Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC

Applicants

RESPONDING FACTUM OF DORAL HOLDINGS LIMITED and 430635 ONTARIO INC.

(Motion to accept filing of a Plan And Authorize Creditors' Meeting to Vote on the Plan)

(Returnable December 21, 2015)

Date: December 16, 2015

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PART I – OVERVIEW

1. This factum is filed by Doral Holdings Limited and 430635 Ontario Inc. (collectively, "**Doral**") in response to the motion of Target Canada Co. and certain affiliates identified as the Applicants (collectively, "**Target Canada**"). Target Canada is seeking a Meeting Order, including, this Court: (a) accepting the filing of a Joint Plan of Compromise and Arrangement in respect of Target Canada dated November 27, 2015 (the "**Plan**"); (b) authorizing Target Canada to establish one class of Affected Creditors (as defined in the Plan) for the purpose of considering and voting on the Plan (the "**Unsecured Creditors' Class**"); (c) authorizing Target Canada to call, hold and conduct a meeting of the Affected Creditors (the "**Creditors' Meeting**") to consider and vote on a resolution to approve the Plan, and approving the

procedures to be followed with respect to the Creditors' Meeting; and (d) setting a court date, upon creditor approval of the Plan, of the sanction hearing.

2. Doral's position[1] is summarized as follows: while the threshold to file a plan and call a creditor's meeting may be low under the *CCAA,* how low can you go before the threshold becomes meaningless and is no longer a threshold. That would be the result here if the Court allowed the filing of the Plan and the calling of Creditors' Meeting at this time, for the following reasons:

(a) the terms of the Plan are in direct contravention of paragraph 19A of the Amended and Restated Initial Order and paragraph 55 of the Claims Procedure Order, in that they compromise, prejudice, extinguish or otherwise affect guaranteed leases;

(b) the Landlord Formula (Amount) should not be a secret formula or shrouded in secrecy. During the festive season, I understand that even Macy's did not keep secrets from its customers about bargains being offered at Gimbels.[2] In the same spirit, Doral and other guarantee landlords are entitled to know whether the Landlord Formula Amount is the best bargain. And with respect, it is not enough to say that it is a better bargain than the BIA Formula. What was the RioCan formula or bargain? The specific details of the settlement between Target Corporation and Target Canada's largest landlord, RioCan, have not been disclosed by Target Canada or Target Corporation to other landlords including Doral. Without this information, Doral is unable to compare and assess the Landlord Formula Amount under the Plan;

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[1] Capitalized terms in this paragraph are defined below.

[2] The source of my information is the movie "Miracle on 34th Street".

(c) Good faith is a factor that courts will consider in deciding whether or not to direct meetings of creditors to be called to permit a debtor to submit a proposed plan of arrangement under the *CCAA*. A court will refuse to direct meetings of creditors if they are not brought in good faith. Evidence of lack of good faith includes the contravention of earlier Orders in the *CCAA* proceedings and the failure to make full disclosure of the facts and circumstances underlying the relief being sought;

(d) the finality or immunity of the Landlord Formula Amount glosses over some business and legal questions that need to be addressed before the Plan is voted on at the Creditors' Meeting. For example, the affiant for Doral, S. Michael Belcastro, is not a lawyer and as a layperson was under the impression that Doral's Guarantee or Limited Guaranty of Lease granted by Target Corporation, which expires September, 2016, might limit Target Corporation's potential liability to that date and not to the expiry date of the Lease on September, 2021. However, section 6 of the Guarantee actually provides that, notwithstanding its eventual expiration, the Guarantee shall continue in respect of "a failure to pay a liability arising from an event which occurred prior to the [Guarantee] Expiry Date." Does Target Corporation have potential limited (i.e., to 2016) or broader (i.e., to 2021) liability under the Guarantee? Under paragraph 19A and 55 of previous Court Orders in these proceedings, Doral ultimately had the right of having a Judge (on the Commercial List) decide this issue by way of a possible lawsuit against Target Corporation pursuant to the Guarantee. The proposed Plan takes this right away and the Landlord Formula Amount is immune from attack or appeal under the Plan. Section 33 of the draft Meeting Order permits an objecting landlord to dispute "the calculation of its Landlord Formula Amount" but not appeal or dispute the validity of the formula *per se*. Doral faces the finality or immunity of the Landlord

Formula Amount not having sufficient information to know whether it is the best bargain (*vis-à-vis* RioCan's settlement) and whether Target Corporation considers itself to have potential limited or broad liability under the Guarantee;

(e) until recently, the landlords with guarantees were treated as a separate and distinct class, as reflected in paragraphs 19A and 55 of previous Court Orders in these proceedings, and they should be classified as such under the Plan and not as a single class with ordinary unsecured creditors; and

(f) without full disclosure of the "nature and effect of the releases", Target Corporation should not be released from the Guarantee.

PART II – FACTS

A. Seaway Mall

3. Doral and Zellers Inc. ("**Zellers**") entered into a lease regarding the Seaway Mall in Welland, Ontario on August 1, 2008 (the "**Lease**").[3]

4. On September 23, 2011, the Lease was assumed by and assigned to, Target Canada Co., as tenant, pursuant to the Assignment and Assumption of Lease Agreement between Zellers and Target Canada Co. (the "**Assignment**"). On the same date, Target Canada Co. and Doral agreed and restated that the term of the Lease would expire on September 22, 2021, pursuant to the Lease Amending Agreement. [4]

B. The Guarantee

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[3] Affidavit of S. Michael Belcastro sworn December 7, 2015 ("**Belcastro Affidavit**"), paras. 10, 11.

[4] Belcastro Affidavit, paras. 12, 13.

5. Target Corporation executed a Limited Guaranty of Lease dated September 23, 2011 (the "**Guarantee**") with respect to the Lease.[5]

6. The Guarantee contained, *inter alia,* the following provisions:

(a) Target Corporation would be absolutely liable as follows:

> "1. **Guaranty**. Guarantor hereby unconditionally, absolutely, continuingly and irrevocably guarantees to Landlord, in accordance with and subject to the terms of this Guaranty, the timely payment and performance by Tenant of its obligations and liabilities arising under or pursuant to the Lease whether direct or indirect, absolute or contingent, now or hereafter existing, or due or to become due (collectively, "Tenant's Liabilities"). ..."

(b) Doral would be entitled to payment by Target Corporation, without first attempting to enforce the Lease or collect from any other party. The guaranteed obligation also survived bankruptcy or reorganization, as follows,

> "2.1 **General Waivers**. **Landlord shall not be required to prosecute collection or seek to enforce or resort to any remedies against the Tenant or any other person liable to the Landlord on account of Tenant's Liabilities**. The Guarantor's liabilities shall in no way be impaired, affected, reduced or released by reason of (i) the failure or delay by the Landlord to do or take any of the actions or things described in the Lease, **(ii) the voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all the assets of the Tenant (or its permitted assignees) or the marshalling of assets and liabilities, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition with creditors or readjustment of, or other similar proceedings or any other inability to pay or perform affecting, the Tenant (or its permitted assignees) or any of its respective assets, or (iii) any allegation concerning, or contest of the legality or validity of the indemnification obligations under the Lease.**" [emphasis added]

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[5] Belcastro Affidavit, para. 14, Exhibit "A".

(c) The Guarantee also expressly provides that the liability of Target Corporation is not discharged or released by a disclaimer of the Lease by Target Canada Co., as follows:

> "2.3 Waivers Relating to Lease. **Without limiting the waivers set forth above, the liability of Guarantor under this Guaranty shall not be deemed to have been waived, released, discharged, impaired or affected by (i) the granting of any indulgence or extension of time to the Tenant,** (ii) the assignment of the Lease, or the subletting of the Premises by Tenant with or without the Landlord's consent, (iii) the expiration of the term of the Lease, (iv) the Tenant holding over beyond the term of the Lease, (v) **the rejection, disaffirmance or disclaimer of the Lease by any party in any action or proceeding,** (v) any defect or invalidity of the Lease or (vii) any amendment, supplement or replacement of the Lease." [emphasis added]

(d) The Guarantee expires, *inter alia*, five years after the Assignment, on September 23, 2016 (the "**Guarantee Expiry Date**"), but section 6 provides that, notwithstanding its eventual expiration, the Guarantee shall continue in respect of "a failure to pay a liability arising from an event which occurred prior to the [Guarantee] Expiry Date." [6]

C. CCAA Proceedings

7. On January 15, 2015, Target Canada applied for and was granted protection under the Initial Order (the "**Initial Order**") by the Ontario Superior Court of Justice (Commercial List) (the "**Court**") under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**").[7]

8. On February 11, 2015, the Court issued the Amended and Restated Initial Order (the "**Amended and Restated Initial Order**"), which incorporated certain changes to the Initial Order. In particular, under paragraph 19A, the Landlord Guarantee Claims "(a) shall be determined by a judge of the Ontario Superior Court of Justice (Commercial List)…; (b) shall

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[6] Belcastro Affidavit, para. 15, Exhibit "A" (emphasis added).

[7] Belcastro Affidavit, para. 16.

not be determined, directly or indirectly, in the within CCAA proceedings; (c) shall be unaffected by any determination..., whether made in the within proceedings under the CCAA...other than that any recoveries under such proceedings received by such landlords shall constitute a reduction and offset to any Landlord Guarantee Claims; and (d) **shall be treated as unaffected and shall not be released or affected in any way in any Plan filed by the Target Canada Entities, or any of them, under the CCAA...".** [8]

9. The Lease was disclaimed by Notices by Debtor Company to Disclaim or Resiliate an Agreement, each dated April 29, 2015 (and effective as of May 29, 2015).[9]

10. Paragraph 55 of the Claims Procedure Order granted by this Court in these CCAA proceedings, dated June 11, 2015 (the "**Claims Procedure Order**"), provides, generally, that the claims process shall not prejudice, limit, bar, extinguish or otherwise affect any guaranteed claims and for greater certainty, the Claims Procedure Order is subject to and shall not derogate from paragraph 19A of the Initial Order.[10]

D. Demand and Reply

11. Doral relied on paragraphs 19A of the Amended and Restated Initial Order and 55 of the Claims Procedure Order. It understood these paragraphs as protecting its Guarantee and rendering the Guarantee untouchable in these *CCAA* proceedings. As a last resort, the Guarantee could be relied on in a lawsuit against Target Corporation.[11]

12. On May 13, 2015, Doral's lawyer wrote an email to counsel for Target Corporation, indicating, among other things, that Doral would be relying on the Guarantee. Shortly thereafter, counsel for Target Corporation left a voice-mail message with Doral's lawyer acknowledging receipt of the email.[12]

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[8] Belcastro Affidavit, para. 17 (emphasis added).

[9] Belcastro Affidavit, para. 18, Exhibit "B".

[10] Belcastro Affidavit, para. 19.

[11] Belcastro Affidavit, paras. 4, 5.

[12] Belcastro Affidavit, para. 23, Exhibit "C".

13. On September 21, 2015, Doral's lawyer wrote to counsel for Target Corporation, demanding payment pursuant to the Guarantee.[13]

14. On October 2, 2015, counsel for Target Corporation wrote to Doral's lawyer and acknowledged, among other things, receipt of Doral's demand letter of September 21, 2015, the existence of the Guarantee, and the duty to mitigate damages but stated that generally it would be more effective to first determine with certainty the amount of Doral's claim before starting any formal action. To date, Target Corporation has not paid Doral under the Guarantee. [14]

E. Subsequent Events

15. On or about November 23, 2015, Doral first learned about the $132 million settlement between RioCan Real Estate Investment Trust ("**RioCan**") and Target Corporation, regarding approximately 18 guaranteed leases between RioCan entities and Target Canada. The source of the information was from the newspaper or Internet and Doral is unaware of the specific details of the settlement nor how the terms and payment under the settlement compare with the Landlord Formula Amount under the proposed Plan.[15]

16. The proposed Plan was made public on or about November 27, 2015, with Target Canada's serving and filing of its motion record for the Meeting Order. Under the Plan, among other things, Target Corporation is to be released from its obligations under Doral's Guarantee; Doral's proven claim is to be determined or calculated based on the Landlord Formula Amount; and Doral is to be classified into a single class of ordinary unsecured creditors for voting purposes. [16]

17. On or about December 2, 2015, Doral received the Notice of Revision or Disallowance in these proceedings dated December 1, 2015. Doral's claim was significantly reduced by more

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[13] Belcastro Affidavit, para. 24, Exhibit "D".

[14] Belcastro Affidavit, para. 25, Exhibit "E".

[15] Belcastro Affidavit, paras. 8, 20.

[16] Belcastro Affidavit, para. 21.

than $5 million. The calculation or determination of Doral's proven claim was based on the Landlord Formula Amount in the proposed Plan.[17]

PART III – ISSUES

18. The main issue before this Court is whether it should grant the requested Meeting Order. This gives rise to the following questions: (a) How low is the threshold under section 4 of the CCAA? (b) Does Doral have enough information from Target Canada and Target Corporation to make an informed decision about the Plan and whether the Landlord Formula Amount to be paid Doral makes "business" sense in the circumstances? (c) Should Doral and other guarantee landlords be classified into a single class of ordinary unsecured creditors? and (d) Should Target Corporation be released from the Guarantee?

PART IV- LAW AND ARGUMENT

(A) How low is the threshold under section 4 of the *CCAA?*

19. Writing in 1951, Dr. Carl Morawetz reminded his readers at the time of the court's equitable jurisdiction in bankruptcy. As he pointed out with respect to certain cases, the "court in its bankruptcy jurisdiction is a court of equity and may, under certain circumstances, give equitable relief to suitors entitled thereto in proceedings in bankruptcy."[18]

20. Years later, other commentators would emphasize the importance of good faith as the "gatekeeper of the equity court" and its application under the *CCAA*:

> "Good faith in *CCAA* proceedings usually involves questions of fairness to creditors, commercial morality and going beyond the perspective which the statute is intended to operate. To permit good faith to be 'the gatekeeper of the equity court", the court is given a wide discretion. This often involves the consideration of such equitable maxims as: (1) 'He who seeks equity must do

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[17] Belcastro Affidavit, para. 22.

[18] Carl H. Morawetz, *Bradford and Greenberg's Canadian Bankruptcy Act* (Toronto: Burroughs & Co. [Eastern] Limited, 1951), at p. 268-269.

> equity'; (2) 'He who comes to equity must come with clean hands'; (3) 'Equality is equity'; and (4) 'Equity regards the intent, not the form'."[19]

21. Just because a section of the *CCAA* does not expressly have a "good faith" requirement does not mean it does not apply under the section. As noted by the authors in *Debt Restructuring:*

> "...the inclusion of the words 'good faith' ...adds nothing as good faith is always necessary, particularly in a court of equity. The mere fact, however, that the words 'good faith' or *'bona fide'* do not appear elsewhere in the Act does not mean that a court does not have the obligation or right to raise the question of good faith. This was confirmed by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General).* The court held as follows: '...The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority...'."[20]

22. Section 4 of the *CCAA* grants the court discretion to order a meeting of creditors to vote on a proposed plan. In their factum, Target Canada relies on certain case law to support the proposition that the threshold to be satisfied under section 4 for the court's approval to file a plan and call a meeting of creditors is low and that the granting of a meeting order is an essentially "procedural step" that does not engage considerations of whether the debtor's plan is fair and reasonable.[21]

23. However, section 4 of the *CCAA* does engage good faith considerations as mandated by the Supreme Court of Canada in *Century Services.* As the authors in *Debt Restructuring* point out:

> "Good faith is a factor that courts may use to determine whether or not to direct meetings of creditors to be called to permit a debtor to submit a proposed arrangement to them...The statute is not imperative that meetings be directed...The exercise of the discretion by the court in this regard will be based

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[19] John D. Honsberger and Vern DaRe, *Debt Restructuring: Principles and Practice* (Toronto: Canada Law Book/Carswell, 2015), at p. 9-29 (footnotes omitted) (*"Debt Restructuring"*). In the name of full disclosure, one of the co-authors of the text is me.

[20] *Debt Restructuring*, at p. 9-29 (footnotes omitted).

[21] *Factum of the Applicants (Motion to Accept Filing of a Plan and Authorize Creditors' Meeting to Vote on the Plan)* dated December 3, 2015 (*"Applicants' Factum"*), at paras. 30-32.

> on the facts, guided by the law and its intent and by what is just and proper under the circumstances.
>
> A court, for example, may refuse to direct that meetings of creditors be held if the proceedings are not commenced in good faith. Evidence of lack of good faith could be: the financial condition of the debtor is hopeless and there is a lack of any reasonable prospects for its economic rehabilitation;...there is no or very little chance that the creditors would accept the arrangement; the debtor has made an earlier arrangement under the Act, or has failed to make a full disclosure of the facts and circumstances bearing upon the provisions of the order requested and upon which a court might exercise its discretion. To order a meeting in any of these circumstances could be unfair to creditors who in equity are the *cestui que trust* of the property of an insolvent debtor and would be an abuse of the proceedings contemplated by the Act."[22]

24. While the threshold to file a plan and call a creditor's meeting may be low under section 4 of the *CCAA,* how low is low before the threshold becomes meaningless and is no longer a threshold. Good faith dictates otherwise in this case. This Judge is being asked to rescind or contradict landlord protections it granted in earlier Orders in these proceedings. These were protections many landlords bargained hard for at the outset of these proceedings and subsequently relied on in their actions (i.e., some landlords subsequently sued or commenced actions by way of statements of claim against Target Corporation pursuant to their respective guarantee). Doral, like other landlords with guarantees, relied on paragraphs 19A of the Amended and Restated Initial Order and 55 of the Claims Procedure Order. It sent a demand letter to Target Corporation pursuant to its Guarantee. Doral understood these paragraphs as protecting its Guarantee and rendering the Guarantee untouchable in these *CCAA* proceedings and a last resort against Target Corporation. That protection is being taken away by this proposed Plan. At the same time, Doral is being asked to vote or make a "business judgment" on a proposed Plan and a Landlord Formula Amount payable to Doral without all the necessary information to make an informed decision. As noted above, good faith under section 4 of the *CCAA* requires "a full disclosure of the facts and circumstances bearing upon the provisions of the order requested and upon which a court might exercise its discretion". The specific details of the settlement between Target Corporation and Target Canada's largest landlord, RioCan, have not been disclosed by Target Canada or Target Corporation to other landlords including Doral. Without this information, Doral is unable to compare and assess the Landlord Formula Amount

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[22] *Debt Restructuring*, at pp. 9-29 to 9-30 (footnotes omitted).

being offered under the Plan. In the circumstances, it is respectfully submitted that the threshold under section 4 of the *CCAA* has not been met and that this Court should refuse at this time to grant the Meeting Order.

(B) Does Doral have enough information to vote or make a "business judgment" regarding the proposed Plan?

25. As noted by the authors in *Debt Restructuring*:

> "There should be full disclosure of all relevant facts and circumstances that will assist the court in the exercise of its discretion to give directions respecting the holding of meetings of those affected by the plan."[23]

26. In *Langley's Ltd. (Re)*[24], the Ontario Court of Appeal, dealing with a compromise under the Ontario *Companies Act*, held that the supporting affidavit should make full disclosure and place candidly and frankly before the court all the facts and circumstances which bear on the jurisdiction of the court, the provisions of the order requested and upon which the court is asked to exercise its discretion. Masten J.A. held as follows:

> "The responsibility necessarily rests on the applicant of making sure that all conditions precedent are observed, that the meeting is effectively summoned, organized and constituted so as effectively to transact its business, and that every shareholder affected by the proposed scheme receives such fair, candid and reasonable notice of the proposed arrangement as will afford him proper and adequate opportunity for its consideration prior to the meeting."[25]

27. Doral has insufficient information at this time to vote or make a "business judgment" on the Plan because Target Canada and Target Corporation have not provided full disclosure of all the relevant facts and circumstances underlying the relief being sought under the Meeting Order. To avoid repetition, paragraph 2 above sets out the missing information, which, in my respectful submission, combined with the finality of the Landlord Formula Amount, makes it premature at this time to call or order the Creditors' Meeting.

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[23] *Debt Restructuring,* at page 9-54 (footnote omitted).

[24] *Langley's Ltd. (Re),* 1938 CarswellOnt 9 (Ont. C.A.), at paras. 24-25.

[25] *Langley's Ltd. (Re),* 1938 CarswellOnt 9 (Ont. C.A.), at para. 25.

(C) Should Doral be classified into a single class of ordinary unsecured creditors?

28. Landlords have been classified differently under the *CCAA* depending on the particular facts of the case. While the relatively new section 22 of the *CCAA* is the governing provision, the old case law continues to be important.[26]

29. In *Armbro Enterprises*[27], a landlord sought separate class status. The Court held that there was sufficient community of interest between the landlord and other unsecured creditors, and that a separate class would cause unnecessary fragmentation. However, the case can be easily distinguished from these proceedings: it concerned one objecting landlord and not several landlords; the objecting landlord did not have a supporting guarantee from a third party; and the objecting landlord waited too long to oppose its classification. The Court in *Armbro Enterprises* also found that the landlord had adequate notice and had failed to raise the matter early in the process. Waiting until the sanctioning hearing to object to the definition of class was too late, according to the Court. Stakeholders that want decision rights via the definition of class should establish those interests early in the process. This is what the landlords with guarantees did in these proceedings. At the outset of Target Canada's *CCAA* filing, several landlords with guarantees sought the protection of their decision/enforcement rights under their guarantees and these rights were protected under paragraph 19A and 55 of the earlier Court Orders. This Court has already recognized landlords with guarantees in these proceedings as a distinct and separate class under paragraphs 19A and 55.

30. In contrast to *Armbro Enterprises*, the Court in *Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce*[28] held that it was acceptable to separate the landlords and the unsecured creditors into two classes because if the landlords were grouped with unsecured creditors, there would be greater difficulty in ascertaining the amounts of their claims, and because under the plan, the landlords were enjoined from exercising the contractual and statutory remedies that

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[26] *Debt Restructuring,* at p. 9-47: "Commenting on the recent amendments in *Re SemCanada Crude Co.* ...Romaine J. noted that these 'factors do not change in any material way the factors that have been identified in the case law'.

[27] *Armbro Enterprises Inc., Re,* 1993 CarswellOnt 241 (Ont. Bktcy.) (*"Armbro Enterprises"*), at paras. 7-9.

[28] *Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce,* 1992 CarswellOnt 164 (Ont. Gen. Div.), at paras. 9-12 (*"Grafton-Fraser"*).

they would ordinarily enjoy when a tenant becomes insolvent. This case supports a separate classification for the landlords with guarantees in *Target Canada* for the following reasons: the landlord claims are difficult to value (without full disclosure of the RioCan settlement and whether Target Corporation considers itself to have limited (to 2016) or broad (to 2021) liability under the Guarantee), and the landlords with guarantees are being enjoined from exercising their contractual and other remedies including the enforcement of their guarantees as a result of the release of Target Corporation and the HBC Entities (i.e., Zellers Inc. and Hudson's Bay Company) under the proposed Plan.

31. *Grafton-Fraser* was distinguished in *San Francisco Gifts Ltd.*[29] San Francisco obtained protection under the *CCAA,* abandoned its leases with the landlords and removed assets from the premises. The landlords took the position that they should be placed in a separate class because they had distinct legal rights, their claims were difficult to value and they were preferred over other creditors in the class. While the Court recognized that the landlords' right to pursue distraint against the companies was unique, this was not sufficient to warrant a separate class. The landlords' claims were not difficult to value according to the Court. However, the plan was amended to preserve any cause of action the landlords would have against any party who aided San Francisco in removing assets from their premises. Madam Justice Topolniski made the following comments regarding the classification of landlords in separate classes:

> "11. The commonality of interest test has evolved over time and now involves application of the following guidelines that were neatly summarized by Paperny J. (as she then was) in *Resurgence Asset Management LLS v. Canadian Airlines Corp. ("Canadian Airlines")*:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
>
> 2. The interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor prior to and under the Plan as well as on liquidation.
>
> 3. The commonality of interests should be viewed purposively, bearing in mind the object of the *CCAA,* namely to facilitate reorganizations if possible.

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[29] *San Francisco Gifts Ltd., Re,* 2004 ABQB 705 (CanLII) (Alta. Q.B.), at paras. 11, 12, 28 and 50, leave to appeal refused (2004), 5 C.B.R. (5th) 300 (Alta. C.A.) (*"San Francisco Gifts"*).

> 4. In placing a broad and purposive interpretation on the *CCAA*, the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlements as creditors before or after the Plan in a similar manner.
>
> 12. To this pithy list, I would add the following considerations:
>
> (i) Since the *CCAA* is to be given a liberal and flexible interpretation, classification hearings should be dealt with on a fact specific basis and the court should avoid rigid rules of general application...(ii) In determining commonality of interests, the court should also consider factors like the plan's treatment of creditors, the business situation of the creditors, and the practical effect on them of a failure of the plan....
>
> 28. I find that the Plan does not adequately address the objecting landlords' unique legal entitlement to claim damages against persons who aided their tenant in clandestinely removing goods from the premises. In making this finding, I considered the following to be significant factors:
>
> 1. Unlike the ability to follow and seize goods, which has been rendered academic, this right of action is potentially meaningful.
>
> 2. The Plan does not offer compensation for deprivation of this right of action, resulting in a 'confiscation' of the objecting landlords' right as described in *Sovereign Life*.
>
> 3. Unlike claims that would be extinguished on a bankruptcy of the companies, this right of action would survive since it is against third parties.
> ...
>
> 50. However, I find that the Plan does not adequately address their right to claim damages against persons who aided a tenant in clandestinely removing goods from the premises. Rather than create a separate voting class for the objecting landlords, I direct that the Plan be amended to preserve any cause of action the objecting landlords and others in their position might have against any party who aided San Francisco in clandestinely removing its assets from their premises." (footnotes omitted)

32. Classification should be dealt with on a fact specific basis. From the outset of these proceedings, Target Canada has treated the landlords with guarantees as a separate and distinct class as evident by Target Canada's consent or non-opposition to paragraphs 19A and 55 of

previous Court Orders. Its parent, Target Corporation, which has made itself a part of these proceedings by sponsoring the Plan and seeking to be released from the landlord guarantees, has also treated landlords with guarantees in a distinct and separate manner, as evidenced by its settlement with the largest landlord with guarantees, RioCan. The proposed Target Canada Plan confiscates or extinguishes certain rights or remedies of the landlords with guarantees against Target Corporation and other third parties (i.e., HBC Entities). These rights or remedies would survive the bankruptcy of Target Canada. Unlike in *San Francisco Gifts,* the proposed Target Canada Plan has not been amended to date to preserve any cause of action that the landlords may have against third parties. Whether the Target Canada Plan adequately addresses or compensates the guarantee landlords for their lost rights or remedies against Target Corporation and other third parties is not known at this time. Full disclosure of the RioCan settlement has not been provided to the landlords by Target Canada or Target Corporation and there may be some legal question as to whether Target Corporation has limited liability (i.e., to the expiry date of the landlord guarantee) or broad liability (i.e., to the expiry date of the applicable lease) under the guarantees. Unlike *San Francisco Gifts,* the claims process under the Plan does not provide a mechanism for valuing landlord guarantee claims. Section 33 of the draft Meeting Order permits an objecting landlord to dispute "the calculation of its Landlord Formula Amount" but not appeal or dispute the validity of the formula *per se.* Under these circumstances, the guarantee landlords including Doral should be classified as a separate voting class.

(D) Should Target Corporation be released from the Guarantee?

33. Third-party releases in a plan proposed under the *CCAA* are considered at the sanction hearing. However, the court has stressed that third-party releases should be the exception and should not be granted as a matter of course.[30]

34. In *Metcalfe & Mansfield Alternative Investments II Corp.*[31], Blair J.A. upheld the approval of the plan as fair and reasonable including the third-party releases. In the analysis

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[30] *Canwest Global Communications Corp. (Re),* 2010 ONSC 4209 (CanLII) (Ont. S.C.J. (Comm. List)), at paras. 28-29.

[31] *Metcalfe & Mansfield Alternative Investments II Corp., Re,* 2008 ONCA 587 (CanLII), at para. 113 (emphasis added) (*"Metcalfe & Mansfield"*).

concerning the fairness and reasonableness of the plan, the following factors were considered relevant:

> (a) the parties being released were necessary and essential to the restructuring of the debtor;
> (b) the claims being released were rationally related to the purpose of the plan and necessary for the plan;
> (c) the plan could not succeed without the releases;
> (d) the parties being released were contributing in a tangible and realistic way to the plan;
> (e) the plan benefited not only the debtor companies but also the creditor noteholders generally;
> (f) the voting creditors approving the plan did so with "knowledge of the nature and effect of the releases"; and
> (g) the releases were fair and reasonable and not overly broad or offensive to public policy.

35. As held by Blair J.A. above in *Metcalfe & Mansfield,* creditors voting on a plan should do so with "knowledge of the nature and effect of the releases". While it may be premature at this stage, before the sanction hearing, to be asking the Court whether there is a "nexus" or "reasonable connection" between the guarantee landlords third party claims being compromised in the proposed Plan and the restructuring/liquidation achieved by the proposed Plan to warrant the inclusion of the third party releases in favour of Target Corporation and the HBC Entities in the proposed Plan, the guarantee landlords, including Doral, are entitled to know now, before the vote or Creditors' Meeting, the true "nature and effect of the releases". How does the RioCan settlement compare with the Landlord Formula Amount? Does Target Corporation consider its potential liability to Doral under the Guarantee, as limited (to the expiry date of the Guarantee in 2016) or broader (to the expiry date of the Lease in 2021)? Until Doral and other guarantee landlords have full or complete information about the "nature and effect of the releases", it is my respectful submission that voting on these releases is premature at this time.

PART V- RELIEF REQUESTED

36. For the reasons set out above, Doral respectfully requests that this Court not grant the Meeting Order and dismiss the Applicants' motion, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December, 2015.

Vern DaRe
Lawyers for Doral Holdings Limited
and 430635 Ontario Inc.

Schedule "A"—List of Authorities

Case Law and Secondary Sources

Carl H. Morawetz, *Bradford and Greenberg's Canadian Bankruptcy Act* (Toronto: Burroughs & Co. [Eastern] Limited, 1951).

John D. Honsberger and Vern DaRe, *Debt Restructuring: Principles and Practice* (Toronto: Canada Law Book/Carswell, 2015).

Langley's Ltd. (Re), 1938 CarswellOnt 9 (Ont. C.A.).

Armbro Enterprises Inc., Re, 1993 CarswellOnt 241 (Ont. Bktcy.).

Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce, 1992 CarswellOnt 164 (Ont. Gen. Div.).

San Francisco Gifts Ltd., Re, 2004 ABQB 705 (CanLII) (Alta. Q.B.), at paras. 11, 12, 28 and 50, leave to appeal refused (2004), 5 C.B.R. (5th) 300 (Alta. C.A.).

Canwest Global Communications Corp. (Re), 2010 ONSC 4209 (CanLII) (Ont. S.C.J. (Comm. List)).

Metcalfe & Mansfield Alternative Investments II Corp., Re, 2008 ONCA 587 (CanLII).

Schedule "B"- Relevant Statutes

COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended

Compromise with unsecured creditors

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

Company may establish classes

22. (1) A debtor company may divide its creditors into classes for the purpose of a meeting to be held under section 4 or 5 in respect of a compromise or arrangement relating to the company and, if it does so, it is to apply to the court for approval of the division before the meeting is held.

Factors

(2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account

(a) the nature of the debts, liabilities or obligations giving rise to their claims;

(b) the nature and rank of any security in respect of their claims;

(c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

(d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed.

Related creditors

(3) A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

Class-creditors having equity claims

22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

TARGET CANADA CO., ET AL.

Applicants

-and-

DORAL HOLDINGS LIMITED ET AL.

Respondents

Court File No. CV-15-10832-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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