

CANADA / JUDGMENT

Blackburn Developments Ltd. (Re)

2011 BCSC 1671

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Supreme Court of British Columbia

DECIDED

7 December 2011

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2011 BCSC 1671 Blackburn Developments Ltd. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blackburn Developments Ltd. (Re),

2011 BCSC 1671

Date: 20111207

Docket: S111150

Registry: Vancouver

In the Matter of the Companies' Creditors Arrangement Act,

R.S.C. 1985, c. C-36, as amended

And

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

And

In the Matter of Blackburn Developments Ltd.

Petitioner

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for PricewaterhouseCoopers Inc.:

K. Jackson

D. Toigo

Counsel for Home Equity Development Inc. and Landus Development Group Inc.:

J. Sandrelli

Counsel for Pinnacle International Lands Inc.:

W. Milman

Counsel for Streetwise Capital Partners Inc.:

D. Gruber

T. Louman-Gardiner

Counsel for Christina Friesen and

Martin Biggerstaff:

B. Friesen

Counsel for R. Wellsby and R. Wilson:

D. Fitzpatrick

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 24 and 25, 2011

Place and Date of Judgment:

Vancouver, B.C.

December 7, 2011

- [1] The petitioner, Blackburn Developments Ltd. ("Blackburn"), is a real estate development company that undertook a very large residential real estate development project near Chilliwack, British Columbia. The development went on for many years. Blackburn sold some lots. In order to meet its financial obligations over the years it granted a large number of mortgages over its development lands and a golf course that was an important part of the development.
- [2] By 2010 and probably before, Blackburn was insolvent. It had incurred many millions of dollars of losses and owed its creditors, both secured and unsecured, in excess of \$80,000,000. While many creditors had mortgage security over the Blackburn real estate portfolio, the value of the properties charged was not sufficient to satisfy the amounts secured by the mortgages and most mortgage creditors were in fact unsecured or faced large deficiencies. Despite Blackburn's difficulties, its management was still hopeful of restructuring its affairs. It was recognized that it had potentially valuable losses that could be monetized through a corporate reorganization. However, it was far behind in preparing

its financial statements and filing its required income tax returns, and it was therefore impossible to value its tax attributes.

- [3] In February 2011 Blackburn sought protection pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [CCAA]. On February 23, 2011 it obtained an order (the "Initial Order") granting a stay of proceedings against it to permit it to prepare a plan of arrangement (the "Plan") to present to its creditors.
- [4] From the outset of these proceedings it was apparent that Blackburn had two potential sources of funds to finance the Plan. The first was the development potential of its real estate holdings. The second was its tax attributes. It was also apparent that Blackburn faced formidable obstacles to completing a Plan. These included the chaotic state of its financial records, its lack of liquidity, the complicated state of the title to its real estate holdings, and the scepticism of some of its secured creditors about its ability to bring forward an acceptable plan.
- [5] These obstacles were addressed in part by the adoption of what has come to be known as a two track process in the CCAA proceedings by which Blackburn pursued a restructuring plan and the Monitor, PricewaterhouseCoopers, marketed its assets. This provided Blackburn with a chance to restructure and gave some comfort to its secured creditors that realization on their security would not be unduly delayed.
- [6] Initially the focus of the Monitor's marketing efforts was on the company's real estate and related assets. The potential of marketing the real estate and tax attributes through a reorganization was recognized but was not the primary focus of the early applications before me.
- [7] The applications addressed in these reasons arise partially out of the collision of the two processes. There are three applications, all by the Monitor. They are:
 - a. to disallow the votes of Streetwise Capital Partners Inc. ("Streetwise") cast at the creditors' meeting held to consider the Plan;
 - b. to sanction the Plan;
 - c. to extend the stay of proceedings to January 15, 2012.
- [8] The history of this proceeding is well known to the parties and need not be repeated in detail. By July 2011, the financial, tax and accounting records of Blackburn had been brought up to date, giving a clearer picture of the value of its tax attributes. The Monitor was in a position to begin the process of negotiating and finalizing an asset sale agreement. On July 22, 2011 I made an order (the "Claims Procedure Order") approving a claims procedure that authorized the Monitor to undertake a claims process. Paragraphs 22 and 23 of the Claims Procedure Order provided for assignment of claims and expressly stated that the assignee of a claim was entitled to vote that claim, provided it complied with the provisions of paragraph 23.

- [9] After July 22, management of Blackburn continued to pursue a restructuring as contemplated in the Initial Order.
- [10] With the benefit of hindsight it can now be seen that the two track process had a fundamental flaw. It was based on the erroneous assumption that an asset sale and a restructuring could be separately negotiated. In fact the Monitor was unable to negotiate any asset sale that was not effected through a restructuring.
- [11] It was able to enter into a Restructuring Term Sheet (the "Pinnacle RTS") with Pinnacle International Lands Inc. ("Pinnacle") in September 2011. As the name discloses, a restructuring was an essential part of the Pinnacle RTS. In the Pinnacle RTS, Pinnacle agreed to provide sufficient funds to Blackburn to pay senior secured debt and, through a corporate arrangement, ultimately become the sole shareholder of Blackburn. It would thereby acquire Blackburn's attributes. An essential step in the process therefore was approval by Blackburn's creditors of a plan of arrangement implementing the Pinnacle RTS.
- [12] In the period up to August 30, 2011 management of Blackburn pursued a restructuring, as contemplated in the Initial Order. The only entity that showed a serious interest in pursuing a restructuring with Blackburn was Streetwise, a company that specialized in realizing value from financially distressed enterprises. Streetwise is a self-described "vulture fund". By August 30, 2011, discussions between management of Blackburn and Streetwise had advanced to the point that the directors of Blackburn had concluded that Streetwise's restructuring proposal offered the best recovery for creditors.
- [13] On August 30, Mr. Rick Wellsby, one of the two directors of Blackburn, sent an email to most of the unsecured creditors of Blackburn soliciting their support for the Streetwise proposal. The email was criticized in the Monitor's submissions to me. I will return to those criticisms later in these reasons. The email attached a letter of intent that bound any creditor signing it to assign its claim against Blackburn to Streetwise for 2 cents on the dollar plus certain additional consideration.
- [14] Many creditors executed letters of intent. The letters of intent contained conditions precedent in favour of Streetwise that gave Streetwise until October 15, 2011 to satisfy itself that it had sufficient support for its proposed restructuring to proceed with it. For all practical purposes, the executed letters of intent were options in favour of Streetwise. By September 30, Streetwise had received sufficient signed letters of intent to ensure that, if it acted upon them, it could defeat any plan proposed pursuant to the CCAA.
- [15] On September 16, 2011, Streetwise proposed a transaction to the Monitor pursuant to which Streetwise would become the sole shareholder of Blackburn and acquire its tax attributes through a restructuring that required a plan of arrangement. Streetwise proposed a capital contribution, payment of a portion of the restructuring costs and payment of \$1,250,000 as a fund to make a distribution to unsecured creditors. The principal difference between the Pinnacle and Streetwise proposals was that the Pinnacle proposal called for Blackburn to retain its real estate holdings and provided sufficient capital to satisfy senior secured claims

while the Streetwise proposal called for a disposition of those real estate assets, except for the golf course.

- [16] The Monitor did not pursue Streetwise's proposal for the reasons set out in paragraph 3.10 of the Monitor's 11th Report. Among those reasons was the fact that the Landus Group ("Landus") did not support the proposed transaction and in the Monitor's view no restructuring proposal could succeed without the support of Landus because Landus held sufficient unsecured claims to defeat any plan. On September 23, the Monitor informed Streetwise that it was moving forward with a preferred bidder.
- [17] On September 30, I approved The Pinnacle RTS on the recommendation of the Monitor. As part of that order I directed Blackburn to execute the Pinnacle RTS. I did so despite the fact that Streetwise sought to have the Monitor or the Court consider a revised offer from it. While I have already given my reasons for approving the Pinnacle RTS I repeat that I was concerned that the CCAA proceedings had already become prolonged, that restructuring costs were mounting alarmingly and that the Streetwise proposal did not have the support of Landus, without whose support no Plan could be approved.
- [18] However, Blackburn was unable to execute the Pinnacle RTS because both its directors, Messrs. Wellsby and Wilson, resigned. On October 5, I made a further order authorizing the Monitor to execute the Pinnacle RTS on behalf of Blackburn and to take the steps necessary to bring the a plan of arrangement implementing the Pinnacle RTS (the "Pinnacle Plan") to a meeting of creditors for approval. At the same time I ordered that Blackburn and its principals, including its former directors, cease restructuring activities.
- [19] In my brief oral reasons I tried to make it clear that I was in no way restricting any creditor from exercising its rights to oppose the Pinnacle Plan or to persuade other creditors to vote against it.
- [20] Streetwise did not appeal the September 30 order. However it did proceed to acquire the claims of those creditors who had signed letters of intent prior to September 30 and to purchase other claims. As a result Streetwise had by the end of October acquired claims in the amount of approximately \$38,000,000, including approximately \$7,500,000 in related party claims. The related party claims are subject to a challenge. However, even excluding those claims, Streetwise was the assignee of \$30,500,000 in claims, more than sufficient to defeat the implementing of the Pinnacle Plan.
- [21] At the meeting of creditors held on November 21 Streetwise voted all its claims against approval of the Pinnacle Plan and it was defeated. However, the Monitor, supported by Landus and Pinnacle, seeks an order disallowing Streetwise's votes. If those votes are disallowed the result will be that the Pinnacle Plan will be approved by a sufficient number of creditors to be approved in accordance with s. 6 of the CCAA.

- [22] The Monitor submits that I have the discretionary jurisdiction to disallow Streetwise's votes, but not its right to receive a dividend, on its claims. It submits that I should exercise that jurisdiction to disallow the votes if I conclude that Streetwise has not acted in good faith and has voted its claims for a collateral and improper purpose. The Monitor concedes that there is no express provision in the CCAA permitting the court to disallow votes of a person who is a creditor. However, it submits that the broad discretion granted by s. 11 of the CCAA extends to controlling any conduct done in bad faith, particularly if that conduct has the effect of frustrating the due process of the administration of a CCAA plan. The Monitor says that that control extends to a power to disallow votes.
- [23] The Monitor relies on three authorities, two from the United States and one from Nova Scotia, to support the proposition that a court exercising supervisory jurisdiction over an insolvency matter has the jurisdiction to disallow votes of creditors if those votes are cast for an improper purpose. Counsel for all parties agreed that this question has not previously been considered in Canada in CCAA proceedings.
- [24] The Monitor submits that Streetwise did not act in good faith when it voted against the Pinnacle Plan. The Monitor says that Streetwise acquired sufficient claims to block approval of the Plan as part of a scheme to defeat the Pinnacle Plan for the purpose of getting a second chance to acquire Blackburn's tax attributes for itself. The Monitor submits that it was improper for Streetwise to buy up claims and vote those claims in order to allow it to force the other interested parties to reconsider its offer for the tax attributes.
- [25] Streetwise submits that I have no jurisdiction to disallow votes by a creditor who has obtained its status in accordance with the Claims Procedure Order because in so doing I would be depriving that creditor of an express statutory right given by the CCAA. It also submits that the facts of this case do not call for making such an order even if I have jurisdiction to do so. Streetwise's position is that it has participated in good faith in the very process contemplated by the Initial Order and that it has acted throughout in the bona fide belief that there is more value to unsecured creditors than is provided by the Pinnacle RTS.
- [26] The three cases relied on by the Monitor are *In re Allegheny International Inc.*, 118 B.R. 282 (Bankr. W.D. Pa. 1990) [Allegheny], *In re DBSB North America Inc.*, 421 B.R. 133 (Bankr. S.D.N.Y., 2009) [DBSB], and *Re Laserworks Computer Services Inc.* (1997), 6 C.B.R. (4th) 69, [1998] N.S.J. No. 60 (CA) [Laserworks].
- [27] In this case Streetwise undoubtedly became involved in the Blackburn CCAA proceedings because it wished to acquire the tax attributes of Blackburn for itself. This is obvious from the terms of its September 16th offer to the Monitor. However the critical question is not why Streetwise first became interested in Blackburn but whether it voted against the Plan for an improper purpose. In deciding this matter I must proceed on the basis that Streetwise is a creditor pursuant to legally valid assignments. It is of course implicit in the position taken by the Monitor that Streetwise is entitled to share in the distribution to creditors that this is so.

- [28] I do not find it necessary to decide whether a judge supervising a CCAA proceeding has the jurisdiction to disallow the votes of a creditor while at the same time recognizing that the creditor has a valid claim for purposes of distribution. As is often the case in CCAA matters, the parties urgently require a decision. I will therefore proceed on the assumption that I have that jurisdiction. In so doing, I will attempt to adopt the analysis and apply the principles set out in *Laserworks*.
- [29] *Laserworks* was a case decided in the context of a proposal under the Bankruptcy and Insolvency Act [BIA]. In that case *Laserworks* made a proposal to its creditors. A competitor purchased sufficient claims to allow it to defeat the proposal. Under the BIA this had the effect of putting *Laserworks* into bankruptcy, thereby eliminating it as a competitor, the very purpose for which the competitor had purchased the claims. The remaining creditors favoured approval of the proposal. The Nova Scotia Court of Appeal found that the creditor had voted its claims for an improper purpose and that the Registrar had the discretion to disallow the votes of that creditor.
- [30] In *Laserworks*, the court set out the basis on which it thought it appropriate to intervene to disallow votes at paras. 50-56 as follows:

50 Motive or purpose is not relevant to objections to proofs of claim based on statutory exceptions under the BIA. These are established in several sections, including s. 109(1), persons who had not duly proved and lodged a claim; s. 54(3), a relative of the debtor (who may vote against but not for a proposal); 109(4), the debtor as proxy for a creditor; s.109(6), a creditor who did not deal with the debtor at arm's length (with exceptions); s. 110(1), a person with a claim acquired after the bankruptcy unless the entire claim is acquired; s. 111, a creditor with a claim on or secured by a current bill of exchange (subject to conditions); s. 112, a creditor holding security (subject to conditions); and s. 113(2), a trustee as proxy (subject to restrictions). See also s. 109, the trustee as creditor.

51 (It will be noted that many of these exceptions arise from circumstances that could give rise to conflict of interest. This will be considered further under the fourth ground of appeal.)

52 However the statutory exceptions are not a code exhausting the forms in which substantial injustice may manifest itself. Objections will be sustained under s. 108(3) if they result from a crime or a tort against the debtor or a creditor. In the present appeal, and in the authorities cited by the Registrar, the substantial injustice assumes the guise of tortious behavior, to which motive is relevant. In the s. 108(3) context the commonest torts, or instances of substantial injustice arising from tortious behavior, relate to abuse of process and fraud. However conspiracy to harm was also found in *Dimples Diapers*.

53 Tortious or tort-like behavior falling short of a fully developed tort susceptible of formal proof or definition can nevertheless result in substantial injustice, particularly for persons at a point so vulnerable they must resort to insolvency protection. (See *Shepard*.) In my view that is why Parliament chose the language it did in s. 187(9): to create a discretionary jurisdiction in courts that is not fettered, for example, by the high standards required for establishing such torts as

abuse of process in other contexts. What remains to be considered is the threshold level of the substantial injustice which will result in remedial action by the court.

(ii) The Authorities

54 The four cases cited by the Registrar establish that the threshold is crossed when the BIA is used for an improper purpose. An improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament.

55 Farley J. held in *Dimples Diapers* that:

. . . the Bankruptcy Act, R.S.C. 1985, c. B-3 has as its purpose the provision of "the orderly and fair distribution of the property of a bankrupt among its creditors on a *pari passu* basis". (L.W.Houlden and C.H.Morawetz, *Bankruptcy Law of Canada*, 3rd ed. (looseleaf) (Toronto: Carswell, 1989) at p. 1-3 [A&4]....

56 In the cases cited the improper purpose takes the form of abuse of process or tortious behavior closely analogous to abuse of process. In each case the court reacted to what could be seen as substantial injustice. The remedy of choice arising under s. 43(7) is refusal of the petition. The appropriate remedy in the present case is rejection of the tainted votes.

[31] The court elaborated on the concept of substantial injustice at paras. 72-74, in a portion of the judgment dealing with class voting, as follows:

72 Hardie Boys J. cited the same passage quoted above by Justice Stewart from *Vicount Haldane's* judgment. It concludes that there is a restriction on powers conferred on a majority of a special class in order to enable that majority to bind a minority:

...They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only.

73 Hardie Boys J. considered *Re Farmers' Co-operative*, which was also cited by Justice Stewart, in which votes of several creditors who were competitors of the debtor were disallowed.

...In a later development of the same matter, but not now involving the Court's sanction under s. 205, *Gallen J.* accepted that the Court has an overriding control, not limited to the approval stage under s. 205, and may restrict a right to vote where the equities of a particular situation require it: see [1992] 1 NZLR 348. It is unnecessary for present purposes to decide whether these cases were correctly decided, for even if they were, the principle is not of unlimited application, and does not apply to the exercise of voting rights generally. This is clear from what Viscount Haldane said in the *British America Nickel* case. Immediately after the passage already quoted, his Lordship said

Subject to this, the power may be unrestricted. It may be free from the general principle in question when the power arises not in connection with a class, but only under a general title which confers the vote as a right of property attaching to a share.

Thus in *Pender v. Lushington* (1877) 6 Ch. D.

Jessel MR said there is:

... no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.

While the voting rights conferred by Part XV of the Insolvency Act are not akin to a "right of property attaching to a share", they are rights conferred without reservation. There is no requirement for class voting; there is instead a general right conferred equally on all creditors. The rationale of the principle does not apply. It is well settled that the motive (short of fraud) of a petitioning creditor, no matter how reprehensible, is irrelevant to his right to obtain an order of adjudication: *King v. Henderson* [1898] AC 720, *Re King, ex parte Commercial Bank of Australia Ltd. (No. 2)*, [1920] VLR 490. The motive of a creditor voting on a proposal, really the other side of the coin to a petition for adjudication, can be no different. That is not to say that there may be no remedy in an extreme case, such as fraud or mistake. But certainly where, as here, there are perfectly legitimate reasons for opposing the proposal, a creditor is not to be denied that right because he may have some other motive as well...

74 If the exception made for fraud is broadened to "substantial injustice" I would take *Hardie Boys J.*'s conclusions to be a fair statement of the law in Canada as well, as applied by Canadian courts in the cases cited by the Registrar. The New Zealand court included mistake as well as fraud as an exception. A creditor is not to be deprived of the right to vote for wrongful motives alone; motive must be coupled with a tortious act to support a finding of improper purpose.

[32] The reference to "substantial injustice" in paragraph 74 of *Laserworks* finds its origin in s. 187(9) of the BIA. No such express provision is found in the CCAA. However, assuming without deciding that the same jurisdiction can be found in s. 11 of the CCAA, the test promulgated in *Laserworks* is difficult to meet. As I understand that test I must be satisfied that there has been conduct amounting to an abuse of process or other tortious or near tortious character and that that conduct has resulted in a substantial injustice before I can exercise my discretion to disallow a vote of a creditor.

[33] In its submissions to me the Monitor placed particular emphasis on the fact that *Streetwise* was actively seeking to acquire the tax attributes of *Blackburn*. It points out that after I had approved the *Pinnacle RTS*, *Streetwise* continued to acquire claims. It submits that the inescapable inference to be drawn from these facts is that *Streetwise* acquired the claims and voted to block approval of the *Pinnacle Plan* not for the purpose of achieving the purposes of the CCAA, but for the improper purpose of forcing a situation in which it would acquire the tax attributes for itself.

- [34] All parties supporting the application to disallow Streetwise's votes emphasized that Streetwise was not a creditor of Blackburn at the outset of these proceedings, that it continued to purchase claims after it was aware that the Pinnacle RTS had been approved to be presented to creditors and that it was obvious that Streetwise wished to obtain the tax attributes of Blackburn. They submit that these circumstances are strong indicators that Streetwise was not acting in good faith.
- [35] The Monitor has asked that I infer that Streetwise exercised its votes for an improper purpose analogous to the improper purpose found in the authorities referred to above. Against that inference I have the evidence of Mr. Sethi, contained in two affidavits. The gist of that evidence is that Streetwise entered into restructuring discussions with management of Blackburn prior to August 30, 2011 and that by that date Streetwise believed that it had a viable restructuring plan. Mr. Sethi deposes that in accordance with its expectation it began to acquire the right to have debt assigned to it in order to facilitate approval of its proposed restructuring. Mr. Sethi says, and the documentary evidence supports, that he attempted to initiate discussions with the Monitor in mid-September 2011, but that the Monitor declined to negotiate with him.
- [36] Mr. Sethi deposes that when he became aware of the Pinnacle RTS, he attempted to put forward an alternative plan but was unsuccessful in persuading me to give more time to consider Streetwise's offer. Critically, he has deposed that he does not consider that the Pinnacle Plan fairly allocates the value of the tax attributes between the secured and unsecured creditors. In his affidavit #2 he states that he was of the view that there was more value in the unsecured claims than was being offered under the Pinnacle Plan and that accordingly Streetwise decided to acquire the unsecured claims that it effectively had under option. It also acquired additional claims in the same belief.
- [37] I think the substance of Mr. Sethi's evidence was that he was confident that Streetwise could recover more than the cost of acquiring the claims, either through an enhanced offer from Pinnacle or through some other plan that would be presented, if the Pinnacle Plan was defeated.
- [38] I accept Mr. Sethi's evidence as reliable. He was not cross-examined on his affidavit. The uncontradicted evidence before me is that Streetwise was acting as a bona fide party seeking to participate in a restructuring of Blackburn up to September 30, 2011. There is no dispute that management of Blackburn had the right to pursue a restructuring up to that date. Streetwise became involved in the proceeding at a time when it was known that Blackburn's assets were being offered for sale. I think I can infer that by the summer of 2011 it was obvious to everyone that any restructuring would result in a third party gaining control of Blackburn. I find that by September 30, 2011 Streetwise had committed considerable time and resources in pursuing what I will describe as the Blackburn opportunity.

- [39] I also accept as genuine Mr. Sethi's evidence that Streetwise proceeded to acquire creditor claims because it believed that it would ultimately recover more than it paid for those claims. I do not think that Streetwise can be said to be acting in bad faith by acquiring those claims even if it was motivated in part to do so to acquire a blocking position. It is obvious that a party with a blocking position is in a strong position in the negotiations over the terms of a plan of arrangement. That reality was demonstrated in this case by the Monitor's recognition that no plan of arrangement was possible without the support of Landus.
- [40] It seems to me that this case raises squarely the appropriateness of permitting "vulture funds" to participate in insolvency restructurings. In my view there is no compelling argument that the activities of vulture funds are undesirable. Even if there were, I think it is the role of Parliament and not the courts to address what limits, if any, should be placed on the activities of such funds. I also note that in this case the terms of the Pinnacle RTS were significantly improved after it became apparent that Streetwise had a substantial position in the claims. There is no doubt that the Pinnacle Plan put to the creditors on November 21 was significantly superior to that recommended by the Monitor on September 30. The inference that I draw from that is that the enhancements to the offer were motivated by a desire to enlist creditor support in the face of the Streetwise opposition to the Plan.
- [41] I think that the cases cited to me by the Monitor in which bad faith was found are distinguishable from this case. Firstly, the courts in those cases found that the creditor who acquired claims had no bona fide intention of profiting from realizing on those claims. In the American cases the courts relied on the fact that the claims were acquired at par or close to par as evidence that the acquiring party did not regard the investment in the claims as a legitimate profit making venture. In all three cases the acquiring creditor did not put forward any plausibly credible evidence that it acquired the claims to make a profit on them or that there was any reasonable prospect of a greater recovery for creditors if the plan or proposal was defeated. In addition, as far as I am able to discern, none of the cases involved an assignee that had become involved in the process with the support of management of the insolvent company. Finally I can see no indication that the plans or proposals under consideration in those cases were in effect liquidation proposals, as is the case in this proceeding.
- [42] In DBSD the Court found that the acquiring creditor had no bona fide interest in profiting from an investment in the debt as the debt was purchased at par. In Allegheny the Court also found as a fact that the acquiring creditor, Japonica, had no bona fide intention to profit from its investment in the debt. In addition it acquired de facto blocking positions in two separate classes whose interests were in direct conflict. These actions were in the Court's view inconsistent with Japonica's actions being carried out for economic reasons.
- [43] I also question whether the US decisions are consistent with the law in Canada. Firstly, the US decisions concern the exercise of an express statutory power to disallow votes. It appears from the cases cited that US courts have been prepared to exercise that power in situations in which they conclude that the votes have been exercised in aid of a plan to acquire control

of the debtor company. I must frankly say that I find the distinction made in those cases between pursuing economic interests as a creditor and as a potential owner difficult to grasp. In both cases the creditor is pursuing its economic interests. Both American decisions acknowledge that acquiring debt with a view to making a profit is not bad faith behaviour. Thus the activities of a vulture fund are permissible under US law.

- [44] As I have already stated, I think that the policy approach taken in Laserworks is preferable to that of the US authorities. As the above quoted passages make clear, the Court in Laserworks recognized that creditors are entitled to vote their claims in what they as creditors perceived to be their own economic interests as long as their actions are not unlawful or do not result in a substantial injustice.
- [45] I think this approach is preferable because it recognizes that the effect of such an order is to deprive the assignee of a statutory right and to subject it to having its contractual rights compromised against its will. In my view such a result would only be appropriate in the clearest of cases.
- [46] The Monitor and other parties were critical of the conduct of the directors of Blackburn and in particular with the contents of the August 30 email from Mr. Wellsby to Blackburn's creditors. The Monitor submits that this email contained misleading and inaccurate information that may well have misled creditors into signing the Letters of Intent that empowered Streetwise to obtain assignments of their claims. In the Monitor's submission I should take the allegedly misleading statements into account in deciding whether I should disallow Streetwise's votes.
- [47] It is quite clear that the email does contain inaccurate information, particularly with respect to the potential recovery creditors could expect if the proposed Streetwise restructuring plan was approved. I am also concerned that the email did not adequately explain that the Letters of Intent purported to give Streetwise the unilateral right to take an assignment of claims whether or not its proposed restructuring plan proceeded.
- [48] I have decided that I should not take the contents of the email into account in deciding these applications. The point made by the Monitor is that the assignments of claims acted upon by Streetwise may have been obtained as a result of misrepresentations contained in the email. However, even if that were so, in law the assignments would only be voidable at the instance of any affected creditor. While some assigning creditors have expressed regret to the Monitor about executing the Letters of Intent and assignments, none has applied to me to have the assignments set aside or for any other remedy against Streetwise. In addition the Monitor has registered Streetwise as a creditor in accordance with the Claims Procedure Order. While that registration is not conclusive with respect to Streetwise's right to vote on the Pinnacle Plan, it does relieve me of the task of examining the circumstances of the assignments to determine their validity in the absence of an express challenge thereto.

- [49] I am also of the view that Mr. Wellsby did not intend to deceive the creditors when he sent the email. I accept his evidence that he genuinely believed that the Streetwise proposal offered the best recovery to creditors and that he continued to hold that belief after I approved the Pinnacle RTS.
- [50] After hearing the submissions of all parties and considering the extensive evidence before me I have concluded that in this case there was a genuine difference of opinion about the best course to follow to maximize recovery for the unsecured creditors of Blackburn. The Monitor was clearly of the view that it was futile to proceed with a restructuring without the support of Landus, which effectively had a blocking position given the extent of unsecured debt that it held. I accept that Streetwise and the directors of Blackburn held the genuine belief that the Pinnacle Plan unfairly favoured Landus and did not provide a fair dividend to unsecured creditors.
- [51] In this case I cannot find that the predominate purpose of Streetwise's negative vote was to acquire control of Blackburn and hence its tax attributes. Mr. Sethi has denied that that was the predominate purpose and the surrounding circumstances do not lead to that conclusion. In addition, the liquidation analysis prepared by the Monitor does not lead to the conclusion that creditors will be worse off under liquidation.
- [52] Accordingly, the application to disallow Streetwise's votes is dismissed. With that dismissal there is no approved Plan to be sanctioned and it follows that that application is also dismissed.
- [53] At the hearing I extended the stay in this matter until December 15, 2011. As is probably apparent from these reasons it is my view that it is possible for the parties to reach an agreement that would permit a Plan to be approved. The difference of opinion over the appropriate allocation of the value of the tax attributes has unfortunately led to the defeat of the restructuring plan favoured by the Monitor. Despite this setback it is my view that the synergies between the values of the real estate assets and the tax attributes remain and I urge the parties to renew their efforts to reach an agreement on how to share those values.
- [54] To assist in that regard I am therefore prepared to hear an application to extend the stay beyond December 15 if the parties see any utility in so doing.

"Sewell J."

The Honourable Mr. Justice Sewell

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Prepared on 29 October 2026 · Esheria