

CANADA / JUDGMENT

Cliffs Over Maple Bay (Re)

2010 BCSC 389

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 389 Cliffs Over Maple Bay (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cliffs Over Maple Bay (Re),

2010 BCSC 389

Date: 20100325

Docket: S083716

Registry: Vancouver

In the Matter of the

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

AND

In the Matter of the

Business Corporations Act, R.S.B.C. 2002, c. 57

AND

In the Matter of the

Cliffs Over Maple Bay Investments Ltd.

Petitioner

Before: The Honourable Mr. Justice Groves

Reasons for Judgment

In Chambers

Counsel for Lawson Lundell:

P.J. Roberts

Counsel for Fisgard Capital Corporation and Liberty Holdings Excell Corp.:

G.J. Tucker

Z.J. Ansley

Counsel for Century Services Inc.:

M. Buttery

Place and Date of Hearing:

Vancouver, B.C.

November 24 and 26, 2009

Place and Date of Judgment:

Vancouver, B.C.

March 25, 2010

I. Introduction

- [1] The present applications are the last outstanding matters arising from Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"), proceedings involving the petitioner, The Cliffs Over Maple Bay Investments Ltd. (the "Cliffs"), which were commenced in May of 2008.
- [2] The Cliffs is a real estate company which was engaged in the business of developing a large scale residential and commercial resort on Vancouver Island, which was to consist of residential homes, a hotel, and a golf course. The project encountered significant problems, largely due to the unexpected loss of access to a primary water source for the development. This caused considerable financial difficulties for the Cliffs. By the spring of 2008, the Cliffs was in default on its loan obligations, which resulted in the CCAA proceedings.
- [3] The issue on the motions before the Court concerns the entitlement of various competing creditors to portions of a \$500,000 loan made by Century Services Inc. ("Century") to the Cliffs in August, 2008.
- [4] This loan related to a debtor in possession financing order made by this Court, which was ultimately set aside by the Court of Appeal.
- [5] The majority of the loan monies were used for various purposes. As of November 1, 2009, \$162,276.33 of the loan remained in the trust account of Lawson Lundell LLP, the Cliffs' solicitors (the "Funds").

- [6] Three groups claim they are entitled to the entirety of the Funds, each to the exclusion of the others. Century asserts that it retains both legal and equitable ownership of the Funds. Lawson Lundell advances a claim of solicitor's lien over the Funds for services rendered to the Cliffs, for which it has not been paid. Fisgard Capital Corp. and Liberty Excell Holdings Ltd. ("Fisgard"), the secured creditors of the Cliffs, argue that the Funds form part of the Cliffs' estate, and that various security documents, mortgages, and Court Orders grant them priority and ownership of the Funds. Separate from its claim on the Funds, Fisgard also claims an entitlement to those portions of the \$500,000 loan that were retained by Century on account of fees and interest.
- [7] A secondary issue before the Court concerns Lawson Lundell's entitlement to receive payment of its outstanding fees and disbursements for services rendered to the Cliffs out of an administrative charge ordered in the CCAA proceedings.

II. Facts

- [8] On April 18, 2006, the Cliffs granted Fisgard a General Security Agreement and a mortgage, charging all of the Cliffs' present and after acquired personal property, accounts, inventory, and real property. By March of 2008, some of the loans which were secured by these instruments had matured, and significant arrears had accumulated.
- [9] On May 26, 2008, the Cliffs was granted protection pursuant to the CCAA by Court Order (the "Initial Order"). The Initial Order was granted without notice, and provided, inter alia, for an administrative charge of up to \$200,000 over the Cliffs' property in favour of the Monitor and its counsel, and counsel for the Cliffs. This charge was given priority over all other security interests, trusts, liens, mortgages, charges and encumbrances of any nature. Paragraph 34 of the Initial Order stated:

THIS COURT ORDERS that the Monitor, counsel to the Monitor, if any, and counsel to the petitioner shall be entitled to the benefits of, and are hereby granted, a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of \$200,000, as security for payment of their respective fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings

- [10] All relief provided for in the Initial Order was granted on an interim basis only, and was set to expire within a month, unless further extended by order of the Court. On June 27, 2008, a comeback hearing was held, on notice to interested parties. At this hearing, the Cliffs sought to extend the stay of proceedings and other relief granted in the Initial Order, and to expand the powers of the Monitor. The Cliffs also sought a DIP financing Order. This relief was opposed by the Cliffs' secured creditors. The Court granted the relief sought, including DIP financing (the "DIP Order").

- [11] The DIP Order authorized the Cliffs to borrow a maximum of \$2,350,000 under a credit facility with Century, with no individual payment or tranche from the facility to exceed \$500,000. The DIP Order expressly provided that the credit facility provided by Century was to be on the terms and subject to the conditions set forth in a commitment letter between Cliffs and Century dated June 13, 2008. The terms and effect of the commitment letter will be addressed in detail below.
- [12] The DIP Order also imposed conditions on the use of the DIP funds. Lawson Lundell was not permitted to forward the funds it held in trust to the Cliffs without a written request from the Monitor. The relevant term of the Order provides:
8. THIS COURT ORDERS that, advances under the DIP Facility shall be made only at the request of the Monitor to the DIP Lender, such advances to be paid to Lawson Lundell LLP "in trust" and to be paid out only on the written request of the Monitor in consultation with the Petitioner, subject to further Order of the Court.
- [13] On July 7, 2008, the Cliffs and the Monitor signed an order to pay authorizing Century to send the first tranche of the DIP financing to Lawson Lundell. This order to pay provided the following:
- Please accept this as your irrevocable authority and direction to payout of the first advance under the above referenced mortgage loan all taxes, assessments and utilities charged against the Property given as security; property valuation fee, solicitor's charges, accrued interest to interest adjustment date, and other expenses payable, and to pay all prior encumbrances on the Property...
- [14] On the same day, Fisgard filed an application for leave to appeal the DIP Order. Fisgard obtained leave to appeal on July 18, 2008. The appeal was heard August 12, 2008.
- [15] The DIP financing was subject to an "appeal provision". The appeal provision provided that Century was only to advance the DIP financing following the expiry of the time in which an appeal could be brought from the DIP Order, if no appeal was filed.
- [16] In early August, prior to the hearing of the appeal, Century purported to waive the appeal provision, and provided the \$500,000 in DIP financing authorized by the order to pay to Lawson Lundell. Century sought, and was provided, further security from the Cliffs' principals for this payment. When commitment fees, interest charges, and other chargebacks were taken into account, Lawson Lundell held the net amount of \$350,500 in trust on account of this payment.
- [17] Lawson Lundell was placed on an undertaking not to release any portion of this \$350,500 until Century's solicitors provided them with written authority to do so. A further condition imposed was the payment of a \$25,000 due diligence fee to Century.
- [18] On August 8, 2008, this undertaking and condition were satisfied.

- [19] In accordance with paragraph 8 of the DIP Order, the Cliffs and the Monitor requested and proceeded to use some of the DIP funds held in trust by Lawson Lundell. On July 15, 2008, a real estate appraisal was prepared by the Altus Group in respect of the Cliffs' property located at North Cowichan on Vancouver Island at the direction of the Monitor (the "Altus Report"). The parties agree that approximately \$98,000 of the DIP monies were used to pay for the Altus Report. Additionally, the parties agree that the amount of \$12,958.52 was directed to be paid by the Monitor out of the DIP facility to consultants who provided advice on golf course specific issues. Payments were also made to the principals of the Cliffs on account of wages.
- [20] None of the parties dispute the propriety of these expenses, and none advance a claim of entitlement for these amounts. After these expenditures are taken into account, the \$162,276.33 which constitutes the subject of this dispute remains in Lawson Lundell's trust account.
- [21] There is no evidence that the Monitor requested the release of the Funds, as required by the DIP Order and they were never used by the Monitor or the Cliffs.
- [22] On August 12, 2008, the Court of Appeal heard the appeal from the DIP Order, giving judgment on August 15, 2008. The Court allowed the appeal, holding that the invocation of the CCAA in the circumstances of this case was improper, and set aside the DIP Order. The Court's reasons are indexed at 2008 BCCA 327. At para. 41 of the Court's reasons, the Court held that notwithstanding the fact the DIP Order had been set aside, the administrative charge was to continue in effect:
- [41] I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.
- [23] At the hearing of the appeal, the Monitor appeared and made submissions regarding the administrative charge. Fisgard conceded that it did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal was pronounced. The Court of Appeal noted:
- [39] In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge

for its fees and disbursements up to the day on which the decision on appeal is pronounced.

[24] No formal order appears to have been entered as a result of the appeal.

[25] In subsequent proceedings in this Court, several orders have been made.

[26] By order dated September 24, 2008, Mr. Justice Rice granted Century a charge on the Cliffs' property in the amount of \$98,000 in connection with the Altus Report.

[27] By order dated February 17, 2009, I approved the fees and disbursements of the Monitor and its counsel in the total amount of \$118,577.28.

[28] By order dated March 31, 2009, Mr. Justice Pitfield approved the sale of the Cliffs' real property holdings to 0844246 B.C. Ltd., subject to the security interest created by:

[T]he Administrative Charge as described in the Order of Mr. Justice Groves pronounced May 26, 2008 in the proceeding numbered S083716 of the Vancouver Registry of the Supreme Court of British Columbia (the "CCAA Proceeding") as it may have been effected by the Order of Mr. Justice Groves, pronounced June 27, 2008 (the "Confirmation Order") in the CCAA Proceeding which Confirmation Order was set aside by the Court of Appeal for British Columbia on August 18, 2008 in the appeal having Court file number CA030261, Vancouver Registry (the "Appeal"), and any future orders of the Court herein and/or in the CCAA proceeding.

[29] As a result of the appeal, a dispute arose between Century and Fisgard as to the nature of the priority Century enjoyed in relation to the first tranche of the DIP funds. On June 30, 2009, in reasons for judgment indexed at 2009 BCSC 869, I held that Century's non-compliance with the appeal provision of the DIP Order resulted in Century being unable to rely on the priority charge granted to it in that Order, and that Fisgard as the next ranking security holder was entitled to priority in relation to the Funds. This Order was made without prejudice to Lawson Lundell's claim of solicitor's lien over the Funds.

[30] In addition to its claim of solicitor's lien, Lawson Lundell seeks a declaration that it is entitled to payment of its outstanding accounts from the administrative charge created in the Initial Order.

[31] To date, Lawson Lundell has been paid \$15,700.70 by the Cliffs for legal fees and disbursements incurred in this matter. On June 26, 2008, Lawson Lundell rendered a bill in the amount of \$7,291.34 for which it was paid in full. On August 18, 2008, Lawsons rendered a bill in the amount of \$144,822.94 to the Cliffs for legal services and disbursements incurred up to that date in this matter, of which \$8,409.36 has been paid. Thus, Lawson Lundell is owed \$136,413.58 on account of that bill. Interest continues to accrue on this sum at 12% per annum.

[32] Since August 18, 2008, Lawsons has continued to perform work for the Cliffs, and as of January 5, 2009, had recorded unbilled work in progress in the amount of \$50,516.29 inclusive of disbursements, but not any applicable taxes.

III. Issues

[33] The following issues arise from the applications that are before the Court:

1. Does res judicata bar Century from claiming entitlement to the Funds?
2. Were the Funds "advanced" by Century to the Cliffs? Did the Cliffs ever own or possess the Funds?
3. Alternatively, are the Funds impressed in equity with a trust in Century's favour? If the Funds are subject to a trust, does this defeat Fiskgard's claim?
4. Is Lawson Lundell entitled to a solicitor's lien over the Funds?
5. Is Lawson Lundell entitled to access the residue of the administrative charge on account of its fees and disbursements?

IV. Analysis

1. Res Judicata

- [34] Century claims it is entitled at law, or alternatively, in equity, to ownership of the Funds. Fiskgard raised a preliminary objection to these submissions. Fiskgard submits that Century's arguments are barred by both issue estoppel and cause of action estoppel. They submit that it is no longer open to Century to argue that it is entitled to the Funds, as this was the issue determined in my June 30 Order, which provided that "Fiskgard and Liberty are entitled to priority over the Funds".
- [35] No appeal was taken from this order, and Fiskgard submits it is conclusive on any questions regarding ownership of the Funds.
- [36] Fiskgard further submits that Century's "new arguments" based on the doctrine of unjust enrichment and the law of trusts are also precluded by either issue estoppel or cause of action estoppel, as Century could have made these submissions at the hearing which led to the June 30 Order, but failed to do so either intentionally or through inadvertence.

Issue Estoppel

- [37] The doctrine of issue estoppel provides that where a question is litigated, the judgment of the Court is a final determination as between the parties and their privies on that point. While issue estoppel is generally raised as a bar in subsequent suits between the same parties, it is also applicable to subsequent proceedings in the same piece of litigation. In *Fidelitas Shipping Co. v. U/O Exportchleb*, [1966] 1 Q.B. 630 at 642 (C.A.), Lord Diplock stated:

Where the issue separately determined is not decisive of the suit the judgment upon that issue is an interlocutory judgment and the suit continues. Yet I take it to be too clear to need citation of authority that the parties to the suit are bound by the determination of the issue. They cannot subsequently in the same suit advance an argument or adduce further evidence directed to showing that the issue was wrongly determined.

[38] In giving the majority judgment of the Supreme Court in *Angle v. M.N.R.*, [1975] 2 S.C.R. 248, Dickson J. referred to the judgment of Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853, who said the requirements of issue estoppel were:

- (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 the privies were the same persons as the parties to the proceedings in which the estoppel was raised or their privies...

[39] The continued validity of the three step test adopted in *Angle* was acknowledged by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. Writing for the Court, Justice Binnie held at para. 24 that issue estoppel will only apply where the question said to be barred by the doctrine was "distinctly put in issue and directly determined by the Court" at a previous hearing. It is not sufficient that the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. The question out of which the estoppel is said to arise must have been fundamental to the decision arrived at in the earlier proceeding.

[40] Thus, it is a condition precedent to the invocation of issue estoppel that the party seeking to prevent the advancement of an argument has established that the same question was actually decided in a previous proceeding, not that it could have been decided. Issue estoppel "applies only in circumstances where it is clear from the facts that the question has already been decided": *R. v. Van Rassel*, [1990] 1 S.C.R. 225 at 238.

[41] Therefore, to determine whether Century is barred from advancing certain submissions on this application, I must determine precisely what issues this Court was called upon to adjudicate at the May 12, 2009 hearing.

[42] In determining whether a question has been raised and decided in earlier proceedings, the Court is entitled to look at "any material which shows what issues were raised and decided": *Rogers v. The Queen* (1994), 181 C.L.R. 251 at 263 (Aust. H.C.).

[43] In addressing Fisdard's issue estoppel submission, I have referred to the motion material submitted by the parties for the Court's consideration at the May 12 hearing, my reasons for judgment arising from that hearing, and the resulting Order dated June 30, 2009.

[44] A review of these materials demonstrates that the issues raised by the parties and considered by the Court were limited to the construction of a clause in the commitment letter, whether the loan was made in compliance with the required terms and conditions, and the relative priorities Century and Fisgard held in relation to those funds as a result of the advance having been made in a manner contrary to these terms and conditions. At paras. 51 and 52 of my reasons, I held:

It follows that the August 7, 2008, advance of \$500,000 was not authorized under the terms of the DIP order. Thus Century is not entitled to priority on the funds claimed. As Fisgard/Liberty are the first and second mortgagees of Cliffs, they are entitled to priority of the funds in question

Century's priority for advances made pursuant to the order is lost because I have concluded that those advances were not in compliance with the order.

[45] It is clear that issue estoppel does not bar what Fisgard itself characterized as Century's "new arguments", based on unjust enrichment and the law of trusts. The beneficial ownership of the funds was not a question decided at the May 12, 2009 hearing, nor was it raised in the parties' arguments or the reasons of this Court. Thus, it cannot be said that this question was "distinctly put in issue and directly determined" at that time. Neither party raised, nor did the Court address, any party's equitable interest in or entitlement to the funds at the previous hearing.

[46] Further, I find that Century is not barred by issue estoppel from arguing that the Funds were never advanced to the Cliffs. The previous hearing only addressed priorities within the context of the DIP charge, not at large.

[47] Finding that Fisgard was entitled to "priority" over the Funds insofar as the terms of the DIP Order were concerned was not a finding on the issue of ownership. A "priority" is distinct from an in rem interest in property: *Dinning v. Workmen's Compensation Board*, [1932] 1 D.L.R. 373 at 378 (B.C.C.A.). A priority is not a property right; rather, it is a relative or comparative term, a concept which is legally distinct from that of ownership or title: *Attorney General of Newfoundland v. Churchill Falls (Labrador) Corporation Ltd.* (1983), 49 Nfld. & P.E.I.R. 181 at 226, aff'd on other grounds (1985), 56 Nfld. & P.E.I.R. 91 (Nfld. C.A.), aff'd [1988] 1 S.C.R. 1085.

[48] Fisgard further claims that my June 30 Order which characterizes the Funds as having been "advanced" by Century to the Cliffs conclusively establishes that Century did not retain title to the Funds.

[49] I do not agree. The parties' submissions at the previous hearing addressed the effect of Century's waiver of the appeal provision on its entitlement to priority as provided for by the charge granted in the DIP Order. Submissions were limited to this narrow issue, as were this Court's reasons. Issues regarding ownership of the Funds and the impact of legal and equitable principles beyond the narrow scope of the priority granted in the DIP Order itself were not argued, and were simply not in the contemplation of the Court. The issue was not

determined.

- [50] If I am wrong, and issue estoppel is applicable in the circumstances, I decline to apply it. One of the purposes of estoppel being to work justice between the parties, the Court has discretion to refuse to apply issue estoppel where to do so would work an injustice: *Arnold v. National Westminster Bank Plc.*, [1991] 2 A.C. 93 at 109 (H.L.).
- [51] In *Royal Bank of Canada v. United Used Auto & Truck Parts Ltd. et al.*, 2006 BCSC 1192, aff'd 2007 BCCA 111, leave to appeal ref'd [2007] S.C.C.A. No. 148, Rice J. stated that the application of an estoppel to bar future litigation "is not automatic, nor is it guaranteed". He noted that:
- [54] The same principle applies to cause of action estoppel and the doctrines of res judicata, abuse of process, and collateral attack in general. A court must retain a residual discretion to refuse to apply any form of estoppel when to do so would be contrary to the requirements of justice. As the Supreme Court of Canada explained in *Danyluk*, supra, at para. 33: "The underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."
- [52] These proceedings are not the "one shot" trial of an action, and of necessity have required multiple hearings. Great care must be taken in applying res judicata to proceedings in the same action, as distinct from separate actions between the same parties: *Talbot v. Pan Ocean Oil Corp.* (1977), 3 Alta. L.R. (2d) 354 at 360 (C.A.).
- [53] Further, the key finality rationale which was held in *Danyluk* to underpin res judicata is of limited weight in the present circumstances, given that Fisgard knew that issues surrounding Lawson Lundell's entitlement to a solicitor's lien would require a subsequent application relating to the Funds, and that no conclusive finding as to their ultimate disposition had been made in my June 30 reasons.
- [54] I do not accept that Century is precluded from advancing its claim. The public interest in ensuring that justice is done on the facts of this case requires entertaining the parties' submissions on the merits.

Cause of Action Estoppel

- [55] Fisgard submits in the alternative that Century's submissions are barred by cause of action estoppel, which is distinct from issue estoppel. In *Thoday v. Thoday*, [1964] 1 All E.R. 341 (C.A.), (cited with approval by Dickson J. in *Angle*), Lord Diplock defined cause of action estoppel at 352:

cause of action estoppel prevents a party from asserting or denying as against the other party, the existence of a particular cause of action, the existence or non-existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist i.e. judgment was given upon it, it is said to be merged in the judgment. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is estopped per rem judicatum.

[56] While issue estoppel is the predominant doctrine arising from interlocutory matters, cause of action estoppel may also apply. Donald Lange in *The Doctrine of Res Judicata in Canada*, 2nd ed. (Markham: LexisNexis Butterworths, 2004) states at page 178:

The subject matter of a motion may also be considered a cause of action for the purpose of cause of action estoppel. Where the question in the motion decides the proceeding itself because the question decides the cause of action a second proceeding based solely on the same question relitigates the same cause of action and is estopped by the decision in the motion on the basis of cause of action estoppel.

[57] The leading Canadian authority on cause of action estoppel is the Supreme Court of Canada's decision in *Grandview (Town) v. Doering*, [1976] 2 S.C.R. 621. In *Bjarnarson v. Manitoba* at 304 (Man. Q.B.), aff'd (1987), 45 D.L.R. (4th) 766 (Man. C.A.), Hewak C.J.Q.B. summarized the legal principles established in *Grandview*:

The Supreme Court of Canada in the case of *Grandview v. Doering*, [1976] 2 S.C.R. 621, [1976] 1 W.W.R. 388, 61 D.L.R. (3d) 455, 7 N.R. 299, identified four criteria that must be present before the doctrine of cause of action estoppel would apply:

1. There must be a final decision of a court of competent jurisdiction in the prior action;
2. The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action (mutuality);
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[58] Unlike issue estoppel, it is not a condition precedent to the invocation of cause of action estoppel that a question has previously been decided by the Court. Figgard relies upon the following statement of Wigram V.C. in *Henderson v. Henderson* (1843), 3 Hare 100 at 114-115, in support of its submission that Century's claims ought to have been advanced in the earlier hearing, and that its failure to bring them forward at that time is an absolute bar to the Court entertaining them on this application:

In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same

subject of litigation in respect of matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties, exercising reasonable diligence, might have brought forward at that time.

[59] While this case has been cited with approval by the Supreme Court of Canada, in *Hoque v. Montreal Trust Co.* (1997), 162 N.S.R. (2d) 321 (C.A.), leave to appeal ref'd [1997] S.C.C.A. No. 656, the Court provided some flexibility to the rule in *Henderson*. At para. 37, Cromwell J.A. (as he then was) stated:

Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process. [emphasis added]

[60] These principles have been applied recently in this Court, particularly in the context of proceedings in Chambers. In *Gubbels v. Fitterer*, 2006 BCSC 795, Parrett J. followed *Buschau v. Rogers Communications Inc.*, 2003 BCSC 1718 at para. 36, where Groberman J. (as he then was) stated:

I acknowledge that the doctrine of *res judicata* does apply to interlocutory applications. The court has some discretion, however, with respect to the application of the doctrine, and will generally apply it less stringently to interlocutory orders than to final orders. In particular, the rule in *Henderson v. Henderson* (1843), 3 Hare 100, 67 E.R. 313 (Ch.) that a party must bring forward "its full case" at one time is of limited application to interlocutory applications. Judicial efficiency, one of the foundations of the doctrine of *res judicata*, will often be well served by allowing interlocutory applications to deal with only small parts of a larger picture.

[61] I am not satisfied that cause of action estoppel has any application in the present circumstances. The burden of proving the doctrine's constituent elements is on the party raising the issue of *res judicata*: *Kinar v. Deitner*, [1996] S.J. No. 764 at para. 7 (C.A.); *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 at para. 55 (C.A.).

[62] The term "cause of action" was defined by Binnie J. in *Danyluk* at para. 54 as "comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the Court" (emphasis added).

[63] In *Royal Bank of Canada*, Rice J. held at para. 41:

Where a party seeks to pursue a second action against the same foe, the court must be satisfied that the new cause of action alleged is truly separate and distinct from the old, and not merely a new portrayal of the same subject matter, such as tort rather than contract. Litigants may not simply characterize the facts of the first action in a different way to avoid the application of *res judicata*. [emphasis added]

[64] As noted by Lord Diplock in *Thoday*, "cause of action estoppel prevents a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties." (emphasis added)

[65] The underlined passages in these cases demonstrate that cause of action estoppel is inapplicable in this case, where Century is not seeking any relief against Fisgard. There are no pleadings. There has been no cause of action or claim asserted by Century against Fisgard. What there is in this case is a dispute over a pool of money between three competing creditors, none of whom, however, are engaged in the litigation of claims against one another. Further, the question litigated at the prior hearing did not decide the ultimate disposition of the Funds.

[66] Fisgard has not established that cause of action estoppel applies in the circumstances.

[67] If I am wrong in this finding, then in any event I exercise my residual discretion to refuse to apply cause of action estoppel. The Court enjoys a discretion to refuse to apply cause of action estoppel, even where the constituent elements have been established: *Grant McLeod Contracting Ltd. v. Forestech Industries Ltd.*, 2008 BCSC 756; *Saarnok Estate v. Neufeld*, 2003 BCSC 937 at para. 29; *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.*, 2003 ABCA 34 at para. 37; *Glenko Enterprises Ltd. v. Keller*, 2008 MBCA 24 at para. 52.

[68] I reiterate my earlier conclusion that it would be against the interests of justice if Century were precluded from arguing its legal and equitable entitlement to the funds, given that the issue was not considered, and that the fundamental "finality" consideration which underpins *res judicata* is of limited force in the circumstances.

2. Were the Funds advanced to the Cliffs?

[69] Fisgard submits that as Century advanced \$500,000 to the Cliffs and cannot rely on the protection of the DIP Order, it has lost any and all rights to that advance of funds. In essence, Fisgard says Century took the risk any unsecured lender faces in an insolvency.

- [70] Fisgard argues that at the moment Century's solicitors advised Lawson Lundell on August 8, 2008, that the undertaking and conditions they had imposed were satisfied, Century no longer had any control over the funds and the advanced funds became the sole property of the Cliffs, which Fisgard is now entitled to by virtue of its security interests in the Cliffs' property.
- [71] Citing *Canadian Business Centre Ltd. v. Bridge Holdings Ltd.*, 2005 BCSC 1772 at para. 29, aff'd 2007 BCCA 277, Fisgard also submits that as a loan "advance" includes that part of an advance which is not actually paid over to the borrower but is retained by the lender on account of fees and interest, in addition to the Funds, Fisgard is entitled to an order compelling Century to pay the amounts it retained on account of interest fees and various chargebacks.
- [72] Century submits that for property rights in or ownership of loan funds to transfer to a borrower, it is a condition precedent that a borrower must obtain "control" of the money.
- [73] Century argues that this never occurred in relation to the Funds, or the amounts held back on account of fees and interest. Century points to the DIP Order, which provided that advances to the Cliffs were paid to Lawson Lundell in trust, and required a request from the Monitor for the advancement of the loan monies to Lawson Lundell (the order to pay), and a further written request from the Monitor authorizing their payment out of Lawson Lundell's trust account.
- [74] Century submits that as there is no evidence the Monitor authorized or requested the release of the Funds as it did with the other loan monies which were used for the various reports and disbursements outlined above, the Cliffs was not able to access and Lawson Lundell is not able to release the Funds.
- [75] As a result, Century says that in law the Funds were never advanced, and ownership and possession of the Funds never passed to the Cliffs. When the DIP Order was set aside, the Funds ought to have been returned to Century, as the condition governing their advancement never was and never could be satisfied.
- [76] In reply, Fisgard claimed that Century cannot rely on the terms of the DIP Order requiring the Monitor's authorization, as Century's advance was non-compliant with that order.
- [77] I do not agree that the fact the DIP Order was set aside on appeal or that Century advanced the Funds in breach of the appeal provision nullified the trust conditions pursuant to which Century provided, and Lawson Lundell accepted, the Funds. While the DIP Order was ultimately set aside by the Court of Appeal, that Court remitted any issues relating to DIP financing to this Court, including the issue of entitlement to the funds in Lawson's trust account. This direction had the effect of maintaining the status quo and did not relieve Lawson Lundell of the conditions upon which it accepted the Funds. Similarly, that Century failed to comply with the appeal provision does not negate the fundamental fact that Lawson Lundell accepted the Funds in trust, subject to the condition that payment out would only

occur upon the Monitor's written direction.

[78] I accept Century's submission. Where funds have been released by a lender to a borrower's solicitor with trust conditions governing their use, they do not become the property of the borrower until the trust conditions are satisfied. If the trust conditions are not satisfied, unspent funds must be returned to the lender.

[79] In *The Locke Stock & Barrel Co. v. Bearcat Explorations Ltd.*, 2006 ABCA 368, 27 C.B.R. (5th) 303, Locke Stock & Barrel ("LSB") had sent \$200,000 to the solicitor for the interim receiver of the respondent Bearcat. The money was to be held on the following conditions (at para. 1):

We currently hold that money on the trust condition that you have imposed upon us that the funds not be disbursed until either a protocol relating to the DIP facility has been fully executed or you approve specific disbursements of the funds. You have not executed the protocol and have not approved any specific disbursements of the remaining funds.

[80] LSB approved of specific disbursements so that all but approximately \$62,000 of the monies were paid out of trust. At that point, LSB refused to consent to further monies being disbursed, and demanded the return of the balance. The issue on appeal was whether the balance could be used to pay Bearcat's creditors, or whether it had to be returned to LSB.

[81] Picard J.A. held that even though the funds were not advanced in accordance with a DIP Financing agreement and that LSB had not obtained that type of security, the funds must be returned to LSB:

8 This court has discussed the law on lawyer's trust conditions in the *Carling Development v. Aurora River Tower* (2005), 371 A.R. 152, 2005 ABCA 267 case. Given the trust conditions in this case, the lawyer for the interim receiver is bound not to release the funds without the appellant's approval as to the release in general and as to the specific disbursements. The trust conditions make the appellant beneficial owner of the monies. There is no general power in the relevant statutes for a judge to take the property of one party and give it to another, thereby over-riding the terms of the trust conditions.

9 In our view, funds held in trust under unsatisfied conditions are not funds advanced and therefore that part of the May 27, 2006 order governing the disbursement of advanced funds and forbidding the repayment of advances to third parties does not apply to the remaining \$62,000.

10 We find that the bankruptcy judge erred in law in ordering the disbursement of the \$62,000 when the trust conditions had not been met and the appellant was not bound by any agreement for its disbursement, nor had the appellant waived its rights under the trust conditions as to this part of the \$200,000.

[Emphasis added].

[82] The decision in *First Mortgage Committee v. Investors Acceptance Corp.*, 2003 ABQB 67, is also on point. Various parties advanced competing claims with respect to money on deposit in a law firm's trust account. These funds represented the residue of a loan made on the terms of a letter of commitment which required the signature of two authorized persons before they could be paid out of the solicitor's account.

[83] The issue before Hawco J. was whether the monies held in the solicitor's trust account had been advanced to the borrower, becoming the property of the borrower. The lenders' submission focused on the fact that the funds could only be advanced from trust by the solicitor if the "required signing authority" condition was satisfied. As such, ownership of the funds never passed to the borrower.

[84] Hawco J. accepted this submission, stating the following:

11 In my respectful view, the ownership or property in the \$100,000 had not passed to TCH. Although the funds were placed in a Royal Bank account in the name of TCH, this was only the first step required to advance the money to TCH. In order for TCH to take ownership of these funds, they had to be released to TCH through a proper signing authority. TCH would only acquire control of the funds and, therefore, ownership if this pre-condition was met. This did not occur. The Investors in Syndicate #803 are therefore entitled to the funds. [emphasis added.]

[85] The Court reached this conclusion notwithstanding the fact that the parties had, in the past, expressed the opinion that the monies had "been advanced", that the entirety of the loan was deposited into a bank account for the borrower, and that all of the fees paid, and interest charged, were based upon the entirety of the loan having been received by the borrower. These facts did not negate the clear terms of the commitment letter which governed the parties' obligations, whereby the monies were advanced for deposit only, requiring the authorized signatories to consent before they were removed from the account. As the funds were not subject to the borrower's control, nor were they in the borrower's exclusive possession, they were never the property of the borrower.

[86] A similar conclusion was reached in *Weinberg v. Junior 8 Developments Ltd.*, [1980] O.J. No. 1419, 16 R.P.R. 21 (H.C.), where Hollingworth J. stated:

11 ...In this case there were monies in a trust account which could not be released unless conditions were met which were agreed upon between the parties. In this case also, the trust account was in the names of solicitors for both the mortgagor and mortgagees and following the Canadian Comstock principle I have no alternative but to state that the monies which were unadvanced did not belong to the mortgagor but belonged to the mortgagee.

[87] The Canadian Comstock principle stems from the decision in *Canadian Comstock Co. Ltd. v. 186 King Street (London) Ltd.* [1964] 2 O.R. 439 at 440 (Co. Ct.), aff'd [1964] 2 O.R. 439 at 447 (C.A.), where funds were paid by a mortgagee into a trust account in the mortgagor's name. Because of an agreement between the mortgagee and the bank, the funds were only payable out to the mortgagor if the mortgagee gave authorization. The Ontario County Court stated,

at p. 446: "The important consideration is that the actual receipt, possession, and control of the money was and remained subject to a condition imposed by the mortgagees."

[88] This decision was upheld by the Court of Appeal, who stated, at p. 449:

The sole question remaining for disposition in the action and in this appeal then is: did that which occurred between the mortgagees and the bank with the concurrence of the mortgagee constitute a payment or advance on account of the mortgage as contemplated by and provided for in s. 13 of the Act? The learned County Judge thought not and stated fully his reasons for reaching that conclusion. We agree, not only with the result, but with the reasons given for that result by His Honour and have little to add. In our view, on the facts of this case, the mortgagor never secured an actual payment or advance in the sense that it acquired any control over the moneys in the trust account. To us it seems unimportant as to the name or in whose name the moneys in the trust account were placed. All that the mortgagor acquired was merely a qualified right to secure an advance or payment out of the trust funds or, if it felt that such was being wrongfully withheld by the mortgage trustees, it acquired a cause of action with respect to those trust account moneys.

[89] As the Funds are held by Lawson Lundell on a trust condition that has not and now never will be satisfied, they are not the Cliffs' property. As the Cliffs never had possession or control of the Funds or the interest payments and fees, Century is entitled to the Funds. This conclusion defeats Fiskard's claim (as a security interest cannot attach to property which is not the debtor's) and Lawson Lundell's entitlement to a solicitor's lien, as I describe in detail below.

3. Alternatively, are the Funds impressed with a trust in Century's favour? If so, does this defeat Fiskard's claim?

[90] In the alternative, Century claims it is entitled to a constructive trust over the Funds on the basis that Lawsons and Fiskard would be unjustly enriched if they obtained the Funds. The requirements needed to establish an unjust enrichment are threefold: an enrichment, a corresponding deprivation, and a lack of any juristic reason for the enrichment: *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

[91] This submission is not truly an alternative basis on which the Court may ground a decision in Century's favour, as it implicitly requires a finding that the Funds were not "advanced" and therefore were never in the possession of Cliffs.

[92] This is so because if Century had "advanced" the Funds so they became the property of the Cliffs, it did so pursuant to a contract which was supported by consideration; in exchange for advancing the funds, Century received loan interest and security documentation. A contract is an established juristic reason justifying an enrichment, as is the operation of a statutory regime.

- [93] In this case, the combination of Century and Cliffs' contractual relationship, the foreclosure proceedings taken against the Cliffs, and Lawson's purported statutory entitlement to a solicitor's lien pursuant to the Legal Profession Act, S.B.C. 1998, c. 9, all provide a clear juristic reason for any deprivation Century may suffer if the Funds were "advanced" and Lawsons or Fiskard were to receive them. A lender who advances funds in exchange for valuable consideration runs the risk that other creditors may have a better claim to those funds upon the borrower's insolvency.
- [94] However, a further alternative submission advanced by Century does not suffer from the same defect. At the hearing of the application, I asked counsel whether the funds were impressed with what has come to be known as a Quistclose trust in Century's favour. Century's counsel submitted that regardless of whether the Funds were advanced to the Cliffs, her client is their owner in equity on this basis.
- [95] In *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1970] A.C. 567, the House of Lords held that where money is advanced by a lender to a borrower for a specific purpose, it is impressed with a trust in favour of the lender, and the borrower (or the third party who has possession of borrowed funds with knowledge of the terms of the trust) is obliged to return it to the lender if it is not used for the agreed upon purpose. In this case, the insolvency of the Cliffs is said to have frustrated the specific purpose for which the money was advanced, giving rise to a trust in favour of Century.
- [96] Century submits language contained in the commitment letter of June 13, 2008, upon which the DIP loan was extended, discloses a mutual intention between Century and the Cliffs to create a Quistclose trust. This agreement provides in part:
1. Borrower: The Cliffs Over Maple Bay Investments Ltd.
 3. Purpose: To facilitate further construction of the golf course and development of the home lots and source an irrigation solution for the golf course.
 8. Conditions: The obligation of Century to make the facility available is subject to and conditional upon each of the following:
 - a. Court authorized DIP borrowing, with the funds to be used for development purposes as disclosed by the borrower.
- [97] The DIP Order provided that the DIP facility would be "on the terms and subject to the conditions set forth in the Commitment Letter".
- [98] In *Twinsectra Ltd. v. Yardley*, [2002] 2 A.C. 164, [2002] 2 All E.R. 377, the House of Lords discussed the nature and elements of a Quistclose trust. At paras. 68 and 69 of the decision, Lord Millett provided a useful overview:

Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses, and save to the extent to which he may have taken security for repayment the lender takes the risk of the borrower's insolvency. But it is well established that a

loan to a borrower for a specific purpose where the borrower is not free to apply the money for any other purpose gives rise to fiduciary obligations on the part of the borrower which a court of equity will enforce. In the earlier cases the purpose was to enable the borrower to pay his creditors or some of them, but the principle is not limited to such cases.

Such arrangements are commonly described as creating "a Quistclose trust", after the well-known decision of the House in *Quistclose Investments Ltd. v. Rolls Razor Ltd.* [1970] AC 567 in which Lord Wilberforce confirmed the validity of such arrangements and explained their legal consequences. When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the lender has his normal remedy in debt. If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower's assets, in which case it passes to his trustee-in-bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. This depends on the intention of the parties collected from the terms of the arrangement and the circumstances of the case.

[99] Professor Sarah Worthington, in her text *Equity*, 2nd ed. (Oxford: Oxford University Press, 2006) summarizes the general principles underlying Quistclose trusts at pages 255-56:

The idea is simple. If money is lent on the mutual understanding that it should not be at the free disposal of the borrower, but should be used exclusively for a specific purpose, then a stipulation will be implied that if the purpose fails then the money must be repaid; the borrower cannot simply use the funds for other purposes. Crucially, these obligations will be specifically enforced; they will therefore give rise to a trust of the loan funds in favour of the lender until the funds are used for the specified purpose. This trust recognizes that the loan funds never form part of the borrower's assets, able to be disposed of as he wishes. The borrower obtains legal title to the funds, it is true, but the lender retains the beneficial interest until the funds are used for the nominated purpose.

These arrangements are often used in corporate rescue operations. Loans are made to enable the debtor to repay specific creditors, or to purchase necessary equipment. The lender's position is secured by the trust, although only for the short time between the borrower's receipt of the funds and his use of them for the nominated purpose. If the debtor collapses before the funds have been spent, then the lender can recover the funds themselves; his position is secured. After the funds have been properly spent, however, there is then no trust property (and no breach of trust that would support tracing into substitutes). The lender is then merely an unsecured creditor

- [100] In *Re Westar Mining Ltd.*, 2003 BCCA 11 at para. 12, Mackenzie J.A. noted that a Quistclose trust must still possess the three certainties required of all purpose trusts: certainty of intention, subject matter, and objects. His Lordship also noted that the segregation of the lender's funds from the borrower's other assets and the use of a separate account to accomplish this purpose is some evidence of a mutual intention to create a trust and of certainty of subject matter.
- [101] The Court of Appeal in *Giles v. Westminster Savings Credit Union*, 2007 BCCA 411 at para. 31, leave to appeal ref'd [2007] S.C.C.A. No. 505, recently reaffirmed that that it is a condition precedent to the creation of a Quistclose trust that the terms of the instrument governing the parties' relationship demonstrate a mutual intention between the parties that the party receiving the money will not use it for any purpose other than the specific purposes agreed to.
- [102] In *Del Grande v. McLeery* (1998), 40 B.L.R. (2d) 202 (Ont. Gen. Div.), aff'd (2000) 127 O.A.C. 394, the Court adopted the following criteria to determine whether funds advanced by one party to a solicitor's trust account for the benefit of another are impressed with a Quistclose trust:

10 All counsel are agreed that this issue will be governed by the application of the criteria or principles enunciated in the decision of the English House of Lords in *Barclays Bank Ltd. v. Quistclose Investments Ltd.*, [1970] A.C. 567. All counsel in their respective Factums have given satisfactory statements of the principles or criteria arising from the "Quistclose" decision. In this regard, I reproduce the submission contained in paragraph 21 of the Factum filed on behalf of the McCleery Group.

"Where a third party receives money:

- (a) with knowledge that the lender and the borrower intended to create a trust;
- (b) with knowledge of the purpose of the trust;
- (c) with knowledge that the money is only to be used to fulfill the purpose of the trust; and
- (d) where there was an intention to create a secondary trust in favour of the lender if the primary purpose of the trust cannot be carried out,

the third party is bound to use the money only to fulfill the specific purpose of the trust. If the purpose of the trust is fulfilled, then the primary trust is satisfied and the lender has no claim to the money in equity. It is only where the purpose of the primary trust is not satisfied that the third party is bound to return the money to the lender. Under those circumstances, the money is impressed with a secondary trust, created as a result of the parties' intentions, and the trust is enforceable against the third party because of his knowledge of the trust ("Quistclose Trust")."

12 Extrapolating the principles from the above fact-specific extract, the criteria may be stated thus:

1. Whether the terms of the loan were such as to impress upon the loan sum a trust in favour of the lender if the specific purpose of the loan was not achieved or fulfilled;
2. Whether the party receiving the loan proceeds had notice of the trust or of the circumstances giving rise to the trust so as to bind such party.

[103] On the facts of this case, if the funds are subject to a trust because of the commitment letter, Lawson Lundell was clearly provided with notice of such a trust; the agreement was sent to the Cliffs care of Lawson Lundell, its solicitors. Thus, the question I must answer is whether the terms of the loan agreement were such as to give rise to the creation of a Quistclose trust, keeping in mind that the three certainties must be established before such a trust may arise.

(i) Certainty of Intention

[104] To determine whether the Funds are subject to a trust, the Court must interpret the terms of the commitment letter in light of the circumstances prevailing at the time of its execution: *De La Giraudais v. De La Giroday* (1998), 23 E.T.R. (2d) 282 at para. 31 (B.C.S.C.). The words "trust" do not have to appear in a contract in order for the Court to characterize the parties' relationship as such. As Lord Millett noted in *Twinsectra*, the parties' subjective intentions and beliefs are irrelevant in determining whether a trust relationship has been created:

71 A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them. Whether paragraphs 1 and 2 of the undertaking created a Quistclose trust turns on the true construction of those paragraphs.

72 The fact that *Twinsectra* relied for its security exclusively on Mr Sims' personal liability to repay goes to *Twinsectra*'s subjective intention and is not relevant to the construction of the undertaking, but it is in any case not inconsistent with the trust alleged. Arrangements of this kind are not intended to provide security for repayment of the loan, but to prevent the money from being applied otherwise than in accordance with the lender's wishes. If the money is properly applied the loan is unsecured. This was true of all the decided cases, including the Quistclose case itself.

[105] Clauses 3 and 8(a) of the commitment letter specifically state the purposes for which the loan could be used by the Cliffs. On the terms of the commitment letter, the loan was provided on the condition that it would be used for "development purposes"; more particularly, "further construction of the golf course and development of the home lots and sourc[ing] an irrigation source for the golf course." I find that these provisions were intended to, and had the effect of, restricting the Cliffs' freedom to utilize the funds for purposes other than those set out in the commitment letter.

- [106] When one takes into account the surrounding circumstances prevailing at the time the commitment letter was executed, the reason these permitted purposes were included in the commitment letter becomes apparent. At the time of the advance, the Cliffs had a number of encumbrances registered against its assets, and had sought protection under the CCAA. In light of these facts, Century sought to advance the funds as a DIP lender, in order to obtain priority over all other secured lenders. Of course, as I held in my earlier reasons, Century's failure to strictly comply with the terms of the DIP Order resulted in a loss of that privileged position.
- [107] These underlying facts are of fundamental importance to the interpretation of the commitment letter. Century knew that Cliffs was indebted to numerous creditors, and was having difficulty servicing its liabilities; the continued existence of Cliffs as a going concern was in doubt. In light of the danger that Century's funds would simply be used to satisfy other creditors and wind up the project instead of constructing and completing the development, it makes sense that Century set out the permitted purposes for which the Funds could be used in clauses 3 and 8(a) of the commitment letter. The purpose of Century's credit facility was not to pay secured creditors and wind up the project; rather, it was to provide funds which were required for the project's continued existence and completion.
- [108] Further, in clause 8(b) of the commitment letter, the parties agreed that the funding was "subject to approval by court order satisfactory to Century and its counsel". The DIP Order provided that advances from Century's financing facility would only be made at the request of the Monitor, with such advances to be paid to Lawsons in trust, to be paid out only on the further written request of the Monitor. As noted in *Re Westar Mining Ltd.* at para. 16, the segregation of a lender's funds from the borrower's other assets and the use of a separate bank account for this purpose is some evidence of a mutual intention to create a trust. In addition to providing for the separation of funds, clause 8(b) and the resulting order shed important light on, and are further evidence of, the parties' mutual intention that the funds were to be used for the completion of the golf course development, not to extinguish the Cliffs' general liabilities and wind up the project. The Monitor was appointed to facilitate the Cliffs' development project. Requiring the Monitor's consent before any funds could be placed in the Cliffs' hands further ensured that the loan would be used for development purposes.
- [109] In my view, the fact that the order to pay dated July 17, 2008, by which the Monitor directed Century to pay the first tranche into Lawson Lundell's trust account provided "irrevocable authority [to Century] to payout... solicitor's charges... and to pay all prior encumbrances on the Property", did not and could not negate the trust conditions contained in the commitment letter which bound Century and the Cliffs, and were given the force of an order of this Court in the DIP Order. A direction from the Monitor to Century providing approval of the first payment is not a contract which could negate or vary the terms of the purpose trust in the commitment letter.

[110] I find as a fact that the language contained in clauses 3 and 8(a), interpreted in light of the surrounding circumstances discloses a mutual intention between Century and the Cliffs to create a Quistclose trust.

(ii) Certainty of Subject Matter

[111] In my view, this requirement is clearly satisfied in this case: the subject matter of the Quistclose trust is the Funds, which have not and cannot be used for the permitted purposes set out in the commitment letter. The quantum and location of the trust monies can thus be ascertained with certainty.

(iii) Certainty of Objects

[112] In *Twinsectra*, the House of Lords addressed an argument that language limiting the purpose for which funds could be used to "an acquisition of property" was too vague, precluding the creation of a Quistclose trust on the ground that the certainty of objects test could not be satisfied. Lord Hoffman disposed of this argument at para. 16:

However, the fact that the undertaking was unusual does not mean that it was void for uncertainty. The charge of uncertainty is levelled against the terms of the power to apply the funds. "The acquisition of property" was said to be too vague. But a power is sufficiently certain to be valid if the court can say that a given application of the money does or does not fall within its terms: see *In re Baden's Deed Trusts* [1971] AC 424. And there is no dispute that the £357,720.11 was not applied for the acquisition of property.

[113] Lord Millett held at para. 101:

... A trust must have certainty of objects. But the only trust is the resulting trust for the lender. The borrower is authorised (or directed) to apply the money for a stated purpose, but this is a mere power and does not constitute a purpose trust. Provided the power is stated with sufficient clarity for the court to be able to determine whether it is still capable of being carried out or whether the money has been misapplied, it is sufficiently certain to be enforced. If it is uncertain, however, then the borrower has no authority to make any use of the money at all and must return it to the lender under the resulting trust. Uncertainty works in favour of the lender, not the borrower...

[114] Similar reasoning applies in this case. There is no doubt that if the Funds were provided to either Lawson's or Fiskard at this time, after the demise and frustration of the Cliffs' development project, they would not be applied for the purposes provided for in the trust. The commitment letter provides sufficient clarity for the Court to determine that this would be a misapplication of the Funds, as there no longer is any development to carry out. Thus, the power is sufficiently valid, as I am able to find that paying the Funds to either Lawson's or Fiskard at this time would not fall within its terms. Advancing funds for the benefit of secured creditors after the development has ceased, the subject properties have been foreclosed upon, and the Cliffs' project has been frustrated is not a "development purpose" or of assistance to the "further construction of the golf course and development of the home

lots and sourc[ing] an irrigation source for the golf course".

Priorities: Fisgard's Security Interest

- [115] Assuming my finding that the Funds were never advanced to the Cliffs is incorrect, does the Quistclose trust alone defeat Fisgard's security interest?
- [116] In *Twinsectra*, after undertaking an exhaustive review of the academic and common law authorities on point, at paras. 100-102, Lord Millett definitively found that a Quistclose trust is not a constructive trust, but is a form of resulting trust, which arises as soon as money is advanced, not at the time it is judicially declared to exist.
- [117] The fact that a Quistclose trust is properly described as a resulting trust and not a constructive trust is relevant to the status of the Personal Property Security Act R.S.B.C. 1996, c. 359 ("PPSA"), security Fisgard holds in the Cliffs' present and after acquired property.
- [118] In *Manning Jamison Ltd. v. Registrar of Travel Services*, 1999 BCCA 185, Goldie J.A. held that in light of the definitions found in the PPSA, a trust which in substance secures the payment or performance of an obligation may be a security interest, thereby becoming subject to the priority regime set out in the PPSA.
- [119] In *Ellingsen (Trustee of) v. Hallmark Ford Sales Ltd.*, 2000 BCCA 458, Donald J.A. (Lambert J.A. concurring) held that a constructive trust interest in property is not defeated by security registered under the PPSA, even where that registration predates the judicial declaration of trust, as the PPSA has no application to such interests, which are an "other interest given by a rule of law" within the meaning of s. 4(a) of the PPSA. However, Donald J.A. implicitly suggested that the same result is not necessarily achievable where a resulting trust is involved (at paras. 26-28).
- [120] In *Kimwood Enterprises Ltd. v. Roynat Inc.* (1985), 15 D.L.R. (4th) 751 (Man. C.A.), a case not cited in *Ellingsen*, the Court reached a similar conclusion, holding that a constructive trust is not defeated by security registered under the PPSA. However, the Court suggested that PPSA legislation is an inappropriate mechanism for determining priorities whenever one party is the sole equitable owner of collateral, whether subject to an express or constructive trust, particularly where that collateral was not in the possession of the debtor at the time the secured party made their loan and took security.
- [121] While in light of *Kimwood* I am inclined to the view that a resulting trust falls within the ambit of an "other interest given by a rule of law" within the meaning of s. 4(a) of the PPSA, and is thereby excluded from the PPSA and not subject to Fisgard's security interest, this conclusion may be untenable in light of *Ellingsen*. In any event, I am able to base my decision on other grounds, namely that Fisgard's PPSA security never "attached" to the Funds, and therefore Fisgard's security interest cannot defeat or rank ahead of Century's equitable ownership.

[122] The following sections of the PPSA are relevant to this conclusion:

1 (1) "collateral" means personal property that is subject to a security interest;

...

12 (1) A security interest, including a security interest in the nature of a floating charge, attaches when

- (b) the debtor has rights in the collateral or power to transfer rights in the collateral to a secured party, and
- (2) For the purposes of subsection (1) (b) and without limiting other rights, if any, which the debtor has in the collateral, a debtor has rights in goods leased to the debtor or consigned to the debtor when the debtor obtains possession of them in accordance with the lease or consignment.

...

13 (1) Subject to section 12 and subsection (2), a security agreement that provides for a security interest in after acquired property attaches to that property in accordance with the terms of the agreement without any need for a specific appropriation by the debtor.

...

19 A security interest is perfected when

- (a) it has attached

[123] "Attachment" is a term of art used in the PPSA to mean that all the events necessary for the creation of a security interest have taken place and the security agreement is ready to be perfected. Without attachment there can be no security interest in the collateral. Section 12(1)(b) of the PPSA provides that a security interest "attaches" when the debtor acquires "rights in the collateral". Section 13, which deals with after acquired property, is expressly made subject to s. 12, thereby requiring a debtor to have rights in the after acquired collateral before a security interest may attach to that property.

[124] In *The British Columbia Personal Property Security Act Handbook 2008* (Toronto: Thomson-Carswell, 2008) at 60, Professor Richard H. McLaren states:

The second element necessary for attachment is that the Debtor has rights in the collateral. Title to the collateral subject to a Security Interest will always constitute rights in the collateral. It is likely that under s. 12(1)(b) of the Act, the Debtor will be required to have more than mere possession of the collateral however, the meaning of rights in the collateral is unclear. The Act does not specify the quantum of "rights" which the Debtor must have in the collateral to support the Security Interest. Case law from both the U.C.C. and other provinces indicate that the Debtor must have something more than mere possession but less than full legal ownership. Precisely what will constitute rights in collateral is left to judicial determination.

Section 12(2) supplies further detail as to when the Debtor is considered to have rights in the collateral. In all other cases it is necessary to look to property law concepts in order to determine what constitutes a right in the collateral.

[125] In *Haibeck v. No. 40 Taurus Ventures Ltd.* (1991), 59 B.C.L.R. (2d) 229 (S.C.), Campbell A.C.J. stated:

34 Builders argues that RoyNat's security interest has not attached since No. 40 has no "rights in the collateral" within the meaning of s. 12(1)(b) of the PPSA. Accordingly, it submits that it has the only perfected security interest which has priority over that of RoyNat by virtue of s. 35(1)(b) of the PPSA.

35 I am unable to accept this submission. I am satisfied that the delivery of the appliances (the collateral) by Builders to No. 40 provided No. 40 with "rights in the collateral" within the meaning thereof in s. 12(1)(b) of the Act.

36 I find support for this conclusion in the Handbook, at p. 85, where the authors comment:

The debtor must have real rights in the collateral. These real rights may be derived from ownership or they may be possessory in origin.

[Emphasis added]

[126] In *Western Surety Co. v. National Bank of Canada*, 2001 NBCA 15, Drapeau J.A. (as he then was) held:

77 Legal title to a future "debt" does not pass to the assignee until such time as the assignor becomes entitled to it. In other words, the "future debt" under a General Assignment of Book Debts must come into existence before legal title to it vests in the assignee. In *Rehm v. DSG Communications Inc.*, [1995] 4 W.W.R. 750 (Sask. Q.B.), at paras. 14 and 23 and *Marine Building Holdings Ltd. v. Proton Engineering* (1993), 5 P.P.S.A.C. (2d) 46 (B.C.S.C.), at para. 14, the courts held that a debtor obtained sufficient rights in the collateral in the form of an account receivable for the security interest to "attach" (see ss. 12 and 19 of the Personal Property Security Act) when the money became due and owing to the debtor. See, as well, *Re Tri-Lateral Enterprises Ltd.* (1977), 14 O.R. (2d) 712 (Ont. S.C. in Bankruptcy, Henry J.), at p. 714 and *Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce* (1982), 36 O.R. (2d) 703 (C.A.), at p. 707. [emphasis added]

[127] In *Gray v. Royal Bank of Canada* (1997), 143 D.L.R. (4th) 179 at para. 19 (B.C.S.C.), Lander J. reviewed the authorities on point, stating that the cases "suggest that delivery by a vendor into the hands of a purchaser is sufficient to create rights in the collateral on the part of the debtor sufficient to support a security interest".

[128] In *Kunkel v. Sprague Nat. Bank*, 128 F.3d 636 at 641 (8th Cir. 1997), the Court interpreted the phrase "rights in the collateral" found in the Uniform Commercial Code, on which the PPSA is modelled:

The phrase "rights in the collateral" is not defined in the UCC. "If the debtor owns the collateral outright, it is obvious that the security interest may attach." Clark, *The Law of Secured Transactions Under the Uniform Commercial Code* 2.04[1], at 2-43 (Rev. ed. 1993). It is also well-settled, however, that "rights in the collateral" may be an interest less than outright ownership, but must be more than the mere right of possession. See *id.*; see also 4 J. White & R. Summers, *Uniform Commercial Code* 126 (4th ed. 1995) ("It follows that almost any 'rights in the collateral' will suffice under 9-203."). The concept of "title" is not determinative. See Kan. Stat. Ann. 84-9-202. "An agreement to purchase can give rise to sufficient rights in the debtor to allow a security interest to attach, regardless of whether the debtor has technically obtained title to the property." *United States v. Ables*, 739 F. Supp. 1439, 1444 (D. Kan. 1990). Courts consider factors such as the extent of the debtor's control over the property and whether the debtor bears the risk of ownership. See, e.g., *Kinetics Tech. Int'l Corp. v. Fourth Nat'l Bank*, 705 F.2d 396, 399 (10th Cir. 1983) (debtor's control); *Chambersburg Trust Co. v. Eichelberger*, 588 A.2d 549, 552-53 (Pa. Super. Ct. 1991) (debtor had risk of ownership). [emphasis added.]

[129] In light of these authorities, the "quantum" of rights enjoyed by a debtor in collateral must be more than trifling or completely contingent in nature before a security interest may be said to attach.

[130] This raises the question of the nature of the Cliffs' rights in the Funds. As discussed above, the payout of the Funds from Lawson Lundell's trust account was conditional upon a request to this end being made by the Monitor in writing.

[131] The requirement that the Funds would not be paid out without the written request of the Monitor means that the Cliffs did not have sufficient "rights in the collateral" for Fisgard's security interest to attach, regardless of whether my finding that the Funds were not "advanced" is correct. The will of a third party (the Monitor) is an external condition upon which the Cliffs' entitlement to the money is entirely dependent, and is therefore a barrier to the Cliffs obtaining "rights in the collateral" beyond a mere expectation or contingent right to future enjoyment.

[132] The Cliffs certainly had a right to receive the collateral; but this right was contingent upon the Monitor making a request in writing which has not and never will be made. Century held the entirety of the beneficial interest in the Funds through the Quistclose trust; the Cliffs never had actual possession of the Funds, had no control over their disposition, and could not compel Lawson Lundell to disburse them. The agency of the Monitor was required. In these circumstances, I find that the Cliffs did not have sufficient "rights in the collateral" for Fisgard's security interest to attach.

4. Is Lawson Lundell entitled to a declaration of solicitor's lien over the Funds?

[133] Lawson Lundell argues that a claim of solicitor's lien attaches to the property of the client in advance of the client's own interest in that property. The solicitor's lien is not, therefore, subject to the claims of others to whom the client may have transferred or granted an interest in that property. Lawson Lundell further submits that a solicitor's lien takes

priority over virtually all other claims, and that it does not matter when those other claims arose relative to the solicitor's lien. It claims entitlement to both a statutory lien pursuant to the Legal Profession Act, and a common law lien against the Funds, citing *Albion Securities Company Ltd. v. Nathanson, Schachter & Thompson*, 2003 BCSC 232 at para. 23, which acknowledged that both liens may be invoked by solicitors in British Columbia.

[134] Lawson's claim for a common law lien must be dismissed, in light of my finding that the Cliffs never legally owned the Funds, and alternatively, that they are impressed with a Quistclose trust. At common law, a solicitor's charging lien does not extend to interests in the property other than the client's, and the solicitor's claim is subject to any and all pre-existing equities held by third parties in the fund: *Rees, Newsham & Weir v. Stanek* (1982), 16 Sask. R. 288 at 300 (Q.B.). In *Re Gilliland*, [1933] O.J. No. 204, 14 C.B.R. 492 (Ont. H.C.), Armour J. held:

11 The lien can be exercised against the client only and cannot be set up as against persons whose claims are paramount to those of the client (*Francis v. Francis* (1854), 5 DeG. M. & G. 108). And it attaches to the property only to the extent of the client's interest therein and is confined to the ultimate balance coming to the client (*Verity v. Wylde*; In re Downes (1859), 4 Drew. 427, 28 L.J. Ch. 561; *Chick v. Nicholls* (1878), 26 W.R. 231).

12 The solicitor has no higher right than his client (In re Harrold, *Wilde v. Waldford* (1884), 53 L.J. Ch. 505; In re Union Cement anti Brick Co. (1872), 26 L.T. 240), and is liable to all the equities between his client and the other parties interested in the property (*Taylor v. Popham*; *Monke v. Taylor* (1808), 15 Ves. 72; *Bawtree v. Watson* (1838), 2 Keen 713, 7 L.J. Ch. 183).

[135] In *Hosseini v. Chernoff*, 1999 BCCA 386, Donald J.A. (for the Court) expressly held that a solicitor could not charge property which, as a result of litigation, has been determined to belong to another party, as in such a circumstance the solicitor would not have "recovered or preserved" the property, which is a condition precedent to a statutory declaration of solicitor's lien.

[136] In *Hosseini*, the Court concluded that a lawyer who had acted on behalf of a husband in matrimonial proceedings had no claim to a solicitor's lien against matrimonial property which was the subject of dispute in the action and which was subsequently determined by the Court in the proceedings to be the property of his wife. In coming to this conclusion, the Court specifically overruled earlier authority which held that a solicitor's lien attaches to any property at issue in the litigation, regardless of whether the property was recovered or preserved through efforts of the solicitor claiming the lien, and irrespective of which party to the litigation is ultimately successful in securing rights to the property.

[137] Thus, my finding that Century is legally and beneficially entitled to the Funds is also dispositive of Lawson Lundell's statutory claim for a solicitor's lien. As I have found that Lawson Lundell's client the Cliffs has no interest in the Funds because Century is entitled to them at law and in equity, Lawson Lundell has not recovered or preserved the Funds on the Cliffs' behalf, and is not entitled to a declaration of solicitor's lien.

5. Is Lawson Lundell entitled to access the residue of the Administrative Charge for payment of its fees and disbursements?

[138] After taking into account the fees and disbursements of the Monitor and its counsel which have drawn down the administrative charge provided for in the Initial Order, Lawson Lundell claims against the charge for \$81,422.72 on account of their fees and disbursements.

[139] Lawson Lundell's claim is opposed by Fiskard. Briefly stated, Fiskard submits that Lawsons is not entitled to the order sought on the following grounds:

1. Lawsons is disentitled from any reliance upon the charge because it was inappropriate to invoke the CCAA in this matter;
2. In any event, the Administrative Charge is capped at \$200,000 and this sum has been entirely exhausted by the fees and disbursements of the Monitor; and
3. The lack of reference to Lawsons' fees in the Court of Appeal's reasons regarding the Administrative Charge means Lawsons is not entitled to rely upon the charge.

[140] Before I can find that Lawson Lundell is entitled to recover any fees or disbursements from the administrative charge, I must find that the administrative charge continues to exist and was not extinguished by the Court of Appeal; that

the \$200,000 which constitutes the administrative charge has not been exhausted by the fees and disbursements incurred by the Monitor and its counsel; and, that Lawsons Lundell's initiation of CCAA proceedings on behalf of the Cliffs was not so inappropriate as to preclude their reliance on the administrative charge.

(i) Was the Charge extinguished by the Court of Appeal?

[141] Fiskard argues that because the Court of Appeal's decision setting aside the DIP Order did not reference Lawsons' entitlement to claim fees from the administrative charge, it has no recourse to the administrative charge. For ease of reference, I reproduce para. 41 of the Court of Appeal's reasons in this matter:

- [41] I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced. [emphasis added]
- [142] In my view, the Court of Appeal's express direction that the administrative charge created by the Initial Order was to continue in effect, and the Court's earlier comment at para. 39 that the preservation of the charge was "academic" in light of Fisgard's concession at the hearing means the administrative charge continues to exist despite the fact that the DIP Order (which was required for the continuation of the time limited relief contained in the Initial Order) was otherwise set aside. The Court of Appeal's silence on Lawson Lundell's entitlement is of no moment, given the Court's express direction that the charge was to continue until dealt with in this court.
- [143] While Fisgard did not take the position that my February 17, 2009 Order approving the Monitor's fees and disbursements had the effect of terminating the charge, even if it could be said that the administrative charge continued to exist only until the Monitor's fees and disbursements were paid, it has not been established in evidence that the Monitor has been paid the fees and disbursements approved in that Order.

(ii) Has the Charge been Exhausted?

- [144] The Initial Order imposed a \$200,000 aggregate cap on the administrative charge. As noted above, the fees and disbursements of the Monitor and its counsel were approved in the total amount of \$118,577.28, which would mean that \$81,422.72 is still available to Lawson Lundell, if it is entitled to the benefit of the charge. However, Fisgard submits that in addition to the approved fees and disbursements of the Monitor and its counsel, three reports commissioned by the Monitor must be treated as counting against the charge. Two of these reports relate to golf course specific issues, which according to Fisgard total \$12,958.52. The third report is the Altus Report, which the parties agree cost approximately \$98,000. Accordingly, if Fisgard is correct, the charge has been entirely consumed and no funds remain for the benefit of Lawsons.
- [145] I do not accept Fisgard's submission. The evidence clearly establishes that the reports were paid for with funds provided by Century pursuant to the DIP Order. This is reflected in Rice J.'s Order, which granted Century a charge on the Cliffs' assets to secure the cost of the Altus Report. None of these reports were financed in whole or in part by funds drawn from the administrative charge.

[146] I agree with Fisgard that fees charged by consultants retained by the Monitor can be characterized as "monitor's disbursements". But this does not mean that they should count against the cap imposed on the charge. Amounts paid from a source other than the charge cannot properly count as a draw against the charge, regardless of whether they were ultimately used for things that can be called Monitor's disbursements.

(iii) Has Lawson Lundell's Conduct Disentitled it from Reliance on the Charge?

[147] In its reasons setting aside the DIP Order and the CCAA proceedings in this matter, the Court of Appeal found that the circumstances surrounding the Cliffs' financial difficulties were not appropriate for resolution under the CCAA:

[35] It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the CCAA. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

[148] Fisgard submits the fact the Court of Appeal set aside the DIP Order and found the invocation of the CCAA inappropriate in the circumstances of this case means the administrative charge ought not to be available to Lawson Lundell. Fiskard relies on *Re Marine Drive Properties Ltd.*, 2009 BCSC 1083.

[149] In *Marine Drive*, the Court distinguished between two situations. In a situation where CCAA proceedings were appropriate, but ultimately unsuccessful, the Court held that counsel for the petitioner should not be deprived of the priority granted by an administrative charge simply because the proceedings were unsuccessful. The Court stated at para. 25:

The priority for fees of professional advisors may be confirmed, even if a successful arrangement is not achieved through the CCAA process. Further, the charges that are incurred before the application for an initial order and the charges incurred to defend an initial order may be confirmed under the administrative charge even where no arrangement is made and the stay is ultimately set aside. If this were not the case, the ability of insolvent companies to take advantage of the CCAA would be limited. Only those companies which have sufficient cash flow to pay for or provide substantial retainers to their advisors would be in a position to apply for protection under the CCAA.

[150] This point was also made by Wachowich C.J.Q.B. in *Re Hunters Trailer & Marine Ltd.*, 2001 ABQB 546 at para. 19:

To qualify for CCAA protection a company must be insolvent. The reality is that most companies that find themselves in such a position are unlikely to have the financial resources to pay for the advisors required to embark upon, formulate and present a restructuring plan under the CCAA. As a result, the practice has developed whereby debtor companies in the initial application for CCAA protection seek to secure payment of their professional advisors through an administrative charge on the assets of the company in priority to the claims of other secured creditors, except possibly the DIP lender.

- [151] On the other hand, if the circumstances were such that resorting to the CCAA was inappropriate, the petitioner's counsel should not be entitled to priority. As Butler J. held in *Marine Drive* at para. 31: "[i]t would be inequitable for that priority to be retained when the circumstances are such that the priority never should have been granted."
- [152] In my view, the present situation is distinguishable from that which was before the Court in *Marine Drive*, such that it is not inequitable for Lawson Lundell to retain priority though the administrative charge. In *Marine Drive*, the Court noted at para. 29 that "[the secured creditors] immediately applied to set aside the Initial Order and challenge the administrative charge."
- [153] Paragraph 51 of the Initial Order granted in this case provided any interested person with liberty to apply on two days' notice for further relief or for the variation of the Initial Order. Fisgard did not take advantage of this opportunity by applying to set aside the administrative charge before the comeback hearing. During this period of time, Lawson Lundell reasonably relied on the security provided by the administrative charge in connection with their work on behalf of the Cliffs.
- [154] Further, unlike in *Marine Drive*, where the ex parte initial order was set aside by the trial court less than a month after its issuance, before a comeback hearing was held, a comeback hearing was held in this matter, at which time the Initial Order was confirmed and continued, after Fisgard and other interested parties were afforded the opportunity to make submissions.
- [155] Additionally, at para. 7 of *Marine Drive*, the Court reviewed its earlier reasons setting aside the ex parte order, noting that there were significant concerns the petitioner had failed to make full and frank disclosure at the initial hearing:

[7] In my Reasons I made the following comments that are relevant to this issue:

16 There are numerous contentious issues raised by these applications. The question of whether full and frank disclosure was made would require careful examination of the materials relied upon at the hearing on January 15, 2009, and careful review of the statements made by counsel. I do have serious concerns regarding the disclosure made at the time of the initial application. However, given the conclusions I have reached on the other issues, I have not undertaken that close review. ...

[Emphasis added]

[156] No such concerns have been raised in the present proceedings.

[157] Fisdard points to the Court's finding that it was fundamentally inappropriate to invoke the CCAA in Marine Drive, particularly through an ex parte application when there was no urgency. In Fisdard's submission, the facts of this case are analogous. However, in Marine Drive, the Court found as a fact that the initial order would not have been granted had the application been brought on notice:

[30] I also found that there were no circumstances that made it appropriate to continue the Initial Order. As Bancorp has argued, given the facts in this case, that finding was equivalent to a conclusion that there were no circumstances present that supported the making of an order under s. 11 of the CCAA. In other words, if notice had been given, the Initial Order would not have been made.

[158] As found by the Court of Appeal, the circumstances which made CCAA proceedings inappropriate in this case were not drawn to the trial court's attention by counsel at the comeback hearing, and were raised for the first time at the hearing of the appeal. Thus, this is not a case like Marine Drive where the Initial Order would not have been granted had it been made on notice to other concerned parties. The Initial Order was expressly confirmed on a "with notice" application, where all parties were given a chance to make submissions. In my view, the circumstances of this case, where CCAA proceedings were set aside on appeal only after they were confirmed at a contested hearing, are entirely different from those in Marine Drive.

[159] The situation in this case bears substantial similarity to the facts in Hunter's Trailer, where the Court found that counsel to the petitioner was entitled to the benefit of the charge, notwithstanding the fact that the CCAA proceedings were subsequently set aside:

34 It is preferable that priority for administrative costs and DIP financing be dealt with on notice to all interested parties. However, if the circumstances warrant, priority may be granted on the initial application, but on a limited basis only until the matter is considered on notice to those affected by the order. That is precisely what occurred in this case. Hunters brought an application on November 8th for an extension of the stay of proceedings. This application was made on notice to the secured creditors. If they had wanted to challenge the initial Order before that date, they could have done so on two days' notice.

37 My initial Order was granted as I was satisfied on the facts then before me that there was a reasonable prospect that Hunters could make arrangements with its creditors which would allow it to remain in business. Despite the express provision in my Order of October 11, 2000 permitting interested parties to apply on two days notice to vary the Order or to seek other relief, the first indication received by the Court from Bank of America that it opposed the Order was the application of Hunter's major secured creditors to have the initial Order vacated and the supporting affidavit of Kent Andrews filed on November 17, 2000.

[Emphasis added]

[160] As noted in *National Bank of Canada v. Stomp Pork Farm Ltd.*, 2008 SKCA 73 at para. 22, the Court should be reluctant to subsequently alter priorities with respect to funds secured by court order, as doing so "plants an unwelcome seed of uncertainty in the process contemplated by the CCAA". To accept the argument that the administrative charge ought to be set aside because submissions that were not advanced to the trial court were successfully made on appeal would in my view plant an unwelcome seed of uncertainty in the process.

Accounting and Taxation

[161] In its written submissions, Fisgard noted that if the Court were to determine that Lawsons is entitled to rely on the administrative charge, an accounting may be necessary. Fisgard points to paragraph 32 of the Initial Order as limiting Lawson Lundell to "reasonable" fees and disbursements. As set out above, Lawsons is owed \$136,413.58 on account of a bill rendered three days after the Court of Appeal set aside the CCAA proceedings in this matter. Lawson Lundell also advanced a claim for \$50,516.29 of unbilled work performed since that time. I have found that \$81,422.72 remains available from the original \$200,000 administrative charge.

[162] As noted in *Hunters Trailer* and in *Re General Publishing Co.*, [2003] O.J. No. 2358 at para. 6 (S.C.J.), counsel fees and disbursements secured by an administrative charge should only include those costs that are incurred in connection with the CCAA proceedings, not representation that occurred after those proceedings have been set aside.

[163] On that basis, I am satisfied that Lawson Lundell's claim for unbilled work in progress is not covered by the administrative charge. However, I am satisfied that the fees and disbursements which comprise the August 18, 2008 bill were incurred in connection with the failed CCAA proceedings, and are thus covered by the charge, up to \$81,422.72. This maximum recoverable amount is approximately 60% of the fees and disbursements Lawsons billed, not including interest at 12% per annum. In effect, the portion of Lawson's bill which can be recovered has been reduced almost by half.

[164] I consider it unlikely that the bill would be reduced further than this at any subsequent hearing. However, there is liberty to apply for further relief if the parties consider it appropriate.

V. Conclusion

[165] Century is entitled to the Funds.

[166] The relief sought in Fisdard's notice of motion is dismissed.

[167] Lawson Lundell is entitled to payment of \$81,422.72 from the administrative charge on account of fees and disbursements, unless there is an application for further relief in this regard within 30 days of the release of these reasons.

[168] Lawson Lundell sought an order for special costs in connection with its claim for a solicitor's lien. Given the divided success on these applications, absent further submissions or circumstances of which I am unaware, I consider it appropriate to order the parties to bear their own costs of the motions.

The Honourable Mr. Justice J. R. Groves

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