File No. CI 20-01-26627

THE QUEEN'S BENCH
Winnipeg Centre

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C., C.B-3, AS AMENDED, AND SECTION 55 OF THE COURT OF QUEEN'S BENCH ACT, C.C.S.M., C. C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

Applicant,

- and -

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

Respondents.

MOTION BRIEF OF THE RESPONDENTS
(Inventory Sales Process – Landlord Charge)

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(Inventory Sales Process – Landlord Charge)

Part I - List of Documents

1. Nygard Organizational Chart – Appendix "D" to the First Report of the Receiver dated April 20, 2020 (the "**First Report**").

2. Credit Agreement dated December 30, 2019 (the "**Credit Agreement**") – Exhibit "D" of the affidavit of Robert Dean affirmed March 9, 2020 ("**Dean Affidavit'**)

3. Canadian Share Pledge Agreement – Exhibit "F" of the Dean Affidavit (the "**Share Pledge**")

4. Debenture – Exhibit "I" of the Dean Affidavit (the "**Mortgage**")

5. General Order – Appendix "F" of the Receiver's Second Report (the "**Second Report**") dated May 27, 2020 (the "**General Order**")

6. Respondents' Motion Brief dated May 13, 2020

Part II - List of Case Authorities and Statutory Provisions

1. *Crate Marine Sales Ltd, Re*, 2016 ONCA 433

2. *Curriculum Services Canada/Services Des Programmes D'Études Canada (Re), 2020 ONCA 267*

3. *Manulife Bank of Canada v. Conlin [1996] 3 S.C.R. 415*

Part III - List of Points to be Argued

Introduction:

1. This motion brief is filed in response to the Second Report and will specifically address:

   (a) The Receiver's request for an Order approving certain terms of an inventory liquidation through certain retail outlets in Canada (the "**Landlord Terms Order**"). The Respondents, and specifically, Nygard Properties Ltd. ("**NPL**") and Nygard Enterprises Ltd. ("**NEL**") oppose the Receiver's creation of the Landlord's Charge (as that term is defined in the Landlord Terms Order); and

   (b) The Receiver's update on settling the document production order in accordance with the direction provided by this Court on April 29, 2020 and clarified at the case conference held on May 14, 2020 (the "**Document Production Order**").

Background:

2. Pursuant to an Order dated March 18, 2020 (the "**Receivership Order**"), Richter Advisory Group Inc. (the "**Receiver**") was appointed receiver over all assets, undertakings and properties of Nygard Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., Nygard NY Retail, LLC, Nygard Enterprises Ltd., Nygard Properties Ltd., 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership (collectively, the "**Respondents**").

3. The Respondents are either Borrowers, Guarantors or Limited Recourse Guarantors under the Credit Agreement. The Applicant is a lender, the Administrative Agent, and the Collateral Agent under the Credit Agreement.

Credit Agreement – page 1

4. Pursuant to the Credit Agreement the Respondents incorporated in the United States (i.e. Nygard Holdings (USA) Limited, Nygard Inc., Fashion Ventures, Inc., and Nygard NY Retail, LLC) are Borrowers (the "**Debtors**") and the Respondents incorporated in Canada are guarantors. Specifically:

Limited Recourse Guarantors - NEL and NPL

Guarantors - 4093879 Canada Ltd., 4093887 Canada Ltd., and Nygard International Partnership

Credit Agreement – Article 1.01 and recitals

Organizational Chart – First Report at Appendix "D"

5. The Credit Agreement specifically limits the recourse available to the Applicant and Second Avenue Capital Partners LLC (collectively, the "**Lenders**") as it pertains to NPL and NEL (the "**Limited Recourse Guarantors**"). Article 11.09 of the Credit Agreement states:

> Notwithstanding anything to the contrary contained in this Article XI, Agent's recourse with respect to the Limited Recourse Guarantors shall be limited to the assets encumbered by the Mortgages and assets pledged by each Limited Recourse Guarantor pursuant to the Securities Pledge *and neither Agent nor Lenders shall enforce such liability against any other property or asset of any Limited Recourse Guarantor* [emphasis added]

Credit Agreement – Article 11.09

6. Of note, NEL did not pledge its equity interest in NPL to the Lenders.

Share Pledge – Dean Affidavit at Exhibit "F"

7. In addition to limiting recourse as it pertains to assets, the Credit Agreement limits NPL's guarantee for the obligations thereunder to US$ 20,000,000 plus costs. Specifically, Article 11.05 of the Credit Agreement states:

> The Agent agrees that its recourse against Nygard Properties Ltd ("NPL") pursuant to Mortgages on Owned Real Estate of NPL shall be limited to a realized value after all costs and expenses, including enforcement costs, of $20,000,000.

Credit Agreement – Article 11.05

8. The limited recourse available to the Applicant (and by extension the limited scope of the Receiver's appointment) with respect to enforcement as against NPL and NEL was explicitly stated at paragraph 2 of the General Order which states:

> **THIS COURT ORDERS** that in relation to the Respondents Nygard Enterprises Ltd. ("**NEL**") and Nygard Properties Ltd. ("**NPL**") as Limited Recourse Guarantors for the purposes of the Receivership Order dated March 18, 2020 (the "**Receivership Order**"), made in these proceedings, "Property" shall only include such property, assets, and undertaking of NEL and NPL in which the Applicant has an interest pursuant to the Credit Agreement made amongst the Applicant, Second Avenue Capital Partners LLC and the Respondents dated as of December 30, 2019 (as defined in the affidavit of Robert Dean affirmed March 9, 2020 in this proceeding) and the Loan Documents (as defined in the Credit Agreement) executed and delivered in connection therewith

General Order at paragraph 2

9. At paragraph 36 of the Second Report, the Receiver advises that it has conditionally sold substantially all of NPL's real property pledged in the Mortgages. The sale terms are not disclosed, nor are sale prices.

Second Report at paragraph 36

Landlord Terms Order

(a) Gardena Properties

10. The wording of the Landlord Terms Order (and its incorporation by reference to certain defined terms in the Consulting Agreement, the Sale Approval Order and the Sale Guidelines) is sufficiently ambiguous and broad that it could be read as including certain real property owned by Brause Investments Ltd. and Edson's Investments Ltd. located in Gardena, California (the "**California Properties**"). The Gardena Properties are distribution centres currently in the possession of the Receiver, but are not retail stores.

11. Matters regarding the occupation and rent owing for the Gardena Properties are the subject of a separate motion. The Gardena Properties and the issues related thereto are entirely different than those faced by the landlords of the retail stores. In that regard, the Respondents request a paragraph be inserted to the Landlord Terms Letter expressly stating that the Landlord Terms Order does not apply to the Gardena Properties.

(b) Landlords' Charge

12. Paragraph 8 of the proposed Landlord Terms Order would create a priority charge for retail rents payable (the "**Landlords' Charge**"). The Landlord Charge states:

> **THIS COURT ORDERS** that with respect to Rent, Landlords shall be entitled to and are hereby granted a charge (the "**Landlords' Charge**") on the Property (as defined in the Receivership Order, as amended), as security for the payment of unpaid Rent for the period commencing March 18, 2020 up to and including the Repudiation of a Lease (the "Post Filing Rent") and the Landlords' Charge shall form a charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory and otherwise, but subordinate in priority to: (i) the Receiver's Charge and the Receiver's Borrowing Charge (both as defined in the Receivership Order); (ii) the Encumbrance in favour of the Applicant; (iii)

> any Encumbrance in favour of a secured creditor who would be materially affected by this Order and who was not given notice of this motion; (iv) the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the *Bankruptcy and Insolvency Act* (Canada)("BIA"); (v) any valid claims to the Property of the Debtors as asserted pursuant to section 81.1 of the BIA; and (vi) any valid priority charges which exist in relations to sales taxes and taxes pursuant to the *Excise Tax Act* (Canada).

13. As noted by the Receiver in its motion brief, neither the BIA nor case law provides the Receiver with the authority to grant priority charges to landlords. Instead, the Receiver relies upon the Court's inherent jurisdiction as its support for the Landlord's Charge.

14. The Respondents' objections to the Landlords' Charge are threefold:

(a) The Receiver has failed to provide sufficient information to the stakeholders, or the Court, regarding the possible impact of the Landlords' Charge on the Respondents and their stakeholders;

(b) There is neither a legal basis, nor need, for this Court to create a Landlords' Charge. The Landlords and the Receiver have their rights and obligations as created by the Receivership Order and long standing case law; and

(c) The Landlords' Charge purports to provide a court-ordered charge over the Property of NPL and NEL, but those entites are Limited Recourse Guarantors with specifically-defined interests and obligations with respect to collateral subject to the Receivership; indeed, NPL's guarantee to the Applicant is limited to US$20,000,000 plus costs. The court-ordered charge sought by the Receiver would make the Limited Recourse Guarantors' potential liability *unlimited*, and thus would give the Applicant more that it specifically bargained for.

(i) Lack of Information to Assess Landlord Charge

15. The Receiver asks the court to exercise its inherent jurisdiction to prefer the landlords over other stakeholders of the Respondents without providing the Court with any information regarding:

(a) the leases (or at least a summary of the leases) that will be subject to the Landlords' Charge;

(b) the Respondent(s) who are the lessee(s) of the subject properties and whether any of the other Respondents have guaranteed the leases in question;

(c) the potential rent exposure under the proposed Landlords' Charge;

(d) steps taken (by either the Receiver or the Landlords) to seek government relief under various federally and provincially sponsored COVID-19 programs designed for commercial landlords; and

(e) investigations taken to determine whether retail landlords are entitled to occupancy rent during the time that the Receiver was unable to take possession of the premises due to COVID-19

16. It is the Respondents' recollection that most, if not all, of the Store leases list Nygard International Partnership ("**NIP**") as the lessee and that none of the other Respondents provided guarantees with respect to said leases. Unfortunately, the Respondents cannot state this definitively as the

Receiver is in possession of the Store leases and they have not been provided to the Respondents, or the Court.

17. It is also important to note that the Landlords' Charge, if approved, is asking all of the Respondents (and by extension, their stakeholders) to shoulder the burden for rent payments that they did not agree to pay.

18. The Receiver's brief cites the COVID-19 pandemic as the basis its "pragmatic approach" articulated in the Landlord Terms Order. Unfortunately, there is no analysis of whether the Store landlords are entitled to payment of rent when the Receiver cannot occupy the premises due to COVID-19 restrictions. Further, there is no evidence in the Receiver's record that it investigated whether any, or all, of the landlords would be entitled funding from government programs geared to assist landlords during the COVID-19 pandemic. That is, there is a serious issue as to whether the proposed Landlords' Charge is even necessary at this time.

Receiver's Motion Brief at paragraph 16

19. In short, this Court has no evidence before it with which to assess the economic impact of the Landlords' Charge on the stakeholders of the other Respondents, nor has it been provided with any evidence explaining why the Landlords' Charge is of benefit to any stakeholders other than perhaps the lessee(s) of the various premises and/or the Respondent who holds title to the inventory in question.

(ii) <u>No Legal Basis for a Landlords' Charge</u>

20. It is respectfully submitted that the Courts have not addressed the granting of a Landlords' Charge in the context of a receivership because there

are clearly defined rights and obligations as between landlords and the Receiver. These rights and obligations are outlined both in the Receivership Order and applicable case law.

21. As the Ontario Court of Appeal stated in *Re: Crate Marine Sales Limited*:

> [T]here is a long-standing principle that where a person occupies the property of another, that occupation gives rise to a rebuttable presumption, based on the implied contract that the occupier will pay rent to the owner for the use of the property. Receivers, liquidators and trustees in bankruptcy and others with similar obligations who occupy the premises of the debtors are bound by that principle.

Re: Crate Marine Sales Limited 2016 ONCA 433

22. The Receivership Order also addresses the principle that while third parties cannot terminate contracts with the Respondents as a result of the Receiver's appointment, these third parties are also not required to extend credit to the Respondents or the Receiver. Accordingly, the landlords are entitled to occupation rent at the time that it comes due. If rent is not paid, the landlord(s) are entitled to terminate the lease

Receivership Order at paragraphs 3 and 16

23. It is also important to note the recent Ontario Court of Appeal decision in *Re: Curriculum Services Limited* where the court held that a landlord's right to recovery in bankruptcy is strictly limited to the amounts payable pursuant to section 136(1) of the BIA.

Re: Curriculum Services Limited 2020 ONCA 267

(iii) <u>NPL and NEL Should not be included in the Landlord Charge</u>

24. The Receiver failed to discuss the Landlord Terms Order with any of the Respondents or its counsel. It also appears that the Receiver did not consider the impact of the Landlords' Charge on the stakeholders of the Limited Recourse Guarantors, and in particular, NPL whose obligations to the Lenders are limited to US$20,000,000 plus costs.

25. The significance of NPL is accentuated by the fact that the Second Report advises that the Receiver has conditionally sold the Toronto Property, the Inkster Property and the Notre Dame Property (as those terms are defined in the Second Report and collectively referred to as the "**NPL Properties**"). However, the Receiver has not provided any information regarding the potential recovery from the sale of those properties.

26. While the Receiver has provided scant details regarding the possible sale of the NPL Properties, it is possible that those sales could (and perhaps should) satisfy NPL's limited guarantee obligations to White Oak, thus permitting NPL to continue with its BIA proposal process. However, if the Landlords' Charge is extended to NPL, it will prejudice NPL's remaining stakeholders and their rights in the BIA proposal process.

27. In considering NPL's position in this process, it is respectfully submitted that the Court consider the Supreme Court of Canada decision in *Manulife Bank of Canada v. Conlin* in which the court reiterated the long standing proposition that:

> a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alternation of the terms of the contract of debt without the consent of the guarantor
>
> …

> The basis for the rule is that any material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk.
>
> *Bank of Canada v. Conlin* [1996] 3 S.C.R. 415 (hereinafter "*Conlin*") at paras 2 and 3

28. While not directly on point, it is respectfully submitted that what this Court is being asked to sanction, at least as it pertains to NPL and NEL, is more egregious than the facts in *Conlin*. In the case before this Court, the landlords, the Receiver and the Applicant negotiated terms of a proposed Landlords' Charge, the effect of which would be to significantly increase NPL's risk. This arrangement was made without even advising NPL, much less consulting with NPL and obtaining its consent.

Document Production Order

29. At paragraphs 47 through 50 of the Second Report, the Receiver provides its views on the status of the Document Production Order. Unfortunately, the analysis contained therein is incomplete.

30. While the Receiver is correct that the Document Production Order was argued on April 29, 2020, counsel for the Respondents and counsel for the Receiver required clarification regarding the Court's oral reasons delivered at that time. Much of the dispute as between the Receiver and the Respondents centred on whether the Receiver was granted the unfettered discretion to waive privilege on behalf of the Respondents.

31. Accordingly, the Receiver convened a case conference on May 14, 2020. At that case conference, the Respondents understood the Court to say the following:

(a) The Receiver is not capable of waiving privilege on behalf of anyone save for the Respondents;

(b) The Receiver must provide the Respondents with seven days advanced notice of its intention to waive privilege;

(c) The advanced notice provided by the Receiver (as indicated in sub (b) above) must also include copies of the documents that it intends to produce;

(d) If the Respondents intend to oppose the Receiver's waiver of privilege, they must provide written notice to the Receiver within the seven days referenced in (b) above, failing which, the Receiver may release the relevant documents as it deems appropriate; and

(e) If the Respondents oppose the Receiver's proposed waiver of privilege, the Receiver will set the documents or information in question aside and a date will be scheduled for a Court in either Manitoba or New York (as may be appropriate) to determine whether the privilege should be waived.

32. Based on the foregoing, the Respondents prepared a revised form of Order which was presented to the Receiver and the Receiver rejected that proposed form of Order. There have been further without prejudice discussions regarding the proposed form of Document Production Order but, to date, the parties have not been able to reach an agreement.

33. Contrary to paragraph 50 of the Second Report, it is not the Respondents who are attempting to re-litigate the Document Production Order; Rather, it is the Receiver who is failing to accept the Court's direction as provided at the May 14, 2020 case conference.

34. Regardless of the parties' respective positions, it is extremely concerning to the Respondents that the Receiver is so preoccupied with obtaining unilateral power to waive the Respondents' rights in their privileged

communications. As outlined in the Respondents Motion Brief dated May 13, 2020:

(a) A Receiver only has the authority to waive a debtor's privilege if doing so is required as part of their court ordered mandate. This Receiver has no such mandate; and

(b) The Receiver has no obligation to waive privilege in this matter, either under the subpoena delivered to Nygard Inc. by the U.S. Attorney's Office, or on any other basis disclosed by the Receiver.

Conclusions

35. The Respondents respectfully request that the Receiver's request for a Landlords' Charge be dismissed or, in the alternative, limited to the Property of the lessee under the relevant lease(s). If a Landlord is uncomfortable with that arrangement, it has its right to terminate the lease(s) in question. Likewise, if White Oak, as senior secured creditor, believes that the liquidation is required to maximize recovery from inventory liquidations, it should be willing to advance funds to the lessee in question (and only the lessee in question) for the purposes of making rent payments.

36. In the Respondents' respectful submissions, under no circumstances should the Landlords' Charge be extended to the Limited Recourse Guarantors generally, or NPL specifically.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31ST DAY OF MAY, 2020.

2016 ONCA 433
Ontario Court of Appeal

Crate Marine Sales Ltd., Re

2016 CarswellOnt 8798, 2016 ONCA 433, 132 O.R. (3d) 104,
267 A.C.W.S. (3d) 272, 350 O.A.C. 138, 37 C.B.R. (6th) 187

In the Matter of the Receivership of Crate Marine Sales Limited, F.S. Crate & Sons Limited, 1330732 Ontario Limited, 1328559 Ontario Limited, 1282648 Ontario Limited, and 1382416 Ontario Limited

Alexandra Hoy A.C.J.O., R.A. Blair, L.B. Roberts JJ.A.

Heard: April 19, 2016
Judgment: June 3, 2016
Docket: CA C61243

Proceedings: reversing *Crate Marine Sales Ltd., Re* (2015), 32 C.B.R. (6th) 132, 2015 ONSC 6295, 2015 CarswellOnt 16091, Penny J. (Ont. S.C.J.)

Counsel: James P. McReynolds, for Appellant, 2124915 Ontario Inc.
R. Brendan Bissell, for Respondent, A. Farber & Partners Inc., as Receiver
Harvey Chaiton, for Respondent, Crawmet Corp.

Subject: Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
X.4 Claims by landlord
X.4.d Occupation rent
X.4.d.iii Meaning of occupation
Headnote
Bankruptcy and insolvency --- Priorities of claims — Claims by landlord — Occupation rent — Meaning of occupation
C group of companies operated marina located on premises owned by landlord 212 Inc. — C group became insolvent — Receiver was appointed and continued to operate marina — When marina's lease expired, 212 Inc. leased location to new tenant and brought motion to establish its right to occupation rent from receiver — Motion judge determined receiver was not obligated to pay occupation rent — 212 Inc. appealed — Appeal allowed — Receiver occupied marina and was liable to pay occupation rent — Receiver deprived 212 Inc. of its rights of use of premises in manner that constituted occupation — Motion judge's finding to contrary was palpable and overriding error — Where deprivation of use is tantamount to actual occupation, liability to pay occupation rent is engaged — Motion judge erred by focussing primarily on "deprivation of use", when there was admitted possession and evidence of actual occupation, and by conflating "deprivation of use of premises" in real property sense with "deprivation of use" in more general cost/benefit or economic sense — Presumption in favour of obligation to pay rent had not been rebutted, and no equitable considerations applied.
Table of Authorities
Cases considered by *R.A. Blair J.A.*:
B.L. Armstrong Co. v. Kisluk (1981), 39 C.B.R. (N.S.) 230, 1981 CarswellOnt 206 (Ont. H.C.) — referred to
Bank of Montreal v. Steel City Sales Ltd. (1983), 28 R.P.R. 225, 47 C.B.R. (N.S.) 15, 148 D.L.R. (3d) 585, 57 N.S.R. (2d) 396, 120 A.P.R. 396, 1983 CarswellNS 47 (N.S. T.D.) — referred to
Beatty Ltd. Partnership, Re (1991), 1 C.B.R. (3d) 225, 1 O.R. (3d) 636, 1991 CarswellOnt 162 (Ont. Bktcy.) — referred to

Checkout Foodmarts Ltd., Re (1975), 21 C.B.R. (N.S.) 151, 1975 CarswellOnt 115 (Ont. S.C.) — referred to
Rossiter v. Swartz (2013), 2013 ONSC 159, 2013 CarswellOnt 301 (Ont. S.C.J.) — referred to
Sasso v. D. & A. MacLeod Co. (1991), 5 C.B.R. (3d) 239, 3 O.R. (3d) 472, 1991 CarswellOnt 186 (Ont. Gen. Div.) — referred to
Sawridge Manor Ltd. v. Western Canada Beverage Corp. (1995), 33 C.B.R. (3d) 249, 61 B.C.A.C. 32, 100 W.A.C. 32, 1995 CarswellBC 169 (B.C. C.A.) — referred to
Young v. Bank of Nova Scotia (1915), 34 O.L.R. 176, 23 D.L.R. 854, 1915 CarswellOnt 162 (Ont. C.A.) — referred to
Zalev v. Harris (1924), 27 O.W.N. 197 (Ont. C.A.) — referred to

Words and phrases considered:

occupation

The threshold test for occupation rent is "occupation". It is not deprivation of use or possession. However, deprivation of the right of use, or possession, to the exclusion of the landlord will no doubt - in most cases at least - be tantamount to occupation for these purposes.

APPEAL by landlord from judgment reported at *Crate Marine Sales Ltd., Re* (2015), 2015 ONSC 6295, 2015 CarswellOnt 16091, 32 C.B.R. (6th) 132 (Ont. S.C.J.), finding receiver was not obliged to pay occupation rent.

***R.A. Blair J.A.*:**

Overview

1 The Crate Marine group of companies operated a number of marinas in Southern Ontario, including the Lagoon City Marina on Lake Simcoe (the "Marina"). The appellant, 2124915 Ontario Inc. ("212 Ontario"), is the owner and landlord of the premises on which the Marina is located.

2 In the fall of 2014, the Crate Marine companies ("Crate Marine") became insolvent. At the instance of one of their creditors, Crawmet Corp., A. Farber & Partners was appointed first as interim receiver and then, by order dated December 8, 2014, as Receiver over the Crate Marine assets, undertakings and properties. As Farber's Third Report states, it immediately "took possession of" the debtor companies properties and "secured ongoing utility, insurance and other services in the Receiver's name". The Lagoon City Marina was one of those properties. The Receiver continued Crate Marine's boat storage operations at that site and collected accounts receivable from customers.

3 At issue on this appeal is whether the motion judge erred in determining that the Receiver is not obligated to pay occupation rent for the period from December 8, 2014 to April 30, 2015, when the Lagoon City Marina lease expired and 212 Ontario began leasing the Marina to another tenant, Pride Marine Group.

4 Respectfully, he did, in my view.

Factual Background

5 212 Ontario acquired the Marina property in 2007 subject to a lease in favour of Steven and Greg Crate as trustees "for a company to be incorporated". The Crate brothers are the principals of Crate Marine. Crate Marine's sole operating entity was Crate Marine Sales Limited ("CMSL"). It is common ground that the lease was never assigned to any corporate entity. However, CMSL operated the Marina. It booked all costs and revenues associated with the operations at the Marina, and paid rent under the lease directly to 212 Ontario.

6 By December 2014, CMSL owed the appellant $501,950.65 in arrears of rent.

7 As part of the exercise of taking possession, the Receiver changed the locks on the Marina. Subsequently, it entered into an agreement with 212 Ontario whereby 212 Ontario was provided with a key to the premises, but only subject to a number of stringent restrictions ("the Key Agreement"):

(i) subject to the permission of the Receiver on prior notice, access was limited to dealing with actual or potential emergencies or damages to the Marina;

(ii) the Receiver could cancel the right to access at any time by requesting the return of the key;

(iii) 212 Ontario would not use the access to assert any of its rights as landlord against the Marina;

(iv) 212 Ontario would not permit unauthorized access to the Marina; and

(v) 212 Ontario would report to the Receiver if it discovered any action out of the ordinary course of business within the Marina, and would report on all of its actions with regard to the Marina.

8 Between December 8, 2014 and April 30, 2015 the Receiver paid the insurance, electricity and heating costs associated with the Marina. It retained former employees to preserve and safeguard the assets of the Marina, collect accounts receivable, deal with customer inquiries, continue shrink-wrapping boats for winter storage, and conduct an inventory at the Marina. It also continued to use the Marina to store customer-owned boats and various Crate Marine assets and to carry on the Crate Marine business in that respect. In March 2015, the Receiver took the position that it was entitled to enforce storage and repair liens against a number of customers' boats that were docked and stored at the Marina. But the Receiver did not pay occupation rent.

9 212 Ontario took the position that the Receiver owed rent in the sum of $66,821.66 per month, for a total of $319,016.00. In response, the Receiver took the position that it was not obliged to pay occupation rent because there was a "lack of any connection between the landlord and the companies for which our client has been appointed" - a reference to the fact that the lease itself was between 212 Ontario and the Crate brothers and had never been formally assigned to any of the Crate Marine companies.

10 The parties' approach to the issue of occupation rent was complicated by the fact that a dispute arose over the ownership of the equipment and assets in the Marina. 212 Ontario filed a proof of property claim in the receivership claims procedure and took the position that all chattels under dispute had to remain on site until this issue was resolved. During an onsite meeting in January to identify and review the machinery and equipment on-site, the Receiver's representatives were present to escort 212 Ontario's representatives through the Marina.

11 Early in the receivership, the Receiver expressed an interest in obtaining a new lease, or continuing the existing lease of the Marina. However, these discussions did not lead to an agreement, and on January 15, 2015, 212 Ontario entered into a new lease, effective May 1, 2015, with the Pride Marine Group. Again, the Receiver's representatives were present to escort the representatives of 212 Ontario and Pride during Pride's attendance to review the Marina prior to the commencement of its tenancy.

12 At one point, 212 Ontario indicated that it would bring a motion in the receivership to "carve out" the Marina and the machinery and equipment from the receivership, but it never pursued that option. It eventually brought this motion to establish its entitlement to occupation rent.

The Decision of the Motion Judge

13 The motion judge determined that the Receiver was not obliged to pay occupation rent. He recognized that court-appointed receivers are bound by the same general principle that applies to anyone occupying another's property - there is an implied agreement by the occupier, subject to a rebuttable presumption, to pay rent for the use of the occupied property: *Beatty Ltd. Partnership, Re* (1991), 1 C.B.R. (3d) 225, [1991] O.J. No. 6 (Ont. Bktcy.), at para. 6; *B.L. Armstrong Co. v. Kisluk* (1981), 39 C.B.R. (N.S.) 230 (Ont. H.C.); *Bank of Montreal v. Steel City Sales Ltd.* (1983), 148 D.L.R. (3d) 585 (N.S. T.D.). He concluded, however - relying on *Beatty* - that the act of occupation required "some form of deprival of use" and that the Receiver's conduct did not cross that threshold in the circumstances.

14 The motion judge also referred to the Receiver's argument that it was not obliged to pay occupation rent because the tenants were the Crate brothers personally and not CMS over whose assets it had been appointed receiver. He observed that it was unnecessary to deal with this issue, given his foregoing conclusion, but went on to find in any event that there was a sufficient nexus between 212 Ontario, as landlord, and CMSL - CMSL operated the Marina, paid rent to 212 Ontario, received revenues and paid costs - to make CMSL responsible under the lease.

The Issues

15 The primary issue raised on the appeal is whether the motion judge erred in concluding that the Receiver did not occupy the Marina and was therefore not obliged to pay occupancy rent.

16 I conclude that he did.

17 The respondents raise two other issues as well. They submit that:

(a) the result reached by the motion judge is nonetheless correct because there was no privity between CMSL (over whose assets the Receiver had been appointed), and 212 Ontario; and

(b) the record supports a finding that the presumption in favour of occupancy rent is rebutted in the circumstances or that equitable considerations such as estoppel or detrimental reliance lead to the same conclusion.

18 I would not give effect to the latter arguments.

Law and Analysis

19 In my opinion, the motion judge misapprehended the nature of the test for determining whether the Receiver was liable to pay occupation rent. The appellant contends that the motion judge imported a requirement for "deprivation of use" *in addition to* "occupation" of the premises before the obligation to pay occupation rent is triggered. While that may be, I think it is more accurate to say that he erred by focussing primarily on "deprivation of use" - when there was admitted possession and evidence of actual occupation - and by conflating "deprivation of use" in the real property sense with "deprivation of use" in a more general strategic or economic benefit/detriment sense. This skewed his approach to whether the Receiver's activities crossed the occupation threshold for purposes of liability for occupation rent.

20 The motion judge did not deal with either the rebuttable presumption or the equitable arguments, presumably because he concluded that the Receiver had not crossed the initial "occupation" threshold. However, he dealt with a number of the considerations upon which the respondents rely in this context in his "deprivation of use" analysis. For the reasons outlined below, this was an erroneous approach, in my view. That said, I am not persuaded that the record supports either a finding that the presumption in favour of the obligation to pay occupancy rent has been rebutted, or that equitable considerations would work against a finding of liability.

21 Finally, I agree with the motion judge's finding that there is a sufficient nexus between CMSL and 212 Ontario in relation to the lease to provide the necessary privity between 212 Ontario and the Receiver for the liability to pay occupation rent to flow from the Receiver to 212 Ontario: see *Checkout Foodmarts Ltd., Re* (1975), 21 C.B.R. (N.S.) 151 (Ont. S.C.) .

Occupation/Deprivation of Use

22 As the jurisprudence referred to above establishes, there is a long-standing principle that where a person occupies the property of another, that occupation gives rise to a rebuttable presumption, based on an implied contract, that the occupier will pay rent to the owner for the use of the property. Receivers, liquidators and trustees in bankruptcy and others with similar obligations who occupy the premises of the debtors are bound by that principle: see *Beatty*, at para. 6; *Kisluk*; *Steel City Sales*; *Young v. Bank of Nova Scotia* (1915), 34 O.L.R. 176 (Ont. C.A.); *Zalev v. Harris* (1924), 27 O.W.N. 197 (Ont. C.A.); Christopher

A.W. Bentley, John McNair, and Mavis Butkus, *Williams and Rhodes' Canadian Law of Landlord and Tenant*, loose-leaf (2015-Rel. 9), 6th ed. (Toronto: Carswell, 2013), vol. 1, at p. 7-11.

23 This presumption may be rebutted where there is evidence that the parties intended the occupier would use the land without an expectation of paying compensation to the owner: *Canadian Law of Landlord and Tenant*; *Steel City Sales*, at pp. 588-89; *Rossiter v. Swartz*, 2013 ONSC 159 (Ont. S.C.J.), at para. 41.

24 I agree that the jurisprudence does not support the view - to the extent it may have been adopted by the motion judge - that the obligation to pay occupation rent requires "some form of deprivation of use" *in addition to* occupation of the premises. However, the notion of "deprivation of use" led to considerable discussion on the appeal about the interaction between it and the concepts of "occupation" and "possession" raising several questions. Is deprivation of use the equivalent of occupation, or one of the *indicia* of occupation, or something in addition to occupation, for these purposes? Is possession the same as occupation for these purposes? Does taking possession constitute a sufficient deprivation of use to constitute occupation for these purposes?

25 While these questions may generate an interesting debate at a certain esoteric level, they need to be kept in perspective for purposes of determining whether a trustee or receiver has occupied premises in the context of liability for occupation rent. The threshold test for occupation rent is "occupation". It is not deprivation of use or possession. However, deprivation of the right of use, or possession, to the exclusion of the landlord will no doubt - in most cases at least - be tantamount to occupation for these purposes.

26 *Beatty* illustrates this, it seems to me. In that case, the trustee took possession and changed the locks to prevent theft and vandalism, but did not provide the landlord with a key until much later, thereby excluding the landlord from the premises. The trustee did not assume actual occupation of the premises, nor did it continue to operate the bankrupt's business from them.

27 The issue was whether, by reason of this conduct, the trustee had "occupied" the premises. The issue was not whether, in addition to occupation, the landlord had otherwise been deprived of a right of use. Steele J. concluded that the trustee's taking of possession, leading to the deprivation of the landlord's use, was the equivalent of occupation. At para. 13, he said:

> The issue in the present case is whether the trustee has occupied the premises. It was argued that the trustee never went into occupation of the premises and in fact that he expressly stated that he had no intention of so doing. However, the landlord was deprived of his right of use of the premises because he did not have the keys until some period of time later. In my opinion the deprivation by the trustee of the landlord's right of possession is the same as actual occupation by the trustee. It is a question of fact in each case whether or not the trustee actually occupied or deprived the landlord of his right of use of the premises.
>
> [Emphasis added.]

28 This approach makes sense to me. Where deprivation of use, through the taking of possession or otherwise, is tantamount to actual occupation, the liability to pay occupation rent is engaged. That is what Steele J. meant when he referred to the trustee having "actually occupied *or* deprived the landlord of his right of use of the premises".

29 "Right of use" in this context is a real property concept, however. A landlord's right to receive occupation rent stems from the landlord's real property interest in the lands. It is not tethered to whether that use gives rise to a net benefit or detriment to the landlord in an overall economic benefit or other sense. This is where the motion judge's analysis of the factual basis for occupation led him down an impermissible path, in my view. Respectfully, he erroneously conflated "deprivation of the use of the premises" in the real property sense, with "deprivation of use" in a more general cost/benefit or economic sense.

30 The respondents are right when they submit that determining "occupation" is a factual exercise and that the motion judge correctly referred to, and to some extent dealt with, the general factors found in the jurisprudence to be relevant to that exercise: (i) changing the locks; (ii) keeping assets of the estate on the premises; (iii) bringing prospective buyers to the premises; (iv) employing persons to perform maintenance work on the premises; and (v) employing persons to take inventory of the premises: *Sasso v. D. & A. MacLeod Co.* (1991), 3 O.R. (3d) 472, [1991] O.J. No. 676 (Ont. Gen. Div.), at paras. 32-37; *Sawridge Manor*

Ltd. v. Western Canada Beverage Corp. (1995), 61 B.C.A.C. 32, 1995 CarswellBC 169 (B.C. C.A.), at paras. 16-20. With the possible exception of (iii), all of these factors, and more, were present here. But the motion judge downplayed them, and his treatment of their impact appears to have been subsumed in his overall view that 212 Ontario had not suffered any economic or strategic disadvantage as a result of what had happened.

31 For example, in conducting his analysis and arriving at his conclusion, at para. 30, that "on the threshold question .... the Receiver did not 'occupy' the premises in the sense necessary to attract liability for occupation rent", the motion judge focussed primarily on the following considerations:

- 212 Ontario "had a significant economic interest in the boats remaining on site until April 30, 2015" in order to retain the existing customers' business (para. 15);

- 212 Ontario "would [not] have done anything differently than the Receiver did upon its appointment to secure the property" (para. 24);

- there may have been advantages to 212 Ontario to have the equipment remain on site for purposes of the dispute between it and the Receiver over the machinery and equipment (para. 26); and

- the security measures put in place by the Receiver were equally advantageous to 212 Ontario (para. 29).

32 All of these factors were born out on the record, but the focus on them was misplaced. The motion judge's approach impermissibly substituted equity or an analysis of the economic benefits or disadvantages flowing from the use of the premises, for a real property analysis as to whether 212 Ontario had been deprived of its real property rights of use of the premises.

33 At the time the receivership order was granted, there were substantial arrears of rent totalling over $500,000. Had the Receiver not taken possession of and exerted control over the premises to the exclusion of 212 Ontario, 212 Ontario would have been free to exercise its rights over the property as landlord in December 2014. It could have taken steps to terminate the lease and obtain possession. It could have exercised its right to distrain. It could have sought a new tenant to take possession immediately, instead of having to wait until the termination of the lease at the end of April 2015.

34 The Receiver submits that 212 Ontario was precluded from taking such steps in any event, because of the terms of the receivership order that was obtained at the behest of Crawmet, the secured creditor, and not by the Receiver. The deprivation therefore flows from the order itself and not from the conduct of the Receiver, the argument goes.

35 I do not accept this submission. While there may be some force in the response that it was all part of the receivership process, the ultimate answer is that the Receiver was "empowered and authorized, but not obliged" to act in respect of the Marina property under the terms of the order, as it chose to do.

Factual Errors

36 Had he not been drawn down the path of an economic or strategic benefits/detriment analysis, the motion judge may have recognized that in reality the Receiver had both taken possession of and assumed actual occupation of the Marina or - to put it another way - had deprived 212 Ontario of its rights of use of the premises in a manner that constituted occupation. His finding to the contrary amounts to palpable and overriding error on this record, in my respectful opinion.

37 The Receiver admitted and advised the Court that it had taken possession of the Marina on or shortly before December 8, 2014 - the date when the final receivership order was made. It paid the insurance, electricity and heating costs associated with the Marina.

38 The Receiver took control of the premises to the exclusion of others, including 212 Ontario. While it is true that 212 Ontario was provided with a key to the premises, the terms of the Key Agreement were very restrictive and - except perhaps in the case of an emergency threat to the property, such as a fire or break-in - effectively precluded 212 Ontario from access to the

premises except with the permission of, and under the control of, the Receiver. Importantly, the terms of access specified that "212 Ontario would not use the access to assert any rights as landlord against the Marina".

39 As noted above, the Receiver employed former Crate Marine employees not only to preserve and safeguard the assets of the Marina, but also to collect accounts receivable, deal with customer inquiries, continue shrink-wrapping boats for winter storage after December 8, 2014, and conduct an inventory at the Marina. It also continued to use the Marina to store customer-owned boats and various Crate Marine assets and to carry on the Crate Marine business in that respect. In March 2015, the Receiver took the position that it was entitled to enforce storage and repair liens against a number of customers' boats that were docked and stored at the Marina.

40 Finally, 212 Ontario's visit to the Marina to assess the equipment and inventory was supervised by representatives of the Receiver, and it required the consent of the Receiver to show the premises to the ultimate new lessee, Pride Marine, and was subject the supervision of the Receiver during that period of access.

41 The Receiver "occupied" the Marina giving rise to the obligation to pay occupation rent.

The Nexus Between 212 Ontario and CMSL

42 The respondents argue that the result reached by the motion judge is nonetheless correct because there was no privity between CMSL (over whose assets the Receiver had been appointed) and 212 Ontario. The lease was entered into between 212 Ontario, as landlord, and the Crate brothers in trust for a company to be incorporated, as tenant. The lease was never formally assigned to CMSL or any of the Crate Marine companies.

43 The motion judge dealt with this argument, even though he viewed it as unnecessary given his conclusion that the occupation threshold had not been met. In doing so, he said, at para. 33:

> Had it been necessary to do so, I would have held that because Crate Marine Sales Limited in fact operated from the Marina, actually paid the rent and booked Marina revenues and costs, there was a sufficient nexus with 212 Ontario to make Crate Marine Sales Limited liable to 212 Ontario for the use of that property. Accordingly, I would have found that one of the exceptions specifically identified by Henry J. (payment of rent by the occupier to the landlord, who accepts it) applied here so that the core principle of *Re Checkout Food Marts* has no application.

44 I agree with these findings and reject the argument that occupation rent is not payable because the lease was technically between 212 Ontario and the Crate brothers.

Equitable Considerations

45 Having concluded that 212 Ontario had not met the threshold test of establishing that the Receiver occupied the Marina, the motion judge did not go on to consider whether there were circumstances that would rebut the presumption that it was liable to pay occupation rent. The respondents submit that there are equitable factors such as estoppel or detrimental reliance which should lead to such a conclusion.

46 I am not persuaded by this argument.

47 As noted earlier, the presumption may be rebutted where there is evidence that the parties intended the occupier would use the land without an expectation of paying compensation to the owner: *Rossiter v. Swartz*, at para. 41; *Canadian Law of Landlord and Tenant*; *Steel City Sales*, at pp. 588-89. It is not tenable to conclude that the parties intended the Receiver would use the land without compensation when, on the evidence, 212 Ontario was adamant throughout - and confirmed this on multiple occasions in correspondence between counsel - that it was seeking occupation rent.

48 The motion judge did not address whether there were equitable grounds upon which the presumption could be rebutted. The grounds suggested by the respondents centre on the collateral dispute between the parties over entitlement to the machinery and equipment at the Marina. Essentially, the argument is: 212 Ontario insisted that the disputed machinery and equipment

remain on site pending a resolution of the dispute over who owned them; it was in 212 Ontario's financial interest that the machinery and equipment (and the boats owned by third party customers) remain on site; the Receiver acquiesced in this arrangement; and therefore there was no expectation that the Receiver would pay occupation rent for the use of the premises. It would be inequitable to require the Receiver to do this because of the benefit enjoyed by 212 Ontario and because the Receiver apparently relied to its detriment on this arrangement by not removing the machinery and equipment out and therefore avoiding the obligation.

49 Again, this is a difficult argument to make in face of 212 Ontario's clear and adamant position throughout that it expected occupation rent to be paid. In any event, the Receiver took possession of and used the premises for more than just the security and protection of the machinery and equipment. It continued to operate CMSL's business, collecting accounts receivable as it did, and, although it may never have brought a potential purchaser to the Marina, the Receiver did attempt to find a buyer for Crate Marine's business as a going concern. The fact that it was ultimately unsuccessful in doing so does not suggest that it should not pay occupation rent for its use of the premises.

50 I would not give effect to these submissions.

Conclusion and Disposition

51 The Receiver is liable to pay occupation rent.

52 The appeal is therefore allowed, the order below set aside, and in its place an order is granted:

(a) declaring that A. Farber & Partners Inc. occupied the Lagoon City Marina from December 8, 2014 to April 30, 2015, and is therefore obliged to pay occupation rent for that period; and

(b) requiring A. Farber & Partners Inc. to pay 2124915 Ontario Inc. occupation rent in the amount of $319,016.00 plus applicable interest.

53 In accordance with the agreement of counsel, the costs of the appeal are payable to the appellants by the respondent, A. Farber & Partners Inc., fixed in the amount of $15,000 inclusive of disbursements and HST. No costs are awarded for or against the respondent, Crawmet Corp. If the parties are unable to agree on costs before the motion judge, they may make brief submissions to the panel, not to exceed three pages in length, within two weeks of the release of this decision.

Appeal allowed.

COURT OF APPEAL FOR ONTARIO

CITATION: Curriculum Services Canada/Services Des Programmes D'Études Canada (Re), 2020 ONCA 267
DATE: 20200427
DOCKET: C66626

Hoy A.C.J.O., van Rensburg and Roberts JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF
Curriculum Services Canada/Services Des Programmes D'Études Canada
of the City of Toronto
in the Province of Ontario

Catherine Francis, for the appellant

Alex Ilchenko and Monty Dhaliwal, for the respondent

Heard: October 9, 2019

On appeal from the order of Justice Victoria R. Chiappetta of the Superior Court of Justice, dated February 15, 2019, with reasons reported at 2019 ONSC 1114.

van Rensburg J.A.:

I. OVERVIEW

[1] The appellant is Medallion Corporation, as authorized agent for the landlord, 280 Richmond Street West Limited (the "Landlord"). The respondent, RSM Canada Ltd. (the "Trustee"), is the trustee in bankruptcy of Curriculum Services Canada/Services des Programmes d'Études Canada ("Curriculum" or the "Tenant"). Curriculum was a tenant of the Landlord.

[2] This is the second appeal of the partial disallowance of the Landlord's claim in the bankruptcy of the Tenant. The first appeal, from the decision of the

Trustee, was to Chiappetta J. of the Superior Court of Justice (the "bankruptcy judge").

[3] Broadly, this appeal is about the rights of a commercial landlord as a creditor in the bankruptcy of its tenant following the disclaimer of the lease by the trustee in bankruptcy. Specifically, the issue is whether a landlord has a claim arising from the disclaimer of its lease for any amount in relation to the unexpired term of the lease, other than its preferred claim for three months' accelerated rent under s. 136(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). In other words, can a landlord claim as an unsecured creditor for the disclaimer of its lease, calculated in accordance with its contractual rights under the lease?[1]

[4] In Ontario, the law on this question was settled many years ago in *Re Mussens Ltd.*, [1933] O.W.N. 459 (H.C.).[2] As between the landlord and tenant, the disclaimer of a commercial lease by the tenant's trustee in bankruptcy brings to an end the future or ongoing obligations of the tenant under the lease. The landlord has no right of compensation or claim as an unsecured creditor for

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[1] Subsection 136(1)(f) also gives a landlord a preferred claim in respect of three months of arrears of rent preceding the bankruptcy. However, there is no issue in this case about arrears of rent or other amounts that were owing at the time of the bankruptcy, claims that the Landlord could have asserted as an unsecured creditor in Curriculum's bankruptcy. In these reasons, the analysis is limited to the issue of whether the landlord can claim as an unsecured creditor in the bankruptcy for damages relating to the unexpired term of the lease.

[2] The principle cited in *Re Mussens* was articulated in Canada at least as early as 1922 in *Eastern Nut Krust Bakeries, Ltd. v. Damphousse, Trustee and the Catherine Realties Ltd.* (1922), 2 C.B.R. 215 (Que. S.C.).

damages in respect of the unexpired term of the lease in relation to the loss of the tenancy as a result of the disclaimer; the landlord is limited to its preferred claim for up to three months' accelerated rent. The Landlord contends that this principle has been overtaken by more recent developments in the law.

[5] In this case, the Landlord claims the repayment of the value of certain tenant inducements ($203,442.37) according to a formula provided for in the lease. The Landlord asserts that it is entitled to claim this amount as an unsecured creditor in the bankruptcy of its former tenant, upon and notwithstanding the Trustee's disclaimer of the lease. The Landlord also claims the unpaid balance of its preferred claim for accelerated rent, pursuant to the lease, as an unsecured creditor under s. 136(3) of the BIA, which amounts to $50,289.28.

[6] For the reasons that follow, I would allow the appeal, but only to permit the Landlord to rank as an unsecured creditor for the unpaid balance of its preferred claim. Subsection 136(3) of the BIA expressly authorizes a landlord to claim the unrecovered balance of its preferred claim as an unsecured creditor in the bankruptcy of its tenant.

[7] As for the Landlord's claim to rank as an unsecured creditor to recover unpaid tenant inducements, the obligations under the lease between the Tenant and Landlord came to an end once the Trustee disclaimed the lease. As I will

explain, the long-accepted rule articulated in *Re Mussens* has not been attenuated by the decision of the Supreme Court in *Highway Properties Ltd. v. Kelly, Douglas & Co. Ltd.*, [1971] S.C.R. 562, nor has it been overruled by the Supreme Court's decision in *Crystalline Investments Ltd. v. Domgroup Ltd.,* 2004 SCC 3, [2004] 1 S.C.R. 60. The Landlord is not entitled to claim as an unsecured creditor in the bankrupt Tenant's estate for damages relating to the unexpired term of the lease, except to recover the balance of its preferred claim for three months' accelerated rent, which is specifically provided for by statute.

II. FACTS

[8] The Landlord and Tenant were parties to a lease dated May 26, 2017 (the "Lease"). The Lease was for 8,322 square feet of space at 150 John Street West, Toronto, for a term of ten years and six months, commencing on July 1, 2017 and ending on December 31, 2027.

[9] On March 29, 2018, and without being in default of its obligations under the Lease, Curriculum made an assignment in bankruptcy. RSM Canada Inc. was appointed trustee. The Trustee occupied the leased premises and paid occupation rent of $25,698.31 to the Landlord.

[10] On April 20, 2018, the Landlord filed a Proof of Claim in the bankruptcy. The Landlord claimed $100,558.59 as a preferred claim for three months' accelerated rent, in accordance with the priority of claims prescribed by s.

136(1)(f) of the BIA. Because the realization of property on the leased premises yielded an amount that was less than the preferred claim ($24,571), the Landlord asserted its right to claim the balance of the unrecovered preferred claim ($75,987.59) as an unsecured creditor.

[11] The Landlord also advanced an unsecured claim in the amount of $4,028,111.23. This represented its claim for rent payable for the balance of the unexpired portion of the term of the Lease, together with amounts for tenant inducements consisting of leasehold improvements provided at the Landlord's cost under the Lease and free rent for a six-month period. In asserting its rights, the Landlord relied on the Tenant's obligation under the Lease to make certain payments on bankruptcy, including on termination or disclaimer of the Lease.

[12] Section 16.1 of the Lease provides for events of default, including the bankruptcy of the Tenant. It also provides for the Landlord's remedies, including: the payment of three months' accelerated rent; the right to terminate the Lease (with the right to obtain damages for the Landlord's deficiency for the balance of the term); and upon any termination, including disclaimer, payment of the value of the unpaid amount of any tenant inducements calculated over the unexpired term of the Lease. The relevant portions of s. 16.1 read as follows:

> 16.1. If any of the following shall occur:
>
> …

> (f) Tenant, any assignee or a subtenant of all or substantially all of the Premises makes an assignment for the benefit of creditors or becomes bankrupt or insolvent or takes the benefit of any statute for bankrupt or insolvent debtors or makes any proposal, assignment, arrangement or compromise with its creditors or Tenant sells all or substantially all of its personal property at the Premises other than in the ordinary course of business (and other than in connection with a Transfer requiring Landlord's consent and approved in writing by Landlord), or steps are taken or action or proceedings commenced by any person for the dissolution, winding up or other termination of Tenant's existence or liquidation of its assets (collectively called a "Bankruptcy");
>
> (g) a trustee, receiver, receiver-manager, manager, agent or other like person shall be appointed in respect of the assets or business of Tenant or any other occupant of the Premises;
>
> …

then, without prejudice to and in addition to any other rights or remedies to which Landlord is entitled hereunder or at law, the then current and the next three (3) months' Rent shall be forthwith due and payable and Landlord shall have the following rights and remedies, all of which are cumulative and not alternative, namely:

…

(v) to obtain damages from Tenant including, without limitation, if this Lease is terminated by Landlord, all deficiencies between all amounts which would have been payable by Tenant for what would have been the balance of the Term, but for such termination, and all net amounts actually received by Landlord for such period of time;

…

> (vii) to obtain the Termination Payment from Tenant;[3]
>
> (viii) if this Lease is terminated due to the default of Tenant, or if it is disclaimed, repudiated or terminated in any insolvency proceedings related to Tenant (collectively "Termination"), to obtain payment from Tenant of the value of all tenant inducements which were received by Tenant pursuant to the terms of this Lease, the agreement to enter into this Lease or otherwise, including, without limitation, the amount equal to the value of any leasehold improvement allowance, tenant inducement payment, rent free periods, lease takeover, Leasehold Improvements or any other work for Tenant's benefit completed at Landlord's cost or any moving allowance, which value shall be multiplied by a fraction, the numerator of which shall be the number of months from the date of Termination to the date which would have been the natural expiry of this Lease but for such Termination, and the denominator of which shall be the total number of months of the Term as originally agreed upon.[4] [Emphasis added.]

[13] On April 23, 2018, the Trustee issued a Notice of Disclaimer of the Lease. Following the disclaimer, the Landlord found a new tenant for the leased premises, effectively mitigating its claim for future rent.

[14] On September 19, 2018, the Trustee issued a Notice of Partial Disallowance of Claim, allowing only the Landlord's preferred claim in the amount

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[3] "Termination Payment" is defined in s. 2.30 of the Lease and provides a formula based on the amount by which the net present value of the amounts payable as "Rent" and "Additional Rent" under the Lease for the lesser of the balance of the Term or the next three years following the Termination Date exceeds fair market Rent. "Termination Date" is defined as the date on which the Lease is terminated, disclaimed or repudiated.

[4] Schedule C of the Lease provides a similar remedy to the Landlord on bankruptcy of the Tenant, but only in respect of the recovery of the unamortized portion of the leasehold improvement allowance.

of $24,571 (limited to the actual value of the property on the leased premises), and disallowing the Landlord's unsecured claims.

[15] The Landlord appealed the disallowance of its unsecured claim to the Superior Court of Justice. It confined its appeal to its claims under s. 16.1 of the Lease for tenant inducements in the amount of $203,442.37, including leasehold improvements and free rent, and the balance of the three months' accelerated rent of $50,289.28[5], for a total unsecured claim of $253,731.65.

III. RELEVANT STATUTORY PROVISIONS

[16] The relevant statutory provisions are found in the BIA and the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7 (the "CTA").

[17] Section 71 of the BIA provides that a bankrupt's capacity to deal with its property ends on its bankruptcy, and that its property vests in the trustee in bankruptcy. The section reads:

> 71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

[5] The original claim of $100,558.59, less the recovered preferred claim in the amount of $24,571, less the occupational rent paid by the Trustee in the amount of $25,698.31.

[18] Subsection 30(1)(k) of the BIA provides that a trustee, with the approval of inspectors, may elect to retain for the whole or part of its unexpired term, or to assign, surrender, disclaim or resiliate, any lease of, or other temporary interest or right in, any property of the bankrupt.

[19] Section 136 of the BIA provides for the priority of certain unsecured claims, including, under s. 136(1)(f), priority for a landlord's claim for three months' arrears of rent and three months' accelerated rent. This claim ranks after: (a) a deceased bankrupt's funeral and testamentary expenses; (b) the costs of administration of the bankrupt's estate; (c) the Superintendent's levy; (d) certain claims for wages, alimony and support payments; and (e) municipal taxes. A landlord's preferred claim is limited to the value of the realization from the property located on the leased premises, and is to be credited against the amount payable by the trustee for occupation rent.

[20] Subsection 136(1)(f) specifically provides:

> 136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> …
>
> (f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed

> the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

[21] Under s. 136(3) of the BIA, where the realization is less than the amount of the preferred claim, a landlord may claim the unrecovered balance as an unsecured creditor. Subsection 136(3) reads as follows: "A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him".

[22] While s. 136 of the BIA sets out a scheme of payment priorities, the landlord's rights on a tenant's bankruptcy are established under provincial law. Canada's first bankruptcy legislation, the *Bankruptcy Act, 1919*, S.C. 1919, c. 36, prescribed, at s. 52, the remedies available to landlords on a tenant's bankruptcy. After part of s. 52(5) was held to be *ultra vires* in *Re Stober* (1923), 4 C.B.R. 34 (Que. S.C.), the section was repealed and replaced with what is now s. 146 of the BIA, which provides:

> 146. Subject to priority of ranking as provided by section 136 and subject to subsection 73(4) and section 84.1 [these sections are not relevant to this appeal], the rights of lessors are to be determined according to the law of the province in which the leased premises are situated.

[23] The Ontario law that defines a commercial landlord's rights on a tenant's bankruptcy is found in the CTA. The landlord's preferential lien for rent, and the

trustee's right to retain and to assign the lease, exercisable within three months of the bankruptcy and before the trustee has disclaimed the lease, are set out in s. 38. Section 39 provides for the right of the trustee in bankruptcy, at any time before electing to retain the leased premises, to "surrender or disclaim" the lease. Sections 38 and 39 read as follows:

> 38. (1) In case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the preferential lien of the landlord for rent is restricted to the arrears of rent due during the period of three months next preceding, and for three months following the execution of the assignment, and from thence so long as the assignee retains possession of the premises, but any payment to be made to the landlord in respect of accelerated rent shall be credited against the amount payable by the person who is assignee, liquidator or trustee for the period of the person's occupation.
>
> (2) Despite any provision, stipulation or agreement in any lease or agreement or the legal effect thereof, in case of an assignment for the general benefit of creditors, or an order being made for the winding up of an incorporated company, or where a receiving order in bankruptcy or authorized assignment has been made by or against a tenant, the person who is assignee, liquidator or trustee may at any time within three months thereafter for the purposes of the trust estate and before the person has given notice of intention to surrender possession or disclaim, by notice in writing elect to retain the leased premises for the whole or any portion of the unexpired term and any renewal thereof, upon the terms of the lease and subject to the payment of the rent as provided by the lease or agreement, and the person may, upon payment to the landlord of all arrears

> of rent, assign the lease with rights of renewal, if any, to any person who will covenant to observe and perform its terms and agree to conduct upon the demised premises a trade or business which is not reasonably of a more objectionable or hazardous nature than that which was thereon conducted by the debtor, and who on application of the assignee, liquidator or trustee, is approved by a judge of the Superior Court of Justice as a person fit and proper to be put in possession of the leased premises.
>
> 39. (1) The person who is assignee, liquidator or trustee has the further right, at any time before so electing, by notice in writing to the landlord, to surrender possession or disclaim any such lease, and the person's entry into possession of the leased premises and their occupation by the person, while required for the purposes of the trust estate, shall not be deemed to be evidence of an intention on the person's part to elect to retain possession under section 38. [Emphasis added.]

[24] These provisions have been in place relatively unchanged since 1924: see *Commercial Tenancies Act*, S.O. 1924, c. 42. As I will explain, they have been consistently interpreted to limit an Ontario landlord's rights once a lease has been disclaimed by a bankrupt tenant's trustee in respect of claims for damages relating to the unexpired term of the lease; a landlord's claim is limited to up to three months' accelerated rent (where the lease so provides).

[25] Before the bankruptcy judge and this court, the Landlord advanced a different interpretation of these provisions that would permit it to claim, as an unsecured creditor in the bankruptcy of its tenant, the specific amounts it bargained for under the Lease, which are payable on bankruptcy and specifically in the event of a disclaimer. I turn now to the reasons of the bankruptcy judge.

IV. THE REASONS OF THE BANKRUPTCY JUDGE

[26] The bankruptcy judge identified the issue as "whether it remains the law in Ontario that the disclaimer of a lease by a trustee in bankruptcy prevents a landlord from claiming unsecured damages". She dismissed the Landlord's appeal of the partial disallowance of its claim on the basis of a "long-established legal precedent".

[27] The bankruptcy judge referred to and followed the analysis of the Registrar in Bankruptcy in *Re Linens 'N Things Canada Corp.* (2009), 53 C.B.R. (5th) 232 (Ont. S.C.). In that case, the Registrar upheld a trustee's disallowance of amounts claimed under a lease, including the costs of building a structure expressly for the tenant, the tenant allowance, and the leasing commission. The Registrar relied on *Re Mussens* as authority that, after a disclaimer, there is no right in Ontario for a landlord to claim damages in respect of the unexpired portion of the lease. The bankruptcy judge noted that the Registrar in *Re Linens 'N Things* rejected the argument, based on *Highway Properties*, that the landlord could recover contractual damages as *Highway Properties* did not involve an insolvency. She endorsed para. 21 of *Re Linens 'N Things* where the Registrar stated that "the CTA and its predecessors has been found … to have the effect of a consensual ending of the lease, and … this is a statutorily permitted breach for which there is no damage remedy, beyond the s. 38 CTA and s. 136 BIA preferred claim".

[28] The bankruptcy judge also considered and rejected the Landlord's argument that *Crystalline Investments* had effectively overruled *Re Mussens*. After a close examination of each of these cases, as well as *Cummer-Yonge Investments Ltd. v. Fagot et al.* (1965), 50 D.L.R. (2d) 25 (Ont. H.C.), aff'd without reasons (1965), 50 D.L.R. (2d) 30n (Ont. C.A.) (a case that was overruled in *obiter* in *Crystalline Investments*), the bankruptcy judge concluded that *Crystalline Investments* had not addressed whether a landlord can claim unsecured damages in the bankruptcy proceedings of its tenant upon the disclaimer of a lease by the trustee, and that the principle in *Re Mussens* remained the law on this issue in Ontario, as correctly applied in *Re Linens 'N Things.*

[29] The bankruptcy judge dismissed the appeal of the partial disallowance of the Landlord's claim, without addressing the balance of the Landlord's claim for three months' accelerated rent.

V. ISSUES ON APPEAL

[30] Two issues are raised in this appeal:

1. Is the Landlord entitled to assert a claim for unpaid tenant inducements under the Lease as an unsecured creditor in Curriculum's bankruptcy?
2. Is the Landlord entitled to assert the balance of its preferred claim for three months' accelerated rent as an unsecured creditor in Curriculum's bankruptcy?

[31] The bulk of these reasons will address the first question, which involves the Landlord's challenge to the ongoing authority of *Re Mussens* and the Landlord's interpretation of the relevant provisions of the BIA and CTA. With respect to the second issue, I will briefly explain that, on a plain reading of s. 38 of the CTA, together with s. 136(3) of the BIA, the Landlord is entitled to claim as an unsecured creditor for the balance of its preferred claim for three months' accelerated rent.

VI. ANALYSIS

(1) Is the landlord entitled to assert a claim for unpaid tenant inducements under the lease as an unsecured creditor in Curriculum's bankruptcy?

[32] The Landlord contends that it should be able to claim in Curriculum's bankruptcy for unpaid tenant inducements under the Lease in the same way that other unsecured creditors can assert claims for contractual damages. It argues that the principle in *Re Mussens* was overruled by the Supreme Court's decision in *Crystalline Investments*. Further, the Landlord suggests that, while other provinces have specifically prohibited landlords from claiming damages for the unexpired portion of a lease, the CTA contains no such restriction and does not prohibit such a claim. In effect, the Landlord proposes an interpretation of ss. 38 and 39 of the CTA that, upon disclaimer, would give priority to its claim for up to three months' accelerated rent, while permitting it to claim damages in respect of the unexpired term of the Lease in accordance with the terms of the Lease.

[33] The Landlord relies on the principle stated in *Highway Properties*, that a lease both creates an interest in land and gives rise to contractual rights, and its recognition of a landlord's right to accept a tenant's termination of a lease and to sue for damages for its breach. The Landlord argues that there is nothing in the BIA or the CTA to prevent a landlord from filing an unsecured claim for damages in the estate of a bankrupt tenant, nor is there any principled reason why a landlord should be treated differently from other creditors in a bankruptcy. The Landlord points to the terms of the Lease that expressly contemplate and provide for the situation of a bankruptcy or disclaimer and set out the contractual damages to which the Landlord is entitled.

[34] In the discussion that follows, I begin with a brief summary of *Re Mussens* and the way that this authority has been interpreted by the courts. I will specifically address a line of cases dealing with the obligations of guarantors, assignors, and others following the disclaimer of a commercial lease, including the leading case from Ontario, *Cummer-Yonge Investments.*

[35] Turning to *Crystalline Investments*, I will explain that, while overturning the principle in *Cummer-Yonge Investments* that a trustee's disclaimer can release a guarantor from its obligations under the lease, *Crystalline Investments* did not address, and left intact, the rule articulated in *Re Mussens* and later cases, that on disclaimer of a commercial lease by its trustee, an Ontario landlord has no claim against a bankrupt tenant arising out of the disclaimer for damages in

respect of the unexpired term of the lease; the landlord has only what is specifically provided for – its preferred claim for three months' accelerated rent.

[36] I will then turn to the Landlord's argument based on *Highway Properties.* As I will explain, the argument that *Highway Properties* alters the principle stated in *Re Mussens*, and affords additional remedies to a landlord post-disclaimer, has been rejected in other cases, and for good reason. *Highway Properties* recognized that a lease is also a contract, and provided for a landlord's "fourth option" after a tenant's repudiation, that of accepting the repudiation, and suing for prospective damages. The case, however, did not address a situation of bankruptcy or insolvency. The remedies for a tenant's repudiation do not apply once a trustee has disclaimed the lease. The Landlord's argument fails to recognize the fundamental distinction between a disclaimer and a repudiation of a lease.

[37] Finally, on this issue, I will briefly consider the Landlord's argument that the relevant statutory provisions should be interpreted harmoniously with those that apply to a reorganization under the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 (the "CCAA"). While the CCAA contains provisions that permit the disclaimer of any agreement to which the company is a party, including leases, and specifically provides for a provable claim by a party suffering a loss in relation to the disclaimer, there is no comparable provision that applies to leases disclaimed by a trustee on bankruptcy.

(a) The principle stated in *Re Mussens*

[38] *Re Mussens* involved a landlord's claim for damages under the *Winding-Up Act*, R.S.C. 1927, c. 213, for breach of its tenant's covenant to pay future rent after the liquidator had disclaimed the lease. Rose C.J. rejected the landlord's claim, concluding, at pp. 460-61, that if the liquidator exercised its right under the *Landlord and Tenant Act*, R.S.O. 1927, c. 190 to "surrender possession or disclaim" the lease, then there could be no further liability of the tenant to pay rent "and no suggestion that, by failing to pay rent, the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages". Rose C.J. stated, at pp. 460-61:

> I think that by his letter of April 21, 1932, confirmed in his letter of June 21, 1932, the liquidator exercised his right "to surrender possession or disclaim" the lease, and that when he had exercised that right the obligation of the tenant, the insolvent company, to pay rent was at an end. It did not require a statute to confer upon the liquidator power to surrender possession or disclaim the lease with the consent of the lessor; the statute means I think that whether the lessor is or is not willing the liquidator may surrender possession or disclaim the lease, and that if he does so surrender possession or disclaim the lease the tenant in liquidation shall be in the same position as if the lease had been surrendered with the consent of the lessor. Of course, if the lease were surrendered with the consent of the lessor, there could be no suggestion of any further liability on the part of the lessee to pay rent and no suggestion that, by failing to pay rent, the tenant was committing a breach of covenant and was rendering himself liable for liquidated or unliquidated damages. [Emphasis added.]

[39] In this passage, Rose C.J. concluded that the statutory right to "surrender possession or disclaim" a lease has the same effect as a surrender with the consent of the lessor. As I will explain, this statement, equating a disclaimer with a consensual surrender of a lease, was applied in subsequent cases, such as *Cummer-Yonge Investments*, to release derivative obligations such as those of a guarantor, after a lease had been disclaimed by a tenant's trustee.

[40] More important to the present analysis, however, is the court's interpretation in *Re Mussens* of the relevant statutory provisions, and whether they permit a landlord to make a claim for damages for the surrender or disclaimer of the lease in the tenant's bankruptcy proceedings. Contrasting the provisions of the *Landlord and Tenant Act* with the comparable legislation in England that provided specifically for a right to compensation following a disclaimer, at p. 461, Rose C.J. concluded that, in Ontario, there was no "similar saving of the rights of the lessor" and therefore no equivalent right to compensation. In other words, the silence in the Ontario legislation on the question of compensation meant that, after a disclaimer, the landlord had no claim for damages against the tenant in relation to the ending of the lease, and was limited to what it was specifically afforded by statute. Rose C.J. stated, at p. 461:

> In England, as is pointed out by the Master in his judgment, the statute with which sec. 38 of *The Landlord and Tenant Act* more or less corresponds,

> contains the provision that any person injured by the operation of the section (i.e., by the disclaimer or surrender) shall be deemed a creditor of the bankrupt to the extent of such injury and may accordingly prove the same as a debt under the bankruptcy; but the Ontario statute contains no similar saving of the rights of the lessor, and I think that the result is that in Ontario the liquidator has been given a statutory right to commit a breach of the insolvent's covenant, and that no right of compensation for the statutory breach having been given to the covenantee no damages can be recovered. [Emphasis added.]

[41] *Re Mussens* accordingly stands for the principle that, under Ontario law, the trustee of a bankrupt tenant is permitted by statute to bring an end to the lease, and all future obligations of the tenant thereunder, by surrendering possession of the leased premises or disclaiming the lease within three months of the bankruptcy. The principle articulated in *Re Mussens*, and the case itself, have been referred to in subsequent cases (some of which are referred to later in these reasons) and in articles and texts dealing with bankruptcy and insolvency and commercial leases. See e.g. L.W. Houlden, "Bankruptcy of the Landlord or Tenant" (1965), 7 C.B.R. (N.S.) 113, at p. 123; Christopher Bentley et al., *Williams & Rhodes' Canadian Law of Landlord and Tenant,* 6th ed. (Toronto: Thomson Reuters Canada Limited, 2019), at c. 12:6:3 (WL); Steven Jeffery, "*Cummer-Yonge* - A Post-Mortem: *Crystalline Investments Ltd. v. Domgroup Ltd*." (2006), 21 B.F.L.R. 263, at p. 285; and David Bish, *Canadian Bankruptcy and Insolvency Law for Commercial Tenancies*, (Toronto: LexisNexis Canada Inc., 2016), at pp. 225, 394.

[42] The Landlord notes that four provinces have legislation that expressly prohibits the type of claim it advances here (Prince Edward Island, Saskatchewan, Alberta and British Columbia), while nine provinces and territories have no such prohibition. However, it does not follow, as the Landlord argues, that such a claim is permitted where it is not expressly prohibited or restricted. Indeed, the Landlord has not cited a single case that would interpret the legislation this way, nor any case that is contrary to the interpretation provided for in *Re Mussens*. As discussed, *Re Mussens* interpreted the absence of a landlord's statutory right of compensation for termination of the lease after a disclaimer (other than the claim for up to three months' accelerated rent) as meaning that there is no such right.

(b) *Crystalline Investments* changed the law in Ontario, but not in the way the Landlord contends

[43] The Landlord argues that recent cases, including *Crystalline Investments*, specifically overruled the *Re Mussens* line of cases, such that a disclaimer does not bring an end to all obligations under the lease. As a result, the Landlord argues that the obligation to pay the tenant inducements, which was specifically contemplated by the Lease as an obligation upon any termination of the Lease, bankruptcy of Curriculum, or disclaimer by its trustee, must survive.

(i) The *Cummer-Yonge Investments* line of cases

[44] *Re Mussens* was applied in a number of cases as authority that, upon disclaimer by a trustee, all obligations in connection with a lease come to an end, not just those of the tenant. In particular, courts have relied on the statement in *Re Mussens* equating a disclaimer with a mutual surrender of a lease to conclude that the obligations of assignors and guarantors also come to an end with the disclaimer of a lease.

[45] The leading case in Ontario articulating this conclusion was *Cummer-Yonge Investments.* In that case, a bankrupt tenant's lease was disclaimed by a trustee in bankruptcy, leaving the landlord with a claim beyond its preferred claim in the bankruptcy. The landlord turned to a third-party guarantee securing "the due performance by the lessee of all of its covenants … including the covenant to pay rent". The landlord accepted that the tenant's further obligations under the lease had ended, but asserted that, upon disclaimer, the rights and obligations under the lease were revested in the bankrupt tenant, and so would permit a claim on a guarantee.

[46] Gale C.J. rejected this argument, citing the passage from *Re Mussens* equating a disclaimer to a surrender. He concluded that on bankruptcy, all of the tenants' rights and obligations under the lease irrevocably pass to the trustee and "when the trustee subsequently disclaimed that interest, all the rights and obligations which he inherited from the bankrupt were wholly at an end": at p. 29.

For this reason, the guarantee was inoperative. Thereafter there could be no covenants in the lease which the lessee was required to perform, so that the guarantee of the “due performance by the lessee of all its covenants in the lease" was thereupon extinguished.

[47] This approach was followed in a number of cases that cited and relied on the statement in *Re Mussens* equating the statutory surrender of possession or disclaimer by a trustee to a surrender with the consent of the landlord. For example, in *Re Salok Hotel Co. Ltd.* (1967), 66 D.L.R. (2d) 5 (Man. Q.B.), aff’d on other grounds (1967), 66 D.L.R. (2d) 5 (Man. C.A.), at p. 14, Wilson J. cited *Re Mussens* as authority that, upon the disclaimer of a lease by the trustee, all liability of the trustee and of the estate of the bankrupt lessee up to that time was extinguished, and that the landlord could not rank against the estate of the bankrupt for breach of contract. Citing *Cummer-Yonge Investments*, Wilson J. also held that, upon disclaimer of the lease, the liability of guarantors is also at an end.

[48] The decision in *Cummer-Yonge Investments* was controversial. It was cited and followed in a number of cases, including *Titan Warehouse Club Inc. (Trustee of) v. Glenview Corp.* (1988), 67 C.B.R. (N.S.) 204 (Ont. H.C.), aff’d 75 C.B.R. (N.S.) 206 (Ont. C.A.) and *Peat Marwick Thorne Inc. v. Natco Trading Corporation* (1995), 22 O.R. (3d) 727 (Gen. Div.). It was distinguished in *885676 Ontario Ltd. (Trustee of) v. Frasmet Holdings Ltd.* (1993), 99 D.L.R. (4th) 1 (Ont.

Gen. Div.). (Each of these cases involved claims under letters of credit.) Moreover, in *Andy & Phil Investments Ltd. v. Craig* (1991), 5 O.R. (3d) 656 (Gen. Div.) and *Sifton Properties Limited v. Dodson* (1994), 28 C.B.R. (3d) 151 (Ont. Gen. Div.), the courts accepted that a guarantee could be drafted to secure an obligation that would survive bankruptcy.

[49] In 1993, the British Columbia Court of Appeal, without citing *Cummer-Yonge Investments*, concluded that the disclaimer of two assigned leases by an assignee's trustee in bankruptcy did not end the assignors' obligations to their landlords: *Transco Mills Ltd. v. Percan Enterprises Ltd.* (1993), 100 D.L.R. (4th) 359 (B.C.C.A.). In that case, the assignor tenants made the argument accepted in *Cummer-Yonge Investments* – that a disclaimer had the same effect as a mutual surrender of a lease, with the result that the obligations of any third party, such as an assignor, would be eliminated. The relevant B.C. legislation was comparable to ss. 38 and 39 of the CTA.

[50] Writing for the court in *Transco Mills*, Taylor J.A., at pp. 364-65, traced the assertion that a disclaimer can be equated to a mutual surrender to s. 23 of the *Bankruptcy Act 1869* (U.K.), 32 & 33 Vict., c. 71, which had specifically provided that a lease disclaimed by a trustee shall be deemed to have been surrendered.[6] He noted (as did Rose C.J. in *Re Mussens*), that the U.K. statute specifically

[6] The reference to "deemed surrender" was subsequently omitted from the U.K. *Bankruptcy* Act: see *Transco Mills*, at p. 365.

gave to any person injured by the operation of the section a right to claim in the bankruptcy for such injury. He then referred to later English case law restricting the meaning of surrender in this statutory context, including *Hill v. East & West India Dock Co.* (1884), 9 App. Cas. 448 (H.L.), where Lord Blackburn, at p. 458, stated that the statutory concept of deemed surrender was to be taken to apply only "so far as is necessary to effectuate the purposes of the Act and no further".

[51] Taylor J.A. observed that, by contrast to the U.K. legislation, there was no statutory or other basis in B.C. for equating the disclaimer of a lease by a trustee to a surrender. He approved of the way the English courts had approached the U.K. legislation: the effect of a disclaimer should be limited to accomplishing the purpose of the bankruptcy scheme only, and, so far as possible, to not adversely affect the position of those outside the bankruptcy. As a result, he held, at p. 369, that the trustee's disclaimer did not end the leases for all purposes and that the assignor tenants remained liable for the bankrupt assignee's failure to pay rent.

[52] The issue in the cases discussed above was not whether the bankrupt tenant was relieved of its ongoing obligations under a disclaimed lease (this was either stated directly or assumed), but whether the disclaimer also ended the landlord's rights against security provided by the tenant, a guarantor of the tenant's obligations, or an assignor of a lease that was subsequently disclaimed.

[53] Ultimately, the approach in *Transco Mills* was followed by this court in *Crystalline Investments*, which sought to distinguish *Cummer-Yonge Investments.* This court's decision in *Crystalline Investments* was ultimately upheld by the Supreme Court which, in *obiter*, overruled the *Cummer-Yonge Investments* holding. I turn to *Crystalline Investments* now.

(ii) The Supreme Court decision in *Crystalline Investments*

[54] In *Crystalline Investments*, a commercial tenant ("Domgroup"), entered into leases with each of Crystalline Investments Limited and Burnac Leaseholds Limited (the "landlords"). Domgroup subsequently assigned the two leases to its subsidiary which was thereafter sold and amalgamated to form Food Group Inc. ("Food Group"). Food Group ultimately became insolvent and filed a proposal under s. 65.2 of the pre-1997 version of the BIA. The terms of the proposal purported to "repudiate" the assigned leases (s. 65.2 was later amended to use the term "disclaim").[7] The landlords had a right to challenge the repudiation, but did not do so, and were then limited to a claim for the lesser of up to six months' rent and the rent for the remainder of the leases following repudiation. The landlords sued Domgroup for their additional damages, relying on the provision in

[7] At the time s. 65.2 of the BIA used the word "repudiate" rather than disclaim and limited the landlord's compensation to payment of an amount equal to the rent payable over the six-month period immediately following repudiation or the remainder of the term of the lease if less than six months. The section was amended in 1997 to substitute the word "disclaim" for "repudiate". It was also amended to prescribe a different landlord remedy.

the leases confirming that the assignor would remain fully liable thereunder notwithstanding any assignment.

[55] Domgroup argued successfully at first instance that its position was comparable to that of the guarantor in *Cummer-Yonge Investments*: the effect of the repudiation of the leases in the bankruptcy proposal was that all obligations under the leases had come to an end for all purposes, thereby terminating its obligations as assignor. Domgroup was successful in having the action dismissed in its summary judgment motion: (2001), 39 R.P.R. (3d) 49 (Ont. S.C.). The landlords prevailed in their appeal to this court: (2002), 49 R.P.R. (3d) 171 (Ont. C.A.). Carthy J.A., writing for this court, referred to and approved of the reasoning of the British Columbia Court of Appeal in *Transco Mills.* He also purported to distinguish *Cummer-Yonge Investments*, on the basis of the difference between a guarantor of obligations under a lease and one who has primary obligations. In this case, the assignor had signed “as principal and not as surety”.

[56] The Supreme Court upheld the decision of this court. However, rather than attempting to distinguish the *Cummer-Yonge Investments* line of cases, Major J., writing for the court, examined the issue based on first principles. He concluded that, absent a contractual release from the landlord, the original tenant as assignor under the lease would remain liable on the covenant to the landlord, notwithstanding the insolvency of the assignee and any consequent repudiation of the lease.

[57] The issue in *Crystalline Investments* was fairly narrow: did s. 65.2 of the BIA alone terminate the rights and obligations of the assignor under the leases?[8] At the time, s. 65.2 read as follows:

> 65.2 (1) At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial tenant under a lease of real property, the insolvent person may repudiate the lease on giving thirty days notice to the landlord in the prescribed manner, subject to subsection (2).

[58] Major J. observed that, while s. 65.2 focusses on bilateral relationships, such as a simple lease between a landlord and a tenant, the effect of the repudiation does not change in a tripartite arrangement resulting from the assignment of a lease: “In both situations the repudiation must be construed as benefiting only the insolvent”: at para. 27. At para. 28, he observed that “[t]he

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[8] Major J. concluded that, whether the leases were terminated by surrender, which was raised for the first time by Domgroup in the Supreme Court, or by the application of some other principle of common law, was a question best left for trial: at para. 10.

plain purposes of the section are to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can", and that "[n]othing in s. 65.2, or any part of the Act, protects third parties (i.e. guarantors, assignors or others) from the consequences of an insolvent's repudiation of a commercial lease". Major J. confirmed that such third parties would remain liable when the party on whose behalf they acted becomes insolvent. He explained that, on an assignment of a lease, while the landlord's privity of estate with the original tenant comes to an end, the privity of contract continues and the original tenant remains liable upon its covenant: at para. 29.[9]

[59] The Supreme Court addressed the argument that, unless a repudiation under s. 65.2 terminated a lease for all purposes, an assignor's common law indemnification right against the original tenant could frustrate the BIA: the

[9] While accepting that upon assignment, the landlord's privity of estate with the original tenant/assignor comes to an end, Major J. did not address the question of what became of the leasehold interest as between the assignor and the landlord, once the assignor was called upon under the assignment. In *Transco Mills*, Taylor J.A. concluded that the disclaimer would result in the automatic revesting of the balance of the term in the assignor, preserving the leasehold interest, which could be recognized by a vesting order: at p. 369. This is similar to what is provided for expressly in the comparable U.K. legislation, as interpreted by cases such as *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd. et al.*, [1996] 1 All. E.R. 737 (H.L.). Indeed, in *Hindcastle Ltd.*, the House of Lords decision referred to by Major J. at para. 41 of *Crystalline Investments*, Lord Nicholls concluded, at p. 748, that a disclaimer operates to determine the bankrupt tenant's interest in the leased property, and that it has the effect of accelerating the reversion expectant upon the determination of that estate, such that as between the landlord and tenant the lease ceases to exist. At the same time, the rights of others, such as guarantors and original tenants/assignors are to remain as though the lease had continued and had not been determined.

insolvent assignee could face an additional claim on the lease in excess of the preferred payment required to be paid to the landlord under s. 65.2. Major J. rejected this argument, noting that in such circumstances, the assignor would simply join the other unsecured creditors in the proceedings: at paras. 32-35.

[60] Finally, Major J. confirmed that the same analysis should apply to the *Cummer-Yonge Investments* facts: “Post-disclaimer, assignors and guarantors ought to be treated the same with respect to liability. The disclaimer alone should not relieve either from their contractual obligations”: at para. 42.

[61] Major J. observed that *Cummer-Yonge Investments* had created uncertainty in leasing and bankruptcy, as drafters of leases attempted to circumvent its holding by playing upon the primary and secondary obligation distinction, and courts performed “tortuous distinctions” in order to reimpose liability on guarantors: at para. 39. Major J. noted, at para. 41, that, in *Cummer-Yonge Investments*, Gale C.J. applied the reasoning of the English Court of Appeal in *Stacey v. Hill*, [1901] 1 K.B. 660 (C.A.), which was subsequently overruled by the House of Lords in *Hindcastle Ltd. v. Barbara Attenborough Associates Ltd. et al.*, [1996] 1 All. E.R. 737 (H.L.). He concluded that *Cummer-Yonge Investments* “should meet the same fate”: at para. 42.

(iii) *Crystalline Investments* did not affect the principle stated in *Re Mussens*

[62] In the present case, the bankruptcy judge concluded, after her own review of *Crystalline Investments*, that neither the *ratio decidendi* nor the *obiter dicta* of that case (overturning *Cummer-Yonge Investments*) addressed whether a landlord can claim unsecured damages in the bankruptcy proceedings of its tenant upon the disclaimer of a lease by the trustee in bankruptcy. I agree with her analysis and conclusion.

[63] In *Re Mussens* the court equated the legal effect of a trustee's statutory right of disclaimer to a "mutual surrender" of the lease. Subsequent decisions, invoking that characterization, have reasoned that certain third-party obligations that are linked to the lease come to an end when the lease is disclaimed by the trustee. This has led to confusion and ultimately to cases, like *Cummer-Yonge Investments*, that were overtaken by *Crystalline Investments*.

[64] As noted earlier, although *Re Mussens* used the language of "mutual surrender", Taylor J.A. appears to reject that characterization in *Transco Mills*. In *Crystalline Investments*, the Supreme Court did not address the issue. Whether or not a disclaimer should be characterized as a mutual surrender, both *Re Mussens* and *Transco Mills* are consistent in their treatment of the legal effect of a disclaimer on the obligations of a bankrupt tenant.

[65] The key underlying principle that emerges from *Crystalline Investments* is that the disclaimer of a lease by the tenant's trustee benefits only the insolvent party.[10] The Supreme Court overruled *Cummer-Yonge Investments*, stating that the liability of assignors and guarantors would not be discharged by the disclaimer alone. Major J. did not contradict the premise that a trustee's disclaimer ends the obligations of the tenant under the lease. Indeed, he assumed that the effect of a disclaimer is to bring the tenant's obligations under the lease to an end, and he explained that the purpose of s. 65.2 of the BIA is "to free an insolvent from the obligations under a commercial lease that have become too onerous, to compensate the landlord for the early determination of the lease, and to allow the insolvent to resume viable operations as best it can": at para. 28. *Crystalline Investments* is consistent with the principle stated in *Re Mussens* that a disclaimer operates to end the bankrupt tenant's obligations under the lease. However, it would not support an interpretation of *Re Mussens* that would characterize a disclaimer as a consensual surrender for all purposes.

[66] The parties to the present appeal requested and were granted leave to make written submissions on *7636156 Canada Inc. v. OMERS Realty Corporation*, 2019 ONSC 6106, 74 C.B.R. (6th) 312, a decision released shortly

[10] I note that although U.K. insolvency legislation is different, the House of Lords has treated a disclaimer in the same fashion; a disclaimer puts an end to the bankrupt's obligations under the lease, but determination of the lease is not permitted to affect the rights or liabilities of other persons: see *Hindcastle Ltd.*, at p. 748; *Re Park Air Services Plc*, [1999] 1 All. E.R. (H.L.), at pp. 678-79, *per* Lord Millett.

after the hearing of the appeal. In that case, Hainey J. relied on *Re Mussens* and distinguished *Crystalline Investments* in the context of a landlord's rights under a letter of credit following disclaimer by the tenant's trustee in bankruptcy. After citing the *Cummer-Yonge Investments* line of cases referred to in para. 48 above he concluded that on disclaimer, "the bankrupt no longer has any obligations owing to the landlord under the lease, and the landlord is not entitled to draw on a letter of credit provided as security under the lease for any amounts in excess of the Landlord's three months' accelerated rent preferred claim under s. 136(1)(f) of the BIA": at para. 39. He accepted the trustee's submission that his conclusion was not impacted by *Crystalline Investments* because the obligation to make payment under the letter of credit was "wholly dependent on the continued existence of the Bankrupt's obligations to the Landlord under the Lease": at para. 44.

[67] *736156* has since been appealed to this court: C67634. Because the case was concerned with the obligations under a letter of credit after disclaimer, and not any claim by the landlord in the tenant's bankruptcy, and in view of the outstanding appeal, it is unnecessary and beyond the scope of these reasons to address the decision, except to note that the court accepted the continuing authority of *Re Mussens*.

(c) *Highway Properties* does not provide a basis for the Landlord's claim for tenant inducements under the Lease

[68] I turn now to address the Landlord's argument that *Highway Properties* would support its right to claim as an unsecured creditor for the tenant inducements provided for under the Lease. The same argument has been rejected in other cases, for good reason, and must be rejected here. In short, while *Highway Properties* recognized that, after accepting a tenant's repudiation, the landlord can assert a contractual claim for its prospective losses, the case does not speak to a landlord's remedies in bankruptcy or insolvency. In particular, it does not address the remedies that are available to a landlord after a lease has been disclaimed by the tenant's trustee in bankruptcy.

(i) The Supreme Court decision in *Highway Properties*

[69] *Highway Properties* involved the claim of a landlord for prospective losses following a tenant's repudiation of an unexpired lease. The tenant had abandoned the premises and the landlord took possession, while asserting a claim for damages for its loss calculated over the unexpired term of the lease. The lower courts had dismissed the landlord's claim for prospective damages, concluding that the repudiation of the lease by the tenant and the taking of possession by the landlord amounted to a surrender by operation of law, so that the lease ceased to exist. Accordingly, claims for prospective loss could not be supported and only accrued loss could be claimed.

[70] At the time the case was heard, the law recognized three mutually exclusive options available to a landlord on a tenant's repudiation of a lease: (i) to do nothing and insist on the tenant's performance of the terms and sue for rent or damages on the footing the lease remains in force; (ii) to elect to terminate the lease, retaining the right to sue for rent accrued due or for damages to the date of termination for prior breaches of covenant; or (iii) to advise the tenant of the landlord's intention to re-let the property on the tenant's account and to enter into possession on that basis: see *Highway Properties*, at p. 570.

[71] In *Highway Properties*, Laskin J., writing for the court, observed that a lease is both a conveyance and a contract. The termination of the tenant's estate in the land when its repudiation was accepted by the landlord did not necessarily mean that the tenant's covenants under the lease came to an end. Laskin J. accepted the proposition that the landlord had a fourth contractual option on repudiation of the lease, which was exercised in that case: to terminate the lease with notice to the tenant that damages will be claimed for the loss of the benefit of the lease over its unexpired term, while repossessing the leased property.

[72] *Highway Properties* specifically addressed remedies available to a landlord after a tenant's repudiation of the lease. It did not, however, change the legal effect of a disclaimer or alter the principle in *Re Mussens.* To treat a disclaimer as a repudiation for damages purposes is to ignore the fundamental distinctions between surrender and disclaimer on the one hand and repudiation on the other.

(ii) Cases considering the Landlord's *Highway Properties* argument

[73] The attempt to rely on *Highway Properties* to support a landlord's claim for prospective damages in a bankruptcy after disclaimer has been rejected in a number of cases.

[74] In *Re Vrablik* (1993), 17 C.B.R. (3d) 152 (Ont. Gen. Div.), the issue was whether, post-disclaimer, a landlord could claim as an unsecured creditor in its tenant's bankruptcy for damages in lieu of payments that would have been due under the unexpired portion of a five-year commercial lease. These included rent before the premises were re-let, taxes, maintenance costs, and the shortfall on re-letting the premises. Maloney J. observed that it would be a "grave error" to adopt the analysis and decision in *Highway Properties* as "the present case involves a bankruptcy, which is quite different from an outright repudiation of a contract. A bankruptcy is a final and irreversible situation": at p. 158. He rejected the argument that the reference to the landlord's rights being determined by the "laws of the province in which the leased premises are situated" in s. 146 of the BIA, referred to the common law of the province, including the option to accept the termination and to sue for prospective damages, as recognized in *Highway Properties.* Rather, this phrase referred to ss. 38 and 39 of the *Landlord and Tenant Act*, R.S.O. 1990, c. L.7, which together with the BIA would limit the landlord's claim to three months' rent. Maloney J. concluded that the BIA and the *Landlord and Tenant Act* provided a comprehensive scheme for the

administration of the leasehold interests of bankrupt tenants and that *Highway Properties* had no application: at pp. 158-59.

[75] Similarly, as I have noted in para. 27 above, in *Re Linens 'N Things*, the Registrar dismissed an appeal of a trustee's disallowance of a landlord's claim for the costs of building a structure, amounts provided under the lease as a tenant's allowance, and the commission paid on the lease itself by the landlord, following the disclaimer of the lease by the trustee. The landlord, relying on *Highway Properties*, had characterized these claims as damages for breach of contract rather than rent. The Registrar rejected this argument, noting that in *Highway Properties* the tenant had repudiated the lease, and there was no insolvency or any question of the applicability of s. 146 of the BIA or anything like ss. 38 and 39 of the CTA. As such, the terms of the lease, which reserved to the appellant "all of its rights at law and equity for breach of the lease" were irrelevant: at paras. 15-16.

[76] The Registrar observed, at paras. 20-21:

> The Ontario statute did not provide for such a damage claim and deemed creditor status 76 years ago, and it does not do so today. The Dominion Parliament, in exercising its jurisdiction over bankruptcy law in the Dominion, has wholly left it up to the Provinces to determine the rights of lessors in these circumstances, and the Provincial Parliament has not seen fit to provide for the type of damage claim advanced by the Appellant
>
> …

> [N]either of the statutes which govern rights in these matters provides for the type of claim advanced. Even more, the CTA and its predecessors, has been found for the better part of a century to have the effect of a consensual ending of the lease, and the cases recognize that this is a statutorily permitted breach for which there is no damage remedy, beyond the s. 38 CTA and s. 136 BIA preferred claim.

[77] The application of *Highway Properties* was argued and rejected in the Alberta case *Principal Plaza Leaseholds Ltd. v. Principal Group Ltd. (Trustee of)* (1996), 9 W.W.R. 539 (Alta. Q.B.). In that case, the trustee of a bankrupt tenant disallowed the landlord's claim for damages for the unexpired portion of the leases, taking the position that on disclaimer, the entire balance of the unsecured claim was extinguished. The landlord argued that *Re Mussens* and *Re Vrablik* were wrongly decided because they concluded that a disclaimer has the same effect as a surrender, when in fact a disclaimer is a form of repudiation by the trustee without the landlord's consent. The landlord argued that on disclaimer, the landlord has the same rights that it would have on repudiation in a non-bankruptcy situation under *Highway Properties*. Cairns J. rejected this argument, stating that the overwhelming weight of authority was that the combined effect of the federal and provincial legislation is that "the claim of the landlord respecting the unexpired portion of the leases has been extinguished by the disclaimer of the leases": at p. 596.

(iii) The *Highway Properties* remedies are for repudiation, not disclaimer

[78] *Highway Properties* dealt with the remedies available to a landlord after the abandonment of the leased premises by the tenant. The tenant was not bankrupt and the provisions of the BIA and CTA were not at issue. Instead, the case addressed the landlord's remedies, outside of bankruptcy or insolvency, following a tenant's repudiation or fundamental breach.

[79] The distinction between repudiation before bankruptcy and disclaimer after bankruptcy was central to the facts in *Re TNG Acquisition Inc.*, 2011 ONCA 535, 107 O.R. (3d) 304. In that case, a trustee in bankruptcy disallowed a claim for prospective damages[11] by a landlord after the tenant, which had been in CCAA proceedings, made an assignment in bankruptcy and the trustee had purported to disclaim the lease. The issue was whether the Chief Restructuring Officer (the "CRO") had already repudiated the lease on behalf of the tenant before the restructuring efforts failed and the tenant declared bankruptcy. If so, the landlord could claim its prospective damages as an unsecured creditor in the tenant's bankruptcy.[12]

[80] The Initial Order in the CCAA proceedings gave the tenant the right to "vacate, abandon or quit any leased premises and/or terminate or repudiate any

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[11] The trustee allowed the landlord's preferred claim for three months' accelerated rent limited to the value of assets on the premises as well as an unsecured claim for a portion of the arrears, operating costs and the cost of repairs. At issue was the landlord's claim for prospective losses.

[12] The events in this case preceded amendments to the CCAA (S.C. 2005, c. 47, s. 131) that came into force in 2009 permitting the disclaimer of agreements, including leases: see CCAA, s. 32.

lease … without prior notice … in writing … on such terms as may be agreed upon between the Applicant and such landlord or, failing such agreement, to deal with the consequences thereof in the Plan". The CRO exercised that right, sending a repudiation letter to the landlord. The landlord never acknowledged, accepted, signed or returned the repudiation letter before the restructuring failed and the bankruptcy occurred. The landlord submitted a Proof of Claim that included its "unrecoverable expenses" during the entire term of the lease. The trustee issued a disclaimer of the lease the following month. The landlord argued that the repudiation was complete when the trustee received the repudiation letter, and that the lease had already been forfeited when the trustee issued its disclaimer. This argument was rejected at first instance, and the appeal from the disallowance was dismissed.

[81] In the landlord's further appeal to this court, Gillese J.A. noted that the effect of the trustee's disclaimer of the lease was to bring the lease to an end and to terminate all rights and obligations for the payment of rent: "Thus, if the trustee disclaims the lease, the landlord has no claim for rent for the remainder of the lease": at para. 14. She went on to discuss the effect of the repudiation letter. Citing *Highway Properties*, Gillese J.A. explained that repudiation does not in and of itself bring a lease to an end. Rather, "[i]t confers on the innocent party a right of election to, among other things, treat the lease as at an end, thereby relieving the parties of further performance, though not relieving the repudiating party from

its liabilities for breach": at para. 34. In the absence of any election, the landlord/tenant relationship remained intact, and the lease, which had not been brought to an end in the CCAA proceedings, was therefore susceptible to statutory disclaimer by the trustee following the commencement of bankruptcy: at paras. 38, 40.

[82] It was essential in *Re TNG Acquisition* to determine whether the landlord had already accepted the CRO's repudiation of the lease at the time of the bankruptcy because this determined the remedies available to the landlord. If the repudiation had been accepted, the various options under *Highway Properties* would have been available to it, including an unsecured claim for its losses over the unexpired term of the lease. Unless this had already occurred, the effect of the disclaimer was to preclude any such claim.

[83] In his text, *Canadian Bankruptcy and Insolvency Law for Commercial Tenancies*, David Bish observes that, while in practice, particularly outside of insolvency law, the terms "disclaim" and "repudiate" are used without distinction,[13] there are fundamental differences: "[F]or example, as a matter of common law, a landlord has no claim for damages following a disclaimer (i.e., but

[13] As discussed, even in the insolvency context, "repudiate" and "disclaimer" are at times used to mean the same thing. The proposal provisions under the BIA authorized the "repudiation" of leases, until "repudiation" was replaced by "disclaimer" in 1997. In that context, the statutory "repudiation" that was authorized was the same as a "disclaimer".

for the statutory reservation of such claim), whereas a landlord does have a claim for damages following repudiation": at p. 225n.

[84] David Bish explains why disclaimer should not be viewed as a type of repudiation, at pp. 235-36:

> It may be argued that disclaimer ought to be viewed as a type of repudiation, or equivalent to a repudiation. In some respects, they achieve similar outcomes and share similar characteristics, including a fundamental refusal by a tenant to perform a lease. However, the better view is that there is an important distinction between the two concepts and neither the acts nor the consequences that flow from the acts are synonymous. Disclaimer is appealing because of its simplicity in insolvent circumstances and in sidestepping unnecessary legal complications that arise in cases of repudiation. In this respect, disclaimer is more akin to a unilateral and irrevocable act of the tenant (one that dispenses with complications such as the doctrines of waiver, notice, elections and the like), with established consequences for tenant and landlord alike. A disclaimer, unlike a repudiation, does not "put the ball in the landlord's court", so to speak; it avoids the dance between landlord and tenant that ensues where a repudiation occurs.

[85] David Bish further observes that the argument that the panoply of *Highway Properties* options should be available on disclaimer makes little sense in the insolvency scenario where it is clear that certain of those options are unworkable and where the statute provides a specific right to compensation. The landlord should not be able to elect a remedy that would negate or undermine the statutory right to disclaim: at pp. 234-35.

(iv) Conclusion on the Landlord's *Highway Properties* argument

[86] The Landlord asserts that Curriculum's bankruptcy and the disclaimer were each events of default under s. 16.1 of the Lease, triggering the rights and remedies provided thereunder. The Landlord's rights and remedies in this case, however, are determined by statute and not by the terms of the Lease. The remedies provided under the Lease for default – even those specifically applicable in bankruptcy or upon disclaimer – simply were not available once the Lease was disclaimed.

[87] On bankruptcy, the Lease vested in the Trustee and was subject to the various rights and remedies prescribed by the legislation. As in *Re TNG Acquisition* there was no termination of the Lease that preceded the bankruptcy, and the Landlord's claim for damages for the loss of the Lease is precluded.

[88] It was suggested that the Landlord's claim for tenant inducements might be considered an existing or accrued claim because the Landlord seeks to recover money it has already spent (in the nature of a loan to the Tenant) and not damages for the loss of the Lease. There is no merit to this argument. The Landlord's claim is not for the value of the tenant inducements accrued up to the time of bankruptcy. The Landlord has already recovered such amounts in the rental payments it received. The claim is for the value of tenant inducements calculated for the remaining term of the Lease. The entitlement to recoup an amount for tenant inducements arises under the Lease and only "if [the] Lease is

terminated due to the default of Tenant, or if it is disclaimed, repudiated or terminated in any insolvency proceedings". It is a remedy for default, including bankruptcy or disclaimer. In other words, the Landlord had no right to recover such amounts prior to the bankruptcy, when the Lease was immediately vested in the Trustee.

[89] To reiterate, the Trustee's disclaimer brought to an end the rights and remedies of the Landlord against Curriculum with respect to the unexpired term of the Lease, apart from the three months' accelerated rent specifically provided for under the CTA and BIA. The Landlord's unsecured claim, however it is characterized, is precluded because the disclaimer brings to an end both the Tenant's ability to insist on performance of the Lease by the Landlord and the Landlord's ability to claim in the Tenant's bankruptcy in respect of any of its remedies. The Lease ended by disclaimer without the Landlord having terminated it or invoked its remedies under the Lease upon the occurrence of events under s. 16.1.

[90] The statutory claim is provided in place or in lieu of any ongoing rights a landlord might have against the tenant under its lease. In Ontario, the landlord has a right to claim for three months' accelerated rent. While the right can only be exercised if the lease provides for it, the right is one prescribed by statute and does not assume the continued existence or enforceability of the lease.

(d) The harmonization argument

[91] The Landlord's final argument on this issue is that the disclaimer provisions should be interpreted to permit it to assert a claim for damages for the unpaid tenant inducements because claims for damages are permitted under the parallel BIA proposal provisions and the CCAA disclaimer provision. The Landlord relies on the Supreme Court decision in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 for its "harmonization argument". The Landlord quotes para. 24 of that decision, which states the following:

> With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation.

[92] Nothing in *Century Services* assists the Landlord in the present appeal. In that case, the issue was whether GST collected by a debtor but not yet remitted was subject to a statutory deemed trust under the *Excise Tax Act*, R.S.C. 1985, c. E-15 (the "ETA") in favour of the Crown, and whether the deemed trust would prevail when a CCAA stay was lifted to permit the debtor to enter bankruptcy. The debtor had attempted reorganization under the CCAA, and the subject funds were held in the monitor's trust account until it could be determined whether the reorganization would be successful. The ETA provided that the deemed trust operated despite any other enactment of Canada, except the BIA. Under the BIA,

the Crown priority was lost. As a preliminary issue, the court confronted the apparent inconsistency between two federal statutes: the ETA which only expressly recognized the BIA loss of priority and the CCAA, which was enacted before the ETA and provided that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded": s. 18.3(1).

[93] Deschamps J., writing for the majority, resolved the statutory interpretation issue by concluding that the Crown's deemed trust was lost under the CCAA in the same way that it was lost under the BIA. She refused to accept that the ETA trumped the provision of the CCAA purporting to nullify most deemed statutory trusts. At para. 47, she noted that "a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy". Although the effect was to "harmonize" the two regimes in their treatment of the Crown deemed trust, in fact, this was simply a question of statutory interpretation. Deschamps J. gave effect to the provisions of the CCAA and the BIA which treated Crown GST claims the same way.

[94] Later in her reasons, Deschamps J. used the term "harmonization" to describe something else: the ability of the CCAA judge to partially lift the CCAA stay to allow the debtor's entry into bankruptcy, without requiring the term sought by the Crown – the payment of the claimed deemed trust for GST. She

recognized that the CCAA judge's order fostered a "harmonious transition between reorganization and liquidation" and that the court had discretion under the CCAA to "construct a bridge to liquidation under the BIA": at paras. 77, 80.

[95] The Landlord's "harmonization" argument, advocating for the identical treatment of the disclaimer provisions, has no merit where Landlord claims are expressly treated differently in a BIA proposal, under the CCAA and in a bankruptcy.

[96] In a proposal under the BIA, s. 65.2 provides for a commercial tenant to disclaim or resiliate[14] a lease, subject to the landlord's objection and the court's determination whether the insolvent person would be able to make a viable proposal without the disclaimer or resiliation. Section 65.2 provides that the landlord has no claim for accelerated rent even if the lease provides for it. The landlord has an election as to the calculation of its claim: it may claim its actual losses or an amount prescribed by a formula. No provision is made for priority of the landlord's claim. The disclaimer provisions also contemplate what happens where the proposal fails and the tenant becomes bankrupt, and also the reverse – where a tenant is bankrupt and then makes a proposal.

[97] Unlike the BIA proposal provisions that deal specifically with commercial leases, the CCAA disclaimer provision, s. 32, applies to the disclaimer of all

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[14] "Resiliate" is a term used under Quebec's civil law. The discussion in this paragraph leaves out references to resiliation, as only disclaimer is relevant in Ontario.

agreements, including leases. Again, the disclaimer is subject to objection of the other party and court order. Subsection 32(7) provides that, where an agreement is disclaimed or resiliated, a party who suffers a loss in relation to the disclaimer is considered to have a provable claim.

[98] The fact that the BIA proposal provisions and the CCAA disclaimer provision specifically provide for a landlord's claims for damages following "disclaimer" simply indicates that Parliament intentionally departed from the bankruptcy model for landlord claims in the context of a restructuring.

[99] In sum, the fact that the three insolvency regimes all permit disclaimer but provide for different remedies represents a policy choice by Parliament. In such circumstances, there is no scope for applying the "harmonization" principle, or reading the different provisions as providing for the same remedy. Such an interpretation would render the legislator's deliberate policy choice irrelevant.

(2) Is the Landlord entitled to assert the balance of its claim for three months' accelerated rent as an unsecured creditor in Curriculum's bankruptcy?

[100] The second issue on appeal is governed by s. 136(3) of the BIA. Subsection 136(3) provides that "[a] creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him."

[101] The Landlord was entitled to a preferred claim for three months' accelerated rent. However, the priority of its preferred claim was subject to higher ranking priorities and, under s. 136(1)(f), was limited to the realization from the property on the leased premises. As noted above, the Trustee realized only $24,571 from the sale of the property on the premises leased by Curriculum. In consequence, the Trustee allowed the Landlord's preferred claim for $24,571, but disallowed the balance.

[102] The Landlord is entitled to rank as an unsecured creditor for the unpaid balance of its preferred claim. This is the plain effect of s. 136(3) of the BIA. See also *Re Gingras Automobile Ltée.*, [1962] S.C.R. 676, at p. 680, where Abbott J., writing for the court, held that the combined effect of the relevant provisions under the *Bankruptcy Act*, R.S.C. 1952, c. 14 is that a landlord is only entitled to rank as an unsecured creditor for any balance to which it may be entitled under provincial law. Under s. 38 of the CTA, a landlord is entitled to a preferred claim for three months' accelerated rent.

[103] The Trustee ought to have permitted the Landlord to claim the balance of its preferred claim for three months' accelerated rent ($50,289.28) as an unsecured creditor.

VII. DISPOSITION

[104] For these reasons, I would allow the appeal, but only to the extent of permitting the Landlord to claim the balance of its preferred claim for three months' accelerated rent as an unsecured creditor in Curriculum's bankruptcy in the amount of $50,289.28. The Trustee did not seek costs and given the divided success, I would not award costs of the appeal.

Released: April 27, 2020 ("A.H.")

"K. van Rensburg J.A."
"I agree. Alexandra Hoy A.C.J.O."
"I agree. L.B. Roberts J.A."

Most Negative Treatment: Not followed
Most Recent Not followed: Vancouver City Savings Credit Union In Trust v. Cawker | 2004 BCCA 160, 2004 CarswellBC 595, 19 R.P.R. (4th) 1, 129 A.C.W.S. (3d) 1012, 237 D.L.R. (4th) 227, 25 B.C.L.R. (4th) 227, [2004] B.C.J. No. 517, [2004] B.C.W.L.D. 533, [2004] 6 W.W.R. 60, 197 B.C.A.C. 95, 323 W.A.C. 95 | (B.C. C.A., Mar 19, 2004)

1996 CarswellOnt 3941
Supreme Court of Canada

Manulife Bank of Canada v. Conlin

1996 CarswellOnt 3941, 1996 CarswellOnt 3942, [1996] 3 S.C.R. 415, [1996] S.C.J. No. 101, 139 D.L.R. (4th) 426, 203 N.R. 81, 30 B.L.R. (2d) 1, 30 O.R. (3d) 577 (note), 30 O.R. (3d) 577, 66 A.C.W.S. (3d) 555, 6 R.P.R. (3d) 1, 94 O.A.C. 161, J.E. 96-2122

Manulife Bank of Canada (appellant) v. John Joseph Conlin (respondent)

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

Heard: May 30, 1996
Judgment: October 31, 1996
Docket: 24499

Counsel: *H. Stephen Lee*, for appellant.
Raymond F. Leach and *Barbara F. Fischer*, for respondent.

Subject: Property; Corporate and Commercial
Related Abridgment Classifications
Guarantee and indemnity
II Guarantee
II.2 Continuing guarantee
II.2.a What constituting
Judges and courts
XVII Jurisdiction
XVII.2 Superior courts
XVII.2.i Appellate court
XVII.2.i.v Miscellaneous
Real property
VII Mortgages
VII.11 Action on the covenant
VII.11.b Liability on the covenant
VII.11.b.iv Guarantor
Headnote
Guarantee and indemnity --- Guarantee — Continuing guarantee — What constituting
Mortgages --- Action on the covenant — Liability on the covenant — Guarantee
Judges and courts --- Jurisdiction — Jurisdiction of superior courts — Jurisdiction of appellate court
Mortgages — Action on the covenant — Liability on the covenant — Guarantee — Liability of guarantor — Guarantor not waiving equitable right to be released from liability on material variation of terms — Document construed contra proferentem against bank.

Guarantee and indemnity — Guarantee — Continuing guarantee — What constituting — Guarantee permitting variation of terms — Guarantor not having waived equitable or common law rights to be released from guarantee when mortgage renewed — Renewal agreement not constituting extension of original loan agreement.

Judges and courts — Jurisdiction — Jurisdiction of superior courts — Jurisdiction of appellate court — Mortgagor defaulting on mortgage and bank obtaining summary judgment against mortgagor and guarantors — Court of Appeal having jurisdiction to set aside judgment and dismiss action against guarantor — Court of Appeal having jurisdiction to make any order or decision that ought to have been made by court or tribunal appealed from.

The appellant bank made a loan to the respondent guarantor's spouse which was secured by a first mortgage on an apartment building. The guarantor (along with another), guaranteed the mortgage, which was for a three-year term with an interest rate of 11.5 per cent per annum. The guarantor signed the original mortgage documents. The guarantors covenanted to be bound by all conditions of the mortgage, and to remain so bound notwithstanding an extension of time for payment of the loan or an increase in the interest rate charged for the loan. The covenant provided that the guarantor would assume all obligations as the principal debtor.

Prior to the mortgage maturing, the bank agreed to extend the time for repayment of the loan for another three years at an interest rate of 13 per cent per annum. At that time, the guarantor had separated from his spouse, and had no notice or knowledge of the renewal. Only the spouse executed the renewal agreement as mortgagor, although the document provided for the signature of the guarantor as well.

The mortgage went into default, and the bank commenced proceedings to recover the mortgage debt. It obtained summary judgment against both the mortgagor and the guarantors for the principal owing under the mortgage, with interest at 13 per cent. The guarantor successfully appealed. The Ontario Court of Appeal set aside the judgment, and dismissed the action against the respondent guarantor. The bank appealed. At issue was whether the Court of Appeal had exceeded its jurisdiction in allowing the appeal, and dismissing the action, and whether the guarantor was released from his promise to pay under the terms of the mortgage agreement.

Held:

The appeal was dismissed.

Per Cory J. (La Forest, Sopinka and Major JJ. concurring) The principle that a guarantor will be released from liability on a guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor has been established for a long time. The basis for the rule is that any material change in the principal contract will result in an alteration of the surety's risk. While a surety can contract out of the protection provided by the common law or equity to the guarantor, such contracting out must be clear. Whether a surety remains liable is to be determined by an interpretation of the contract between the parties, the intention of the parties, and all of the circumstances surrounding the transaction. If there is any ambiguity in the guarantee, the document should be construed in accordance with the contra proferentem rule. As a favoured creditor, a surety's obligation should be strictly enforced. The guarantor in this case was not a compensated surety, and fell within the class of "accommodation sureties." Any doubt or ambiguity was to be strictly interpreted, and resolved in favour of the guarantor.

The guarantee covenant was to be interpreted and considered within the context of the entire transaction. The renewal or extension of time clause were not ambiguous. The clause clearly indicated that the guarantor was not bound by the renewal agreement. If the guarantor was to be treated as a principal debtor and not as a guarantor, the bank's failure to notify him of the renewal agreement and the new terms served to release him from his obligations, since he was not a party to the renewal agreement. In any event, the equitable or common law rules relieving a surety from liability are applicable where a contract has been materially altered by the creditor and the principal debtor without notice to the surety, in the absence of an express agreement to the contrary.

The renewal agreement was to be considered an integral part of the transaction. Two aspects of the renewal agreement led to the conclusion that the guarantor was not bound. The renewal agreement was a standard form contract prepared by the bank, and it required the signature of the guarantor. The guarantor was expected to execute the document to confirm notice to him and his acceptance of it, but he did not sign it. Furthermore, the renewal agreement provided that it constituted a new, rather than an extension of the former, agreement. The original document specifically distinguished between extensions and renewals. The absence of a reference to a renewal agreement suggested that it had no application for a renewal. The language in the covenant

bound the guarantor to variations if the mortgage was extended; it did not bind the guarantor to a renewal without his consent. The guarantor was to be relieved from liability under these circumstances.

Per Iacobucci J. (dissenting) (Gonthier J. concurring): The Ontario Court of Appeal had jurisdiction to dismiss the action as against the respondent guarantor. The order originally appealed from was granted on a motion for summary judgment brought by the bank. Pursuant to r. 20.04(2) and 20.04(4) of the Ontario *Rules of Civil Procedure*, the motions court judge (and, by extension, the Court of Appeal) had jurisdiction to dismiss the action against the guarantor. The bank was not deprived of its right to have its case fully heard, and to test all of the guarantor's evidence. The bank chose not to exercise its rights under r. 39.02(1) to cross-examine on the affidavits supporting the guarantor's position.

The guarantee clause constituted a waiver of the guarantor's equitable right to be discharged because of the material variation of the mortgage contract. Being essentially a contract, the guarantee was to be interpreted in accordance with the ordinary rules of contractual construction. The primary rule was that effect was to be given to the intentions of the parties as expressed in the written document. In this case, the guarantor plainly agreed to remain bound by the guarantee agreement, notwithstanding the material variations of the principal debt. Even though the guarantee covenant did not refer specifically to a renewal agreement, the language amounted to a clear waiver of the guarantor's right to be discharged in the event of a change in the interest rate or time for repayment. The mechanism of the renewal agreement basically served to extend the time, and increase the interest rate as expressly contemplated in the guarantee covenant. The covenant also did not require the bank to notify the guarantors of any such alteration in the mortgage.

The guarantors were not expected, as "principal debtors," to be signatories to the renewal agreement. The intention of the parties in using such language was to preserve the liability of the surety even in circumstances where the principal obligations were no longer enforceable. The space for the guarantors' signature on the renewal agreement was not helpful in interpreting the guarantee contract. The extent of the guarantor's liability was limited to repayment of the principal, secured by the mortgage at 11.5 per cent per annum.

Per L'Heureux-Dubé J. (dissenting): The "modern contextual approach" constitutes the standard normative approach to judicial interpretation, although, in appropriate circumstances, resort may be had to the old "plain meaning" rules of construction. The "modern contextual approach" for statutory interpretation is equally applicable, with appropriate adaptations, to contractual interpretation. In this case, the appropriate methodology to interpret the language of the guarantee was not the application of the "plain meaning" approach, but an application of the "modern contextual approach," because the terms in the documents constituted "legal terms of art."

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s. 134(1)*considered*

Rules considered:

Ontario, Rules of Civil Procedure

r. 1.04(1)*referred to*

r. 20.04(2)*considered*

r. 20.04(4)*considered*

r. 39.02(1)*referred to*

APPEAL from judgment reported at (1994), 41 R.P.R. (2d) 283, 17 B.L.R. (2d) 143, 20 O.R. (4d) 499, 120 D.L.R. (4th) 234, 75 O.A.C. 117, allowing appeal from decision granting motion for summary judgment for recovery of mortgage debt under mortgage and guarantee.

***Cory J.* (*La Forest, Sopinka* and *Major JJ.* concurring):**

1 I have read with great interest the clear and concise reasons of Justice Iacobucci. I am in agreement with his finding that the Court of Appeal had jurisdiction to make the order dismissing the action against the respondent. However, I must differ with his conclusion that by the terms of the guarantee, the respondent waived the equitable right of a guarantor to be released upon renewal of the mortgage loan with a different term and interest rates to which the guarantor did not consent.

The Position of a Guarantor as Defined by Equity and the Common Law

2 It has long been clear that a guarantor will be released from liability on the guarantee in circumstances where the creditor and the principal debtor agree to a material alteration of the terms of the contract of debt without the consent of the guarantor. The principle was enunciated by Cotton L.J. in *Holme v. Brunskill*, [1877] 3 Q.B.D. 495 (C.A.) at pp. 505-6 in this way:

> The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court
>
> . . . . .
>
> will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

This rule has been adopted in a number of Canadian cases. See for example *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562.

3 The basis for the rule is that any material alteration of the principal contract will result in a change of the terms upon which the surety was to become liable, which will, in turn, result in a change in the surety's risk. The rationale was set out in *The Law of Guarantee* (2nd ed. 1996) by Professor K. P. McGuinness in this way, at p. 534:

> The foundation of the rule in equity is certainly consistent with traditional thinking, but it is a fair question whether it is necessary to invoke the aid of equity at all in order to conclude that in a case where the principal contract is varied materially without the surety's consent, the surety is not liable for any subsequent default. Essentially, a specific or discrete guarantee (as opposed to an all accounts guarantee) is an undertaking by the surety against the risks arising from a particular contract with the principal. If that contract is varied so as to change the nature or extent of the risks arising under it, then the effect of the variation is not so much to cancel the liability of the surety as to remove the creditor from the scope of the protection that the guarantee affords. When so viewed, the foundation of the surety's defence appears in law rather than equity: it is not that the surety is no longer liable for the original contract as it is that the original contract for which the surety assumed liability has ceased to apply. In varying the principal contract without the consent of the surety, the creditor embarks upon a frolic of his own, and if misfortune occurs it occurs at the sole risk of the creditor. A law based approach to the defence is in certain respects attractive, because it moves the surety's right of defence in the case of material variation from the discretionary and therefore relatively unsettled realm of equity into the more absolute and certain realm of law. In any event, it is clear quite certainly in equity and quite probably in law as well, that the material variation of the principal contract without the surety's consent (unless subsequently ratified by the surety) will result in the discharge of the surety from liability under the guarantee.

And further at p. 541, he wrote:

> Where the risk to which the surety is exposed is changed, the rationale for the complete release of the surety is easily explained. To change the principal contract is to change the basis upon which the surety agreed to become liable. A surety's liability extends only to the contract which he has agreed to guarantee. If the terms of that contract (and consequently the terms of the surety's risk) are varied then the creditor should no longer be entitled to hold the surety to his obligation under the guarantee. To require a surety to maintain a guarantee in such a situation would be to allow the creditor and the principal to impose a guarantee upon the surety in respect of a new transaction. Such a power in the hands of the principal and creditor would amount to a radical departure from the principles of consensus and voluntary assumption of duty that form the basis of the law of contract.

The Right of a Guarantor to Contract Out of the Protection Provided by the Common Law

4 Generally, it is open to parties to make their own arrangements. It follows that a surety can contract out of the protection provided to a guarantor by the common law or equity. See for example *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p.

107. The Ontario Court of Appeal, correctly in my view, added that any contracting out of the equitable principle must be clear. See *First City Capital Ltd. v. Hall* (1993), 11 O.R. (3d) 792 (C.A.), at p. 796.

5 The principle was explained by Professor McGuinness in *The Law of Guarantee, supra*, at p. 546 in these words:

> There are certain types of amendment that may be made to the terms of a principal contract (or departures from the terms of the principal contract) that will not have the effect of discharging the surety under that contract, even though those changes may be of a material nature. For instance, where the changes that have been made to the principal contract were specifically authorized by the surety or were otherwise within the contemplation of the contract, the surety will not be discharged. Similarly, changes which are authorized within the guarantee will not relieve the surety from liability.
>
> It is a question of interpretation whether such changes are authorized or contemplated.

The author added at p. 547 the following sage advice to lending institutions:

> *Since the courts have tended to give a narrow construction to provisions in standard form guarantees which authorize such changes, it would be most unwise for a creditor to agree to changes without first obtaining the consent of the surety, except where there is clear authorization* for him to act solely upon his own initiative. Where the creditor seeks to show that the guarantee agreement provides a blanket authorization to make material alterations to the principal contract, *the wording must be very clear* that such a right was intended. [Emphasis added.]

6 The issue as to whether a surety remains liable will be determined by interpreting the contract between the parties and determining the intention of the parties as demonstrated by the words of the contract and the events and circumstances surrounding the transaction as a whole.

Principles of Interpretation

7 In many if not most cases of guarantees a contract of adhesion is involved. That is to say the document is drawn by the lending institution on a standard form. The borrower and the guarantor have little or no part in the negotiation of the agreement. They have no choice but to comply with its terms if the loan is to be granted. Often the guarantors are family members with limited commercial experience. As a matter of accommodation for a family member or friend they sign the guarantee. Many guarantors are unsophisticated and vulnerable. Yet the guarantee extended as a favour may result in a financial tragedy for the guarantor. If the submissions of the bank are accepted, it will mean in effect that a guarantor, without the benefit of notice or any further consideration, will be bound indefinitely to further mortgages signed by the mortgagor at varying rates of interest and terms. The guarantor is without any control over the situation. The position adopted by the bank, if it is correct, could in the long run have serious consequences. Guarantors, once they become aware of the extent of their liability, will inevitably drop out of the picture with the result that many simple and straightforward loans will not proceed since they could not be secured by guarantors.

8 In my view, it is eminently fair that if there is any ambiguity in the terms used in the guarantee, the words of the documents should be construed against the party which drew it, by applying the *contra proferentem* rule. This is a sensible and satisfactory way of approaching the situation since the lending institutions that normally draft these agreements can readily amend their documents to ensure that they are free from ambiguity. The principle is supported by academic writers.

9 G. H. L. Fridman, in his text *The Law of Contract in Canada* (3rd ed. 1994), at pp. 470-71, puts the position in this way:

> The *contra proferentem* rule is of great importance, especially where the clause being construed creates an exemption, exclusion or limitation of liability.
>
> . . . . .
>
> Where the contract is ambiguous, the application of the *contra proferentem* rule ensures that the meaning least favourable to the author of the document prevails.

Professor McGuinness, in his work *The Law of Guarantee, supra*, at pp. 612-13 explains the application of the rule as follows:

. . . . .

> the *contra proferentum* rule of construction (under which the provisions of an agreement that were inserted by a party for his own protection are subjected to a strict interpretation) provides one method through which the courts can restrict the scope of extremely broad provisions which purport to eliminate the rights of the surety. The justification for giving such provisions a narrow construction is clear: it is one thing to say that a party may, if he so chooses, agree to assume an excessive burden, and to waive the rights which the law generally recognizes as existing for his protection. It is quite another thing to assume that parties necessarily intend to enter into such obligations. The more natural assumption is the exact opposite. Where the guarantee was drafted by the creditor, and there is any ambiguity or imprecision in the terms of a provision which purports to limit the rights of a surety, it is only fair that the ambiguity be resolved against the party who prepared the document. If the creditor wishes to take away a right belonging to the surety, he should use clear language in the document.

McGuinness further explains the principle and its justification in these words at p. 244:

> Where it is the creditor who drafted the terms of the contract, consistence of principle would call for the guarantee to be construed narrowly and thus in effect against the creditor. It is submitted that the correct rule is that where there is only one reasonable interpretation that the words used in a guarantee can bear, the guarantee should be given that interpretation. In such a case, the *contra proferentum* rule would not come into play. Where, however, the agreement is ambiguous in the sense that there are two or more interpretations that might reasonably be given to its terms, the guarantee should be construed against the party who prepared it or proposed its adoption, whether that be the creditor or the surety.

10 As well, this Court has stated that the surety is a favoured creditor in the eyes of the law whose obligation should be strictly examined and strictly enforced. This appears from the reasons of Davis J. in *Holland-Canada Mortgage Co. v. Hutchings*, [1936] S.C.R. 165, at p. 172:

> A surety has always been a favoured creditor in the eyes of the law. His obligation is strictly examined and strictly enforced.

He goes on to say:

> "It must always be recollected," said Lord Westbury in *Blest v. Brown* (1862), 4 De G.F. & J. 367, at 376,
>
> in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he has entered into. If that written engagement be altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."
>
> Apart from any express stipulation to the contrary, where the change is in respect of a matter that cannot "plainly be seen without inquiry to be unsubstantial or necessarily beneficial to the surety,"
>
> . . . . .
>
> the surety, if he has not consented to remain liable notwithstanding the alteration, will be discharged whether he is in fact prejudiced or not.

Those comments are as true today as they were at the time they were written.

11 The appellant contends that this principle of interpretation has been abandoned and for that proposition relies upon the reasons of this Court in *Bauer, supra*. I cannot agree with this submission. The issue in that case was whether a particular clause within the guarantee was an exemption clause and thus subject to the special rules of construction applying to those clauses. It was held that the clause in question was not, in fact, an exemption clause. The general question as to whether the scope of surety obligations should be construed strictly was not explicitly addressed by the Court. It is also significant that the Alberta

Court of Appeal in *Alberta Opportunity Co. v. Schinnour*, [1991] 2 W.W.R. 624, found that the clause they were considering was analogous to that in issue in *Bauer*. Nonetheless they determined, correctly in my view, that it should be interpreted in accordance with the general rules of construction. Those rules should, in my view, include the *contra proferentem* rule and thus will be generally applicable to guarantee or surety clauses.

12 The position set out in *Holland-Canada Mortgage Co.*, *supra*, was confirmed in *Johns-Manville Canada Inc. v. John Carlo Ltd.*, [1983] 1 S.C.R. 513. At p. 521 of that case, it was said that "accommodation sureties" are those who entered into the guarantee "in the expectation of little or no remuneration and for the purpose of accommodating others or of assisting others in the accomplishment of their plans." The protection offered to this class of guarantors was explained also at p. 521:

> In respect of them, the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety.

13 These sureties were contrasted with "compensated sureties" whose business consists of guaranteeing performance and payment in return for a premium. With respect to this latter class of sureties it was held at p. 524:

> in the case of the compensated surety it cannot be every variation in the guaranteed contract, however minor, or every failure of a claimant to meet the conditions imposed by the bond, however trivial, which will enable the surety to escape liability.

Although the primary issue in the case was the distinction between accommodation sureties and those who receive compensation, these words nonetheless represent the considered opinion of the Court. In my view, they are correct.

14 I would note in passing that the guarantor in this case comes within the class of accommodation sureties.

15 It follows that if there is a doubt or ambiguity as to the construction or meaning of the clauses binding the guarantor in this case, they must be strictly interpreted and resolved in favour of the guarantor. Further, as a result of the favoured position of guarantors, the clauses binding them must be strictly construed.

16 Finally, when the guarantee clause is interpreted, it must be considered in the context of the entire transaction. This flows logically from the bank's position that the renewal agreement was an integral part of the original contract of guarantee. This position I believe is correct. It follows that fairness demands that the entire transaction be considered and this must include the terms and arrangements for the renewal agreement.

Application of the Principles of Interpretation to the Guarantee and Renewal Agreement Presented in this Case

17 It may be helpful to set out once again clauses 34 and 7 of the original guarantee agreement and recall that the renewal agreement called for the signature of the guarantor.

Clause 34: Guarantee and Indemnity

> IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertaining to this mortgage well and truly do, observe, fulfil and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and

> without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in full of the principal sum and all other moneys hereby secured.

Clause 7: Renewal or Extension of Time

> PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.

18 Counsel for the appellant contended that there was no ambiguity in these clauses and that they made it clear that the respondent's obligations as guarantor continued in spite of the renewal agreement. Counsel for the respondent came to exactly the opposite conclusion. He submitted that on the plain meaning of the clauses, the guarantor was not bound. A somewhat cynical observer might conclude that it should not be unexpected that counsel for the opposing parties would take these positions. However, the same conclusion cannot possibly be reached with regard to the judges who have considered these clauses. The trial judge and the minority in the Court of Appeal came to the same conclusion as the appellant. The majority in the Court of Appeal came to the opposite conclusion. That skilled and experienced judges could come to opposite conclusions with regard to the clauses might well lead one to suspect that the meaning of the clauses is unclear; in a word, they are ambiguous. Of course, if that be the case, the *contra proferentem* rule should be applied. However, for the reasons set out above, my view is that the clauses unambiguously indicate that the respondent was not bound by the renewal agreement. If I am in error and if the *contra proferentem* rule were applied it would strengthen and support my conclusion as to the interpretation of the clauses.

The Effect of the "Principal Debtor Obligation" Set Out in Clause 34

19 In *Canadian Imperial Bank of Commerce v. Patel* (1990), 72 O.R. (2d) 109 (H.C.), at p. 119, it was held that a principal debtor clause converts a guarantor into a full-fledged principal debtor. I agree with this conclusion. If the guarantor is to be treated as a principal debtor and not as a guarantor, then the failure of the bank to notify the respondent of the renewal agreement and the new terms of the contract must release him from his obligations since he is not a party to the renewal. This conclusion does not require recourse to equitable rules regarding material variation of contracts of surety. It is simply apparent from the contract that a principal debtor must have notice of material changes and consent to them. Of course, a guarantor who, by virtue of a principal debtor clause, has a right to notice of material changes, may, by the terms of the contract, waive these rights. However, in the absence of a clear waiver of these rights, such a guarantor must be given notice of the material changes and, if he is to be bound, consent to them.

20 The appellant contended that the words in clause 34 which provide "the said guarantors

. . . . .

covenant, promise and agree as principal debtors and not as sureties". indicate that the respondent is bound as a principal debtor yet without any of the usual rights and benefits of a principal debtor such as notice with regard to renewal, and the opportunity to negotiate and consent to its terms. To take this position seems to me to be unfair and unreasonable.

21 The mortgagor as a principal debtor must be given notice of the renewal agreement. This is evident from the requirement that the mortgagor sign the renewal agreement. The principal debtor clause converts the guarantor into a full-fledged principal debtor with all the duties and obligations which that term implies. If the guarantor is to be responsible to the lending institution as a "full-fledged principal debtor" then he or she is entitled to the same notice of a renewal agreement as the principal debtor mortgagor. That is undoubtedly the reason the standard form of the renewal agreement provides a place for the guarantor to sign. Not just fairness and equity but the designation of the guarantor as a principal debtor leads to the conclusion that the guarantor

must have notice of and agree to the renewal before he is bound by its terms. A guarantor reading clause 34 would be led to believe that as a principal debtor he would have the same notice of a renewal agreement as would the principal debtor mortgagor. If a lending institution wishes to have the guarantor obligated as a principal debtor, then the guarantor must be entitled to the same rights as the principal debtor which would include both notice and agreement as a party to a renewal.

22 Even if it were thought that the principal debtor clause does not convert the guarantor into a principal debtor, the equitable or common law rules relieving the surety from liability where the contract has been materially altered by the creditor and the principal debtor without notice to the surety would apply, in the absence of an express agreement to the contrary. The question is whether in this case, either as principal debtor or as surety, the guarantor has expressly contracted out of the normal protections accorded to him. This question must be determined as a matter of interpretation of the clauses of the agreement, through consideration of the transaction as a whole, and the application of the appropriate rules of construction.

Effect of the Renewal Agreement

23 In my view, the renewal agreement must be considered an integral part of the transaction. There are two aspects of the renewal agreement itself which lead to the conclusion that the guarantor is not to be bound. First, the renewal agreement is once again a standard form prepared and used by the bank and it calls for the signature of the guarantor. It must be assumed that all these standard form agreements prepared by the bank as a lending institution were meant to mesh with and complement each other. The requirement by the standard form of a signature by the guarantor then supports the respondent's position that he was not, by the terms of the original loan agreement, deprived of the equitable and common law protection ordinarily extended to guarantors. Rather, he was expected to sign the renewal agreement. His signature would confirm his notice of the agreement and his consent to it.

24 The appellant submitted that the renewal agreement is simply an extension of the original mortgage which was contemplated by the terms of that mortgage. This submission should not be accepted. The original mortgage was for a period of three years, a term not uncommon in today's mortgage market. The renewal agreement provides for an agreement as to the term of a new mortgage and the new rate of interest. The document itself appears to indicate that the renewal agreement constitutes a new mortgage arrangement. This can be gathered from the provision which reads:

> All the covenants, conditions, powers and matters in the said mortgage shall apply to and *form part of this agreement, except those amended herein*. [Emphasis added.]

25 The standard form indicates that many variations in the original mortgage are to be agreed upon. For example, the mortgagor can select the length of the term of the loan; the rate of interest is to be agreed upon between the mortgagor and the lending institution. If the renewal agreement is no more than the extension of the original mortgage, the mischief that that position creates becomes obvious. What if the renewal provided for an extension of the term to 25 years at a substantially increased rate of interest? What if the situation with regard to the security had changed remarkably as a result of new zoning regulations or a new building code or there had been a marked change of use in the surrounding lands? To say that despite the changed circumstances the guarantor is, beyond the strict terms of the agreement, bound without any notice to an indefinite guarantee of a mortgage containing substantial changes in the term of the loan and the interest rate is worrisome indeed.

26 Further, it is significant that the renewal agreement states that the terms of the old mortgage will form part of the agreement. By doing so it indicates that this is a new agreement rather than merely an extension of an old agreement. This serves to strengthen my view that the respondent was no longer bound by the terms of the original guarantee upon the execution without notice to him of the renewal agreement.

Significance of Clause 7 of the Original Agreement

27 The reasons of Finlayson and Carthy JJ.A. forming the majority of this case in the Court of Appeal are in my view correct. Finlayson J.A. wrote ((1994), 20 O.R. (3d) 499, at p. 513):

> The reference in cl. 7 to the renewal agreement taking priority over subsequent encumbrancers indicates to me that the mortgagee was not directing its corporate mind to the guarantors when negotiating this document
>
> . . . . .
>
> Certainly, there is no express reference to the renewal agreement in cl. 34. On balance, and keeping in mind that these documents were all drawn and presented by the mortgagee, I conclude that the renewal agreement was a material change to the original mortgage debt not contemplated by the language of the guarantee and has the effect of releasing the guarantors from their obligations as sureties.

28 Carthy J.A.'s interpretation of the contract supports that of Finlayson J.A. but emphasises different aspects. First, he stresses that clause 34 makes no reference to renewals. In his view, this is significant because it is a term commonly used with respect to mortgages and it is explicitly used in other clauses such as clause 7. Moreover, he found that clause 34 is perfectly capable of coherently referring to changes in the terms within the period of the original mortgage itself.

29 It is, I think, noteworthy and telling that clause 7 specifically distinguishes between extensions and renewals both in its heading and its text. This leads me to conclude that these terms do *not* refer to the same eventuality. Since clause 7 so carefully distinguishes between extensions and renewals, they must be referring to different situations. Both *Black's* legal dictionary and *The Oxford Dictionary* give separate and distinct definitions of the terms extension and renewal. *Black's Law Dictionary* (5th ed. 1979) at p. 1165 defines "renewal" as "[t]he act of renewing or reviving. A revival or rehabilitation of an expiring subject; that which is made anew or re-established" while it defines "extension" at p. 523 as "[a]n increase in length of time (*e.g.* of expiration date of lease, or due date of note). The word 'extension' ordinarily implies the existence of something to be extended." This clearly indicates that an "extension" refers to extending an agreement which already exists, while a renewal refers to the revival of an agreement which has expired. This distinction is confirmed by *The Concise Oxford Dictionary of Current English* (9th ed. 1995) at p. 476, which defines "extend" as "lengthen or make larger in space or time" while "renew" is defined as "revive; regenerate; make new again, restore to the original state." It follows that the failure to refer to a renewal agreement or even to a renewal in clause 34 strongly suggests that it has no application to a renewal. If the lending institutions wished to have clause 34 apply to renewals, it would be a simple matter to use the specific term which is well known in the commercial world of mortgages.

30 Finally, the renewal agreement refers to incorporating the mortgage terms into the agreement. Clause 3 of the renewal agreement provides that:

> All the covenants, conditions, powers and matters in the said mortgage shall apply to and *form part of this agreement, except those amended herein*. [Emphasis added.]

This, too, suggests that the renewal agreement is a new agreement and not an extension, since the original mortgage terms are only incorporated to the extent that they are not altered by the renewal. Although clause 34 contemplates a change in the interest rate, an extension would not ordinarily involve an alteration of the original terms, but rather a continuation of the same terms over a longer time period.

31 The appellant sought comfort from *Co-operative Trust Co. of Canada v. Kirkby*, [1986] 6 W.W.R. 90 (Sask. Q.B.). In that case, Armstrong J. noted that in some cases, a mortgage extension or renewal agreement could have exactly the same effect as a new mortgage. However, he concluded, correctly I believe, that on the facts of that case, there was no evidence to support the contention that the mortgage extension agreement was in fact a new mortgage. In my view, such a determination will involve a review of the particular guarantee clause and the whole transaction between the parties. The appellant also referred to the decisions in *Royal Trust Corp. of Canada v. Reid* (1985), 40 R.P.R. 287 (P.E.I. C.A.), and *Veteran Appliance Service Co. v. 109272 Developments Ltd.* (1986), 67 A.R. 117 (Q.B.). In both those decisions, the terms renewal and extension agreement were used interchangeably. Yet I think that it becomes clear in reading both these decisions that this was not a central or major issue in the case. To repeat, it will be a question of fact to be determined on the particular transaction, agreement and circumstances presented in each case whether a renewal agreement is a new contract or simply an extension of the existing agreement.

32 It follows I find that the words used in clauses 34 and 7 are sufficiently clear to conclude that the guarantor did not waive his equitable and common law rights either as a principal debtor or as a guarantor. The renewal agreement which was entered into without notice to, or the agreement of, the guarantor materially altered the provisions of the original loan agreement. The guarantor was thereby relieved of his obligation.

33 If the wording of the two clauses should be found to be ambiguous, the *contra proferentem* rule must be applied against the bank. The wording of clause 34 binding the guarantor to variations in the event of an extension of the mortgage should not be applied to bind the guarantor to a renewal without notice since there is ambiguity as to whether clause 34 applies to renewals at all. In these circumstances as well, the guarantor should be relieved of liability.

Disposition

34 I would dismiss the appeal with costs.

***L'Heureux-Dubé J.* (dissenting):**

35 I substantially agree with my colleague Justice Iacobucci's reasons and the result he reaches. I have only one comment which relates to the judicial interpretation methodology relied upon by my colleague.

36 The "modern contextual approach" is, in my view, the standard, normative approach to judicial interpretation, and one may exceptionally resort to the old "plain meaning" rule in appropriate circumstances. One example of the latter is statutory interpretation in the area of taxation, where the words and expressions used in legislative provisions quite often have a well-defined "plain meaning" within the business community.

37 In the case at bar, our court is called upon to determine the appropriate definition of the phrase "the giving of time for payment

. . . . .

or the varying of the terms of payment", in the context and factual situation of the instant case.

38 My colleague decides the issue by going through a contractual interpretation exercise as follows. Firstly, the impugned contractual provisions are reviewed in the context of the whole contract. Secondly, the issue of the *contra proferentem* rule is addressed. Thirdly, the issue of the difference between "accommodating" and "compensated" sureties is examined. Fourthly, an authoritative academic text is relied upon: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996).

39 Thus, after reviewing the provisions in their immediate context, the contract as a whole, the consequences of proposed interpretations, the applicable presumptions and rules of interpretation, and admissible external aids, my colleague comes to a contextual interpretation of the impugned phrase. I fully agree with both the process used and the conclusions he arrived at. However, with respect, that process is not an application of the "plain meaning" approach: in fact, the "modern contextual approach" to judicial interpretation is the one that is actually used in the instant case.

40 I agree with my colleague that "[t]he rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally". But *the rules which govern the interpretation of deeds and contracts generally* are essentially the same as *the rules for statutory interpretation*. As Lord Blackburn stated in *River Wear Commissioners v. Adamson* (1877), 2 App. Cas. 743 (H.L.), at pp. 763-65:

. . . . .

> I shall therefore state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing; and a statute is an instrument in writing. *In all cases* the object is to see what is the intention expressed by the words used.

. . . . .

> In construing written instruments I think the same principle applies. In the case of wills the testator is speaking of and concerning all his affairs;
>
> In the case of a contract, the two parties are speaking of certain things only.
>
> . . . . .
>
> [In both cases] the Court
>
> . . . . .
>
> declares what the intention, indicated by the words used under such circumstances, really is.
>
> And this, as applied to the construction of statutes, is no new doctrine.
>
> . . . . .
>
> My Lords, *mutatis mutandis, I think this is applicable to the construction of statutes as much as of wills*. And I think it is correct. [Emphasis added.]

41 Therefore, the "modern contextual approach" for statutory interpretation, with appropriate adaptations, is equally applicable to contractual interpretation. Statutory interpretation and contractual interpretation are but two species of the general category of judicial interpretation. In the instant case, the methodological reference provided by R. Sullivan in *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131, applies equally to contractual interpretation:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of [that which is to be judicially interpreted] in its *total context*, having regard to [its] purpose
>
> . . . . .
>
> , the *consequences of proposed interpretations*, the *presumptions and special rules of interpretation*, as well as *admissible external aids*. In other words, the *courts must consider and take into account all relevant and admissible indicators of [*
>
> . . . . .
>
> *]meaning. After taking these into account, the court must them adopt an interpretation that is appropriate*. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the [
>
> . . . . .
>
>]text; (b) its efficacy, that is, its promotion of the [
>
> . . . . .
>
>]purpose; and (c) its acceptability, that is the outcome is reasonable and just. [Emphasis added.]

42 This methodology was indeed the one followed by my colleague. In the case at bar, however, the resulting interpretation did not really come from the "plain meaning" of the words, but from their "meaning in law", because they are "legal terms of art". As Lord Diplock explained in *Sydall v. Castings Ltd.*, [1967] 1 Q.B. 302 (C.A.), at pp. 313-14:

> Documents which are intended to give rise to legally enforceable rights and duties contemplate enforcement by due process of law which involves their being interpreted by courts composed of judges, each one of whom has his personal idiosyncrasies of sentiment and upbringing, not to speak of age. Such documents would fail in their object if the rights and duties which could be enforced depended on the personal idiosyncrasies of the individual judge or judges upon whom the task of construing them chanced to fall. It is to avoid this that lawyers, whose profession is to draft and to construe such documents, have been compelled to evolve an English language, of which the constituent words and phrases are more precise in their meaning than they are in the language of Shakespeare or of any of the passengers on the Clapham omnibus this morning. *These words and phrases to which a more precise meaning is so ascribed are called by lawyers "terms of art" but are in popular parlance known as "legal jargon*." [Emphasis added.]

43 After having specified the nature of "legal terms of art", Lord Diplock stated the basic rule of judicial interpretation, as well as the methodology, that are applicable in that context (at p. 314):

> The words and phrases
>
> . . . . .

> which are "terms of art" must therefore be given the meaning which attaches to them as terms of art:
>
> . . . . .
>
> The lexicon of terms of art is to be found in decided cases and in textbooks consulted by legal practitioners.

44 It is quite obvious that where courts expound judicial interpretations of "legal terms of art" using such external aids as legal textbooks, the resulting outcome cannot appropriately be labelled a "plain meaning" definition.

45 Where an instrument uses a legal term of art, there is a presumption that the term of art is used in its correct legal sense: *Inland Revenue Commissioners v. Williams*, [1969] 1 W.L.R. 1197 (Ch.; Megarry J.).

46 This is the presumption that is resorted to by my colleague Iacobucci J. when he makes use of admissible external aids — i.e.: McGuinness, *supra*, — in determining the correct meaning of the phrase "to give time". As McGuinness reviews extensive case-law authority that establishes the generally accepted "meaning in law" of these "legal terms of art", it is an admissible external aid to judicial interpretation: see *Driedger, supra*, at pp. 428, 468 and 474; see also P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 449-53 and 457-58.

47 Subject to the above considerations, I concur with my colleague's disposition of the appeal.

***Iacobucci J.* (dissenting) (*Gonthier J.* concurring):**

48 This appeal raises questions regarding the proper method for interpreting guarantees. Specifically, we are asked to determine whether the wording of the contract in issue was clear enough to waive the guarantors' equitable right to be released when the principal loan was renewed.

I. Background

49 On February 20, 1987, the appellant Manulife Bank of Canada (at the time known as The Regional Trust Company) made a loan of $275,000 to Dina Conlin. The loan was for a term of three years and bore interest at the rate of 11.5 percent per annum. Dina Conlin provided security for the loan in the form of a first mortgage against lands located in Welland, Ontario.

50 The terms of the loan required the signature of two guarantors: the respondent John Joseph Conlin, who was the mortgagor's husband; and Conlin Engineering and Planning Limited, an Ontario corporation. In clause 34 of the mortgage agreement, the two promised, "as principal debtors and not as sureties", to pay the money secured by the mortgage. They further agreed to all of the particular conditions and stipulations of the mortgage which were binding upon the mortgagor.

51 The guarantee was to remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". The liability of the guarantors was stated to be continuous, subsisting "until payment in full of the principal sum and all other moneys hereby secured".

52 In 1989, the respondent and Dina Conlin separated.

53 In 1990, shortly before the mortgage was to mature, Dina Conlin and the appellant executed an agreement which renewed the mortgage for a further three- year term at a yearly interest rate of 13 percent. The renewal forms provided spaces for the signature of the "registered owner" and the "guarantor", but the agreement was signed only by Dina Conlin. The respondent had no notice or knowledge of the renewal.

54 In March of 1992, Dina Conlin defaulted on the mortgage.

55 After fruitless efforts to sell the Welland lands, the bank initiated proceedings for summary judgment against Dina Conlin and the guarantors. The bank claimed the principal owing under the mortgage with interest at the rate of 13 percent per annum. Judgment was obtained on the motion. However, a majority of the Court of Appeal set aside the judgment and dismissed the action against the respondent: (1994), 20 O.R. (3d) 499, 120 D.L.R. (4th) 234, 41 R.P.R. (2d) 283, 75 O.A.C. 117, 17 B.L.R. (2d) 143.

II. Relevant Contractual Provisions

56

> **(7) Renewal or Extension of Time**
>
> PROVIDED that no extension of time given by the Mortgagee to the Mortgagor, or anyone claiming under it, or any other dealing by the Mortgagee with the owner of the equity of redemption of said lands, shall in any way affect or prejudice the rights of the Mortgagee against the Mortgagor or any other person liable for the payment of the monies hereby secured, and that this Mortgage may be renewed by an agreement in writing for any term with or without an increased rate of interest, or amended from time to time as to any of its terms including without limitation increasing the interest rate or principal amount notwithstanding that there may be subsequent encumbrances. And it shall not be necessary to register any such agreement in order to retain the priority of this Mortgage so altered over any instrument delivered or registered subsequent to this Mortgage.
>
> **(34) Guarantee and Indemnity**
>
> IT IS A CONDITION of the making of the loan secured by the within mortgage that the covenants set forth herein should be entered into by us, the Guarantors, namely John Joseph Conlin and Conlin Engineering & Planning Ltd. and now we the said Guarantors, and each of us, on behalf of ourselves, our respective heirs, executors, administrators and assigns, in consideration of the making of the said loan by the Mortgagee, do hereby jointly and severally covenant, promise and agree as principal debtors and not as sureties, that we and each of us shall and will well and truly pay or cause to be paid to the Mortgagee, the principal sum and all other moneys hereby secured, together with interest upon the same on the days and times and in the manner set forth in this mortgage, and will in all matters pertaining to this mortgage well and truly do, observe, fulfill and keep all and singular the covenants, provisos, conditions, agreements and stipulations contained in this mortgage, and do hereby agree to all the covenants, provisos, conditions, agreements and stipulations by this mortgage made binding upon the Mortgagor; and do further agree that this covenant shall bind us, and each of us, notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment thereof or the rate of interest hereon or the giving of a release or partial release or covenant not to sue to any of us; and we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities without notice to us or any of us and without relieving us from our liability hereunder, which shall be a continuous liability and shall subsist until payment in full of the principal sum and all other moneys hereby secured.

III. Judgments Appealed From

A. Ontario Court (General Division)

57 In a very succinct judgment, Killeen J. granted the bank's motion for summary judgment against both Dina Conlin and the respondent. He found that, according to the "clear and unequivocal language" of clauses 7 and 34, the respondent was liable under his guarantee despite the renewal of the mortgage and despite the increase in the rate of interest: "In my view, there is no escape for the guarantor".

B. Ontario Court of Appeal (1994), 20 O.R. (3d) 499

(a) Finlayson J.A.

58 Finlayson J.A. first considered the following language in clause 34: "the said guarantors

. . . . .

covenant, promise and agree *as principal debtors and not as sureties*

. . . . .

" (emphasis added). He found an apparent inconsistency between this last phrase and the fact that, on the face of the contract, the respondent appeared to be signing as a surety and not as a principal debtor. Having briefly discussed the difference between contracts of indemnity and contracts of guarantee, Finlayson J.A. concluded that it was unnecessary to resolve the exact nature of the guarantor's status, stating: "the reference to the guarantor as principal debtor can be disregarded for the purposes of this appeal" (p. 511).

59 Finlayson J.A. then turned to the main issue of whether the renewal agreement extinguished the respondent's liability under his guarantee. He noted that, in equity, either an increase of the interest rate or an extension of the mortgage's term constitutes a material change of the original contract which will extinguish a guarantor's liability.

60 Therefore, it was necessary to determine whether clause 34 constituted a waiver, on the part of the sureties, of these equitable rights. After reviewing several cases where the language of a particular guarantee was held to embrace a renewal agreement, Finlayson J.A. stated that "each of these cases must be confined to its own wording" (pp. 511-12). Furthermore, the language of the Manulife guarantee clause did not, in the opinion of Finlayson J.A., clearly contemplate the renewal agreement. Accordingly, the material change to the loan, effected through the renewal agreement, released the guarantors from their respective obligations.

(b) Carthy J.A. (concurring with Finlayson J.A. in the result)

61 Carthy J.A. began by stating that the law has always treated sureties as "favoured" creditors. While a surety can contract out of his legal rights, the language used to do so must be clear.

62 Applying a "strict" interpretation to the loan agreement, Carthy J.A. concluded that the guarantee agreement was not "explicit enough to embrace a renewal" (p. 515). Furthermore, he found that the wording of clause 7 did not stipulate clearly that the loan could be renewed by an agreement which was not signed by the guarantors. The guarantors had not waived their equitable rights and, accordingly, the renewal agreement extinguished their liability.

(c) Robins J.A. (dissenting)

63 Robins J.A. first reviewed the rule in *Holme v. Brunskill*, [1877] 3 Q.B.D. 495 (C.A.) which states that any material variation of the principal contract without the surety's consent will discharge the surety. He went on to note that a guarantor can contract out of this equitable protection.

64 Robins J.A. then looked at the terms of clause 34 which stated that the guarantee would remain binding "notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon". He concluded that these words clearly contemplated both the extension of the mortgage's term and the increase in the interest rate, as implemented by the renewal agreement. In other words, by clause 34, the guarantors waived their equitable rights to be released from their obligations in the event of these particular changes to the loan contract.

65 Having decided that the respondent was liable as a guarantor, Robins J.A. did not find it necessary to consider whether the guarantors were, in fact, "principal debtors".

66 However, while he found the respondent to be liable under the guarantee, Robins J.A. would have varied the order of the motions court judge such that Conlin would only be liable for the principal amount secured under the mortgage and interest thereon calculated at 11.5 percent per annum. He based this variation on the finding that the guarantors agreed to be liable for the moneys secured *under the original mortgage*. In his view, although they agreed to be liable notwithstanding any change in the interest rate, they did not agree to be liable for that higher rate of interest.

IV. Issues

67 Before our Court, the appellant raised a threshold issue of jurisdiction. It claimed that the Court of Appeal had erred in dismissing the action when that order was not requested by either party at the motion for summary judgment or on appeal and when neither counsel nor the courts ever discussed this form of relief. Accordingly, there are two major issues before us:

> 1. Did the majority of the Ontario Court of Appeal exceed its jurisdiction in allowing the appeal and dismissing the action, rather than sending the matter back to trial?
>
> 2. Under the terms of the loan agreement, was the respondent John Joseph Conlin released from his promise to pay the principal sum and other moneys secured by the mortgage, when the term of the mortgage was extended and the rate of interest increased, without notice to the respondent?

V. Analysis

A. Did the Court of Appeal have jurisdiction to dismiss the action as against the respondent?

68 Section 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, states as follows:

> *134.* — (1) Unless otherwise provided, a court to which an appeal is taken may,
>
> (a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;
>
> (b) order a new trial;
>
> (c) make any other order or decision that is considered just.

69 The order originally appealed from was granted on a motion for summary judgment brought by the bank. The respondent Conlin had brought no cross-motion for summary judgment dismissing the action. There had been no examination for discovery and no trial. Given that an appeal court may not make an order which the trial judge would not have had the jurisdiction to make, *Rotenberg v. York (Borough) (No. 2)* (1976), 13 O.R. (2d) 101 (C.A.), at p. 110, the appellant argued before us that the Court of Appeal had jurisdiction only to set aside the order for summary judgment and send the matter back for trial. The question to be answered, therefore, is whether the motions court judge had the jurisdiction to dismiss the action against the respondent.

70 The original motion for summary judgment was brought pursuant to Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 20.04(2) states:

> Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

Rule 20.04(4) states:

> Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly,
>
> . . . . .

The interpretive guide to the *Rules* is set out in Rule 1.04(1):

> These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

71 Considered in light of Rule 1.04(1), in my opinion, Rules 20.04(2) and (4) gave Killeen J. the jurisdiction to dismiss the action against the respondent. The motions court judge could either have found that there was no genuine issue for trial or he could have found that the only genuine issue was an issue of law. In either case, it would have been within his jurisdiction and, by extension, within the jurisdiction of the Court of Appeal, to dispose of the matter by dismissing Manulife's claim.

72 However, the appellant further argues that Finlayson and Carthy JJ.A. erred in basing their decisions on the unproven assertion that Conlin had never consented to the 1990 renewal agreement. The appellant claims that it had no opportunity to fully test Conlin's affidavit evidence with regard to consent and that, therefore, it was denied the right to have its case fully heard.

73 I do not agree with this assertion. The appellant did, in fact, have the opportunity to test Conlin's evidence. Rule 39.02(1) of the *Rules of Civil Procedure* says that a party to a motion may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion. However, the bank chose not to exercise this right and left Conlin's evidence unchallenged. Therefore, in my opinion, the appellant was not deprived of its right to have its case fully heard and to test all of the respondent's evidence.

74 This case is far from the circumstances that arose in *Keltic Leasing Corp. v. Curtis* (1993), 133 N.B.R. (2d) 73 (C.A.). In that case, the trial judge erred in making a finding of fact on a question which had not been addressed at all by the parties. The Court of Appeal found that this deprived the plaintiff of its right to adduce evidence in support of its position. However, in the case before us, the question of Conlin's consent, or lack thereof, to the renewal agreement was addressed before Killeen J. and, as discussed above, the appellant had full opportunity to counter this with evidence to the contrary.

75 For these reasons, it is my view that there is no reason to interfere with the Court of Appeal's procedural handling of this case.

B. Under the terms of the loan agreement, was the respondent released from his promise to pay the principal sum and other moneys secured by the mortgage when the term of the mortgage was extended and the rate of interest increased without the respondent's consent?

76 It is well accepted that any material variation of the terms of a contract between debtor and creditor, which is prejudicial to the guarantor and which is made without the guarantor's consent, will discharge the guarantor: *Holme v. Brunskill*, *supra*, at pp. 505-6; *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551, at p. 562. An increase in the rate of interest and an extension of the time for payment are both material changes to the loan agreement sufficient to discharge a surety: K. P. McGuinness, *The Law of Guarantee* (2nd ed. 1996), at ¶¶10.23 and 10.51.

77 However, this right to be discharged as a result of a material variation of the principal contract can be waived by the surety. As McIntyre J. said in *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102, at p. 107, "it is open to the parties to make their own arrangements, and a surety is competent to contract himself out of the protection of the equitable rule". The question to be resolved, therefore, is whether clause 34 amounts to a waiver of the respondent's equitable rights. Before dealing with this question, I believe it would be helpful to discuss briefly some of the interpretive principles relating to guarantees.

a) Interpretive principles relating to guarantees

78 In my opinion, there is no special rule of construction for guarantees. Guarantee contracts are basically contracts, like any others, and should be construed according to the ordinary rules of contractual interpretation. As McGuinness states, *supra*, at p. 238, "The rules respecting the interpretation of guarantees are essentially the same as the rules which govern the interpretation of deeds and contracts generally."

79 The cardinal interpretive rule of contracts is that the court should give effect to the intentions of parties as expressed in their written document. As Estey J. said in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at p. 899, quoting Meredith J.A. in *Pense v. Northern Life Assurance Co.* (1907), 15 O.L.R. 131 (Ont. C.A.), at p. 137: "[In all contracts], effect must be given to the intention of the parties, to be gathered from the words they have used." The court will deviate from the plain meaning of the words only if a literal interpretation of the contractual language would lead either to an absurd result or to a result which is "plainly repugnant to the intention of the parties": McGuinness, *supra*, at p. 239; and see the reasons of Estey J. in *Consolidated Bathurst*, *supra*, at p. 901.

80 When interpreting guarantees, like other contracts, the court may apply the *contra proferentem* rule where the wording of the guarantee supports more than one meaning. According to this rule, the ambiguity will be resolved in favour of the party who did *not* draft the contract. This is an interpretive rule of last resort, to be used only when all other means of ascertaining the intentions of the parties, as expressed by their written contract, have failed. See the words of Cartwright J. in *Reliance Petroleum Ltd. v. Stevenson*, [1956] S.C.R. 936, at p. 953. As Lindley L.J. said in *Cornish v. Accident Insurance Co.* (1889), 23 Q.B.D. 453 (C.A.), at p. 456:

. . . . .

> this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty.

81 There is some suggestion in the case law that guarantee agreements entered into by an "uncompensated" or "accommodating" surety will be interpreted more strictly than those entered into by a compensated surety. In this respect, most notable is the decision of the Court in *Johns-Manville Canada Inc. v. John Carlo Ltd.*, [1983] 1 S.C.R. 513.

82 In that case, the respondent, Johns-Manville, had entered into a contract with a supplier. That supplier had entered into a payment bond which named the appellant, Citadel, as guarantor of the supply contract. A condition of the bond was that no suit could be commenced under the bond without proper notice being given to the appellant surety and to the supplier. The supplier defaulted and the respondent commenced an action against the guarantor, Citadel. The respondent gave proper notice to the guarantor. However, while notice was given to the supplier, it did not strictly comply with the requirements of the bonding agreement. The guarantor denied liability under the bond on the basis that the notice provisions of the bond had not been complied with.

83 The Court rejected this argument and held that the guarantor was liable under the bonding agreement despite the respondent's failure to comply strictly with the terms of the contract. The basis for the decision was that guarantee agreements entered into for valuable consideration should be interpreted according to the ordinary rules of contractual construction. In *obiter*, McIntyre J., at pp. 521-22, went on to suggest that a different, stricter rule would apply to guarantors who had not received compensation:

> In respect of them [i.e. uncompensated sureties], the law has been astute to protect them by strictly construing their obligations and limiting them to the precise terms of the contract of surety. Any material variation in the terms of the guaranteed indebtedness and any extension of time or postponement of the debtor's obligation, or any discharge or relinquishment of any security for the debt without the consent of the surety will discharge him. In other words, courts have adopted the *strictissimi juris* construction of the surety contract
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> . . . . .
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> surety contracts should be more liberally construed in favour of claimants in the case of compensated sureties than in the case of accommodation sureties.

84 In my opinion, the above statement should be understood in the context in which it was made. In *Citadel General Assurance*, the issue was not one of contractual interpretation. Rather, it was a question of what consequences were to flow from a clear breach of the contract. For these reasons, it is my view that the comments in *Citadel General Assurance* are not a sufficient basis for holding generally that guarantee contracts should be subject to special, stricter rules of interpretation if the guarantor has not received compensation.

(b) Application of the rules of interpretation to the contract between Conlin and Manulife

85 In applying the above principles to this case, a number of sub-questions arise from the arguments of the parties which I now will address.

(i) Does clause 34 amount to a waiver of the respondent's equitable rights?

86 By clause 34, the guarantors agree to remain bound by the guarantee contract notwithstanding the giving of time for payment of the mortgage or the varying of the rate of interest.

87 The respondent argued that clause 34 does not include a waiver of the guarantors' right to be discharged in the event of a renewal of the mortgage. According to this argument, since the renewal agreement constituted a material change, it discharged the guarantors.

88 It is true, as the respondents contend, that clause 34 does not refer to "renewal" agreements by name. However, the clause does contain a clear waiver of the guarantors' right to be discharged in the event of an extension of time or an increase in the rate of interest:

. . . . .

> this covenant shall bind us, and each of us, notwithstanding the giving of time for payment of this mortgage or the varying of the terms of payment hereof or the rate of interest hereon

. . . . .

89 The respondent maintained that a renewal was not the same thing as the giving of time for payment. He pointed out that clause 7 uses the term "renewal" while clause 34 does not. According to this line of argument, if the parties had intended the guarantee agreement to include a waiver of the right of discharge in the event of a renewal of the mortgage, they would have said so explicitly in clause 34.

90 However, I do not find this argument persuasive. The plain ordinary meaning of the words, "the giving of time for payment

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or the varying of the terms of payment" encompasses the renewal agreement. Through this agreement, the appellant bank extended the term of the loan by three years and increased the rate of interest charged on the debt. I can see no support for the respondent's contention that the "giving of time for payment", as detailed in clause 34, does not include the giving of time for payment as effected by the renewal agreement.

91 In his book *The Law of Guarantee*, *supra*, at p. 556, McGuinness discusses the effect of agreements "to give time" to the principal debtor and says that the "giving of time" includes those agreements "which provide specifically for an extension of time for performance.

. . . . .

[for] further time in which to pay

. . . . .

the guaranteed debt". This is precisely what the renewal agreement accomplished and, thus, this is what was contemplated by the language of the guarantee agreement.

92 In other words, what we must consider is the substantive effect of the renewal agreement, rather than the form of the instrument by which it was executed. The parties did use a renewal agreement, but, at bottom, that renewal agreement extended the time for payment and increased the interest rate, events that are expressly covered in clause 34.

93 With respect, I do not agree with Carthy J.A. when he says that the words "notwithstanding the giving of time for payment" should be interpreted to refer only to forbearance by the bank to pursue remedies during the original term of the mortgage. This is a case where we should heed the warning of Lindley L.J. in *Cornish v. Accident Insurance Co.*, *supra*, and not use the *contra proferentem* doctrine in any guise to create a doubt, or to magnify an ambiguity. Like Killeen J., I am of the view that the plain wording of the agreement in question raises no real difficulty.

(ii) Under clause 34, did the appellant have to notify the guarantors of the renewal agreement?

94 One of the last phrases of clause 34 reads as follows: "we and each of us agree that the Mortgagee may waive breaches and accept other covenants, sureties or securities *without notice to us*" (emphasis added). By contrast, the preceding phrase which waives the guarantors' rights to be discharged in the event of certain material changes to the principal contract does not contain this phrase, "without notice to us". The respondent contends that this omission means that, if the bank failed to notify the guarantors of the relevant material changes, the guarantors would be discharged from their obligations. Because the respondent received no notice of the renewal agreement, he was released from his liability.

95 Again, I am unable to agree with this line of argument. As already stated, the language of clause 34 is clear: the guarantor unconditionally promises to remain bound notwithstanding the extending of time or the changing of the rate of interest charged. It is rather odd to infer a condition of notice when the undertaking is so clear and unambiguous. Of course, the parties could have included a requirement of notice, but, as the language of the waiver in clause 34 is so clear, they would have had to do so explicitly. It may be that the insertion of the words "without notice to us", in connection with the waiver of breaches and the accepting of other covenants, sureties or securities, was simply made out of an abundance of caution, but, regardless, this cannot affect the clear waiver relating to extending time and changing the interest rate.

(iii) What is the effect of the respondent promising "as a principal debtor and not as a surety"?

96 Clause 34 provides that the respondent and Conlin Engineering enter the agreement "as principal debtors and not as sureties". In his concurring judgment, Carthy J.A. reasoned that, as "principal debtors", the guarantors would be "expected" to be signatories to the renewal agreement. With respect, I do not agree.

97 I agree with Robins J.A.'s conclusion that the evident intention of the parties, in using this kind of language, was to preserve the liability of the surety even in circumstances where the principal obligation was no longer enforceable, although I express no opinion on whether the language is sufficient to accomplish such an objective. In any event, it is unnecessary to consider whether this clause was sufficient to turn clause 34 into an indemnity agreement, because I am of the opinion that the respondent is liable as a guarantor.

(iv) What is the significance of the fact that the renewal form provides a space for the guarantor's signature?

98 The respondent points to the fact that the renewal agreement had a space for the signature of the guarantor as proof that the reasonable expectations of the parties were that, in the absence of the guarantors' consent to a renewal agreement, any such agreement would discharge the guarantors. With respect, I do not agree.

99 Our primary task is to determine the meaning of the guarantee contained in clause 34. This agreement was entered into in 1987. The wording or form of another subsequent contract, entered into three years later, cannot change the meaning of the original agreement. In my opinion, the space for the guarantors' signature on the renewal agreement is not helpful in trying to interpret the guarantee contract.

(v) What exactly is the extent of the respondent's obligation?

100 The respondent promised to guarantee the payment of the money secured by the 1987 mortgage. In my view, the terms of that mortgage determine the extent of the respondent's liability. Clause 34 does include a waiver of the guarantors' rights to be discharged in the case of material variation of the terms of the loan agreement. However, the fact that the renewal agreement does not discharge the respondent does not mean that the respondent is liable for the money secured by that renewal agreement — a contract to which he never consented. In clause 34, the guarantors promise to pay "the principal sum and all other moneys *hereby secured*" (emphasis added), i.e. secured by the original mortgage agreement. In other words, the respondent is not liable for interest at the increased rate of 13 percent. Rather, his responsibility, as specified in the 1987 agreement, and as found by Robins J.A. in the Court of Appeal, is to repay the balance owing on the principal sum with interest charged at the rate of 11.5 percent.

VI. Disposition

101 For the foregoing reasons, I would allow the appeal, with costs here and below, set aside the judgment of the Court of Appeal, and substitute therefor an order to the effect that the respondent is liable under his guarantee to pay the balance owing on the principal amount with interest at 11.5 percent per annum.

Appeal dismissed.