesse souhaitait voir réaménagés à des fins résidentielles et commerciales. La demanderesse et la Ville ont conclu une entente prévoyant que la demanderesse devait construire des routes, des parcs, des sentiers et une digue. Les travaux et les aménagements supplémentaires devaient coûter 1,08 million de dollars. Il s'agissait d'une condition préalable au respect par la Ville de ses obligations envers la demanderesse consistant à modifier le zonage industriel de deux lots pour permettre des usages résidentiels et commerciaux et la réalisation ainsi des plans d'aménagement de la demanderesse.

La Ville a subséquemment modifié le zonage des lots, ne permettant plus que la construction d'édifices commerciaux d'un étage. La demanderesse n'a donc pu construire sur les plans d'eau une grande partie des espaces résidentiels et commerciaux qui avaient été approuvés. La demanderesse a intenté une action contre la Ville pour rupture de contrat et, de façon subsidiaire, pour enrichissement sans cause. L'action fondée sur le contrat a ultimement été rejetée au motif que la Ville n'était pas habilitée par la loi à prendre de tels engagements en matière de zonage. L'affaire a été renvoyée en première instance afin que la question de l'enrichissement sans cause soit tranchée. Le juge de première instance a conclu que la Ville avait été injustement enrichie par les travaux et améliorations supplémentaires et a accordé à la demanderesse un montant de 1,08 million de dollars. La Cour d'appel a infirmé le jugement de première instance, au motif qu'il n'y avait aucun appauvrissement, et a rejeté l'action. La demanderesse a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

La doctrine de l'enrichissement sans cause prévoit une cause d'action en equity qui offre une grande souplesse dans les réparations susceptibles d'être accordées dans différentes circonstances selon des principes fondés sur l'équité et la bonne conscience. Le critère de l'enrichissement sans cause se divise en trois conditions: 1) l'enrichissement du défendeur; 2) l'appauvrissement correspondant du demandeur; et 3) l'absence de motif juridique expliquant l'enrichissement. Dans ce cas-ci, la Ville a obtenu des routes, des parcs, des sentiers et une nouvelle digue d'une valeur de 1,08 million de dollars, le tout entièrement aux frais de la demanderesse. Ces travaux et améliorations allaient au-delà de ce que la Ville pouvait légalement exiger en application de l'art. 989 de la Municipal Act. N'était pas crédible l'argument de la Ville que les infrastructures supplémentaires qu'elle avait demandées constituaient plutôt un fardeau qu'un enrichissement en raison de leurs coûts d'entretien. Selon une analyse économique simple, la demanderesse a subi un appauvrissement corrélatif de 1,08 million de dollars. Elle a dû contribuer financièrement à la mise en place des infrastructures et fournir les espaces verts supplémentaires à même les terres qu'elle avait acquises. En l'absence d'une quelconque obligation légale, la demanderesse n'était pas obligée de subventionner les infrastructures de la Ville à partir des profits provenant d'autres parties de son projet.

L'examen d'un motif juridique se divise en deux étapes. Lors de la première étape, le demandeur doit démontrer qu'aucun motif juridique appartenant à une catégorie établie ne justifie le refus de l'indemniser. Le demandeur aura prouvé l'enrichissement sans cause de façon prima facie dès qu'il aura démontré l'absence de motif juridique appartenant à une catégorie établie. Lors de la deuxième étape, c'est au défendeur que revient le fardeau de réfuter la preuve prima facie en démontrant l'existence d'une autre raison valable pour refuser d'indemniser. S'il ne le fait pas de manière convaincante, il y a lieu d'annuler le transfert de richesse. C'est à cette étape que le tribunal doit tenir compte des attentes raisonnables des parties et des considérations d'intérêt public.

La Ville a soutenu avec succès, lors du premier appel, que la vente de zonage ne faisait pas partie de ses pouvoirs et, donc, que cela ne pouvait donner lieu à une cause d'action pour rupture de contrat. La Ville ne pouvait pas maintenant invoquer les ententes contractuelles, dont les parties pertinentes découlaient de sa demande excessive, pour faire échec à la réclamation de la demanderesse. Le premier juge a conclu que les travaux et améliorations supplémentaires donnés en échange de l'engagement sur le zonage étaient clairement distincts et identifiables. Leur coût était de 1,08 million de dollars. Il n'était donc pas difficile de distinguer entre ce à quoi la Ville avait légitimement droit et ce qui était ultra vires. La victoire de la Ville dans le premier appel a fait tomber le motif juridique sur lequel elle s'appuyait principalement. Premièrement, en equity, la demanderesse n'avait pas à essayer de faire écarter toutes les ententes contractuelles avec la Ville. Elle devait seulement isoler les dispositions relatives à la demande ultra vires et démontrer pourquoi la Ville ne devait pas avoir le droit de les invoquer à titre de défense à une réclamation d'enrichissement sans cause. Deuxièmement, le juge de première instance a conclu que les accords ultra vires reposaient sur une erreur commune aux deux parties quant à savoir si le Ville était légalement habilitée à prendre un engagement en matière de zonage.

En equity, on examine le fond plutôt que la forme. Ici, le fond du problème à réparer était clairement identifié comme des améliorations d'une valeur de 1,08 million de dollars qui ont résulté de la demande ultra vires. La Ville cherchait à profiter d'un avantage injustifié aux dépens de la demanderesse. La réparation voulue était l'annulation du transfert de richesse erroné en ordonnant le remboursement de ce montant à la demanderesse. La doctrine en equity a une souplesse de réparation permettant d'annuler un enrichissement considéré injuste par le juge de première instance.

Le premier juge a conclu que la Ville et la demanderesse avaient toutes deux présumé que la Ville était légalement habilitée à s'engager implicitement à ne pas modifier le zonage pour une période de temps raisonnable afin de permettre à la demanderesse de compléter son projet. Par conséquent, les parties ont conclu le contrat prévoyant les travaux et améliorations supplémentaires en raison d'une erreur de droit commune quant à son caractère exécutoire. Il apparaissait clair que la demanderesse n'aurait pas accepté de faire les travaux et les améliorations supplémentaires sans l'engagement en matière de zonage qu'elle croyait avoir obtenu. Par conséquent, la demanderesse a réussi à réfuter le motif juridique invoqué par la Ville, soit les dispositions contractuelles, pour lui permettre de conserver la propriété des travaux et améliorations supplémentaires sans payer pour ceux-ci.

L'article 914 de la Local Government Act n'autorisait pas la Ville à conserver, sans le payer, ce qui constituait un enrichissement de 1,08 million de dollars, étant donné que l'action n'était pas fondée sur l'adoption d'un plan officiel par la communauté ou d'un règlement de zonage. La demanderesse avait une cause d'action complète pour enrichissement

sans cause dès le moment où elle a réalisé les travaux et améliorations supplémentaires, croyant à tort que le contrat conclu avec la Ville à cet égard était exécutoire. L'article 215(3) de la Land Title Act n'aidait pas non plus la Ville parce que, sinon, on lui permettrait de réaliser indirectement ce qui aurait été ultra vires si réalisé directement. Les arguments invoqués par la Ville ne pouvaient servir de motif juridique lui permettant de conserver les travaux et les améliorations sans payer pour ceux-ci.

La demanderesse n'a offert aucune « rallonge » pour obtenir une chose qu'elle avait déjà. Elle l'a fait en contrepartie d'un engagement tacite que la Ville a pu en fin de compte répudier. La réclamation d'enrichissement sans cause ne reposait pas non plus sur le changement de zonage. Elle reposait sur le fait que la Ville avait obtenu, aux frais de la demanderesse, des travaux et améliorations supplémentaires d'une valeur de 1,08 million de dollars auxquels elle n'avait pas légalement droit, étant donné qu'elle avait obtenu une ordonnance de la cour déclarant qu'elle n'avait pas le pouvoir de faire ce qu'elle s'était engagée à faire.

La Ville ne s'était pas acquittée de son fardeau de prouver, à la deuxième étape de l'examen d'un « motif juridique », que l'accueil de l'action pour enrichissement sans cause viendrait frustrer les attentes raisonnables des parties. Le premier juge a conclu que ni la Ville ni la demanderesse ne s'attendaient à ce que les travaux et les améliorations supplémentaires ne fassent l'objet d'un don. Toutes deux s'attendaient à ce que ce leur coût soient couvert par les profits résultant des parties du projet que la demanderesse n'avait pas été en mesure de construire. La Ville était maintenant propriétaire des travaux et il était compatible avec les attentes « raisonnables » des parties que le coût de ces travaux soit remboursé à la demanderesse.

En l'espèce, l'octroi d'une réparation en equity ne serait pas contraire à l'objectif législatif visant à rendre inexécutoires des engagements relatifs au zonage. Tel que prévu, le réaménagement était censé servir au mieux l'intérêt général de la municipalité. Il ne serait pas dans l'intérêt public qu'une municipalité prenne un engagement relatif à l'aménagement, puis non seulement s'y dérobe et le conteste en invoquant qu'il est illégal et outrepasse ses pouvoirs, mais profite d'un avantage financier aux dépens d'un cocontractant de bonne foi. La Ville n'avait aucun droit en equity de bénéficier des travaux et améliorations supplémentaires réalisés par la demanderesse sans assumer leur coût. Le jugement de première instance ordonnant à la Ville de payer 1,08 million de dollars était rétabli.

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s. 989 — considered

APPEAL from judgment reported at *Pacific National Investments Ltd. v. Victoria (City)* (2003), 36 M.P.L.R. (3d) 222, 2003 CarswellBC 535, 11 B.C.L.R. (4th) 234, 223 D.L.R. (4th) 617, 2003 BCCA 162, 23 C.L.R. (3d) 181, 180 B.C.A.C. 104, 297 W.A.C. 104 (B.C. C.A.), allowing appeal by municipality from award of $1.08 million in restitution.

POURVOI du promoteur immobilier à l'encontre de l'arrêt publié à *Pacific National Investments Ltd. v. Victoria (City)* (2003), 36 M.P.L.R. (3d) 222, 2003 CarswellBC 535, 11 B.C.L.R. (4th) 234, 223 D.L.R. (4th) 617, 2003 BCCA 162, 23 C.L.R. (3d) 181, 180 B.C.A.C. 104, 297 W.A.C. 104 (B.C. C.A.), qui a accueilli le pourvoi de la municipalité à l'encontre du jugement octroyant un montant de 1,08 million de dollars à titre de restitution.

***Binnie J.*:**

1 This case arrives in our Court for the second time. On the first occasion, the appellant real estate developer Pacific National Investments Ltd ("PNI") sought to make the respondent municipality liable for breach of contract because it down-zoned in mid-project part of the appellant's 22-acre development on the Victoria waterfront. As a result of the down-zoning, a substantial amount of approved retail, residential and commercial space on the waterfront could not be built. The appellant sued the City on the basis that when PNI accepted an obligation to install $1.08 million in extra works and improvements, it had done so in exchange for an implied undertaking by the City to keep the zoning in place for a reasonable time to allow for completion of its project. By its down-zoning, the City had broken an implied term of the contract that went to the root of the arrangement between the parties. This Court, in a majority judgment, rejected the contractual claim on the basis that the municipality lacked the statutory authority to provide such an implied undertaking, which was *ultra vires*, and that its breach therefore could not give rise to an action for damages (see *Pacific National Investments Ltd. v. Victoria (City)*, [2000] 2 S.C.R. 919, 2000 SCC 64 (S.C.C.)). The matter was remitted to the trial court to deal with the appellant's alternative claim of unjust enrichment. This lesser claim required proof of a different set of facts and offered a much reduced level of compensation because it viewed the dispute from the perspective of the City's *gain* rather than (as in the contract claim) the appellant's *loss*. The claim for unjust enrichment was upheld by the second trial judge, Wilson J., but was reversed by the British Columbia Court of Appeal. I would allow the appeal, set aside the judgment of the Court of Appeal and restore the trial judgment. In my view, with respect, the municipality in these circumstances has no right in equity to retain the benefit of the extra works and improvements without paying for them.

I. Facts

2 In the 1980s, the provincial government and the City of Victoria agreed on the desirability of redeveloping, for residential and commercial uses, approximately 200 acres of provincial Crown land located on Victoria's inner harbour. The area was known as the Songhees lands (named after the First Nation displaced for the railway and industry). The first trial judge, Mackenzie J., found that "[t]he City had an intense interest in planning the redevelopment of such a large, strategically located site in the harbour area close to downtown" ((B.C. S.C.), at para. 3). Amongst other things, the City wanted to obtain additional parkland (closer to 30% of the project instead of the 5% ordinarily required), road improvements, walkways and a new seawall, which were not necessitated by the PNI project itself, but which would serve to make the whole area more efficient and attractive.

3 The province was sympathetic to the City's concerns, as was the appellant, who first became involved in the planning exercise in 1984 as a party interested in eventually undertaking Phase II of the project (22 acres) as a private development. It was the appellant's architect who contributed what became the conceptual plan for the waterfront development in 1985, long before any agreements had been signed between the City and the provincial Crown agency that owned the lands, British Columbia Enterprise Corporation ("BCEC"). The respondent argued that the appellant was a stranger to the negotiations between the City and BCEC, and that on a true interpretation of events, the Province had volunteered the extra amenities to the City and PNI had simply stepped into the shoes of BCEC. This theory was rejected by Mackenzie J., who concluded that the appellant was not a volunteer but a profit-oriented developer who had been a full participant in planning the project, including the efforts to accommodate the City's demand for extra amenities (at para. 23):

> I am satisfied that at all material times both the City and BCEC expected that BCEC would sell phase 2 to PNI, and that PNI would assume BCEC's rights and obligations with respect to phase 2 on the purchase.

4 The development of the Songhees lands proceeded in the following steps:

> 1 The City and BCEC entered into the Songhees Master Agreement dated August 28, 1987. BCEC itself proceeded with Phase I of the project.
>
> 2 A restrictive covenant was registered against title to the lands to prohibit building until appropriate servicing agreements had been entered into between the appellant and the City and subdivision plans had received City approval.
>
> 3 The appellant purchased the Phase II lands from BCEC conditional on zoning, park dedication, a service agreement between the appellant and the City, and formal subdivision approval.
>
> 4 The City enacted zoning bylaws to permit the appellant's plans for the whole of Phase II to be carried out, including the two water lots where three-storey structures were to be built resting on piles driven into the harbour bed, or possibly free floating, with retail and commercial use on the first floor, and residential condominiums on the upper two floors.
>
> 5 Once BCEC's rights and obligations had been assigned to the appellant, the appellant and the City entered into the Songhees Phase II Subdivision Servicing Agreement, dated January 29, 1988 which dealt with, amongst other things, the extra works and improvements which the parties have agreed cost about $1.08 million of the $2.5 million total service costs. It was a condition precedent to the appellant's obligations that the City would re-zone the 22 acres from the existing (industrial) designation to permit residential and commercial uses appropriate to carrying out the agreed upon project.
>
> 6 The City registered a statutory right-of-way for a public walkway around the perimeter of the structures to be built on the water lots.

5 After reviewing the evidence, Wilson J., concluded that the provision of the extra works and improvements, in the view of *all* three parties, was inextricably bound up with retention of the zoning to permit construction of the PNI project as planned ((2002), 217 D.L.R. (4th) 248 (B.C. S.C.), at para. 5):

> ...the provision that the plaintiff was to supply and install certain works, commensurate with the development contemplated, was inextricably bound up with the provision that the development anticipated construction of improvements pursuant to the defining by-laws. And in this case, that meant two, three-storey improvements on the water.

6 By 1993, the condominium residences on dry land had been built, or were under development or at least in contemplation and the appellant had already earned a very substantial profit on its investment with still other lands left to sell. The new residents and others from the municipality were also pleased. They had started to enjoy their new parks, cleaned up vistas and walkways around the new seawall, which had all been put in at the appellant's expense. As Mackenzie J. observed (at para. 16):

> The City had allowed the developer to come in and provide substantial tangible benefits to the City in terms of parks and other services at the developer's cost in the expectation that the development of the water lots as then contemplated by the City, BCEC and PNI would be allowed to proceed.

7 However, when the appellant applied for building permits to develop the two water lots, including a marina, restaurants, shops, other commercial uses, and two stories of residential condominiums on the harbour, the local community objected, and the matter became an issue in the pending municipal election. Following the election, the new City Council, with one dissent, voted to down-zone the two water lots to permit only one-storey commercial buildings, thereby eliminating the two stories of residential condominiums above. The appellant complained that the down-zoning rendered development of its water lots uneconomical.

8 In its Statement of Claim filed on October 8, 1993, the appellant alleged causes of action at common law (breach of contract) and equity (unjust enrichment). With respect to its contractual claim, the appellant alleged that the Songhees Master Agreement was subject to an implied term that the zoning permitting the contemplated development to proceed would be left in place for a reasonable period of time. The City's solicitor had expressed the view that the projet would proceed "in several stages over a period of 10 to 12 years". The common law cause of action was allowed by Mackenzie J. He therefore found it unnecessary to address the claim for unjust enrichment. His judgment in the appellant's favour was reversed by the British Columbia Court of Appeal. The reversal was affirmed as correct by a majority judgment of this Court on December 14, 2000. Under the provincial law governing municipalities at the relevant time, the City did not have the capacity to make and be bound by an implied term to keep the zoning in place for a number of years or to pay damages if it modified it. Our Court then remitted the case "to trial on any unjust enrichment argument that may exist" (para. 75).

II. Relevant Statutory Provisions

9 *Local Government Act*, R.S.B.C. 1996, c. 323:

> 914(1) Compensation is not payable to any person for any reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part.
>
> (2) Subsection (1) does not apply where the bylaw under this Division restricts the use of land to a public use.

Land Title Act, R.S.B.C. 1979, c. 219:

> 215(3) Where an instrument contains a covenant registrable under this section, the covenant is binding on the covenantor and his successors in title, notwithstanding that the instrument or other disposition has not been signed by the covenantee.

III. Judicial History

A. Supreme Court of British Columbia ((2002), 217 D.L.R. (4th) 248 (B.C. S.C.))

10 Wilson J. adopted the findings of fact from the earlier trial. Then, having regard to the outcome of the appeal to this Court, he found that the parties had proceeded on a mistaken assumption that the zoning would not change in a manner that would substantially and adversely affect the development before the plaintiff developer had a reasonable opportunity to implement the whole of Phase II, and a parallel mistake of law, *i.e.* that the City had the capacity to make such a contractual commitment. The extra works and improvements carried out by the appellant were in excess of works which the respondent could lawfully have demanded. He accepted the evidence that the excess work the appellant did as a result of the mistake was worth $1.08 million.

11 Wilson J. found that the City had been enriched by the extra works and improvements which, but for the mistake, it would not have received. The appellant had suffered a corresponding deprivation. He then found there was no juristic reason for the City to retain the benefit without accounting to the appellant. He therefore gave judgment for the appellant for $1.08 million with interest at registrar's rates from time to time commencing October 1, 1993 to the date of his judgment, being May 7, 2002.

B. Court of Appeal of British Columbia (Southin, Braidwood and Hall JJ.A.) ((2003), 223 D.L.R. (4th) 617 (B.C. C.A.))

12 Southin J.A. for the court found the claim concerning unjust enrichment to be misconceived. She agreed that the criteria for a finding of unjust enrichment were the enrichment of the person claimed against, a corresponding deprivation of the claimant and the absence of any juristic reason for retaining the enrichment. Applying these criteria to the facts, Southin J.A. concluded that there was no deprivation. The extra works were "part and parcel of the consideration [the appellant] gave for the benefit which it received under the agreements. There is no true correspondence between the asserted enrichment and the asserted deprivation, that is to say, the downzoning of the two water lots" (para. 25). Not only was there no deprivation, but even if there was, "the juristic reason for what the appellant did in 1993 is that the Legislature had conferred upon it the power to do the act of downzoning. The by-law is of the same force and effect as if it had been enacted by the Legislature itself and provides a complete answer to any and all claims arising out of it" (para. 26). Accordingly, the appeal was allowed and the action was dismissed.

IV. Analysis

13 The doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. This is not to say that it is a form of "'palm tree' justice" (*Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 802) that varies with the temperament of the sitting judges. On the contrary, as the Court recently reaffirmed in *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25 (S.C.C.), a court is to follow an established approach to unjust enrichment predicated on clearly defined principles. However, their application should not be mechanical. Iacobucci J. observed that "this is an equitable remedy that will necessarily involve discretion and questions of fairness" (para. 44).

14 As accepted by the courts in British Columbia, the test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at p. 455; *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at p. 848; *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at p. 987; *Peel (Regional Municipality) v. Canada*, *supra*, at p. 784; and *Garland*, *supra*, at para. 30).

A. Was There Enrichment of the City?

15 The existence of an enrichment to the defendant is governed by "a straightforward economic approach" (*Peter*, *supra*, at p. 990). An enrichment may "connot[e] a tangible benefit" (*Peel, supra*, at p. 790), or it can be relief from a "negative", such as saving the defendant from an expense he or she would otherwise have been *required* to make.

16 In this case, the City obtained $1.08 million worth of roads, parkland and walkways and a new seawall, wholly at the appellant's expense. These works and improvements were in excess of what the City could lawfully demand under s. 989 of the *Municipal Act*, R.S.B.C. 1979, c. 290. Mr. Clive Timms, the principal witness on behalf of the City, acknowledged that it was "beyond the authority of the approving officer to require [the extra works] under what we have characterized as a simple subdivision."

17 The City now argues that these extra works and improvements are not really a benefit because they were built on what was then provincial Crown land, and their upkeep by the City costs about $40,000 per year. The City's portrayal of itself as a victim of the appellant's generosity is not credible. The trial judge at the original trial, Mackenzie J., found as a fact that the City had pushed hard to obtain the extra amenities whose cost of upkeep it now grumbles about. Mackenzie J. noted, at para. 20, that "[t]he City wanted planned development with services, parks and other amenities at no cost to the City taxpayers". The City insisted on a restrictive covenant that prevented any construction until the subdivision plans had been approved and servicing agreements entered into, and it was the City that required the appellant as successor in title to assume BCEC's commitments for services, works and improvements beyond those it could lawfully have demanded (para. 23, *per* Mackenzie J.). On this point the *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (1937), at p. 12, makes the useful comment that "[a] person confers a benefit upon another if he ... performs services beneficial to *or at the request of* the other" (emphasis added).

18 The City argues that while the extra works and improvements "may benefit either PNI as a developer or the neighbourhood and the community, it does not benefit the *Corporation* of the City of Victoria" (emphasis in original). However, it was the City that contracted with the appellant for ownership of "the Works", wherever built, under clause 11(c) of the Songhees Phase II Subdivision Servicing Agreement, dated January 29, 1988, which provides:

> (c) Save and except those works installed for public utility companies, the Works *shall be and remain the absolute property of the City* when accepted in writing by the City Engineer. [Emphasis added.]

19 The City's present argument that the extra works and improvements it demanded are not an enrichment but something of a burden should be rejected.

B. Did the Appellant Suffer a Corresponding Deprivation?

20 Using the straightforward economic approach, the appellant suffered a corresponding deprivation of $1.08 million. The appellant was required to spend funds to provide the amenities and had to give up the extra parkland out of the lands they had purchased. No other person or entity contributed to the enrichment. In these circumstances, as Cory J. put it in *Peter*, *supra*, at p. 1012, "I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment".

21 The City claims that the appellant had already turned a handsome profit on the project even without development of the two water lots. So it did, but that is beside the point. The question here is not whether the developer made a success of its project generally, but whether it suffered a detriment corresponding to the City's enrichment. The appellant is not required to subsidize city amenities from the profits earned elsewhere on the project in the absence of some legal requirement. The significance of the Servicing Agreement in this respect is an issue to be considered at the third stage.

C. Is There a Juristic Reason to Deny Recovery to the Appellant?

22 This branch of the test for unjust enrichment is pivotal, for as McLachlin J. observed in *Peter*, *supra*, at p. 990:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

23 The use of the expression "juristic reason" in this connection emphasizes that "unjust" is to be addressed as a matter of law and legal reasoning rather than a free-floating conscience that may risk being overly subjective; see L. Smith, "The Mystery of 'Juristic Reason'" (2000), 12 *S.C.L.R.* (2d) 211, at p. 219. This third step has to some extent been redefined and reformulated in *Garland*, *supra*, at paras. 44-46. There are now two stages to the juristic reason inquiry. At the first stage, a claimant (here the appellant) must show that there is no juristic reason within the established categories that would deny it recovery. The established categories are the existence of a contract, disposition of law, donative intent, and "other valid common law, equitable or statutory obligatio[n]" (*Garland*, at para. 44). The categories may be added to over time (para. 46). On proving that none of these limited categorical reasons exist to deny recovery, the plaintiff (here the appellant) will have made out a *prima facie* case of unjust enrichment. It will have demonstrated "a positive reason for reversing the defendant's enrichment" (Smith, at p. 244).

24 Although this formulation requires the plaintiff to prove a negative, the task is made manageable by the limited number of categories, and it is only fair to put on the claimant the onus of proving the essential elements of its cause of action.

25 At the second stage, the onus shifts to the defendant (here the respondent City), who must rebut the *prima facie* case by showing that there is some other valid reason to deny recovery. In the absence of a convincing rebuttal, the transfer of wealth will be reversed. According to *Garland*, it is at this stage that the court should have regard to the reasonable expectation of the parties and public policy considerations. However, as Iacobucci J. added, at para. 46:

> The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

26 With respect to the absence of a valid juristic reason in this case, the second trial judge was emphatic (para. 17):

> There is no juristic reason for the City to retain the benefits without accounting to the plaintiff. I think it would be against conscience to have that result obtain.

27 I turn then to whether the appellant has demonstrated that the established categories do not apply.

(1) Stage One: The Established Categories

(a) Contract

28 In the usual course, the existence of a contract, such as was made by the parties to this appeal, would be a complete answer to the claim for unjust enrichment. The City relies on four contracts, namely (i) the purchase agreement between the appellant and BCEC; (ii) the subdivision servicing agreement; (iii) the assumption agreement; and (iv) the Songhees Master Agreement. There is no doubt that the parties were entitled to enter into agreements respecting the development of the 22-acre site, and that the project would not have been allowed to proceed without the appellant contributing to the City appropriate works and improvements. The problem is that the City insisted on receiving more than s. 989 of the *Municipal Act* permitted it to ask for, and in exchange, as found in the first trial, it offered an implied undertaking regarding zoning that it was not authorized to give. The development agreements therefore included a perfectly valid core, which has been carried out by all parties, but we are now required to address the *extra* works and improvements demanded by the City and given by the appellant in exchange for guaranteed zoning. The City successfully argued in the first appeal to this Court that the sale of zoning was *ultra vires* its powers, and therefore incapable of giving rise to a cause of action for breach of contract. The logical conundrum for the City at this stage is that it is the very elements of the contract the City demonstrated were *ultra vires* (extra services for guaranteed zoning) that it now argues are the juristic reason for its just retention of $1.08 million in improvements "at no cost to the City taxpayers" (Mackenzie J., at

para. 20). In my opinion, it is not open to the City to rely on the contractual arrangements, which in their relevant parts flowed from the City's *ultra vires* demand, to defeat the appellant's claim on the particular facts of this case.

29 The trial judge found the "extra" works and undertakings given in exchange for the *ultra vires* zoning commitment to be clearly separate and identifiable. The cost was $1.08 million. There is therefore no difficulty on the facts in distinguishing between the City's lawful entitlement and the *ultra vires* extras.

30 The agreements have been carried into execution by the appellant, who no longer seeks to enforce the *ultra vires* provisions. The question is whether equity will take into account the *ultra vires* nature of the City's demand, which is the root of the legal difficulties that followed, in determining whether the contract of which it forms a central part is fatal to the appellant's claim in unjust enrichment.

31 The general rule, of course, is that it is not the function of the court to rewrite a contract for the parties. Nor is it their role to relieve one of the parties against the consequences of an improvident contract. None of that arises in this case. The question here, more precisely, is whether the City can be permitted in the first appeal to argue that it is absolved by the doctrine of *ultra vires* from any contractual responsibility to carry out the zoning obligations (that the trial court found it had undertaken to the appellant on the basis of a common mistake) and then in this appeal, in the same litigation (albeit in relation to a different cause of action), permitted to succeed on the basis that the same contract constitutes a juristic reason to obtain the extra works and improvements without paying for them. In my view, the City's success in the 2000 appeal knocked out of contention the juristic reason (the contractual provisions) on which it primarily relies in this appeal. I say that for two reasons. First, as a matter of equity, it is not necessary for the appellant in this action to try and set aside the entirety of its contractual arrangements with the City. It need only isolate the provisions relating to the *ultra vires* demand, and show why the City ought not to be allowed to rely on them as a defence to a claim in unjust enrichment. Secondly, the trial judge found that the *ultra vires* arrangements rested on a common mistake. Both the City and the appellant assumed the City had the legal authority to make zoning commitments the City did not possess. The finding of common mistake is important to the appellant's claim to recover the cost of the extra works and improvements. If there had been just the *ultra vires* transaction without the added element of common mistake, it would have been a different case and the outcome would not necessarily be the same.

(i) The Fruit of the Ultra Vires Demand

32 In many cases, no doubt, municipalities make demands that are not strictly authorized and developers do what they are asked to do because in the end they get the zoning they want. There is no suggestion that in the ordinary case such arrangements should be unwound on the basis of the doctrine of unjust enrichment. This case is different. As Mackenzie J. observed after the first trial (at para. 17):

> In short, everyone involved miscalculated. What are the legal consequences of this imbroglio?

To which Wilson J., presiding at the second trial, added, somewhat darkly (at para. 4):

> The plaintiff failed to adhere to the admonition, "put not your faith in princes", and must now accept the consequences.

33 Recognizing, as the trial judge did, that the source of the problem in this case is the City's *ultra vires* demand for works and improvements to which it was not entitled, one approach is to sever from the contractual arrangements the exchange of promises that flowed from that initial *ultra vires* demand.

34 It is true that these commercial agreements are, as one would expect, complex, and do not readily lend themselves to "blue-pencil" deletions. We are dealing, however, with an equitable cause of action, and equity looks to substance rather than to form. As stated earlier, a characteristic of the doctrine of unjust enrichment is the flexibility of remedies. Here the substance of the problem to be remedied is clearly identified. The respondent is sitting on $1.08 million worth

of improvements which have been found to be the fruits of an *ultra vires* demand. The remedy sought is simply to reverse the wrongful transfer of wealth by ordering reimbursement of that amount to the appellant.

35 The City seeks to enjoy an unjustified windfall at the appellant's expense. The equitable doctrine would be a feeble thing if it did not possess the remedial flexibility to reverse an enrichment that has been established to the satisfaction of an experienced trial judge to be manifestly unjust. I would not give effect to a defence based on the form as opposed to the substance of the contractual documents.

(ii) Common Mistake

36 Wilson J. found as a fact that the City and the appellant had entered into their contractual arrangements on the basis of a common mistake as to the City's legal authority. He said (at para. 34):

> I have already found that each of these parties believed in a set of circumstances which have now been found [in the earlier appeal] not to be true.

37 The "mistake" was the belief that the City had the authority to contract for the extra works and improvements in exchange for what was found to be an implied contractual obligation to maintain the zoning in place for a reasonable time, estimated at 10 to 12 years, to allow completion of the appellant's project. The mistake was not wholly unreasonable. The judges of this Court were divided 4 to 3 on that issue in the first PNI appeal.

38 The City now denies that it was under any such misapprehension, suggesting that it knew all along that it could not carry out what was found to be its side of the bargain, but that position was rejected on the facts by the trial judge as noted above.

39 The result, accordingly, is that the City and the appellant purported to contract with respect to the extra works and improvements under a common mistake of law as to the enforceability of their agreement. "It cannot be disputed", wrote Bacon V.C. in 1881, that "Courts of Equity have at all times relieved against honest mistakes in contracts ... where not to correct the mistake would be to give an unconscionable advantage to either party": (*Burrow v. Scammell* (1881), 19 Ch. D. 175 (Eng. Ch. Div.), at p. 182). Such a mistake undermines the juristic reason relied upon by the City, as La Forest J. pointed out in *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161 (S.C.C.), at p. 1200:

> From his analysis, Dickson J. [in *Hydro Electric Commission of Nepean v. Ontario Hydro*, [1982] 1 S.C.R. 347] concluded that the judicial development of the law of restitution or unjust (or as Dickson J. noted, "unjustified") enrichment renders otiose the distinction between mistakes of fact and mistakes of law. He would abolish the distinction, and would allow recovery in any case of enrichment at the plaintiff's expense provided the enrichment was caused by the mistake and the payment was not made to compromise an honest claim, subject of course to any available defences or equitable reasons for denying recovery, such as change of position or estoppel. [Emphasis added.]

See also *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 S.C.R. 1133 (S.C.C.), at p. 1157.

40 Southin J.A. in the Court of Appeal (at para. 24) accepted the existence of the Songhees Phase II Subdivision Servicing Agreement as a valid juristic reason to deny recovery because:

> ... there is nothing in any of this [evidence] from which one could conclude that the original transaction would have come to fruition had the [appellant] asserted it would do only what could lawfully be required of a landowner under s. 989 of the Act.

41 This is true, but the fact is that the City and the appellant *did* make a deal on a basis which this Court found to be *ultra vires*. The City might not have done the deal on any other basis and certainly it is clear the appellant would not have undertaken the extra works and improvements without the zoning assurances it thought it had contracted for.

However, the deal was done on the basis of a common mistake of law, the extra works and improvements are in place, and the relevant question now is who is to pay for them.

42 Southin J.A. also accepted the City's argument that what the appellant "asserts to be the deprivation, that is to say, the extra works, was part and parcel of the consideration it gave for the benefit which it received under the agreements" (para. 25). On this view, "the benefit" was the acquisition of the 22 acres of land and approval of the subdivision plan. Such a view, with respect, is at odds with the findings of fact by the trial judge as to the "consideration" the City and the appellant had agreed upon, namely the maintenance of the zoning in place for a reasonable time to permit the completion of the project. As noted earlier, the "extra" works and improvements were found to be distinct from what was lawfully required.

43 For these reasons, I conclude that the appellant has negatived the contractual provisions as a juristic reason permitting the City to retain the extra works and improvements without paying for them.

(b) Disposition of Law

44 It is evident that the appellant's claim must fail if the City's retention without payment of the $1.08 million enrichment is authorized by statute (*Peter*, *supra*, p. 1018; *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.), at p. 476).

45 The City relies on s. 914 of the *Local Government Act* which provides that no compensation is payable to anyone for any "reduction in the value of that person's interest in land, or for any loss or damages that result from the adoption of an official community plan or a bylaw under this Division or the issue of a permit under Division 9 of this Part". The City argues that the loss claimed by the appellant flows from the down-zoning, and is therefore unrecoverable by reason of the statute.

46 In my view, the claim here is not based on "the adoption of an official community plan or [zoning] bylaw". While the earlier appeal alleged that the down-zoning of the water lots breached an implied term of the contract, that claim was rejected, and the appellant's losses flowing from the down-zoning are no longer in issue. The appellant's cause of action for unjust enrichment was complete when it put in place the extra works and improvements in the mistaken belief that its contract with the City in respect thereto was enforceable. The mistake formed the basis of the City's successful appeal after the first trial.

47 The City also relies on s. 215(3) of the *Land Title Act* under which the restrictive covenant bound the appellant to do the works "notwithstanding that the instrument ... has not been signed by the covenantee". The City's argument amounts to the proposition that registration allows the City to do indirectly what would be *ultra vires* if done directly, and thereby to subvert the legislative intent to limit a municipality's authority, even as the municipality itself escapes its side of the bargain by pleading the doctrine of *ultra vires*. I would not give effect to the City's s. 215 argument. The second trial judge, Wilson J., found, at para. 5, that the appellant's obligations were "inextricably bound up" with the other provisions of the agreements including the City's *ultra vires* promise to maintain in place the requisite zoning. The appellant does not deny its obligation under the restrictive covenant or the underlying agreements. Its position is that in the circumstances, the agreements, flawed as they are, cannot be relied upon by the City as a juristic reason to keep the works and improvements without paying for them. I agree with that position.

(c) Donative Intent

48 The City contends that it is common for developers to offer "sweeteners" in excess of what a municipality can demand for zoning and subdivision approvals. This is true. Each side gets what it wants and moves on. However, their deal is not based on a common mistake. And here the appellant did not get what the City undertook to give it. Mackenzie J., at the initial trial, whose findings were adopted by Wilson J. at the second trial, flatly rejected any suggestion that the appellant possessed a donative intent (at para. 29):

> The characterization of park dedications and service cost expenditures as voluntary belies the reality. PNI was pursuing a business venture. It negotiated terms of purchase with BCEC and a services agreement with the City with a precise expectation of the lots it would acquire, the zoning for each lot and the extent of development thereby permitted. It made commitments pursuant to written agreements with mutual obligations that it considered enforceable. Its motives were commercial and not philanthropic.

49 The appellant did not offer a "sweetener" for something it got. It offered consideration for an implied undertaking it turned out the City was able to repudiate.

(d) Other Valid Common Law, Equitable Or Statutory Obligation

50 Southin J.A. stated, at para. 26:

> In any event, the juristic reason for what the appellant did in 1993 is that the Legislature had conferred upon it the power to do the act of downzoning. The by-law is of the same force and effect as if it had been enacted by the Legislature itself and provides a complete answer to any and all claims arising out of it.

51 With respect, this argument presupposes that the claim for unjust enrichment "arose" out of the down-zoning. However, the claim for unjust enrichment does not depend on the down-zoning. It depends on the fact that the City has obtained $1.08 million worth of extra works and improvements at the appellant's expense to which, after securing a court order declaring that it had no power to do what it purported to undertake to do, the City has no legitimate entitlement.

52 The City also argues that requiring it to pay for the extra works and improvements would constitute an "indirect fetter" on the exercise of its legislative power, but this is not so. The appellant has never attacked the validity of the down-zoning. The appellant no longer seeks damages for breach of contract that included loss of profits on a project it was unable to build. We are now dealing simply with the cost of extra works and improvements. The focus is not on the appellant's loss but on the City's enrichment. The power to down-zone in the public interest does not immunize the City against claims for unjust enrichment.

(2) Stage Two: Reasonable Expectation of the Parties and Public Policy Considerations

53 Under stage two of the "juristic reason" inquiry, the onus falls on the City to show that to allow the claim of unjust enrichment in this case would frustrate the reasonable expectation of the parties. It has not discharged this onus. On the contrary, Wilson J. found that neither the City nor the appellant expected the extra works and improvements to be donated. The reasonable expectation was that the works and improvements would be paid for out of the profits from those parts of the Phase II project the appellant was prevented by the City from building. The City did not expect to get the extra works and improvements for nothing, but the agreed form of consideration (guaranteed zoning) turned out to be beyond its powers. The City now owns the works, and it is consistent with the parties' *reasonable* expectations that the appellant be reimbursed for their cost.

54 The City contends that the grant of an equitable remedy in this case would be bad public policy.

55 First, the grant of the equitable remedy would not frustrate the legislative purpose in making such zoning commitments unenforceable. In fact, the City *did* down-zone the lots in question and *was* held able to do so without having to pay damages for breach of contract. Whether or not it should pay the cost of benefits it actually demanded and received is a different question.

56 Second, it is not suggested that the City or the appellant made these agreements for an improper purpose. On the contrary, Mackenzie J. at the first trial considered the "interlocking agreements [to be] an innovative means of achieving the parties' differing objectives by hinging binding obligations on each piece going into place" (para. 26). He pointed out that the exchange of contractual promises ultimately found to be *ultra vires* was designed, as stated by the City's solicitor,

"to facilitate an unusual rezoning of a large area of undeveloped and unsubdivided land" (para. 26). No one disputes that the redevelopment, as planned, was thought to be in the overall best interest of the municipality.

57 Third, I am not persuaded that it would be good public policy to have municipalities making development commitments, then not only have them turn around and attack those commitments as illegal and beyond their own powers, but allow them to scoop a financial windfall at the expense of those who contracted with them in good faith. This is precisely the sort of unfairness that the doctrine of unjust enrichment is intended to address.

58 The City has not pointed to any other public policy that ought to preclude recovery on the facts of this case. The City insisted on the works and improvements it now owns on the Songhees lands. It should pay for the cost of their construction. Municipalities are subject to the law of unjust enrichment in the same way as other individuals and entities.

V. Disposition

59 I would therefore allow the appeal, set aside the decision of the British Columbia Court of Appeal, and restore the trial judgment requiring the respondent City to pay the appellant $1.08 million. Interest will accrue on that amount at registrar's rates from time to time commencing the 1st day of October 1993 to the date of this judgment. The appellant is entitled to its costs of the trial before Wilson J., of the appeal from that judgment to the British Columbia Court of Appeal, and the costs of the present appeal in this Court.

Appeal allowed.

Pourvoi accueilli.

Tab 6

2016 ONSC 316
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 589, 2016 ONSC 316, 263 A.C.W.S. (3d) 298, 32 C.B.R. (6th) 48

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 Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

G.B. Morawetz R.S.J.

Heard: December 21-22, 2015
Judgment: January 15, 2016
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Shawn Irving, Tracy Sandler, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Linda Galessiere, Gus Camelino, for 20 VIC Management Inc. (on behalf of various landlords), Morguard Investments Limited (on behalf of various landlords), Calloway Real Estate Investment Trust (on behalf of Calloway REIT (Hopedale) Inc.), Calloway REIT (Laurentian Inc.), Crombie REIT, Triovest Realty Advisors Inc. (on behalf of various landlords), Brad-Lea Meadows Limited and Blackwood Partners Management Corporation (on behalf of Surrey CC Properties Inc.)
Laura M. Wagner, Mathew P. Gottlieb, for KingSett Capital Inc.
Yannick Katirai, Daniel Hamson, for Eleven Points Logistics Inc.
Daniel Walker, for M.E.T.R.O. (Manufacture, Export, Trade, Research Office) Incorporated / Kerson Invested Limited
Jay A. Schwartz, Robin Schwill, for Target Corporation
Miranda Spence, for CREIT
Jay Carfagnini, Jesse Mighton, Alan Mark, Melaney Wagner, for Alvarez & Marsal Canada Inc. in its capacity as Monitor
James Harnum, for Employee
Harvey Chaiton, for Directors and Officers of the Applicants
Stephen M. Raicek, Mathew Maloley, for Faubourg Boisbriand Shopping Centre Limited and Sun Life Assurance Company of Canada
Vern W. DaRe, for Doral Holdings Limited and 430635 Ontario Inc.
Stuart Brotman, for Sobeys Capital Incorporated
Catherine Francis, for Primaris Reit
Kyla Mahar, for Centerbridge Partners and Davidson Kempner
William V. Sasso, for Pharmacist
Varoujan C. Arman, for Nintendo of Canada Ltd., Universal Studios Canada Inc., Thyssenkrupp Elevator (Canada) Limited, RPI Consulting Group Inc.
Brian Parker, for Montez (Cornerbrook) Inc., Admns Meadowlands Investment Corp, and Valiant Rental Inc.
Roger Jaipargas, for Glentel Inc., Bell Canada and BCE Nexxia
Nancy Tourgis for Issi Inc.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iii Creditor approval
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Creditor approval
T Canada sought protection under Companies' Creditors Arrangement Act (CCAA) — Certain landlords reached understanding with T Canada and its parent company T Corp. formalized through addition of paragraph 19A to Initial and Restated Order — Paragraph provided that CCAA proceedings would not be used to compromise guarantee claims landlords had against T Corp. — T Canada developed plan to present to affected creditors — T Canada negotiated structure with T Corp. whereby it would subordinate intercompany claims for benefit of remaining creditors and make other contributions — T Corp. required all claims including guarantees to landlords to be settled — T Canada brought motion to accept joint plan and compromise, establish class of affected creditors, authority to hold meeting of creditors, and to set date for hearing of sanction of plan if it was accepted — Motion dismissed — Plan failed to meet low threshold to authorize holding creditors meeting — There was no reasonable chance of success — Plan would not meet criteria at sanction hearing — Court was required to ensure that CCAA process unfolds in fair and transparent manner — Landlords should not be required through CCAA proceeding to release T Corp. from guarantees in exchange for consideration in plan in form of formula within plan — Landlords were concerned about effect CCAA proceedings would have on guarantees from very beginning — That T Corp. would only consider subordinating its intercompany claims as part of global settlement including landlord guarantees was not reason to approve plan — Without amendment landlords would have considered issuing bankruptcy proceedings as against T Canada — Paragraph 19A was incorporated into Initial and Restated Order with support of both T Corp. and monitor — Varying paragraph 19A so that plan could address guarantee claims landlords had as against T Corp. meant plan required court to completely ignore background that led to paragraph 19A and reliance that parties placed on it — Any change in economic landscape did not justify departure from agreed upon course of action as set out in paragraph 19A — T Canada and T Corp. were trying to use CCAA proceeding as means to secure release of T. Corp. from its liabilities — Proposal clearly contravened agreement memorialized and enforced in paragraph 19A — Paragraph 19A arose in post-CCAA filing environment, with each interested party carefully negotiating its position — All parties knew they were entering into binding agreements supported by binding orders — Agreements were heavily negotiated by sophisticated parties — Plan also established landlord formula amount which was not in original order.
Table of Authorities
Cases considered by *G.B. Morawetz R.S.J.*:
ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 2652, 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201 (Ont. S.C.J. [Commercial List]) — referred to
ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re*) 92 O.R. (3d) 513 (Ont. C.A.) — referred to
Alternative Fuel Systems Inc., Re (2003), 2003 ABQB 745, 2003 CarswellAlta 1262, 46 C.B.R. (4th) 8, 20 Alta. L.R. (4th) 265, [2004] 5 W.W.R. 467, 46 C.B.R. (4th) 17, 20 Alta. L.R. (4th) 264 (Alta. Q.B.) — considered
Alternative Fuel Systems Inc., Re (2004), 2004 ABCA 31, 2004 CarswellAlta 64, 47 C.B.R. (4th) 1, 236 D.L.R. (4th) 155, 24 Alta. L.R. (4th) 1, [2004] 5 W.W.R. 475, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.*) 346 A.R. 28, (sub nom. *Remington Development Corp. v. Alternative Fuel Systems Inc.*) 320 W.A.C. 28 (Alta. C.A.) — referred to

BlueStar Battery Systems International Corp., Re (2000), 2000 CarswellOnt 4837, [2001] G.S.T.C. 2, 10 B.L.R. (3d) 221, 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]) — referred to
Crystallex International Corp., Re (2013), 2013 ONSC 823, 2013 CarswellOnt 3043, 3 C.B.R. (6th) 307 (Ont. S.C.J. [Commercial List]) — considered
Dairy Corp. of Canada Ltd., Re (1934), [1934] O.R. 436, [1934] 3 D.L.R. 347, [1934] O.W.N. 347, 1934 CarswellOnt 33 (Ont. C.A.) — referred to
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Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. *Elan Corp. v. Comiskey*) 1 O.R. (3d) 289, (sub nom. *Elan Corp. v. Comiskey*) 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) — referred to
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Quintette Coal Ltd., Re (1992), 13 C.B.R. (3d) 146, 68 B.C.L.R. (2d) 219, 1992 CarswellBC 502 (B.C. S.C.) — referred to
ScoZinc Ltd., Re (2009), 2009 NSSC 163, 2009 CarswellNS 283, 55 C.B.R. (5th) 205 (N.S. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 65.2(3) [en. 1992, c. 27, s. 30] — considered
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Generally — referred to

s. 4 — considered

s. 11 — considered

s. 20(1)(a)(iii) — considered

MOTION to accept joint plan and compromise, to establish class of affected creditors to vote on plan, and authority to hold meeting of those creditors and vote on plan and related procedures, and to set date for hearing of sanction of plan of it was accepted.

***G.B. Morawetz R.S.J.*:**

1 The Applicants Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp, Target Canada Pharmacy (Ontario) Corp, Target Canada Pharmacy Corp, Target Canada Pharmacy (Sk) Corp, and Target Canada Property LLC ("Target Canada") bring this motion for an order, *inter alia*:

(a) accepting the filing of a Joint Plan Compromise and Arrangement in respect of Target Canada Entities (defined below) dated November 27, 2015 (the "Plan");

(b) authorizing the Target Canada Entities to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "Unsecured Creditors' Class");

(c) authorizing the Target Canada Entities to call, hold and conduct a meeting of the Affected Creditors (the "Creditors' Meeting") to consider and vote on a resolution to approve the Plan, and approving the procedures to be followed with respect to the Creditors' Meeting;

(d) setting the date for the hearing of the Target Canada Entities' motion seeking sanction of the Plan should the Plan be approved by the required majority of Affected Creditors of the Creditors Meeting.

2 On January 13, 2016, the Record was endorsed as follows: "The Plan is not accepted for filing. The Motion is dismissed. Reasons to follow."

3 These are the reasons.

4 The Applicants and Partnerships listed on Schedule "A" to the Initial Order (the "Target Canada Entities") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("CCAA") pursuant to the Initial Order dated January 15, 2015 (as Amended and Restated, the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor. [1]

5 The Target Canada Entities, with the support of Target Corporation as Plan Sponsor, have now developed a Plan to present to Affected Creditors.

6 The Target Canada Entities propose that the Creditors' Meeting will be held on February 2, 2016.

7 The requested relief sought by Target Canada is supported by Target Corporation, Employee Representative Counsel, Centerbridge Partners, L.P. and Davidson Kempner, CREIT, Glentel Inc., Bell Canada and BCE Nexxia, M.E.T.R.O. Incorporated, Eleven Points Logistics Inc., Issi Inc. and Sobeys Capital Incorporated.

8 The Monitor also supports the motion.

9 The motion was opposed by KingSett Capital, Morguard Investments Limited, Morguard Investment REIT, Smart REIT, Crombie REIT, Triovest, Faubourg Boisbriand and Sun Life Assurance, Primaris REIT, and Doral Holdings Limited (the "Objecting Landlords").

Background

10 In February 2015, the court approved the Inventory Liquidation Process and the Real Property Portfolio Sale Process ("RPPSP") to enable the Target Canada Entities to maximize the value of their assets for distribution to creditors.

11 By the summer of 2015, the processes were substantially concluded and a claims process was undertaken. The Target Canada Entities began to develop a plan that would distribute the proceeds and complete the orderly wind-down of their business.

12 The Target Canada Entities discussed the development of the Plan with representatives of Target Corporation.

13 The Target Canada Entities negotiated a structure with Target Corporation whereby Target Corporation would subordinate significant intercompany claims for the benefit of remaining creditors and would make other contributions under the Plan.

14 Target Corporation maintained that it would only consider subordinating these intercompany claims and making other contributions as part of a global settlement of all issues relating to the Target Canada Entities including a settlement and release of all Landlord Guarantee Claims where Target Corporation was the Guarantor.

15 The Plan as structured, if approved, sanctioned and implemented will

(i) complete the wind-down of the Target Canada Entities;

(ii) effect a compromise, settlement and payment of all Proven Claims; and

(iii) grant releases of the Target Canada Entities and Target Corporation, among others.

16 The Plan provides that, for the purposes of considering and voting on the plan, the Affected Creditors will constitute a single class (the "Unsecured Creditors' Class").

17 In the majority of CCAA proceedings, motions of this type are procedural in nature and more often than not they proceed without any significant controversy. This proceeding is, however, not the usual proceeding and this motion has attracted significant controversy. The Objecting Landlords have raised concerns about the terms of the Plan.

18 The Objecting Landlords take the position that this motion deals with not only procedural issues but substantive rights. The Objecting Landlords have two major concerns.

Objection # 1 — Breach of paragraph 19A of the Amended and Restated Order

19 First, in February 2015, an Amended and Restated Order was sought by Target Canada. Paragraph 19A was incorporated into the Amended and Restated Order, which provides that the claims of any landlord against Target Corporation relating to any lease of real property (the "Landlord Guarantee Claims") shall not be determined in this CCAA proceeding and shall not be released or affected in any way in any plan filed by the Applicants.

20 Paragraph 19A provides as follows:

> 19A. THIS COURT ORDERS that, without in any way altering, increasing, creating or eliminating any obligation or duty to mitigate losses or damages, the rights, remedies and claims (collectively, the "Landlord Guarantee Claims") of any landlord against Target US pursuant to any indemnity, guarantee, or surety relating to a lease of real property, including, without limitation, the validity, enforceability or quantum of such Landlord Guarantee Claims: (a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List), whether or not the within proceeding under the CCAA continue (without altering the applicable and operative governing law of such indemnity, guarantee or surety) and notwithstanding the provisions of any federal or provincial statutes with respect to procedural matters relating to the Landlord Guarantee Claims; provided that any landlord holding such guarantees, indemnities or sureties that has not consented to the foregoing may, within fifteen (15) days of the making of this Order, bring a motion to have the matter of the venue for the determination of its Landlord Guarantee Claim adjudicated by the Court; (b) shall not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination (including any findings of fact, mixed fact and law or conclusions of law) of any rights, remedies and claims of such landlords as against Target Canada Entities, whether made in the within proceedings under the CCAA or in any subsequent proposal or bankruptcy proceedings under the BIA, other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA, or any proposal filed by the Target Canada Entities, or any of them, under the BIA.

21 The evidence of Target Canada in support of the requested change consisted of the Affidavit of Mark Wong, who stated at the time:

> A component of obtaining the consent of the Landlord Group for approval of the Real Property Portfolio Sales Process ("RPPSP") was the agreement of The Target Canada Entities to seek approval of certain changes to the initial order in the form of an amended and restated initial order...[T]hese proposed changes were the subject of significant negotiation between the Landlord Group and The Target Canada Entities, with the assistance and input of the Monitor and Target Corporation.

22 The Monitor, in its second report dated February 9, 2015, stated:

(3.4) Counsel to the Landlord Group advised that the Real Property Portfolio Sales Process proceeding on a consensual basis as described below is conditional on the proposed changes to the initial order.

(3.5) The Monitor recommends approval of the amended and restated initial order as it reflects;

(a) revisions negotiated as among The Target Canada Entities, the Landlord Group and Target U.S. (in conjunction with revisions to the Real Property Portfolio Sales Process), with the assistance of the Monitor; and

(b) a fair and reasonable balancing of interests.

23 Thus, Objecting Landlords contend that the agreement resulting in Paragraph 19A of the Amended and Restated Initial Order was not just a condition of the Landlord Group's agreement to the RPPSP — it was also a condition of the Landlord Group withdrawing both its opposition to the CCAA process and its intention to commence a bankruptcy application to put the Applicants into bankruptcy at the come back hearing.

24 The Objecting Landlords contend that the Applicants now seek to file a plan that releases the Landlord Guarantee Claims. This, in their view, is a clear breach of paragraph 19A, which Target Canada sought and the Monitor supported.

Objection # 2 — Breach of paragraph 55 of the Claim Procedure Order

25 Second, the Objecting Landlords contend that the Plan violates the Claims Procedure Order and the CCAA. They argue that the Claims Procedure Order was also settled after prolonged negotiations between the Target Canada Entities and their creditors, including the landlords and that this order sets out a comprehensive claims process for determining all claims, including landlords' claims.

26 The Objecting Landlords contend that Paragraph 55 of the Claims Procedure Order expressly excludes Landlord Guarantee Claims and provides that nothing in the Claims Procedure Order shall prejudice, limit, or otherwise affect any claims, including under any guarantee, against Target Corporation or any predecessor tenant. Paragraph 55 also ends with the *proviso* that "[f]or greater certainty, this Order is subject to and shall not derogate from paragraph 19A of the Initial Order."

27 The Objecting Landlords take the position that, in clear breach of Paragraph 55 and of the Claims Procedure Order generally, the Plan provides for a set formula to determine landlord claims, including claims against Target Corporation under its guarantees. KingSett further contends that the formula not only purports to determine landlords' claims for distribution purposes, it also purports to determine their claims for voting purposes, with no ability to challenge either. KingSett contends that this violates the terms of the Claims Procedure Order that was sought by the Applicants and supported by the Monitor.

28 In summary, the Objecting Landlords take the position that the foregoing issues are crucial threshold issues and are not merely "procedural" questions and as such the court has to determine whether it can accept a plan for filing if that plan in effect permits Target Canada to renege on their agreements with creditors, violate court orders and the CCAA.

29 In my view the issues raised by the Objecting Landlords are significant and they should be determined at this time.

Position of Target Canada

30 Target Canada takes the position that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

31 Target Canada submits that the Plan has been the subject of numerous discussions and/or negotiations with Target Corporation (leading to a structure based on Target Corporation serving as Plan Sponsor), the Monitor and a

wide variety of stakeholders. Target Canada states that if approved, the Plan will effect a compromise, settlement and payment of all proven claims in the near term in a manner that maximizes and accelerates stakeholder recovery.

32 Target Corporation, as Plan Sponsor and a creditor of Target Canada, has agreed to subordinate approximately $5 billion in intercompany claims to the claims of other Affected Creditors. Based on the Monitor's preliminary analysis, the Plan provides for recoveries for Affected Creditors generally in the range of 75% to 85% of their proven claims.

33 Target Canada contends that recent case law supports the jurisdiction of the CCAA court to provide that third party claims be addressed within the CCAA and leaves it open to a debtor company to address such claims in a plan.

34 The Plan provides that Affected Creditors will vote on the Plan as a single unsecured class. Target Canada submits that this is appropriate on the basis that all Affected Creditors have the required commonality of interest (i.e. an unsecured claim) in relation to the claims against Target Canada and the Plan will compromise and release all of their claims.

35 Target Canada is of the view that fragmentation of these creditors into separate classes would jeopardize the ability to achieve a successful plan.

36 The Plan values the Landlord Restructuring Period Claims of landlords whose leases have been disclaimed by applying a formula ("Landlord Formula Amount") derived from the formula provided under s. 65.2 (3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA" and "BIA Formula"). The Landlord Formula Amount enhances the BIA Formula by permitting recovery of an additional year of rent. Target Corporation intends to contribute funds necessary to pay this enhancement (the "Landlord Guarantee Top-Up Amounts") Target Canada contends that the use of the BIA Formula to value landlord claims for voting and distribution purposes has been approved in other CCAA proceedings.

37 With respect to the Landlord Formula Amount to calculate the Landlord Restructuring Period Claims, the formula provides for, in effect, Landlord Restructuring Period Claims to be valued at the lesser of either:

(i) rent payable under the lease for the two years following the disclaimer plus 15% of the rent for the remainder of the lease term; or

(ii) four years rent.

38 Target Canada further contends that the court has the jurisdiction to modify the Initial Order on Plan Implementation to permit the Target Canada Entities to address Landlord Guarantee Claims in the Plan and that it is appropriate to do so in these circumstances. This justification is based on the premise that the landscape of the proceedings has been significantly altered since the filing date, particularly in light of the material contributions that Target Corporation prepared to make as Plan Sponsor in order to effect a global resolution of issues. Further, they argue that Landlord Guarantee Creditors are appropriately compensated under the Plan for their Landlord Guarantee Claims by means of the Landlord Guarantee Creditor Top-Up amounts, which will be funded by Target Corporation. As such, Landlord Guarantee Creditors will be paid 100% of their Landlord Restructuring Period Claims, valued in accordance with the Landlord Formula Amount.

39 The Applicants contend that they seek to achieve a fair and equitable balance in the Plan. The Applicants submit that questions as to whether the Plan is in fact balanced, and fair and reasonable towards particular stakeholders, are matters best assessed by Affected Creditors who will exercise their business judgment in voting for or against the Plan. Until Affected Creditors have expressed their views, considerations of fairness are premature and are not matters that are required to be considered by the court in granting the requested Creditors' Meeting. If the Plan is approved by the requisite majority of the Affected Creditors, the court will then be in a position to fully evaluate the fairness and reasonableness of the Plan as a whole, with the benefit of the business judgment of Affected Creditors as reflected in the vote of the Creditors' Meeting.

40 The significant features of the Plan include:

(i) the Plan contemplates that a single class of Affected Creditors will consider and vote on the plan.

(ii) the Plan entitles Affected Creditors holding proven claims that are less than or equal to $25,000 ("Convenience Class Creditors") to be paid in full;

(iii) the Plan provides that all Landlord Restructuring Period Claims will be calculated using the Landlord Formula Amount derived from the BIA Formula;

(iv) As a result of direct funding from Target Corporation of the Landlord Guarantee Creditor Top-Up amounts, Landlord Guarantee Creditors will be paid the full value of their Landlord Restructuring Period Claims;

(v) Intercompany Claims will be valued at the amount set out in the Monitor's Intercompany Claims Report;

(vi) If approved and sanctioned, the Plan will require an amendment to Paragraph 19A of the Initial Order which currently provides that the Landlord Guarantee Claims are to be dealt with outside these CCAA proceedings. The Plan provides that this amendment will be addressed at the sanction hearing once it has been determined whether the Affected Creditors support the Plan.

(vii) In exchange for Target Corporations' economic contributions, Target Corporation and certain other third parties (including Hudson's Bay Company and Zellers, which have indemnities from Target Corporation) will be released, including in relation to all Landlord Guarantee Claims.

41 If the Plan is approved and implemented, Target Corporation will be making economic contributions to the Plan. In particular:

(a) In addition to the subordination of the $3.1 billion intercompany claim that Target Corporation agreed to subordinate at the outset of these CCAA proceedings, on Plan Implementation Date, Target Corporation will cause Property LLP to subordinate almost all of the Property LLP ("Propco") Intercompany Claim which was filed against Propco in an additional amount of approximately $1.4 billion;

(b) In turn, Propco will concurrently subordinate the Propco Intercompany Claim filed against TCC in an amount of approximately $1.9 billion (adjusted by the Monitor to $1.3 billion);

(c) Target Corporation will contribute funds necessary to pay the Landlord Guarantee Creditor Top-Up Amounts.

42 Target Canada points out that in discussions with Target Corporation to establish the structure for the Plan, Target Corporation maintained that it would only consider subordinating these remaining intercompany claims as part of a global settlement of all issues relating to the Target Canada Entities, including all Landlord Guarantee Claims.

43 The issue on this motion is whether the requested Creditors' Meeting should be granted. Section 4 of the CCAA provides:

4. Where a compromise or arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, or any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of shareholders of the company, to be summoned in such manner as the court directs.

44 Counsel cites *Nova Metal Products* for the proposition that the feasibility of a plan is a relevant significant factor to be considered in determining whether to order a meeting of creditors. However, the court should not impose a heavy burden on a debtor company to establish the likelihood of ultimate success at the outset (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.).

45 Counsel submit that the court should order a meeting of creditors unless there is no hope that the plan will be approved by the creditors or, if approved, the plan would not for some other reason be approved by the court (*ScoZinc Ltd., Re*, 2009 NSSC 163, 55 C.B.R. (5th) 205 (N.S. S.C.)).

46 Counsel also submits that the court has described the granting of the Creditors' Meeting as essentially a "procedural step" that does not engage considerations of whether the debtors' plan is fair and reasonable. Thus, counsel contends, unless it is abundantly clear the plan will not be approved by its creditors, the debtor company is entitled to put its plan before those creditors and to allow the creditors to exercise their business judgment in determining whether to support or reject it.

47 Target Canada takes the position that there is no basis for concluding that the Plan has, no hope of success and the court should therefore exercise its discretion to order the Creditors Meeting.

48 Counsel to Target Canada submits that the flexibility of the CCAA allows the Target Canada Entities to apply a uniform formula for valuing Landlord Restructuring Period Claims for voting and distribution purposes, including Landlord Guarantee Claims, in the interests of ensuring expeditious distributions to all Affected Creditors

49 Counsel contends that if each Landlord Restructuring Period Claim had to be individually calculated based on the unique facts applicable to each lease, including future prospects for mitigation and uncertain collateral damage, the resulting disputes would embroil disputes between landlords and the Target Canada Entities in lengthy proceedings. Counsel contends that the issue relating to the Landlord Guarantee Claims is more properly a matter of the overall fairness and reasonableness of the Plan and should be addressed at the sanction hearing.

50 The Plan also contemplates releases for the benefit of Target Corporation and other third parties to recognize the material economic contribution that have resulted in favourable recoveries for Affected Creditors. These releases, Target Canada contends, satisfy the well established test for the CCAA court to approve third party releases. (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90 (Ont. S.C.J. [Commercial List]), affirmed 2008 ONCA 587 (Ont. C.A.), (sub nom. Re *Metcalfe & Mansfield Alternative Investments II Corp.*)

51 Likewise, the issue of Third Party Claims and Third Party Releases is a matter that can be addressed at sanction.

52 With respect to the amendment to Paragraph 19A of the Initial Order, counsel submits that since the date of the Initial Order, and since this paragraph was included in the Initial Order, the landscape of the restructuring has shifted considerably, most notably in the form of the economic contributions that are being offered by Target Corporation, as Plan Sponsor.

53 The Target Entities propose that on Plan Implementation, Paragraph 19A of the Initial Order will be deleted. Counsel submits that the court has the jurisdiction to amend the Initial Order through its broad jurisdiction under s. 11 of the CCAA to make any order that it considers appropriate in the circumstances and further, the court would be exercising its discretion to amend its own order, on the basis that it is just and appropriate to do so in these particular circumstances. Counsel submits that the requested amendment is essential to the success of the Plan and to maximize and expedite recoveries for all stakeholders. Further, the notion that a post-filing contract cannot be amended despite subsequent events fails to do justice to the flexible and "real time" nature of a CCAA proceeding.

54 As such, counsel contends that no further information is necessary in order for the landlords to determine whether the Plan is fair and reasonable and they are in a position to vote for or against the Plan.

Position of the Objecting Landlords

55 At the outset of this proceeding, Target Canada, Target Corporation and Target Canada's landlords agreed that Landlord Guarantee Claims would not be affected by any Plan. In exchange, several landlords with Landlord Guarantee

Claims agreed to withdraw their opposition to Target Canada proceeding with the liquidation under the CCAA and the RPPSP.

56 Counsel to the landlords submit that 10 months after having received the benefit of the landlords not opposing the RPPSP and the continuation of the CCAA, Target Canada seeks the court's approval to unequivocally renege on the agreement that violates the Amended Order by filing a Plan that compromises Landlord Guarantee Claims.

57 The Objecting Landlords also contend that the proposed plan violates the Amended Order and the Claims Procedure Order by purporting to the value the landlords' claims, including all Landlord Guarantee Claims, using a formula.

58 Objecting Landlords take the position that they have claims against Target Canada as a result of its disclaimer of long term leases, guaranteed by Target Corporation, in excess of the amount that the Plan values these claim. One example is the claim of KingSett. KingSett insists they have a claim of at least $26 million which has been valued for Plan purposes at $4 million plus taxes.

59 The Objecting Landlords submit that the court cannot and should not allow a plan to be filed that violates the court's orders and agreements made by the Applicant. Further, if the motion is granted, the CCAA will no longer allow for a reliable process pursuant to which creditors can expect to negotiate with an Applicant in good faith. Counsel contends that the amendment of the Initial Order to buttress the agreement between the parties not to compromise the Landlord Guarantee Claims was intended to strengthen, not weaken, the landlords' ability to enforce Target Canada and Target Corporation's contractual obligation not to file a plan that compromises Landlord Guarantee Claims and it would be a perverse outcome for the court to hold otherwise.

60 With respect to claims procedure, the Claims Procedure Order provides in Paragraph 32 that a claim that is subject to a dispute "shall" be referred to a claims officer of the court for adjudication. The Objecting Landlords submit that the Claims Procedure Order reaffirms the agreement between Target Canada, Target Corporation and the Landlord Group with respect to Landlord Guarantee Claims; they refer to Paragraph 55 which specifically provides that nothing in the order shall prejudice, limit, bar, extinguish or otherwise affect any rights or claims, including under any guarantee or indemnity, against Target Corporation or any predecessor tenant.

61 Counsel for the Objecting Landlords submit that the Plan provides the basis for Target Corporation to avoid its obligation to honour guarantees to landlords, which Target Corporation agreed would not be compromised as part of the CCAA proceedings. Counsel contends that the Plan seeks to use the leverage of the "Plan Sponsor" against the creditors to obtain approval to renege on its obligations. This, according to counsel, amounts to an economic decision by Target Corporation in its own financial interest.

62 In support of its proposition that the court cannot accept a plan's call for a meeting where the plan cannot be sanctioned, counsel references *Crystallex International Corp., Re*, 2013 ONSC 823, 2013 CarswellOnt 3043 (Ont. S.C.J. [Commercial List]) . Counsel submits that the court should not allow the Applicants to file a plan that from the outset cannot be sanctioned because it violates court orders or is otherwise improper.

63 In this case, counsel submits that the Plan cannot be accepted for filing because it violates Paragraph 19A of the Amended Order and Paragraph 55 of the Claims Procedure Order. The Objecting Landlords stated as follows:

> Paragraph 19A of the Amended Order is unequivocal. Landlord Guarantee Claims:
>
> (a) shall not be determined, directly or indirectly, in the CCAA proceeding;
>
> (b) shall be unaffected by any determination of claims of landlords against Target Canada; and,
>
> (c) shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by Target Canada under the CCAA.

Likewise, the Claims Procedure Order, as amended, clearly provides that:

(a) disputed creditors' claims shall be adjudicated by a Claims Officer or the Court;

(b) creditors have until February 12, 2016 to object to intercreditor claims; and,

(c) the claims process shall not affect Landlord Guarantee Claims and shall not derogate from paragraph 19A of the Amended Order.

There is no dispute that the Plan that Target Canada now seeks to file violates these terms of the Amended Order and the Claims Procedure Order...

64 With respect to the issue of Paragraph 19A, counsel submits that this provision benefits Target Canada's creditors who have guarantees from Target Corporation. Further, under the plan, these creditors gain nothing from subordination of Target Corporation's intercompany claim, which only benefits creditors who did not obtain guarantees from Target Corporation. Counsel referred to *Alternative Fuel Systems Inc., Re*, 2003 ABQB 745, 20 Alta. L.R. (4th) 264 (Alta. Q.B.), aff'd 2004 ABCA 31, 346 A.R. 28 (Alta. C.A.), where both courts emphasized the importance of following a claims procedure and complying with ss. 20(1)(a)(iii) to determine landlord claims.

65 Accordingly, counsel submits that barring landlord consent at the claims process stage of the CCAA proceeding, the court cannot unilaterally impose a cookie cutter formula to determine landlord claims at the plan stage.

Analysis

66 Target Canada submits that the threshold for the court to authorize Target Canada to hold the creditors meeting is low and that Target Canada meets this threshold.

67 In my view, it is not necessary to comment on this submission insofar as this Plan is flawed to the extent that even the low threshold test has not been met.

68 Simply put, I am of the view that this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned.

69 As such, I see no point in directing Target Canada to call and conduct a meeting of creditors to consider this Plan, as proceeding with a meeting in these circumstances would only result in a waste of time and money.

70 Even if the Affected Creditors voted in favour of the Plan in the requisite amounts, the court examines three criteria at the sanction hearing:

(i) Whether there has been strict compliance with all statutory requirements;

(ii) Whether all materials filed and procedures carried out were authorized by the CCAA;

(iii) Whether the Plan is fair and reasonable.

(See *Quintette Coal Ltd., Re* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.); *Dairy Corp. of Canada Ltd., Re*, [1934] O.R. 436 (Ont. C.A.); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) at p. 182, aff'd (1989), (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *BlueStar Battery Systems International Corp., Re* (2000), 25 C.B.R. (4th) 216 (Ont. S.C.J. [Commercial List]).

71 As explained below, the Plan cannot meet the required criteria.

72 It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to release Target Corporation from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount?

73 The CCAA proceedings of Target Canada were commenced a year ago. A broad stay of proceedings was put into effect. Target Canada put forward a proposal to liquidate its assets. The record establishes that from the outset, it was clear that the Objecting Landlords were concerned about whether the CCAA proceedings would be used in a manner that would affect the guarantees they held from Target Corporation.

74 The record also establishes that the Objecting Landlords, together with Target Canada and Target Corporation, reached an understanding which was formalized through the addition of paragraph 19A to the Initial and Restated Order. Paragraph 19A provides that these CCAA proceedings would not be used to compromise the guarantee claims that those landlords have as against Target Corporation.

75 The Objecting Landlords take the position that in the absence of paragraph 19A, they would have considered issuing bankruptcy proceedings as against Target Canada. In a bankruptcy, landlord claims against Target Canada would be fixed by the BIA Formula and presumably, the Objecting Landlords would consider their remedies as against Target Corporation as guarantor. Regardless of whether or not these landlords would have issued bankruptcy proceedings, the fact remains that paragraph 19A was incorporated into the Initial and Restated Order in response to the concerns raised by the Objecting Landlords at the motion of the Target Corporation, and with the support of Target Corporation and the Monitor.

76 Target Canada developed a liquidation plan, in consultation with its creditors and the Monitor, that allowed for the orderly liquidation of its inventory and established the sale process for its real property leases. Target Canada liquidated its assets and developed a plan to distribute the proceeds to its creditors. The proceeds are being made available to all creditors having Proven Claims. The creditors include trade creditors and landlords. In addition, Target Corporation agreed to subordinate its claim. The Plan also establishes a Landlord Formula Amount. If this was all that the Plan set out to do, in all likelihood a meeting of creditors would be ordered.

77 However, this is not all that the plan accomplishes. Target Canada proposes that paragraph 19A be varied so that the Plan can address the guarantee claims that landlords have as against Target Corporation. In other words, Target Canada has proposed a Plan which requires the court to completely ignore the background that led to paragraph 19A and the reliance that parties placed in paragraph 19A.

78 Target Canada contends that it is necessary to formulate the plan in this matter to address a change in the landscape. There may very well have been changes in the economic landscape, but I fail to see how that justifies the departure from the agreed upon course of action as set out in paragraph 19A. Even if the current landscape is not favourable for Target Corporation, this development does not justify this court endorsing a change in direction over the objections the Objecting Landlords.

79 This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A.

80 Paragraph 19A arose in a post-CCAA filing environment, with each interested party carefully negotiating its position. The fact that the agreement to include paragraph 19A in the Amended and Restated Order was reached in a post-filing environment is significant (see *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-*

Forest Corp., 2015 ONSC 4004, 27 C.B.R. (6th) 134 (Ont. S.C.J.) at paras. 33-35). In my view, there was never any doubt that Target Canada and Target Corporation were aware of the implications of paragraph 19A and by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlords. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they having any grounds to rescind the order. In my view, it is simply not appropriate to proceed with the Plan that requires such an alteration.

81 The CCAA process is one of building blocks. In this proceedings, a stay has been granted and a plan developed. During these proceedings, this court has made number of orders. It is essential that court orders made during CCAA proceedings be respected. In this case, the Amended Restated Order was an order that was heavily negotiated by sophisticated parties. They knew that they were entering into binding agreements supported by binding orders. Certain parties now wish to restate the terms of the negotiated orders. Such a development would run counter to the building block approach underlying these proceedings since the outset.

82 The parties raised the issue of whether the court has the jurisdiction to vary paragraph 19A. In view of my decision that it is not appropriate to vary the Order, it is not necessary to address the issue of jurisdiction.

83 A similar analysis can also be undertaken with respect to the Claims Procedure Order. The Claims Procedure Order establishes the framework to be followed to quantify claims. The Plan changes the basis by which landlord claims are to be quantified. Instead of following the process set forth in the Claims Procedure Order, which provides for appeal rights to the court or claims officer, the Plan provides for quantification of landlord claims by use of Landlord Formula Amount, proposed by Target Canada.

84 In my view, it is clear that this Plan, in its current form, cannot withstand the scrutiny of the test to sanction a Plan. It is, in my view, not appropriate to change the rules to suit the applicant and the Plan Sponsor, in midstream.

85 It cannot be fair and reasonable to ignore post-filing agreements concerning the CCAA process after they have been relied upon by counter-parties or to rescind consent orders of the court without grounds to do so.

86 Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders and cannot be considered to be fair and reasonable in its treatment of the Objecting Landlords. In my view, this Plan is improper (see *Crystallex*).

Disposition

87 Accordingly, the Plan is not accepted for filing and this motion is dismissed.

88 The Monitor is directed to review the implications of this Endorsement with the stakeholders within 14 days and is to schedule a case conference where various alternatives can be reviewed.

89 At this time, it is not necessary to address the issue of classification of creditors' claim, nor is it necessary to address the issue of non-disclosure of the RioCan Settlement.

Motion dismissed.

Footnotes

1 Capitalized terms not defined herein have the same meaning as set out in the Plan.

2016 ONSC 316, 2016 CarswellOnt 589, 263 A.C.W.S. (3d) 298, 32 C.B.R. (6th) 48

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Tab 7

Arbitration Law of Canada: Practice and Procedure

Third Edition

J. Brian Casey

JURIS

CHAPTER 3

THE ARBITRATION AGREEMENT

The essence of arbitration is that it is consensual. In order to oust the jurisdiction of the court to hear and decide disputes, a party must be able to point to an enforceable agreement wherein the parties to the dispute have agreed to submit to another forum. If the parties have agreed to arbitrate using a broadly worded agreement then, under the theory that the parties have full autonomy to craft their own dispute resolution mechanism, all claims, whether sounding in contract, tort, equity or statute may be arbitrated. The arbitrators take their jurisdiction from the agreement of the parties to resolve their dispute using a third party, not from any State's legislation, although legislation at the place of arbitration may take away or limit that jurisdiction.[1] In essence, if two parties have the right to settle a legal dispute as between them, they have the right to ask a third party to do it for them.

In Canada, this has been clearly set out by the Supreme Court of Canada in a number of decisions. In *Dell Computer Corp. v. Union des Consommateurs*,[2] Deschamps J., writing for the majority, noted that "[a]rbitration is part of no state's judicial system" and "owes its existence to the will of the parties alone." See also *Desputeaux v. Éditions Chouette (1987) Inc.*,[3] in which LeBel J., for the Court, wrote, "[i]n general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators."

It all starts with what the parties have agreed. As the agreement to arbitrate only becomes important once a dispute has arisen, the arbitration clause in a commercial contract may well become the most carefully scrutinized and dissected provision in it. For presumed tactical advantage, lawyers will engage in the most careful parsing of the words of an arbitration agreement to demonstrate why the particular dispute is or is not to be arbitrated.

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1 *Desputeaux v. Editions Chouette (1987) Inc.* [2003] S.C.R. 178.

2 2007 SCC 34 (CanLII), [2007] 2 S.C.R. 801, at para. 51.

3 [2003] 1 S.C.R. 178, at para. 41.

The courts, in interpreting an arbitration agreement, will bear in mind the function of the clause, which is to embody the agreement of the contracting parties that if any dispute arises which falls within its terms, the dispute is to be settled by arbitration. With respect to construing an arbitration clause, Lord Macmillan said in *Heyman v. Darwins Ltd.*,[96] "it is clear that, as the arbitration clause is a matter of agreement, the first thing is to ascertain according to ordinary principles of construction what the parties have actually agreed ..." Further guidance in interpreting an arbitration clause is given by Viscount Simon LC:

> An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made.[97]

The Ontario Court of Appeal has adopted this reasoning. As stated by Mr. Justice Borins in the *Huras v. Primarica Financial Services Ltd.* case:[98]

> Thus, because the arbitration clause is but part of the contract, it is to be interpreted in the context of that contract and the commercial relationship which it creates.

At its broadest, the arbitration agreement can deal with all differences, disputes, claims or controversies between the parties, whether sounding in contract, tort, equity, or created by statute. Under the doctrine of party autonomy, the parties can give the arbitral tribunal the power to award damages, punitive damages, interest, costs and all form of equitable relief including injunction and specific performance.[99] The clause may extend to both contractual and non-contractual matters arising out of the commercial legal relationship.[100] As the arbitral tribunal takes its jurisdiction from the agreement of the parties, it is important that the drafters spend time considering how broad or narrow

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[96] *Supra*, note 13 at page 376.

[97] Ibid., at page 366.

[98] 55 O.R. (3d) 449. Also see *T1T2 Ltd. Partnership v. Canada* (1994) 23 O.R. (3d) 66; *Huras v. Primerica Financial Services Ltd.* (2001) 55 O.R. (3d) 449 (C.A.).

[99] See Chapter 8.

[100] *Canada Packers Inc. v. Terra Nova Tankers Inc.* (1992), 11 O.R. (3d) 382 (Gen. Div.); *Dunhill Personnel System Inc. v. Dunhill Temps Edmonton Ltd.* (1993), 13 Alta. L.R. (3d) 241, 144 A.R. 272 (Q.B.).

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that jurisdiction should be. It is possible to have the arbitration agreement only cover certain matters and to leave the balance of the disputes to the courts. For example, in a long term supply contract, the parties may wish to refer any disputes concerning the quality or suitability of the product to arbitration, but refer other matters dealing with contract interpretation to the courts or some other form of ADR such as expert evaluation.

As with any contract, clarity and simplicity are the goals in drafting an arbitration agreement. If the parties want all matters to be arbitrated, the arbitration agreement should be clear and unqualified.

3.9.1 Determining the Scope of the Arbitration Agreement

In determining the scope of the arbitration agreement, regard must also be given to the context in which the agreement is found and the court, if called upon to interpret it, will look to the entire agreement and the circumstances in which it was entered into. In *Sattva Capital Corp. v. Creston Moly Corp.*,[101] the Supreme Court of Canada held that contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract.

The House of Lords in 2007 in *Premium NAFTA Products v. Philly Company Limited*,[102] made it clear that older English cases that carefully parsed the words of an arbitration agreement to determine its scope are no longer to be followed. In the words of Lord Hoffman:

> I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions "arising under this charter" in clause 41(b) and "arisen out of this charter" in clause 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at

[101] [2014] 2 SCR 633.

[102] [2007] UK HL 40, subnom *Fiona Trust*.

CHAPTER 5

THE ARBITRAL TRIBUNAL'S JURISDICTION

5.1 SOURCES OF JURISDICTION

A tribunal has no jurisdiction to do anything until it is fully and properly constituted. This is specifically set out in the Domestic Acts and is implicit in the definition of the "arbitral tribunal" in the Model Law.

5.1.1 Jurisdiction by Agreement – Party Autonomy

There is no "inherent" jurisdiction in an arbitral tribunal. The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties. An arbitral tribunal does not get its jurisdiction from any legislation. The scope of the tribunal's jurisdiction will be determined by the scope of the arbitration agreement, subject only to any mandatory legislative enactments governing the arbitration agreement. Under the theory of party autonomy, if two parties have the legal right to settle a dispute between themselves, then they can give jurisdiction to a third party to settle it for them.

For example, suppose there are three people on a desert island somewhere in the South Pacific. A coconut falls from a tree and is seen by A, who claims it as his own. B says, "But the coconut fell on the land that we all agreed would be mine, therefore the coconut belongs to me." A and B agree to take their dispute to the third inhabitant, C, who decides the coconut belongs to B, but that one half of the coconut's milk should be given to A as a finder's fee.

This simple example demonstrates that C needed no state's legislation to decide the issue or to craft an appropriate remedy. The power to settle the dispute came from A and B's agreement to bring the dispute to C. If the place of arbitration in our example is moved to Canada, the only effect of Canadian arbitral legislation would be to set standards for procedure that may, if mandatory, circumscribe the otherwise unfettered jurisdiction of the arbitrator to settle the dispute. The arbitrator in our example did not need Canadian arbitral law to give him or her either the power to make a decision, or the power to craft any

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 SEARS CANADA INC., *et al.*

(Applicants)

Court File No.: CV-17-11846-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

BOOK OF AUTHORITIES OF OXFORD PROPERTIES GROUP

(Motion to Appoint Arbitrator, Returnable September 20, 2018)

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