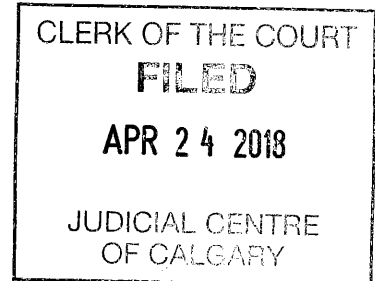


Action No. 1501 05314  
E-File Name: CVQ18CALLIDUS  
E-File No. \_\_\_\_\_

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE OF CALGARY



BETWEEN:

CALLIDUS CAPITAL CORPORATION

Plaintiff

and

KEVIN BAUMANN and PEKISKO RANC LTD.

Defendants

---

PROCEEDINGS

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Calgary, Alberta  
March 20, 2018

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Law Courts, Edmonton, Alberta

2

3 March 20, 2018 Afternoon Session

4

5 Master Farrington Court of Queen's Bench  
6 of Alberta

7

8 K.A. Robertson For the Plaintiff

9 E.J. Bodnar For the Defendant

10 B. Campbell For the Defendant

11 A. Williams Court Clerk

12

13

14 **Discussion**

15

16 THE COURT CLERK: Order in chambers.

17

18 MASTER FARRINGTON: Thank you. Please be seated. So we're ready for  
19 the first of two days here. So go ahead, plaintiff.

20

21 MS. ROBERTSON: Your Honour, thank you. For the record, it's  
22 Robertson, initials K.A. appearing on behalf of the plaintiff/applicant today.

23

24 MASTER FARRINGTON: Yes.

25

26 MS. ROBERTSON: And with me is Mr. Bodnar, initials G.J., that's  
27 B-O-D-N-A-R and Ms. Campbell, initial B., on for the respondents/defendants.

28

29 MASTER FARRINGTON: Good.

30

31 MS. ROBERTSON: Just as a housekeeping matter, Your Honour, the  
32 binders were handed or sent up to be delivered to you, you should have two binders.

33

34 MASTER FARRINGTON: I've got four.

35

36 MS. ROBERTSON: Or four binders, sorry. Four binders that go to  
37 tab 23 and I just want to make sure you have the last couple of tabs because we sent those,  
38 those were transcripts of questioning that occurred after we filed the original set of binders.

39

40 MASTER FARRINGTON: I do and at the outset, usually we say this at the  
41 end, thank you to counsel for the materials, but, to both sides, thank you very much to your

1 firm for the binders. They were a really helpful way of organizing it and thank you to all  
2 counsel for the briefs and the arguments and all the materials. I thought they struck a really  
3 nice balance between detail, but, consumability in terms of things that were digestible.  
4 Sometimes you get really detailed things that are hard to digest, they're just so detailed and  
5 I compliment both sides on that.

6

7 MS. ROBERTSON: Thank you, Your Honour.

8

9 MR. BODNAR: Thank you, Sir. I do have one more binder for  
10 you.

11

12 MASTER FARRINGTON: Oh good, thanks Mr. Bodnar.

13

14 MR. BODNAR: As if you needed it, but --

15

16 MS. ROBERTSON: Just to underscore what you just said.

17

18 MASTER FARRINGTON: Okay.

19

20 MR. BODNAR: So these are the exhibits, Sir, that were entered  
21 at the --

22

23 MASTER FARRINGTON: Oh good --

24

25 MR. BODNAR: -- cross-examinations of Mr. Sinclair and Mr.  
26 Riley.

27

28 MASTER FARRINGTON: Good.

29

30 MR. BODNAR: Obviously not the exhibits that were attached to  
31 their affidavits, but, the ones that were actually entered and marked.

32

33 MASTER FARRINGTON: Okay.

34

35 MR. BODNAR: And there's just a handful of those.

36

37 MASTER FARRINGTON: Okay. Thank you, Mr. Bodnar. Okay. Go  
38 ahead.

39

40 **Submissions by Ms. Robertson**

41

1 MS. ROBERTSON: Sir, you're relatively familiar with these  
2 proceedings, having had the benefit of a couple of applications to date, benefit or the curse,  
3 I'm not sure which it is.  
4

5 MASTER FARRINGTON: Yes.  
6

7 MS. ROBERTSON: I do think, however, it's still of use to go over the  
8 big picture of this before we get into the nub --  
9

10 MASTER FARRINGTON: By wall means.  
11

12 MS. ROBERTSON: -- the crux of the matter. As you know this is a  
13 foreclosure matter by Callidus Corporation of a written mortgage granted specifically as  
14 collateral security for a guarantee given by Mr. Kevin Baumann, who is the principal of a  
15 company called Alken, A-L-K-E-N. The assets of Alken were pledged as security for a  
16 corporate or business loan that was granted by Callidus in millions and millions of dollars.  
17

18 The agreement itself secured -- or the credit agreement related to three different credit  
19 facilities under it. There was a Facility A, Facility B and Facility C. Facility A, was a \$5  
20 million loan that was -- and this is just very general based on --  
21

22 MASTER FARRINGTON: Right.  
23

24 MS. ROBERTSON: -- marginally guessed receivables. Facility B  
25 was based on a 75 percent value of equipment appraisal and that was advanced in one  
26 tranche. Facility A, however, was a revolving line and then finally, a Facility C that was  
27 with respect to a 75 percent value of the property that is actually a subject of these  
28 foreclosure proceedings.  
29

30 The credit facilities fell into default resulting in Callidus enforcing its security as against  
31 the company Alken and that ultimately ended in a receivership and MNP was appointed by  
32 court order as Receiver and the assets of Alken were sold in that receivership to Altair  
33 Water and Drilling Services Ltd., which was essentially a company -- a subsidiary of  
34 Callidus that took these in what's referred to as a credit bid.  
35

36 The terms of the credit bid and why we're enforcing on the security here that by virtue of  
37 the guarantee and the mortgage in support of it, was that the credit bid was an offering to  
38 buy these assets for whatever is owed to Callidus by Alken less \$4.5 million. And the  
39 reason for that less \$4.5 million is exactly what I just mentioned about Facility C. Facility  
40 C was based on the value of this property which was owned by Mr. Baumann, the principal,  
41 because all the assets being vested in the receivership were all the assets excluding that

1 because it wasn't Alken's property, that was carved out and left for another day. And while  
2 Mr. Baumann's guarantee it to a limit of \$6 million, Callidus reasonably said, well, we'll  
3 just carve out the value of the asset as opposed to the value that's technically available  
4 under the guarantee.

5  
6 So this is the foreclosure of that mortgage which was granted as security for that guarantee.  
7 Mr. Baumann has raised various and at times differing responses to these proceedings,  
8 which has created some difficulty and unfortunately what that resulted in, is that in  
9 anticipation of some of the things that I expected to be raised based on what has been raised  
10 up to this point in the brief, doesn't look like all of those. In fact, one of the issues that had  
11 been raised up to this point that you probably have heard about in the course of the various  
12 applications is an allegation that Callidus underfunded, the word they used or Mr. Baumann  
13 has used, is drip fed. Now, the allegation seems to be that they over funded. So some of  
14 the brief I will not be taking you to because to the extent it's irrelevant, I don't see the point  
15 of going through that.

16  
17 But, in any event, what has become apparent in the reply brief is that the respondents are  
18 asserting that this isn't suitable for summary determination. So I thought the first place to  
19 start would be the law in that respect and the authority for what is and is not suitable for  
20 summary determination.

21  
22 The case that goes to that is at tab (I) sorry, I should say (J) -- no never mind -- let's try (H)  
23 of the applicant's brief, *Agriculture Financial Services Corporation v. Trimove Inc.* This  
24 is a relatively recent case from 2017 of this Court and in many respects it's on all squares  
25 with the application today. It was a summary judgment against individual defendants as  
26 individual guarantors after assets were sold in a receivership.

27  
28 The Court does a little summary at the front end of this to talk about what is to be considered  
29 on a summary judgment application and at paragraph 4 they note: (as read)

30  
31 The Supreme Court of Canada has held that summary judgment must  
32 be granted where there is no genuine issue requiring a trial. An  
33 applicant for summary dismissal must establish a prima facie  
34 entitlement to judgment. The respondent then bears the evidentiary  
35 burden of establishing that a question of fact or law which requires a  
36 trial.

37  
38 So there's a shifting of burden. Once the plaintiff here establishes its case in the main, that  
39 it's entitled to a redemption order that there's a balance owing on the guarantee et cetera,  
40 then the burden shifts to the defendants to prove that there is a triable issue.

1 I'll get to a lot of the elements of this case later in terms of those issues.

2  
3 But, going then to the summary trial determination the Court goes on at page 7 to discuss  
4 this a little bit more in depth. So at paragraph 36 the Court notes: (as read)

5  
6 Since 2014, as a result of the decision in *Hryniak*, the general  
7 Canadian approach to summary judgment applications has  
8 experienced a sea change: ...

9  
10 And I would say, in my submission, the sea change has been to be a little bit more towards  
11 the summary judgment process, there's a balancing, there's a cost, there's all these things  
12 that should be considered and the Courts are more inclined to give reasons on a summary  
13 basis now since this decision.

14  
15 And the Court says specifically: (as read)

16  
17 Summary judgment motions must be granted whenever there is no  
18 genuine issue requiring a trial. There will be no genuine issue  
19 requiring a trial when the judge is able to reach a fair and just  
20 determination on the merits on a motion for summary judgment. This  
21 will be the case when the process (1) allows the judge to make the  
22 necessary findings of fact, (2) allows the judge to apply the law to the  
23 facts, and (3) is a proportionate, more expeditious and less expensive  
24 means to achieve a just result.

25  
26 At paragraph 37 they note that prior to that decision *Head West Energy* set out that it was  
27 a two-step process, quoting that case in paragraph 37 and specifically paragraph 22 of the  
28 *Head West Energy* case the Court noted: (as read)

29  
30 The two-step process contemplates the applicant proving its cause of  
31 action on a balance of probabilities after which point an evidentiary  
32 burden shifts to the respondent to demonstrate that there is a genuine  
33 issue for trial. The application must fail if the respondent shows that  
34 there is at least a reasonable doubt as to whether there is a genuine  
35 issue for trial.

36  
37 And then over to page 8 the Court notes what cant' be done in that respect: (as read)

38  
39 ,, it's not open at (1) for the respondent to argue that a triable issue  
40 exists based upon facts or evidence not currently available, but, which  
41 may emerge at discovery or trial.

1  
2 (2) ... it is incumbent upon the respondent to adduce evidence that it  
3 has a reasonable chance of success at trial.

4  
5 (3) It is not sufficient ... to present only bare allegations of fact; the  
6 respondent must present evidence which lends some support to the  
7 claims it advances.

8  
9 And at paragraph 24 of that same citation: (as read)

10  
11 As Master Funduk described in *Tuscon Properties*, if a respondent  
12 could defeat an application for summary judgment on the basis of  
13 allegations alone, unsupported by evidence, *Rule 159* would be  
14 rendered sterile. Any application for summary judgment could be  
15 defeated by a draftsman who simply raised allegations which might  
16 defeat the claim, not a difficult task. Rather, to successfully resist this  
17 type of application some evidence must be led which lends some  
18 support to the defences raised in the pleadings, whether it is found in  
19 the applicant's own evidence, or in an affidavit filed by the defendant  
20 or in cross-examination upon same.

21  
22 So then going through those issues, the Court continues at paragraph or sorry page 12, to  
23 apply those principles to the case and for this -- I'm really going towards what were the  
24 headings of the case, rather than the factual reasons for it.

25  
26 But, on page 12, under the heading 3: Application of the principles here, there's a sub-  
27 paragraph (a): (as read)

28  
29 a) The necessary findings of fact can be made on the affidavit  
30 materials before the court.

31  
32 I say that's the case here. I'm going to take you through all the affidavits and for the most  
33 part, you'll actually see that it's the exhibits to the affidavit, it's the documents. It's the  
34 credit documents, the guarantee and all the security documents and I would really, in my  
35 submission, not even need to take Your Lordship to much of the affidavits because the  
36 evidence, the documents speak for themselves and no one has disputed that these are the  
37 business records and the proper records and the copies of the records that were entered into  
38 between these parties.

39  
40 Going over to page 13, is the second subsection b): (as read)

41



1           b) The law is sufficiently settled in this area of law to allow the court  
2           to make a determination.

3  
4 I say the law on guarantees is well settled, they're to be determined according to their  
5 language. If they're clear and unambiguous they are to be upheld and that's particularly the  
6 case when it's a compensation surety as is the case here.

7  
8 The next sub-category at page 15 is c): (as read)

9  
10           c) In light of the value of the underlying litigation, summary process  
11           is a proportionate means to achieve a just result.

12  
13 This is a little bit different in a foreclosure matter, I submit. I mean here we do have a  
14 relatively large number, but, this is ultimately a foreclosure which is predicated on the  
15 summary process. It is intended to be done through a summary process, at the outset, and  
16 that's kind of a fallback position and it is certainly proportionate and can and is intended to  
17 achieve a just result and then c) and d) lead to each other in that respect.

18  
19 So going to the loan itself then in light of that consideration, I'm at page 2 of my argument,  
20 at the bottom under the heading facts. Much of this is more for context and I don't think  
21 much turns on it or is disputed at all. But, Callidus is a publicly held Ontario corporation  
22 that carries on business as a lender to commercial enterprises, it doesn't do consumer loans.  
23 It provides what are called asset-based loans. Asset based loans are basically what the  
24 name suggests, they are lent amount of credit are advanced based on the value of the assets.  
25 That's in contrast to the regular mortgage you'll often see which is in part on that, but, also  
26 in part on an ability to pay based on income statements and all of the rest of that. This is  
27 margined against the assets of the company.

28  
29 Callidus specifically lends to businesses that for various reasons are unable to secure and  
30 maintain traditional bank financing. The other word that is often used is it's a high-risk  
31 lender. In late 2013, Alken was in default of its covenant under it's credit agreements with  
32 its then senior lender Servus Credit Union. Servus was looking to be repaid and Alken was  
33 seeking both takeout financing and additional funds to supports its growth plans and  
34 providing a liquidity cash flow.

35  
36 In late 2013, around December, Alken first approached Callidus about a possible loan and  
37 he did this through the engagement of a broker at Dynamic Capital to locate a new lender  
38 who introduced Alken to Mr. Baumann. After some initial meetings a term sheet was  
39 presented and I think this is where we should start going through the actual documents.

40  
41 So the term sheet is at Exhibit B of tab 12, of Volume 2.

1  
2 MASTER FARRINGTON: Okay, I have that.

3  
4 MS. ROBERTSON: Tab 12, B. This is the unsigned version, I'll show  
5 you the signatures, but, the unsigned version seems to be a little bit clearer. I think it was  
6 faxed one less time so it's a little bit clearer, so I'll go through this one, just for the ease of  
7 my own eyes.

8  
9 You'll see that it's dated January 7th, 2014 from Callidus to Alken Basin. The borrower is  
10 noted to be Alken, the personal guarantors, and I'm going to note the date there, January  
11 7th, 'cause early in these proceedings there was -- in one of the allegations that I'm not sure  
12 if it's going to crop up again, it doesn't appear to in the reply, is that this was a quick process.  
13 He was -- Mr. Baumann was under a lot of pressure, he had not time to look at this, things  
14 were thrust last minute. That was a general theme.

15  
16 So I am going to emphasize some of the dates here for that, just in case that crops up again  
17 in the reply from my friends. So the personal guarantors are Mr. Baumann, Michael  
18 Baumann, who is Mr. Baumann's brother and Kevin Schmidt. The purpose of the financing  
19 is noted to repay Servus Credit Union and provide working capital. At that time it was  
20 demand loan of up to a maximum of \$26 million through Facilities A, B and C and I  
21 emphasize the word "through" because there was three facilities all to that maximum  
22 amount. One of the things that Mr. Baumann raises is that there was a taking of some  
23 amounts from one Facility, particularly the interest that was occurring on Facility A and  
24 put into Facility B. That's a bookkeeping ledger between the three credit facilities. It  
25 doesn't change the maximum obligation under the whole of the credit facilities which are  
26 being dealt with here.

27  
28 So you'll see there's reference to the three different facilities. Facility A, as I said, was \$5  
29 million based on (INDISCERNIBLE) formulas, the account receivables and there's an  
30 explanation of how that's calculated. Facility B, is a demand single advance term loan of  
31 up to \$17,200,000 or 90 percent of the appraised forced liquidation value of the machinery  
32 and equipment. You'll see that this number changes as negotiations are underway, but,  
33 that's how it was on the term sheet and then Facility C, a single advance term loan of the  
34 lesser of \$4 million at the appraised current value of the -- and that legal description is this  
35 property, although I can tell, Your Honour, that there was some change with the title, I'm  
36 not sure if you noticed that in the brief if you've had an opportunity to read it, but, that's  
37 why Pekisko, if I say that right --

38  
39 MASTER FARRINGTON: There was a transfer to Pekisko.

40  
41 MS. ROBERTSON: Yes and that's why Pekisko Ranch is a party to

1 these proceedings now.

2

3 MASTER FARRINGTON: Yes.

4

5 MS. ROBERTSON: So then going over to page 3, you'll see that  
6 security includes under point (B), that the guarantee of the personal guarantor, the amounts  
7 not noted there in the term sheet, but, including the pledge of all shares and the borrower.  
8 And the pledge of all shares is clearly there from the outset, as was the next condition,  
9 which was a use of a block to deposit account. The borrower will be required to establish  
10 a separate block to deposit account at a branch of a Canadian Chartered Bank acceptable  
11 to the lender into which deposit of all sales receipts, accounts receivable, receipts of any  
12 kind and all other monies from all sources are to be done.

13

14 And the lender would withdraw these funds daily and apply the amounts withdrawn against  
15 the loan. So that was a holding account that all the receipts were supposed to go into and  
16 this makes sense when you're margining and lending against receivables, all the receivables  
17 get put into an account and there's a wash on a regular basis where it's applied to the loan  
18 and more credit advanced. There would be weekly margining availability and then, of  
19 course, the legal fees recoverable.

20

21 And going next to tab (C) --

22

23 MASTER FARRINGTON: Yes.

24

25 MS. ROBERTSON: -- you'll see that Mr. Baumann is negotiating this.  
26 He gets the term sheet, this is now a week later, January 13th, he's asking for some different  
27 amounts. He's also asking for limited recourse guarantee for Kevin Schmidt and that just  
28 goes to the allegation that this was thrust before him without any negotiation.

29

30 Going to (D) then we have the signed version and you'll see right at the top -- well first  
31 you'll see the letter enclosing it is: (as read)

32

33 Further to our recent telephone conversation, we're accepting it, but  
34 subject to an increase in the 1.8 million and a limited recourse  
35 guarantee for Kevin Schmidt.

36

37 So then you have under personal guarantor he has handwritten in the word "subject to a  
38 cap", each page is initialled and then at page 4, it is executed by Alken, as well as Kevin  
39 Baumann, in his capacity as personal guarantor, Michael Baumann as personal guarantor  
40 and Kevin Schmidt and again a handwritten notation, subject to the attached letter. So  
41 those changes.

1  
2 Going to (E) the negotiations began in terms of getting this credit -- this term sheet to an  
3 actual credit agreement. So you'll see on January 15th, Callidus reaches out to the  
4 principals of the company to indicate that they are going to start doing the due diligence  
5 and you'll see in the background, based on tab (E) that Servus is offering forbearance is  
6 based on the idea that there's going to be refinancing soon, as is evidenced by the Credit  
7 Unions, indicating that they would forebear provided that a copy of an accepted term sheet  
8 from Callidus was received by no later than January 20th. And again, the original one was  
9 dated January 7th.

10  
11 And if you go over to (G) --

12  
13 MASTER FARRINGTON: Yes.

14  
15 MS. ROBERTSON: -- you can see an email from Mr. Baumann  
16 indicating that he's now got counsel, it's Mr. David Heighington -- I may not have  
17 pronounced that right and again it's just more communications of the negotiations going  
18 underway with respect to getting this to an accepted credit facility and that's evident again  
19 by Exhibits H and I. And I'll just stop at I, this is February 25th, so again, term sheet  
20 initially delivered January 7th, we're now at the end of February and you'll see there, there's  
21 an email to Mr. Baumann is included in the to: line, it's from counsel for Callidus and in  
22 the middle of it or I would say three lines from the bottom of the text, the top text it says:  
23 (as read)

24  
25 If there are any material issues from your side, please let me know as  
26 soon as possible given the proposed timing. Feel free to copy our  
27 client. Please also note the main subject to review by Mandeep who  
28 is also Callidus counsel for any local conforming changes.

29  
30 So there's an invitation to raise any issues with respect to the credit agreement and this was  
31 after on February 24th, the next page, you'll see that there was an indication from Mr.  
32 Heighington that Alken had indicated they were prepared to negotiate or sorry -- that they  
33 felt that an agreement hadn't been reached on the term sheet and so negotiations were at an  
34 end and the term sheet was null and void. At the bottom of the next page: (as read)

35  
36 Alken Basin has indicated they are prepared to continue negotiations  
37 and hoped (INDISCERNIBLE) transaction. There appears to be a lot  
38 of goodwill amongst the parties towards consummating a transaction.  
39 I would suggest the parties sort out mutually agreeable business terms  
40 and work towards completion of a new term sheet.  
41

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41

There's a response to that: (as read)

David, I think there's a disconnect. We've been instructed to get this transaction closed as early as Friday. I've been working on a credit agreement, which would be a closing document to circulate tomorrow, while based on the term sheet, it has a number of amendments that I understand have been discussed between the parties.

This is, in other words, negotiated: (as read)

Mandeep has previously offered to clarify concerns. What are the fundamental amendments that your client believes are unresolved?

And then leading to that February 25th email. So that's what leads to ultimately a draft being circulated which is at the end of tab (I) and that's the draft that ultimately went around to all counsel. And again, more negotiations, as illustrated by the emails. On (J), March 4th is another email raising some issues and again at tab -- couple of pages over, Mr. Baumann -- as discussed with Dustin, we are okay with all terms, questions about the 750 block.

And so these are --

MASTER FARRINGTON: Which exhibit are we at now?

MS. ROBERTSON: Pardon me?

MASTER FARRINGTON: I'm sorry, which exhibit?

MS. ROBERTSON: The last page of Exhibit J -- or sorry Exhibit K.

MASTER FARRINGTON: Okay. Thank you.

MS. ROBERTSON: So I think, you know, it's not necessary to go through every one of these emails, but, it does show a back and forth, a going back and forth on the terms, so that a credit agreement could be entered into.

So ultimately, the credit agreement was signed. The credit agreement is at --

MASTER FARRINGTON: Just before you move onto that, if you look at the end of Exhibit K and basically the very last couple of lines, it says, "conditional precedent

1 is the higher of the CFO".

2

3 MS. ROBERTSON: Yes.

4

5 MASTER FARRINGTON: Is that getting into things like Mr. Sinclair and  
6 that sort of thing --

7

8 MS. ROBERTSON: I would --

9

10 MASTER FARRINGTON: -- recognizing Mr. Sinclair ended up with  
11 different titles, but, there's this great debate over who put Mr. Sinclair in there.

12

13 MS. ROBERTSON: Now, what that goes to is obviously having some  
14 sort of oversight and confidence in management. It -- where it becomes an issue is later  
15 down this piece when Callidus finds out that -- and Mr. Baumann doesn't dispute this at  
16 all, that he had taken a couple of million dollars of receivables and put -- and didn't put  
17 them in that blocked account that I took you to and that's when it became -- we need to --  
18 we need you out completely and Mr. Sinclair in. But, it wasn't specifically in the role of  
19 CFO.

20

21 But, certainly what that provision shows and I would say telegraphed is we're going to need  
22 confidence in the management and financial dealings of the company because of the nature  
23 of this loan.

24

25 So then going to the credit facility which is at tab 9 (G).

26

27 MASTER FARRINGTON: 9(G).

28

29 MS. ROBERTSON: (G), correct.

30

31 MASTER FARRINGTON: So that's a different binder.

32

33 MS. ROBERTSON: Yes, Sir, sorry.

34

35 MASTER FARRINGTON: Okay. I've got that.

36

37 MS. ROBERTSON: So here's the ultimate agreement that was entered  
38 into and executed by the parties. So the first thing of note and I'm sorry I'm going to be  
39 very boring going through these.

40

41 MASTER FARRINGTON: No, that's fine.

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41

MS. ROBERTSON:

But, a lot turns on the wording and for that reason it requires some emphasis on the wording. So the credit facility says, Callidus, the lender, hereby offers to the borrower the following credit facilities, collectively "the loan". And so again I say, the loan was one loan with three subsets. So how the subsets were dealt with is largely irrelevant the loan is the loan, which is the total.

So then we get the borrowers, Alken Basin and we get some guarantors, a numbered company, Kevin Baumann, Michael Baumann and Kevin Schmidt and the numbered company will become relevant a little bit later because an amalgamation between it and Alken Basin, but, for now it's just a note that there's a numbered company there.

The facilities were as previously set out in the term sheet, but, with different amounts. Facility A, which is a demand revolving loan up to \$5 million. Facility B, which is a non-revolving loan up to \$19 million, I think it was at 17.2 in the term sheet, based on 90 percent of the forced liquidation value as determined by an appraiser acceptable to the lender of the borrowers unencumbered machinery and equipment and related parts inventory, including some specifically listed. Then Facility C, the demand non-revolving loan in the amount of lesser of \$4,500,000 and 75 percent of the commercial market value, again as determined by an appraiser except for the lender of the property and the property is defined with the legal description of the subject property that's before Your Honour today.

At paragraph 3, the purpose of the loan, was used by the borrower to provide working capital, pay out its existing credit facilities, not only with just Servus, but now Royal Bank and another numbered company and to reduce its indebtedness to debenture holders.

So the definitions that -- I'm not going to take you through all them, but, I will draw your attention to borrowing at (G) and again, that means each use of the loan and this is the defined term "loan" which is all three facilities and all such usages outstanding at any time or borrowings.

Then at paragraph 6, or sorry page 6, paragraph (CC) of the definitions --

MASTER FARRINGTON:

Yes?

MS. ROBERTSON:

-- you'll see that the guarantor means collectively, the numbered company, Kevin Baumann, Michael Baumann and Kevin Schmidt and any other person who from time to time guarantees the lender the payment or performance of any of the borrowers' obligations to the lender.

And at page 9 and (N), there's the definition of property, which is this property. Now, at

1 page 11, we get into how the credit facilities are going to work. At paragraph 6, we start  
2 with advances of Facility A loan on page 11, it's numbered page 70 in the upper righthand  
3 corner, if that's more convenient. At 6(c); Facility A loan advances shall be made to the  
4 lender only to the extent of then Facility A loan availability as calculated by the lender in  
5 its sole discretion.

6  
7 So again, the lender has the discretion of how availability will be calculated and then at  
8 paragraph 7 on the next page, under (a): the maximum amount that shall be available under  
9 the Facility B loan, shall be an amount equal to \$19 million and -- or to the lesser of, I  
10 should say, \$19 million and 90 percent of the equipment appraisal.

11  
12 Now, I'm going to take Your Honour to the interest rate because it raises an interesting  
13 issue that is a bit of an academic one, but, I'm erring on the side of caution here. This is  
14 the issue. You'll see at paragraph 10, that interest on this loan is 18 percent and then on  
15 overdue interest payable under paragraph (c) is 21 percent. This contemplated a default  
16 interest rate. Now, that's not relevant on this loan because we're not dealing with any  
17 mortgaged lands.

18  
19 Obviously, Your Honour, is aware of such legislation as the *Interest Act* which does deal  
20 with default rates and that they're unenforceable when you're dealing with land. It's an  
21 interesting academic issue of whether or not that applies in this scenario when the guarantee  
22 deals with lands, but, the principal's obligation is under a credit facility that doesn't. And  
23 I honestly don't know what the answer is to that, but, what I have instructions from my  
24 client is that they're willing to accept interest at 18 percent, just to make this easy and I do  
25 have an new affidavit that I handed to my friends today recalculating this based on an 18  
26 percent interest rate, just so we don't have to enter into the fray of that.

27  
28 So then going to paragraph 15, we get into what is going to be the security for this credit  
29 agreement and you'll see at paragraph 15, the loan will be evidenced or secured by the  
30 following documents made by the borrower, which shall be provided contemporaneously  
31 with the execution of this agreement, shall be in the form an substance satisfactory to the  
32 lender and shall be supported by all necessary resolutions and opinions.

33  
34 And you'll see down at (e) we have the unconditional personal guarantee from Kevin  
35 Baumann limited to the principal and I'm emphasize principal amount of \$6 million secured  
36 by a first mortgage charge of land over the property as defined, supported by title insurance.  
37 And I'm emphasizing the word principal, because my friend is taking issue with the fact  
38 that the debt, now that interest has been calculated, exceeds the \$6 million and obviously  
39 the amount of \$6 million relates to principal, not interest and expenses that are recoverable  
40 over and above that. And I'll take you to the provision of the guarantee that's supports that,  
41 as well.



1  
2 And then you have the limited guarantees from Michael and Kevin, as well as a shared  
3 pledge agreement from each of them for the shares of the numbered company, together  
4 with powers of attorney and original share certificates and that becomes relevant to this  
5 company because of the amalgamation.

6  
7 So then going to paragraph 17 --

8  
9 MASTER FARRINGTON: Yes.

10  
11 MS. ROBERTSON: -- we see the cash management systems. This is  
12 the blocked account that Callidus required. The borrower was to establish and continue to  
13 maintain at its expense, the blocked account at TD, into which the borrower shall promptly  
14 deposit all funds received from all sources including without limitation receivable  
15 payments, cash sales receipts, credit card payments and all refunds received from any  
16 source or any advances or any loans and that's to be used and there's a description of how  
17 that is to be used.

18  
19 So then going to paragraph 20, at page 23, there's a requirement --

20  
21 MASTER FARRINGTON: Yes.

22  
23 MS. ROBERTSON: -- it's a requirement, the usual requirements, I  
24 don't think anything here is overly surprising. You'll see here is at sub-paragraph 6 is where  
25 the CFO comes into play which Your Honour mentioned earlier, as well, as the obligation  
26 to keep proper books and records and account entries made with respect to its businesses.

27  
28 And over on the next page under (b)(3), sell assign lease transfer or otherwise dispose of  
29 any of their assets other than in the ordinary course of business and this gets into some of  
30 the receivables that were essentially disposed of and used by Mr. Baumann other than by  
31 deposit into the blocked account.

32  
33 As does, on the next page, page 25(xi) make any payments and transfer of any of their  
34 undertaking properties, rights or assets to any person without due consideration which in  
35 any manner diverts or results or could result in the diversion of assets and/or opportunities  
36 of the borrower to such other person.

37  
38 Paragraph 21, or section 21 of the credit facility provides how reports are to be done. That  
39 there's invoices listing and advances were done on a weekly basis here and we've taken you  
40 to some of that during the document disclosure application so you might be familiar or  
41 recall that there was weekly lists done or weekly advance requests done based on all of

1 these sorts of reports being done by which availability would be determined and advances  
2 made.

3  
4 So that's how that was done and then over to paragraph 24, we get into the events of default.

5  
6 MASTER FARRINGTON: Yes.

7  
8 MS. ROBERTSON: Without limiting any other rights of the lender if  
9 any one or more of the following has occurred and is continuing then down to the bottom  
10 of page 29, the result of that is set out, but, the events are usual that you would see in these  
11 sorts of agreements, a failing to pay any amount when due, whether on demand or at a fixed  
12 payment date. There's a breach of any term of condition in the credit agreement. There's  
13 a default under any other credit loan or security agreement for ten days without cure, (d) a  
14 petition or proceeding under the bankruptcy laws of Canada. That would obviously include  
15 a CCAA petition and in fact, a CCAA petition was filed in April although it wasn't -- it was  
16 certainly threatened regularly by Mr. Baumann, but, it wasn't -- there's no evidence that it  
17 was served on them.

18  
19 MASTER FARRINGTON: Well, while we're looking at the default clause,  
20 after -- I think demand was made in about April of 2015, is that right?

21  
22 MS. ROBERTSON: Yes, I believe so.

23  
24 MASTER FARRINGTON: And my impression is -- and I need to get into  
25 that in more depth, but, my impression is that further monies were advanced after the  
26 demand was made?

27  
28 MS. ROBERTSON: Yes, what -- yes, that's true.

29  
30 MASTER FARRINGTON: And the default clause --

31  
32 MS. ROBERTSON: Actually, I might have to back up there, I'll have  
33 to look --

34  
35 MASTER FARRINGTON: Okay.

36  
37 MS. ROBERTSON: -- at the exact -- because there was a letter saying  
38 we're not going to enter into any forbearance with you or do anything while you are at the  
39 helm and that resulted in Mr. Sinclair becoming -- stepping in and being appointed by Mr.  
40 Baumann as President. I'll have to look at the exact date of the demand letter.

41

1  
2 MASTER FARRINGTON: And we'll need to get into those details, but, in  
3 the default clause it says -- and if you look right after the lettered items, it says:  
4  
5 In such even the ability of the borrower to make further borrowings  
6 under this agreement shall immediately terminate.  
7  
8 And it seems to me there's much debate about -- I don't think there's much reasonable  
9 debate, at least, about what went on in the placement of the security, but it seems to me the  
10 real dispute here is what went on in the administration of the security --  
11  
12 MS. ROBERTSON: M-hm --  
13  
14 MASTER FARRINGTON: -- now that the default clause suggests no further  
15 borrowings. Do you know how much money was advanced after the demands?  
16  
17 MS. ROBERTSON: I'm not sure based on the exact date of the  
18 demand, but, Mr. Sinclair has sworn information about what happened --  
19  
20 MASTER FARRINGTON: Because I was curious about that, but, I didn't run  
21 across a really good ledger that will now have to be quickly sorted out.  
22  
23 MS. ROBERTSON: There isn't a really good -- I wouldn't say that  
24 there's a ledger about it, but, at paragraph 57 of Mr. Sinclair's affidavit --  
25  
26 MASTER FARRINGTON: Right --  
27  
28 MS. ROBERTSON: -- at tab 14.  
29  
30 MASTER FARRINGTON: Which volume is that in?  
31  
32 MS. ROBERTSON: That is at Volume 2, I believe.  
33  
34 MASTER FARRINGTON: Yes.  
35  
36 MS. ROBERTSON: I'll just make sure, Volume 2.  
37  
38 MASTER FARRINGTON: Volume 2, tab?  
39  
40 MS. ROBERTSON: Tab 14.  
41

1 MASTER FARRINGTON:

Okay. Thank you.

2

3 MS. ROBERTSON:

And paragraph 57 -- sorry paragraph --

4

5 MASTER FARRINGTON:

Yes --

6

7 MS. ROBERTSON:

-- paragraph 57 Mr. Sinclair deposes: (as read)

8

9 Mr. Baumann's complaint states that Callidus debt increased from \$20  
10 million in April 2015 to \$27 million in March 2016. Firstly, this is  
11 not correct. I'm not sure that Mr. Baumann critically understands that  
12 the revolving portion of the credit facilities will increase or decrease  
13 day by day, but, more importantly the debt increased primarily  
14 because of interest. The principal balance owing as at March 16th  
15 was \$23 million to \$23,027,514.02 and the principal balance owing as  
16 at May 4th when the sale to Altair completed was \$22,905,993.18, a  
17 decrease in principal of \$121,520.84, as summarized below.

18

19 MASTER FARRINGTON:

Okay. Thank you.

20

21 MS. ROBERTSON:

So anticipating where Your Honour is going with  
22 that, we also say that it doesn't really matter because of the way the credit bid happened,  
23 because if the credit bid and that's one of the allegations of Mr. Baumann is when that  
24 demand was done, we should've immediately liquidated, not appointed a receiver, done  
25 anything else --

26

27 MASTER FARRINGTON:

Well, that's why I asked the question --

28

29 MS. ROBERTSON:

Yeah --

30

31 MASTER FARRINGTON:

-- to try and sort that out a bit better.

32

33 MS. ROBERTSON:

-- and we say on the numbers, it's just not  
34 accurate, but, more importantly it doesn't matter because it is some faulty logic to some  
35 extent the way that this argument is made by my friends. But, if a credit bid is, as it is in  
36 the case here, whatever I'm owed minus \$4.5 million then it's kind of irrelevant whatever  
37 I'm owed because either I'm owed \$20 million or I'm owed \$22 million. The amount of  
38 that is being discharged by the credit bid because that's the in exchange -- that's the  
39 consideration for the sale itself. But, the amount remaining outstanding is \$4.5 million and  
40 I know I did not say that right at all.

41

1 But, it -- put it another way -- if the exact same bid was made on April 2015 and accepted  
2 by a Receiver, if the Receiver was in on April 2015, whether the debt was \$20 million or  
3 \$22 million, would not matter because it would still be a better result than any of the other  
4 offers that were received by the Receiver years later.

5  
6 MASTER FARRINGTON: I understand that argument --

7  
8 MS. ROBERTSON: Yes --

9  
10 MASTER FARRINGTON: -- but when it's presented to Justice Nixon for  
11 approval, it's not presented on the basis of -- it's presented on the basis of look what a good  
12 offer this is, it's the whole indebtedness.

13  
14 MS. ROBERTSON: Yes.

15  
16 MASTER FARRINGTON: Right, it's not presented on the basis of --

17  
18 MS. ROBERTSON: And she or he -- I'll readily admit, he didn't turn  
19 his mind to what that debt amount was.

20  
21 MASTER FARRINGTON: And he wasn't invited to.

22  
23 MS. ROBERTSON: And he wasn't invited to.

24  
25 MASTER FARRINGTON: Right.

26  
27 MS. ROBERTSON: Correct.

28  
29 MASTER FARRINGTON: Okay. But, there's not a good ledger anywhere  
30 that would show advances, a nice schedule of advances after the demands were made, is  
31 there?

32  
33 MS. ROBERTSON: Not at the tip of my fingers that I know, but, I can  
34 certainly look for that and see if I can find that by tomorrow.

35  
36 MASTER FARRINGTON: Because what Mr. Sinclair's numbers show is, at  
37 least from his perspective, all the advances and all the paydowns and sort of the end result.

38  
39 MS. ROBERTSON: Well --

40  
41 MASTER FARRINGTON: It doesn't show what sort of advances are going

1 on, right?

2

3 MS. ROBERTSON: Yes and this goes to the ultimate issue  
4 that has to be established by my friends is that this is a guarantee claim, we aren't talking  
5 about the obligations of Alken under that, that has been resolved in the receivership. But,  
6 in order to avoid liability under guarantee, Mr. Baumann has to establish that there was  
7 material variation that prejudiced him.

8

9 And so even if we don't have -- even if there was amounts that got advanced and then  
10 through the operations of the company were paid down, because that's what Mr. Sinclair is  
11 essentially saying, it was sum net zero proposition for that year, then there's no prejudice.  
12 So he can't get over the hurdle.

13

14 MASTER FARRINGTON: Well, except does \$6 million in interest amount  
15 to prejudice when the business is carried on for another year with no real paid down of the  
16 loans? So the business is carried on, kind of the spinning of wheels situation based on Mr.  
17 Sinclair's numbers in terms of the principal, but, there's \$6 million in extra interest. Is that  
18 prejudice?

19

20 MS. ROBERTSON: Well, it could be potentially, although I say, no,  
21 not on the credit terms and on the various -- the case law that says, a creditor does not have  
22 to realize when other people say it -- when it's most precipitous. They don't have to wait  
23 for markets to go up, they don't have to sell quick because they think a market is falling.  
24 They're not speculators. Creditors are not speculators. As long as they're commercially  
25 reasonable in their dealings with the assets, then it doesn't -- they can choose when to  
26 realize and how to realize and that's what happened here. They made the decision that  
27 essentially, they would not pull the plug and I'll say this, we're kind of jumping ahead in  
28 my submissions --

29

30 MASTER FARRINGTON: Right.

31

32 MS. ROBERTSON: -- but that was a position that, in fact, Mr.  
33 Baumann supported when he filed his CCAA pleadings. He filed for CCAA so he obviously  
34 and had to believe at the time and he stated on his questioning that he believed this was  
35 appropriate to be reorganized, not liquidated.

36

37 MASTER FARRINGTON: What was the timing of that?

38

39 MS. ROBERTSON: That was April 2015.

40

41 MASTER FARRINGTON: Right, okay.

- 1  
2 MS. ROBERTSON: Yes.  
3  
4 MASTER FARRINGTON: Okay. Sorry to sidetrack you there. Please go  
5 ahead  
6  
7 MS. ROBERTSON: I think that's it for the terms of the credit  
8 agreement, but, just to tie that up with a bow, you'll see at page 94 of Exhibit G of tab 9,  
9 that it was signed by Mr. Baumann, both in his personal capacity and on behalf of Alken.  
10 I don't think any dispute is taken with that respect.  
11  
12 MASTER FARRINGTON: Yes.  
13  
14 MS. ROBERTSON: And just to answer the question of when demand  
15 was made, that is the next exhibit, Exhibit H, it was made on March 18th, 2015.  
16  
17 So then going to the guarantee --  
18  
19 MASTER FARRINGTON: Yes.  
20  
21 MS. ROBERTSON: -- this is at tab 9, Exhibit A.  
22  
23 MASTER FARRINGTON: I'm sorry I have it now. Thank you.  
24  
25 MS. ROBERTSON: And I submit that everything turns on the  
26 wording of this guarantee and this guarantee is clear, unambiguous and sets out all the  
27 rights, obligations and remedies that Mr. Baumann has and to a significant degree, defeats  
28 them, I would say in all respects defeats them. And just looking at the very first word, it's  
29 a limited guarantee. It is a guarantee on the bottom of the first paragraph, a guarantee of  
30 all obligations of the borrower to the lender, including but not limited to, all debts and  
31 liabilities, whether present or future, direct or indirect, absolute or contingent, matured or  
32 not, joint or several and joint or several at any time due or accruing due or owing by the  
33 borrower to the lender under any credit document.  
34  
35 So it's not even referencing just this credit document, it's any credit document. It  
36 contemplates what I would say and address one of Your Honour's concerns about this post-  
37 demand period, any novation of a credit agreement, which I would say is what occurred in  
38 that period when Mr. Sinclair, acting in the capacity of President didn't continue to request  
39 advances and advances were made.  
40  
41 The -- at 1.2 the guarantor hereby unconditionally and irrevocably guarantees in favour of

1 the lender the due and punctual payment performance of info of the obligations together  
2 with any and all costs incurred by the lender. It is the -- at 1.3 it's the intent of this guarantee  
3 that the lender be fully indemnified for the complete payment and performance of all of the  
4 obligations. If any or all of the obligations are not recoverable for any reason whatsoever,  
5 the guarantor will as a separate and distinct obligation, indemnify and save harmless the  
6 lender from and against all losses resulting therefrom.

7  
8 At paragraph 1.5, the obligations are absolute. The liability the guarantor hereunder will  
9 be absolute and unconditional and will not be affected by any lack of validity or  
10 enforceability of any agreement between the obligor and the lender, any implausibility,  
11 impracticability, frustrated or purpose illegality, force majeure or act of government. The  
12 bankruptcy winding up liquidation, dissolution or insolvency of any obligor or any other  
13 person or the amalgamation of or any change in the status, function, control or ownership  
14 of any obligor, the lender or any other person. Any lack or limitation of power and capacity  
15 or disability and under (e), any other law regulation or other circumstance that might  
16 otherwise constitute a defence available to or discharge of an obligor in respect of any or  
17 all of the obligations.

18  
19 And for further clarity, it being the intent of the guarantor that liability to the lender and of  
20 his guarantee shall be absolute and unconditional under any and all circumstances and shall  
21 not be discharged, except by payment in full of the obligations. The guarantee irrevocably  
22 waives any defence setoff or counterclaim in respect of such liability that might otherwise  
23 arise for any reason.

24  
25 And I say that is a complete answer to everything the Mr. Baumann is raising today. In  
26 terms of the amount at 1.6, notwithstanding the foregoing, the liability of the guarantor  
27 hereunder will be limited to the principal, again principal amount of \$6 million and interest  
28 thereon as herein provided and all costs, charges and expenses including legal fees on a  
29 solicitor and client basis.

30  
31 Now, getting to 2.1 again, this is what Mr. Baumann agreed to, in terms of the dealings of  
32 the credit facilities, whatever they may be that were entered into between Callidus and  
33 Alken and he agreed under 2.1 that the liability of the guarantor hereunder will not be  
34 released, discharged, limited or in any way affected by anything done, suffered or  
35 committed by the lender in connection with any duties or liabilities of an obligor to the  
36 lender or any security therefore including any loss of or in respect of any security received  
37 by the lender from an obligor or others. And that would include the sale of the assets in  
38 the receivership, notwithstanding that the receivership itself has its own limitations, just by  
39 virtue of it being court order. But, here he agreed that whatever happens with the security  
40 -- other security you're dealing with that doesn't affect anything here.

41



1 Without limiting the generality of the foregoing, without releasing, discharging, limiting  
2 or otherwise affecting in whole or in part the guarantor's liability hereunder, without  
3 obtaining the consent of or giving notice to the guarantor, so this is unilaterally the lender  
4 may discontinue, reduce, increase or otherwise vary the creditor of the borrower in any  
5 manner whatsoever. So that goes to what Your Honour was discussing, you can go and  
6 continue to borrow or continue -- Callidus can continue to lend, Alken can continue to  
7 borrow and even if it goes above what you're expecting, Mr. Baumann has agreed to be  
8 liable for it.

9  
10 At (c) he's granted -- or the lender can grant time at renewals, extensions, indulgences,  
11 releases and discharges to the obligor, (d) can take or abstain from taking or enforcing  
12 securities. And again, that goes to what Your Honour was talking about in that year period,  
13 they were abstaining from taking or enforcing securities and that was completely  
14 acceptable under the terms of this guarantee and Mr. Baumann accepted that that is  
15 something the lender could do.

16  
17 And then at (g), otherwise deal with the obligors and all other persons and securities as the  
18 lender may see fit. 2.2 is one of the common ones, where the lender will not be bound or  
19 obligated to exhaust its recourse against the borrow or any persons or any securities and  
20 collateral it may hold or take any other action, being entitled to demand payment from the  
21 guarantor. And then at 2.3, any account settled or stated in writing by or between the lender  
22 and the borrower, will be prima facie evidence that the balance or amount thereof appearing  
23 due to the lender is so due. And here we get a little bit of what the effect of Mr. Justice  
24 Nixon's order was and what he was doing in that credit bid. There was no turning your  
25 mind to that, but, clearly this was approved by the Court as a fair offer that allowed for  
26 \$4.5 million to remain due regardless of what the starting point of the obligation was.

27  
28 At paragraph 2.4, there's no set-off in any claim by the lender against the guarantor. The  
29 guarantor may not assert any set-off or counterclaim that either the guarantor, the borrower  
30 or any other person may have against the lender. And 2.5, this is one of the clauses that is  
31 looked at frequently in guarantees when there's been a change in the amount owed, but, the  
32 obligations of guarantor will constitute and be continuing obligations and will apply to and  
33 secure any ultimate balance of the obligations due or remaining due to the lender from time  
34 to time under the credit agreement and the other credit documents and will not be  
35 considered satisfied with any intermediate payment at any time of any part of the  
36 obligations for the time being due or remaining unpaid. Until payment in full of the  
37 obligations, this guarantee will continue to be effective, even if at any time any payment  
38 of any of the obligations is rendered unenforceable or is rescinded or must otherwise be  
39 returned by the lender upon the occurrence of any action or event, including the insolvency,  
40 bankruptcy or reorganization of any obligor or otherwise at all as though such payment had  
41 not been made.

1  
2 So then under demand, upon the occurrence of an event of default that is continuing that  
3 has not been either cured or waived, the lender will be entitled to make demand upon the  
4 guarantor for payment of all obligations upon receiving such written demand the guarantor  
5 shall immediately pay the obligations free and clear and without deduction for any present  
6 or future taxes, charges or withholdings of any kind.  
7

8 And this again is, I should point out, the demand was made against both the company and  
9 Mr. Baumann at the same time.  
10

11 MASTER FARRINGTON: Yes.

12  
13 MS. ROBERTSON: Because this is a primary obligation to Mr.  
14 Baumann, it became basically two different causes of action. Mr. Baumann's cause of  
15 action against him on the guarantee which is what brings us here today and that's been a  
16 long period of time. The dealings with the security of Alken and the assets of Alken were  
17 done under the way that Your Honour has already commented upon with the continuing to  
18 lend and do what they were going to do there and ultimately leading to the receivership,  
19 after attempting a bit of a workout.  
20

21 But, in all of those times, this action or the demand was made, this action actually had been  
22 commenced, I don't remember the date this action was commenced, I'm not sure if it's in  
23 here, while all of this was happening. So the rights under the guarantee had been  
24 crystalized, the guarantee provided that Callidus could do and treat the security under the  
25 Alken umbrella as it desired and in whatever manner it saw fit and that nothing that it did  
26 there would constitute a defence against Mr. Baumann on his -- by Mr. Baumann on his  
27 guarantee.  
28

29 So then just the mortgage is the next tab at tab B.  
30

31 MASTER FARRINGTON: Yes.

32  
33 MS. ROBERTSON: And I don't think anything turns on this. I do note  
34 and this is where that *Interest Act* and section 8 of the *Interest Act* got a little bit of a live  
35 question is, the mortgage itself says interest is at the lesser of 25 percent or the amounts  
36 owing to the obligation. So that's -- that's where that academic or now academic, 'cause  
37 I'm taking it off the table, but, argument of whether or not that still is offensive to section  
38 8 of the *Interest Act* when the credit facilities technically are 21 percent and the mortgage  
39 contemplated a higher rate. So there was no technical default rate under the mortgage.  
40

41 The -- it's very hard to read, so I don't propose to go into it, I don't think much turns on the

1 terms of the mortgage, it's relatively standard form. Oh and I will -- just for completeness  
2 confirm that on the guarantee there was an acknowledgement under the *Guarantees Act*.

3  
4 And then next at tab C, is the transfer to Pekisko land and just for the record, the proceeding  
5 against them is done in accordance with section 57 of the *Land Title Act* as a transferee of  
6 the property.

7  
8 So there is all the security that was granted, it was put in place, the *Land Title Act* office -  
9 - sorry -- search is there with respect to its registration and I don't think anything is disputed  
10 about any of that aspect of it or its enforceability and validity on its face. After it was  
11 granted, the funds were advanced under an irrevocable direction to pay signed by Alken  
12 and given for that purpose. At paragraph 39, page 11 of my argument, I've set out where  
13 it went.

14  
15 MASTER FARRINGTON: Yes.

16  
17 MS. ROBERTSON: So over \$16 million went to Servus to pay out  
18 those loans, \$500,000 went to Royal Bank to pay out a personal line of credit that was  
19 secured against this particular piece of property and \$1.6 million to Nancy Hoover  
20 (phonetic) for payment of debenture and then there's a bunch of enumerated charges,  
21 including lending fees and those sorts of things that are what you would expect to see. And  
22 that was all done through counsel and counsel's undertakings.

23  
24 I should also point out that in the closing book for this document there is a lender's opinion  
25 from counsel for Alken who indicated he was acting for both Alken as well as the  
26 guarantors and he confirmed the validity of this security. The only other thing, just to tie  
27 this up, is that on May 15th, there was a confirmation done by Mr. Baumann and all the  
28 debtors and this arose out of the amalgamation of Alken with that numbered company that  
29 I referenced. That is at tab 12, Exhibit U and it's just a confirmation and reaffirmation, 12  
30 is a -- in the first binder, I believe, sorry Volume 2, 12, U.

31  
32 MASTER FARRINGTON: I have it.

33  
34 MS. ROBERTSON: So you'll see there that Alken, a corporation  
35 formed from the amalgamation referenced above which is the numbered company and  
36 Alken Base and Drilling, has been amalgamated into Alken Base and Drilling Ltd., the  
37 same name acknowledges the credit documents. Paragraph 1 is about what Alken  
38 acknowledges. Paragraph 2, on the next page, is with respect to the guarantees, each of  
39 Kevin Baumann, Michael Baumann and Kevin Schmidt, together with Kevin Baumann  
40 and Michael Baumann, the personal guarantors as personal guarantors under the credit  
41 agreement, hereby acknowledge to the lender the execution of the credit documents, agrees

1 with the lender and confirms and reaffirms that notwithstanding the amalgamation, each of  
2 the credit documents continues to be in full force and effect. Each of the credit documents  
3 secures all present and future obligations of such personal guarantor to the lender pursuant  
4 to the credit agreements. And he is bound and will continue to be bound by the terms of  
5 each of the credit documents to which he is a party and finally agrees with the lender that  
6 it shall execute and deliver any further documents as may be necessary.  
7

8 And then on the next page, of course, are the signatures. And I should point out that in the  
9 schedule, the credit documents are listed and they include the limited guarantee for Mr.  
10 Baumann that is in issue here, the mortgage which is in issue here, as well as a share pledge  
11 at .14, with respect to the shares together with power of attorney and that's relevant because  
12 it's some of the issues that Mr. Baumann has raised and so I can just point out that it was  
13 affirmed in that document. And just on the next page is the -- or sorry next tab, tab V.  
14

15 MASTER FARRINGTON: Yes.

16  
17 MS. ROBERTSON: That's the opinion letter from Mr. Baumann's  
18 own lawyer confirming the validity of all these documents.  
19

20 So now we've gone through when everybody's all happy as is the case when monies are  
21 being advanced and no one can foresee any difficulties down the pike, now we get into the  
22 management of the loan and when things start to hit a snag.  
23

24 At page 12 of my argument, I'm at paragraph 41, as contemplated by the credit agreement,  
25 Alken was required to and did file its weekly borrowing base report, between April of 2014  
26 and August of 2014, Callidus advanced the full amounts requested. However, the available  
27 amounts continued to decrease and by September 2014, the availability was close to  
28 nothing. That resulted in some discussions starting to happen between Callidus and Alken,  
29 there's a number of telephone calls and meetings to discuss the worsening or financial  
30 difficulties.  
31

32 And by email November 13, 2014, various issues were raised and confirmed by email  
33 including to Mr. Baumann confirming that it would be a priority to prepare real estate cash  
34 flows. And I'll just take you to that -- that is again, we should still be at tab 12 and that is  
35 Exhibit W.  
36

37 MASTER FARRINGTON: Yes.

38  
39 MS. ROBERTSON: And this is an email from Jim Hall, Vice-  
40 President of Callidus to various parties including Kevin Schmidt, I'm assuming Kevin S.,  
41 Mike and various people from Alken, although it does look like he might've accidentally

1 done two Kevin S's rather than Kevin Baumann in there. But, in any event, it's an email to  
2 the parties at Alken, that are summary of points made by Craig Boyer, Jim Hall and Tri  
3 Vu, those are the Callidus during out call yesterday. The first job is to prepare a realistic  
4 cash flow forecast running from now until the end of January. It's noted that past forecasts  
5 have not proved out to be reliable, particularly on the sale and cash receipts side. Why the  
6 forecast has not been reliable needs to be determined.

7  
8 The new forecast will tell us what the company needs in terms of cash financing and when  
9 its required. The new forecast will also tell us whether or not Alken's cash flow problems  
10 are short term, temporary nature or longer term. Short term suggests that Alken will be  
11 able to weather the temporary shortfalls in winning and billing work. Longer term by  
12 definition relates to industry wide, somewhat permanent slowdown which will require  
13 more drastic measures. 2) Based on the new cash flow forecast, what is the company's plan  
14 to survive its cash flow shortfall problem. Is there an equity -- these are things to discuss  
15 -- equity injection by the shareholders, sale of certain equipment to lower the interest  
16 charges and debt burden?

17  
18 Even if -- I note that smaller Alken, even if only at break even may be more viable. The  
19 sale of the Red Deer land with excess proceeds remaining in the company and further lower  
20 interest charges, personal service efforts to collect AR, delaying non-essential payments,  
21 layoffs, the equipment -- Nations equipment refinancing and at paragraph 3, an updated  
22 Hilco, M&E appraisal that's machinery and equipment, appraisal needs to be done ASASP,  
23 Callidus will arrange.

24  
25 And I took you to the provision that that credit facility was based on a 90 percent valuation  
26 with the right of Callidus to do appraisals at their discretion. And then 4) once Callidus is  
27 able to review the new cash flow forecast we can determine how we may be able to help.  
28 Hopefully this is clear.

29  
30 And then we have next, over the next page on X, tab X, is where we have an introduction  
31 of Scott Sinclair to assist with the matter. We have Scott meet Kevin and Kevin meet Scott.  
32 Scott is the individual I spoke about last week, Kevin he has capacity. We'll let the two of  
33 you talk tomorrow, you can catch up.

34  
35 And then we have Scott on the next page back in December trying to help and at this point,  
36 he's just there as a consultant, but, he's done some reviews and he says, I'm writing to  
37 provide an update from my initial meeting and planning sessions with Alken Basin. As  
38 you know the company has been in financial distress, the severity and urgency of the  
39 problem however, may not be adequately communicated to date. Specifically, while I  
40 understand the company has provided you sales information and (INDISCERNIBLE)  
41 expectations that reverse the cashflow problem in the first quarter of 2015, it is clear Alken

1 will not be able execute on this work as soon as Monday without further financial support.

2  
3 As Mr. Sinclair, on behalf of Alken as its advisor is trying to assist with the management  
4 of the credit facilities and getting things up to date. And what ultimately ended up hitting,  
5 what I would say would be the big snag, is the Alken appraisal that was ultimately obtained  
6 and this is at Exhibit Z.

7  
8 MASTER FARRINGTON: Yes.

9  
10 MS. ROBERTSON: And you'll see on the third page in on that, there's  
11 an executive summary and the appraised value is just -- the net value at the top is 11.2  
12 million and that's a significant decrease. You may recall that on the credit facility it was -  
13 - the amount of the loan was up to 19 million with the 90 percent and that was based on the  
14 appraisal at the time of being around 19 million. So now we have an almost half as much  
15 in a very short period of time and so that is quite a change.

16  
17 We then have at Exhibit AA, where -- those emails are always in reverse order. We have  
18 Mr. Baumann on February 28th threatening to file a CCAA plan and that obviously is a --  
19 would be a default under the agreement, but he notes: (as read)

20  
21 As President of Alken, I'm informing you of the company's intention  
22 that Alken will be filing for CCAA protection against our lender.

23  
24 Obviously it's not -- it wouldn't be against the lender, but, in any event, he goes through  
25 and what's notable at the bottom of this and I say it's notable because three years later, we're  
26 now here fighting this, but, at the very bottom of this email he says: (as read)

27  
28 Regarding the personal property as collateral this property never  
29 should have been required as collateral under the Callidus sell job and  
30 this issue will be challenged. Any attempt to realize on this personal  
31 asset will be vigorously defended. I feel the success as Callidus will  
32 not be looked on favourable in Alberta with the history. A complaint  
33 to the Canadian and Alberta government business protection agencies  
34 will also be filed. Callidus has a seriously flawed business plan  
35 regarding control and enticements, as well, as lack of ethics relating  
36 to the timely or if ever payment of suppliers of investment companies.  
37 Govern yourself accordingly.

38  
39 So from day 1, as soon as this hit the rails, Mr. Baumann was saying, I'm never going to  
40 pay you a dime under my guarantee. And that's basically what has governed since then  
41 and why we've seen an approach to this by Mr. Baumann which has been what I would call

1 mudslinging, just throwing anything and seeing what it sticks and why we're in a position  
2 now where we really don't know what the ultimate position Mr. Baumann is and what of  
3 all the various allegations he's thrown over the last three years, are the ones, my friend Mr.  
4 Roberts said, it's like a game of whack-a-mole. A mole pops up, we knock it down and a  
5 different mole pops up someplace else by Mr. Baumann with some other allegation of  
6 wrongdoing. All while he understood, acknowledges that he understood and that he  
7 executed these very clear guaranteeing and agreements.

8  
9 So, Your Honour, I'm not sure if it's the practice to take an afternoon break.

10  
11 MASTER FARRINGTON: I usually don't, I often ask if madam clerk needs  
12 one, do you need one?

13  
14 THE COURT CLERK: I'm okay, Sir.

15  
16 MASTER FARRINGTON: You're okay.

17  
18 MS. ROBERTSON: Okay, I'll forge ahead.

19  
20 MASTER FARRINGTON: Is everybody else okay? Okay. Yes.

21  
22 MS. ROBERTSON: So at this point, we now have -- we're in the  
23 situation where, as I said, in mid-November 2014, the updated equipment appraisal was  
24 commissioned. That caused some troubling and I'm at page 13, (d) of my argument --

25  
26 MASTER FARRINGTON: Yes --

27  
28 MS. ROBERTSON: -- my brief, as a result of the appraisal, Alken was  
29 required at Callidus' request to reduce the principal balance of the Facility B loan to an  
30 amount equal to 90 percent of that value, meaning that they would've had to pay down  
31 close to \$9 million to bring the Facility down to \$10 million. And they clearly had no  
32 funds -- no means of funding such a substantial payment.

33  
34 The controller on December 15th submitted his resignation effective January 5th. On  
35 February 2nd, Baumann caused Alken to dismiss Sinclair Range, this was Mr. Scott  
36 Sinclair who was in at the time and at (g), the cumulative effect of the above and  
37 particularly the security shortfall under the Facility B loan was that Callidus was deeply  
38 concerned about the adverse financial circumstances and its ability to recover. Alken did  
39 re-retain Sinclair Range on February 19th and by the email of March 2nd, Mr. Sinclair met  
40 with Callidus to try to discuss a restructuring plan.

41

1 MASTER FARRINGTON: The -- at that point, things were looking bleak,  
2 the words, "deeply concerned", I think you just read --

3

4 MS. ROBERTSON: M-hm --

5

6 MASTER FARRINGTON: -- things aren't looking very good and one of the  
7 things that I'm wondering, is there anything in any evidence anywhere where anyone from  
8 Callidus gives an explanation as to -- this was really bleak, but, this is why we thought it  
9 was important to keep this operating? Or this is why we thought there was merit in keeping  
10 it operating, does anybody say anything about that?

11

12 MS. ROBERTSON: I may have to look a little bit, but, I believe that  
13 Mr. O'Reilly has addressed this. It's talking about why -- there's definitely evidence of why  
14 they changed their role or their decision and went with the receivership. It might be in the  
15 context of the negative of that to some extent. But, it was very much that --

16

17 MASTER FARRINGTON: But, that's a year down the road, the receivership.

18

19 MS. ROBERTSON: Yes -- I mean --

20

21 MASTER FARRINGTON: Because Mr. Baumann presumably would argue  
22 --

23

24 MS. ROBERTSON: -- but he's talking about, I guess, what changed  
25 to make it the receivership. So I guess the negative would be true. For example, he deposes  
26 at paragraph 16 that the plunge in oil prices had the devastating and prolonged effect on  
27 the Alberta economy. The result was, that despite the best efforts of everyone at Alken,  
28 including Mr. Sinclair, Alken simply couldn't earn sufficient revenue to turn its finance  
29 around. As a result, Callidus eventually made the decision to put it into receivership and  
30 tasked the receiver to run a sales process. They'd already retained MNP for that purpose.

31

32 So in other words, it was we can ride this out, the economy conspired against us, which I  
33 think is the unfortunate case for a lot of --

34

35 MASTER FARRINGTON: Your clients' argument would be they could turn  
36 this around?

37

38 MS. ROBERTSON: Yes.

39

40 MASTER FARRINGTON: That's why they kept it going.

41



1 MS. ROBERTSON: I'll look for a more definitive statement if there is  
2 one, but, it's ironic that that's the question that Your Honour is asking because it's always  
3 been the -- the complaint has been you shouldn't have tried to turn it around --  
4

5 MASTER FARRINGTON: Okay.

6  
7 MS. ROBERTSON: -- so we're talking about -- or the receivership  
8 should've been done a year early, so our evidence is always, well why did we decide to do  
9 it when we did it?  
10

11 MASTER FARRINGTON: Well, the reason I asked is -- and Mr. Bodnar will  
12 articulate what his argument is, but, what I understand the argument to be, is he suggests  
13 that Callidus wanted the assets and the land and this was to allow them to do that, put it  
14 through the receivership and get both, rather than realize earlier on the assets. That's I think  
15 what the argument is and I -- you always look for business reasons in things and I was just  
16 wondering was there any evidence from the Callidus side as to what they saw as the  
17 business purpose for keeping this thing running?  
18

19 MS. ROBERTSON: I'll look a little bit closer --

20  
21 MASTER FARRINGTON: Okay, sure --

22  
23 MS. ROBERTSON: -- Mr. Sinclair might have gone into it a little bit  
24 'cause he was running it at the time.  
25

26 MASTER FARRINGTON: We've got lots of time so when you run across  
27 that, but, I'm just curious on that point in terms of your rely to his argument.  
28

29 MS. ROBERTSON: Well, I mean paragraph 45, Mr. Sinclair talks  
30 about his restructuring, his attempts to restructure. So at tab 14, paragraph 45 --  
31

32 MASTER FARRINGTON: Yes. Yes, I have that.

33  
34 MS. ROBERTSON: So he starts as: (as read)

35  
36 As President of Alken, I had a duty to the company and stakeholders,  
37 which I take very seriously, like Callidus was a stakeholder and from  
38 a value perspective was the dominant stakeholder. As such, I clearly  
39 spent considerable amount of time negotiating with Callidus and  
40 keeping them informed of our progress. Between January and  
41 September of 2015, I had various conversations with Mr. Baumann

1 and others about the possibility of Alken ceasing operations and  
2 liquidating its assets. Though obviously not a preferable outcome for  
3 Alken, I needed to keep it as a potential consideration. However, I  
4 did not believe that Mr. Baumann made any request to me or to my  
5 knowledge, Callidus, to liquidate Alken's assets prior to his email of  
6 September 13th, 2015.

7  
8 I note that Mr. Baumann was present as Director of Alken at all times  
9 prior to April 20th and thus could've taken whatever steps he felt  
10 appropriate. Mr. Baumann references communications I had with his  
11 brother, Doug Baumann in relation to a potential sale of certain of  
12 Alken assets. Attached is Exhibit A to Mr. Baumann's affidavit is an  
13 email asking for a copy of an appraisal. Leaving aside the fact that  
14 this was a somewhat odd request, Doug Baumann had recently been  
15 indebted for \$35,000 and refused to pay and so I was skeptical of his  
16 motivations.

17  
18 I also at paragraph 50 this was another issue: (as read)

19  
20 At Mr. Baumann's resignation in late April of 2015 Alken was  
21 required to move locations and as a result of Mr. Baumann's failure to  
22 properly secure a license of the premises, as set out above in  
23 paragraphs 28 to 30 they ultimately moved its premises on or about  
24 September through November, given the logistics involved in moving  
25 locations Alken could not have sold equipment during that period,  
26 however, they began marketing excess equipment for sale in  
27 November 2015.

28  
29 And if you go earlier in this, that issue arises, basically they got kicked out of the leased  
30 premises by the landlord --

31  
32 MASTER FARRINGTON: Yes.

33  
34 MS. ROBERTSON: -- and it was quite a surprise. But, it took efforts  
35 away from what would normally be the kind of considerations that you would be looking  
36 into. They had to leave and so they had to find a location to move all of these assets to  
37 before they could consider what they were going to be doing with them and so there was  
38 that wrinkle --

39  
40 MASTER FARRINGTON: Yes.

41

1 MS. ROBERTSON: But certainly, as Mr. Sinclair deposes it was in  
2 the back of his mind. That was one of the things he was considering as shareholder.

3

4 So then we get to the -- taking you to the -- or the demand that was made in March of 2015  
5 --

6

7 MASTER FARRINGTON: Yes.

8

9 MS. ROBERTSON: -- a March 18th demand was made against both  
10 Alken and Mr. Baumann. On April 13th, 2013, I'm at paragraph 51 of my brief.

11

12 MASTER FARRINGTON: Yes, I have that.

13

14 MS. ROBERTSON: Alken filed proceedings under the CCAA. In  
15 making that filing, Mr. Baumann believed the restructuring of Alken was better than a  
16 liquidation. He confirms this on his questioning and his transcript is in the materials that  
17 supports that.

18

19 And I'll just take you to the -- why that's relevant --

20

21 MASTER FARRINGTON: Sure --

22

23 MS. ROBERTSON: -- because the CCAA petition which is at Exhibit  
24 K of tab 17, which is at Volume 4 or sorry Volume 3, and you'll see this is the originating  
25 application under the CCAA and on page 2, paragraph 4, the applicant proposes to file a  
26 plan or plans or compromise or arrangement for consideration by the applicant's creditors.  
27 The applicant seeks the opportunity to restructure its affairs pursuant to the CCAA in the  
28 expectation that the applicant, its secured and unsecured creditors and its other stakeholders  
29 will derive a greater benefit from such restructuring than would result from the bankruptcy  
30 or other liquidation of the applicant.

31

32 MASTER FARRINGTON: That -- there was never an initial order granted of  
33 CCAA proceedings?

34

35 MS. ROBERTSON: No.

36

37 MASTER FARRINGTON: Was there even an application heard?

38

39 MS. ROBERTSON: It doesn't look like it. I pulled the court card --

40

41 MASTER FARRINGTON: Yes --

- 1  
2 MS. ROBERTSON: -- and couldn't see that anything happened other  
3 than the initial filing.  
4
- 5 MASTER FARRINGTON: Was there an affidavit even filed?  
6
- 7 MS. ROBERTSON: No.  
8
- 9 MASTER FARRINGTON: No.  
10
- 11 MS. ROBERTSON: No, I looked for that, as well. But, on  
12 questioning Mr. Baumann admitted that he stood behind those words. I'll take you to that  
13 quickly. That is at tab 19.  
14
- 15 MASTER FARRINGTON: Yes.  
16
- 17 MS. ROBERTSON: Page 145, I believe, oh sorry, I've got the wrong  
18 one here. That's his admission that depositing the loan amount -- sorry I'm at the wrong  
19 paragraph, paragraph 22. Sorry, tab 21 --  
20
- 21 MASTER FARRINGTON: Yes.  
22
- 23 MS. ROBERTSON: -- page 37, I believe. Yes.  
24
- 25 MASTER FARRINGTON: What line?  
26
- 27 MS. ROBERTSON: Page 37, line 19 and this is the exhibit we just  
28 looked at: (as read)  
29
- 30 Q If we can look again at Exhibit K, which is the CCAA  
31 petition or originating application, so you see on the first  
32 page under basis for that claim it says to read paragraph 3?  
33 A Yes.  
34
- 35 Q And you believed that to be true on April 2015 and you  
36 believe it to be true today?  
37 A Yes, although you know, at the time we were funded by  
38 Callidus. When you're funded by Callidus nothing is  
39 ordinary.  
40
- 41 Q Look at paragraph 4 for me, for a second, over the page.

1           That's the one we just went through, give that a read for me.

2           A Yes.

3  
4           Q The second sentence of that paragraph reads [what I just  
5           read] did you believe that to be true in April 2013 (sic)?

6           A Yes.

7  
8           Q Doesn't that strike you as being inconsistent with your  
9           demands to Mr. Sinclair that Alken assets be liquidated.

10          A Either you get security under CCAA and quite incurring  
11          your bills or harming people or liquidate it.

12  
13          And then there's some discussion about that and the next page, page 39: (as read)

14  
15  
16          Q But, that's not what this says. This says that a restructuring  
17          will be better than a liquidation, right?

18          A Yes.

19          Q So that's what you believe in April 2013, 2015, sorry.

20  
21          MR. BODNAR:           He already answer that.

22  
23          A Yes.

24  
25          So then if you still have the tab 19 open, I can take you to the admission just so that we  
26          have it, which is at paragraph 52. Paragraph 52 of my argument, page 145 of tab 19's  
27          transcript. And this is in response to the letter that was sent by Callidus' counsel saying  
28          we're not going to enter into any forbearance, the letter dated April 20th, 2015.

29  
30          So here's the timing, April 13th there's a filing of the CCAA petition. Shortly after that,  
31          Callidus finds out that about \$800,000 at that time had been put into the wrong account,  
32          instead of put into the blocked account as required under the credit facility, April 20th --  
33          so a week after the filing of the CCAA plan or sorry application, the -- Callidus sends a  
34          letter saying we are not going to continue to work with you because you put money --  
35          diverted money and took it away.

36  
37          And on questioning at page 145, at line 10: (as read)

38  
39          Q This letter makes mention of you having deposited Alken  
40          receivables into an account other than the blocked account.

41          A Correct.

1  
2 Q And you did this?

3 A Yes.

4  
5 Q In the week of so prior to April 20th?

6 A Yes.

7  
8 So I suspect the finding of this is what -- you know this is speculation on my part, I will  
9 admit that, but, it might've been one of the reasons why the CCAA did not proceed because  
10 I suspect that would be a fact that would be fatal to an initial order.

11  
12 Not to mention, just as a practical base, the notice of intention to enforce security had been  
13 sent out on March 13th. The ten days under that had expired. An initial order under the  
14 CCAA wouldn't have bound necessarily the secured creditors because it's a notice of  
15 intention for security had already passed. So you really needed to do an initial order. You  
16 need the buy-in of the secured creditor in those circumstances and when you have a mis-  
17 appropriation of close to \$1 million, you're certainly not going to get that buy-in.

18  
19 I can only assume what Mr. Baumann's discussions were with his legal counsel in that  
20 respect.

21  
22 So Alken remained in operations with Callidus's financial support at that time, Mr. Sinclair,  
23 was the shareholder appointed by Mr. Baumann. I think my friend is -- may attempt to  
24 suggest that Mr. Sinclair was there at the request -- at the appointment of Callidus and I  
25 would invite him to point to evidence to that fact. Because there's bare allegations to that,  
26 but, no evidence to support that it was anything other than at the instance of -- that he was  
27 there as a shareholder for -- sorry there as a president fulfilling his duties and obligations  
28 and not there as an agent of Callidus.

29  
30 MASTER FARRINGTON: And that's part of the biggest debate here, is who  
31 was instructing Mr. Sinclair, who was Mr. Sinclair listening to and by May of 2015, the  
32 share pledge agreement had been enforced upon --

33  
34 MS. ROBERTSON: Correct.

35  
36 MASTER FARRINGTON: -- so at that point in time, it was only Callidus  
37 that had any authority --

38  
39 MS. ROBERTSON: Was the majority shareholder, yeah.

40  
41 MASTER FARRINGTON: -- to instruct Mr. Sinclair and appoint Mr.

1 Sinclair as a director, right?

2

3 MS. ROBERTSON: Correct.

4

5 MASTER FARRINGTON: And at that point in time, I think when I read Mr.  
6 Sinclair's transcript, he had stopped letting Mr. Baumann know what was going on in any  
7 way. So is it really reasonable to suggest that Mr. Sinclair doesn't have some connection  
8 to Callidus from that point forward?

9

10 MS. ROBERTSON: Yes.

11

12 MASTER FARRINGTON: Okay, whose instructing him then or is he  
13 instructing himself?

14

15 MS. ROBERTSON: He's instructing himself as president and he's  
16 fulfilling his duties to the shareholders. Because notwithstanding that the share pledge  
17 agreement authorized Callidus to vote the shares and act on the shares, Mr. Baumann did  
18 remain a shareholder. Mr. Sinclair has confirmed in his evidence that he had a duty to Mr.  
19 Baumann in that respect. But, he doesn't have a duty to consult with him on every single  
20 thing. He's there as the president, that encompasses the duties and rights to operate the  
21 business in the ordinary course of business.

22

23 The things that need shareholder approval would be a disposition of the assets, of materially  
24 all or substantially all of the assets. Those sorts of things, the *Corporations Act* is very  
25 clear in terms of when shareholder approval is required and for what actions and those were  
26 the duties he was fulfilling.

27

28 Ultimately, the fact that he's working with a creditor is, with respect, normal. If you have  
29 a primary creditor and you're out of margin and the only way you can continue operations  
30 in the hopes of a turnaround is to work with your creditor, you're going to be consulting  
31 with your creditor.

32

33 MASTER FARRINGTON: Well, I think all --

34

35 MS. ROBERTSON: Not to mention there's an obligation under credit  
36 facilities to provide that information.

37

38 MASTER FARRINGTON: Right, on the share pledge agreement though,  
39 Mr. Baumann clearly got a letter saying he's got no further power to vote his shares.

40

41 MS. ROBERTSON: Correct.

1  
2 MASTER FARRINGTON: So whose got power to vote his shares?  
3  
4 MS. ROBERTSON: Callidus.  
5  
6 MASTER FARRINGTON: Callidus has power.  
7  
8 MS. ROBERTSON: Yes.  
9  
10 MASTER FARRINGTON: So who has power -- and Mr. Sinclair became a  
11 director, right?  
12  
13 MS. ROBERTSON: Yes.  
14  
15 MASTER FARRINGTON: And who has power either to continue the  
16 directorship appointment or revoke the directorship appointment? Callidus.  
17  
18 MS. ROBERTSON: The shareholders, yes.  
19  
20 MASTER FARRINGTON: So, probably not as black and white as Callidus  
21 would suggest, I don't think, because Mr. Sinclair was clear in his transcript that he stopped  
22 letting Mr. Baumann know what was going on.  
23  
24 MS. ROBERTSON: Yes, yes, that's not disputed.  
25  
26 MASTER FARRINGTON: Okay.  
27  
28 MS. ROBERTSON: So just at paragraph 53, I confirm the timing of  
29 that happening and it was April 21st on resolution by Mr. Baumann and his brother,  
30 Michael Baumann and Mr. Sinclair was appointed as president. Thereafter, Mr. Baumann  
31 resigned as President, Chief Executive Officer, corporate secretary and director and Alken  
32 remained in operations with Callidus support for the remainder of 2015 until 2016.  
33  
34 And that gets us to when things -- it became obvious and that was touched on by Mr.  
35 Sinclair and Mr. Ryley in the portions of the affidavit that I've taken Your Honour to, in  
36 terms of when they made the decision to appoint the receiver. As Mr. Ryley deposed, oil  
37 prices have now tanked, the economy was looking horrible, is that a pun that oil prices  
38 tank? The economy was not looking good and it appeared that it just wasn't going to turn  
39 around so they made the -- Callidus commenced the proceedings to appoint a receiver on  
40 March 21st, 2016 and the receiver was appointed by court order on April 1st, 2016.  
41



1 As a receiver, the assets, undertakings and property of Alken, there was a court approved  
2 sale. I'll take you to the report on the court approved sale, because it does get into some of  
3 what was before the Court and some of the issues that are being raised here that Callidus  
4 says are collateral attack on that. But, the report itself is at Exhibit M, of tab 9, in Volume  
5 1.

6  
7 I have that I think slightly wrong. It's the vesting order.

8  
9 MASTER FARRINGTON: M, I have that?

10  
11 MS. ROBERTSON: The report or the vesting order.

12  
13 MASTER FARRINGTON: Or the vesting order.

14  
15 MS. ROBERTSON: I directed you to the wrong thing, the report is at  
16 tab P, is the -- tab P of tab 17, Volume 4. Volume 17 (sic), P. Volume 4.

17  
18 MASTER FARRINGTON: My Volume 4 starts at tab 19, I think.

19  
20 MS. ROBERTSON: Oh sorry, Volume 3.

21  
22 MASTER FARRINGTON: Okay.

23  
24 MS. ROBERTSON: Sorry, I tried to save a few trees by making  
25 everything double-sided so I could put them into two volumes.

26  
27 MASTER FARRINGTON: Okay. I'm at?

28  
29 MS. ROBERTSON: P.

30  
31 MASTER FARRINGTON: P, I have that.

32  
33 MS. ROBERTSON: So this is the confidential addendum to the  
34 receiver's first report to the Court with respect to the sales process.

35  
36 MASTER FARRINGTON: Yes.

37  
38 MS. ROBERTSON: And you'll see on page 2, the sales process is  
39 summarized starting at paragraph 6 and at paragraph 7, the receiver confirms that it was  
40 advertised in a bunch of websites, that they directly marketed to over 400 people on the  
41 distribution list for contacts and clients. Distribution of the information summary to

1 auction companies and networks of distressed asset purchasers. Distribution of the  
2 information summary by Range Advisors -- Range Advisors is the previous name of  
3 Sinclair Range, which is Scott Sinclair's company.

4  
5 MASTER FARRINGTON: Yes.

6  
7 MS. ROBERTSON: Advisors to Alken to approximately 1,060  
8 individual companies operating in oilfield service and water well drilling. Only four parties  
9 submitted offers to purchase and are auction proposals with respect to the sales process.  
10 The review of those offers was one from Ritchie Brothers, one from Hilco Industrial, one  
11 from Canada Public Auction, over the next page. So these were three that were basically  
12 liquidation value only auction type proposals that were received.

13  
14 And then the Callidus offer was the fourth en block offer for all assets and liabilities. The  
15 price was noted on the third to bottom bullet point under there, purchase price equal to all  
16 of Callidus indemnity of Alken less \$4.5 million. The Callidus purchase price debt, which  
17 is the \$4.5 million number in the definition, shall be assumed by the purchaser and any  
18 other indemnity or obligation Callidus agrees in writing to assume prior to closing. The  
19 Callidus purchase price is estimated to be approximately \$22,927,552, based on the amount  
20 being \$27 million less the \$4.5 million, which is calculated at tab 19 now.

21  
22 So then there's an analysis of the offers to purchase. Of the three option proposals  
23 submitted, the estimated gross liquidation value is \$3 to \$375 indicating the forced sale  
24 value of the equipment has declined significantly since the Hilco valuation appraisal. There  
25 being other appraisals that are mentioned there. Schedule E, as per paragraph 23, which is  
26 -- unfortunately on Mr. Baumann's affidavit the pages aren't numbered. I'm not sure if you  
27 can find schedule E. Schedule E is after the submissions by the various auction companies  
28 and Callidus' offer which is schedule B.

29  
30 MASTER FARRINGTON: Yes.

31  
32 MS. ROBERTSON: And at the top, there is in the top right-hand  
33 corner if you're flipping a schedule stamp with an 'E' in it. It's before the company searches  
34 or DPSA searches, right before that.

35  
36 MASTER FARRINGTON: I think I'm getting there, I found a Schedule C.

37  
38 MS. ROBERTSON: No E.

39  
40 MASTER FARRINGTON: And that's after the -- I see it --

41

1 MS. ROBERTSON: After Callidus.

2

3 MASTER FARRINGTON: There it is, yes.

4

5 MS. ROBERTSON: So you see an analysis of the three -- the various  
6 auction proposals and they basically go from 3.18 and the highest number that is possible  
7 on any of these is \$14,475, which is the second line from the bottom.

8

9 So what that means is the way that the bid was formulated, as long as the amount owed to  
10 Callidus was higher than 18.97, which is 4.5 plus \$14,475, one dollar more than that, it's  
11 the better deal. So whether or not Callidus was owed \$27 million, which it was assumed,  
12 or \$19 million, this would've been the exact same result and this offer would've been better.

13

14 I'll just quickly go to the vesting order itself then, which is at tab 9 of Volume 1.

15

16 MASTER FARRINGTON: Yes.

17

18 MS. ROBERTSON: Tab M.

19

20 MASTER FARRINGTON: I have that.

21

22 MS. ROBERTSON: You'll see that the transaction was approved at  
23 paragraph 2 and at paragraph 3, the vesting of the property. Upon delivery of the receiver's  
24 certificate of the debtors right, title and interest in and to the purchased assets shall vest  
25 absolutely in the name of the purchaser, that being Altair, free and clear of any and all  
26 security interest, whether contractual, statutory or otherwise, hypothics, caveats,  
27 mortgages, trust or de-trusts, whether contractual, statutory or otherwise liens, executions,  
28 levies, charges or other financial and monetary claims, whether they have attached or been  
29 perfected, registered or filed and whether secured or unsecured or otherwise including  
30 without limitation any encumbrances or charges created by the receivership order. All  
31 charges and security interests or claims evidenced by registration under the PPSA and for  
32 greater certainty, this court orders that all encumbrances are hereby expunged and  
33 discharged.

34

35 And then at paragraph 5, just to confirm the purchaser's nominee, if any, shall by virtue of  
36 the completion of the transaction have no liability of any kind whatsoever in respect of any  
37 claims against the debtor. For clarity, notwithstanding the definition of claims in this order,  
38 this paragraph is of no force and affect and shall not apply in relation to the priority charges.

39

40 So those are still applied, but, the assets are free and clear. And there was on provision  
41 here -- under paragraph 10, notwithstanding the pendency of these proceedings if the matter

1 is assigned into bankruptcy the vesting of the purchase assets and the purchaser pursuant  
2 to this order shall be binding on any trustee and may be appointed in respect of the debtor  
3 and shall not be void or voidable by creditors of the debtor. Nor shall it  
4 (INDISCERNIBLE) nor to be deemed to be a settlement, fraudulent preference,  
5 assignment, fraudulent conveyance, transferred under value or other reviewable  
6 transactions under the *BIA* or any applicable federal or provincial legislation.  
7

8 And this is the key words, I wanted to take Your Honour to, nor shall it constitute a  
9 oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial  
10 legislation.  
11

12 So there we have a vesting order that vests not only from the interests against the assets,  
13 but, there's a couple of things confirmed in this application. One, that the sale itself is  
14 provident. This is a provident, fair market value sale that these assets will be vested clear  
15 of all, what you would normally see, the liens encumbrances. But, it's also vested clear of  
16 any claim of oppression or prejudicial conduct with respect to this sale.  
17

18 MASTER FARRINGTON: Well, I think you can and I certainly understand  
19 the *res judicata* argument and I don't need much persuasion on that. But, are you suggesting  
20 this goes so far as to bless everything that's happened for the last year?  
21

22 MS. ROBERTSON: No, no.  
23

24 MASTER FARRINGTON: Okay.  
25

26 MS. ROBERTSON: I'm sure you're happy to hear that. But, no and  
27 certainly that goes just on what was happening at the time. But, it does mean that nothing  
28 can really -- there's no oppressive conduct by virtue of the sale itself.  
29

30 MASTER FARRINGTON: Right.  
31

32 MS. ROBERTSON: Yes.  
33

34 MASTER FARRINGTON: And I don't need much persuasion on that.  
35

36 MS. ROBERTSON: So one of the things that did come up at the --  
37 after that -- the receivership pretty much came to an end and there was a discharge that  
38 happened. Mr. Baumann -- there is -- I'm not sure if Your Honour did see, but, I don't think  
39 it's necessary 'cause it sounds like you looked at what the transcript was before Mr. Justice  
40 Nixon on the sale approval itself.  
41

1 MASTER FARRINGTON: I did.

2

3 MS. ROBERTSON: And certainly some of these issues were raised.  
4 Mr. Baumann was there, I think the only thing that I would make note of, is that he was  
5 there and had notice of the proceedings.

6

7 I'm not sure if you also looked at the discharge, the transcript from the discharge hearing,  
8 as well. That is at tab 17-S, so Volume 3.

9

10 MASTER FARRINGTON: Let's have a look, I haven't seen that. Yes.

11

12 MS. ROBERTSON: And at this application, Mr. Baumann although  
13 it was horrible spelling by the reporter, Mr. J.G. Hanling who was counsel for Mr. Baumann  
14 at one point in these proceedings, I believe, as well, says agent for Mr. K. Bowman, that's  
15 Mr. Baumann, he appeared on behalf of Mr. Baumann on this application.

16

17 And it's clear, Mr. Cumming on behalf of the Monitor confirms that it is Mr. Baumann at  
18 page 2. But, there's a couple of things in here and I don't think I need to take you to  
19 everything because again this was an attempt to relitigate the sale. Mr. Baumann showed  
20 up, he started talking about these memo -- at page 14, line 10, there's a discussion about  
21 his memorandums of understanding. These are the Middle East memorandums that I think  
22 you've -- this came up as a -- in our document disclosure application when we were talking  
23 about the confidentiality of them.

24

25 MASTER FARRINGTON: Yes.

26

27 MS. ROBERTSON: So here we have a transcript where it's clear,  
28 once again Mr. Baumann is saying there's these memorandums that weren't taken into  
29 account. And the Court confirmed at line 10: (as read)

30

31 Okay. But, the memorandum of understanding and initial document  
32 were the subject matter of discussion with Justice Nixon on May 4th  
33 when the assets were sold. So your client made no request to see the  
34 documents.

35

36 But, the point being that it's clear he's told again -- this was all before Mr. Justice Nixon.  
37 They go into then a lot of what the documents themselves are with the Court confirming at  
38 page 19, at line 31, and this is where Mr. Hanling is saying, starting at line 25.

39

40 MASTER FARRINGTON: Yes.

41

1 MS. ROBERTSON: Mr. Hanling starts by saying: (as read)

2  
3 The receiver was misled and as a result of our investigation we can  
4 convince the receiver that he ought to have included the sale package,  
5 the information with respect to the MOU which may have induced  
6 further parties to bid. Then the receiver out to prepare a report to this  
7 court and I'm not certain they can do that once they've been  
8 discharged.

9  
10 I should point out the dialogue before this is basically the memorandums of understanding  
11 were given to anybody who had signed a confidentiality agreement, that's clear on a  
12 previous exchange. But the Court responds: (as read)

13  
14 I'm not certain how you can persuade the receiver to do that. They've  
15 had the MOU's for over a year. They've had them before the sale  
16 process closed. They considered them. They disclosed their existence  
17 and, in fact, copies of them to Justice Nixon. They disclosed that six  
18 purchasers who had signed confidentiality agreements and received  
19 these documents had nothing more to ask.

20  
21 And then the Court on page 20 again goes -- Mr. Cumming make reference to this with the  
22 Court on page 21.

23  
24 MASTER FARRINGTON: Yes.

25  
26 MS. ROBERTSON: At line 25 or line 10, I should say: (as read)

27  
28 It would have only ever have been released to the people it was ultimately released to which  
29 were the people who signed confidentiality agreements.

30  
31 MR. CUMMING: That's correct.

32 THE COURT: Okay.  
33 [and then down at line 26]

34 THE COURT: On the basis that it was considered at the  
35 time what was the nature of the document and who should see it  
36 and the conclusion then was just those who had signed  
37 confidentiality agreements and the conclusion always would have  
38 been just those that had signed the confidentiality agreements.

39  
40 And Mr. Cumming agrees to that. One of the things that is interesting and that's on page  
41 22, is -- and this was again in response to some submissions about the fact that Callidus

1 may have made reference in its public filings that these documents are worth more. The  
2 Court notes: (as read)

3  
4 And that's for another courtroom and I know, take judicial notice of  
5 the fact that companies who are public or who want to become public  
6 make many statements inflating the value of their assets and or their  
7 potential contracts and that's all it is to date.

8  
9 And that's just --

10  
11 MASTER FARRINGTON: So are you saying that's all it was, your client  
12 inflating the value of assets?

13  
14 MS. ROBERTSON: Yes. What the client choses to put in financial  
15 reporting and it's very interesting Mr. Williams affidavit, I'll leave most of this for reply --

16  
17 MASTER FARRINGTON: Sure --

18  
19 MS. ROBERTSON: -- I don't want you to be -- I don't want to spoil  
20 the surprise, but, it's interesting what he -- he's very carefully -- and when being questioned  
21 is questioned on fair market value and he says, no, no, no. I'm not saying this is fair market  
22 value, I'm saying this is an indication of fair value based on what accounting practices are.

23  
24 And so that's an interesting dichotomy because when a Court's looking at a sale and we're  
25 looking at provident sales, we're considering whether or not it was fair market value and  
26 that's what -- I think it's trite, we've all heard the phrase, it's what a third party purchaser  
27 for value is willing to pay after the assets have been fully and properly exposed to the  
28 market. Not what somebody puts on a spreadsheet.

29  
30 And what we submit is, in the receivership, what a third party purchaser was willing to pay  
31 after these were fully and properly exposed to the market was evidenced by those three  
32 auctioneers reports and why the Callidus credit bid isn't quite in the same category, because  
33 they aren't a third party. There's a lot of other things for it, including an analysis of  
34 recoverability, blood from a stone, we'll just get rid of all the debt and we'll leave the one  
35 asset of \$4.5 million and go after that in another venue.

36  
37 MASTER FARRINGTON: Did Mr. Baumann have any status to raise any  
38 objections on behalf of the corporation at that stage, because he had lost his voting rights  
39 and he was, by design, not a party to the action, that was a conscious decision not to make  
40 him a party to the action?

41

- 1 MS. ROBERTSON: He -- it was interesting, there was a discussion  
2 with Madam Justice Horner here about his standing and for precisely that reason and it was  
3 -- or actually was it at sale approval? Maybe it was at the sale approval, but it was --  
4
- 5 MASTER FARRINGTON: It was the sale approval and Mr. Justice Nixon at  
6 that one --  
7
- 8 MS. ROBERTSON: That's the one I'm thinking.  
9
- 10 MASTER FARRINGTON: -- said I think, you know, five minutes.  
11
- 12 MS. ROBERTSON: Well, he said your standing is limited, there was  
13 a specific, you can only speak wearing your hat as guarantor.  
14
- 15 MASTER FARRINGTON: Right.  
16
- 17 MS. ROBERTSON: Because you can't raise the issues on behalf of  
18 Alken.  
19
- 20 MASTER FARRINGTON: Okay.  
21
- 22 MS. ROBERTSON: But, he did raise all of these issues and had  
23 considerable leeway in that respect.  
24
- 25 So that gets us to the assets are now sold, the Alken assets are now sold and into the legal  
26 argument which is starting at page 17 of the brief.  
27
- 28 And I suspect for the reasons I noted in the test for a summary determination of this, most  
29 of my argument is going to be in reply, because in my submission, I've set out quite clearly  
30 through the documents the prima facie case. There is a guarantee, it's signed in writing,  
31 it's enforceable in all respects. There's evidence of the debt that's owing, which is before  
32 the Court today, based on the credit bid and the calculation that was made. I do have this  
33 updated affidavit with the interest rate some place -- with the interest rate -- I've given to  
34 my friends at 18 percent.  
35
- 36 MASTER FARRINGTON: At the -- there's a Supreme Court of Canada case,  
37 I think it's from December of 2016 on --  
38
- 39 MS. ROBERTSON: On the default rates?  
40
- 41 MASTER FARRINGTON: On interest rates --



1  
2 MS. ROBERTSON: Yes.  
3  
4 MASTER FARRINGTON: -- and that. Are the consequences you go to the  
5 non-penalty rate or are the consequences that you go to something much lower? I can't  
6 remember.  
7  
8 MS. ROBERTSON: It's all -- it's discretion.  
9  
10 MASTER FARRINGTON: Okay.  
11  
12 MS. ROBERTSON: And I first of all, don't admit that it's contrary --  
13  
14 MASTER FARRINGTON: Right.  
15  
16 MS. ROBERTSON: -- it's just we're in a bit of a grey area about it.  
17  
18 MASTER FARRINGTON: Okay.  
19  
20 MS. ROBERTSON: But --  
21  
22 MASTER FARRINGTON: Do we have to look at that case?  
23  
24 MS. ROBERTSON: I'll take another look, but --  
25  
26 MASTER FARRINGTON: Okay.  
27  
28 MS. ROBERTSON: -- but in that case, they found it wasn't a default  
29 clause, so they probably didn't look into it.  
30  
31 MASTER FARRINGTON: I can't remember. Okay, so maybe not.  
32  
33 MS. ROBERTSON: And the reason they found it wasn't a default  
34 clause is because it was one of those ones which now is going to be all of them frankly, it's  
35 18 percent for the first 11 -- if it's a 12 month term, it's the first 11 months is 18 percent.  
36  
37 MASTER FARRINGTON: Right.  
38  
39 MS. ROBERTSON: And then on month 12 it jumps up and so they  
40 said it was by the reflection of time, not because of default.  
41

1 MASTER FARRINGTON: Okay.

2

3 MS. ROBERTSON: And before that the cases were -- there was --  
4 lenders are always looking for creative ways to work around it, it was done as a --

5

6 MASTER FARRINGTON: Right.

7

8 MS. ROBERTSON: -- it's 24 percent, but, if you pay within 11  
9 months, we'll give you a deal and give you interest of 18 percent and that was found to be  
10 permissible prior to that.

11

12 So the amount based on 18 percent, per annum is \$6.3 million. I think in the materials  
13 before you I had it calculated at \$6.6 million. So in terms of what we have to establish for  
14 a guarantee, I'll just take you to some of the law in that respect and that comes out of the  
15 same case at tab H.

16

17 MASTER FARRINGTON: Yes.

18

19 MS. ROBERTSON: I'll just for context summarize what my friend's  
20 position is, as I now understand it from the reply brief. First that suitability for summary  
21 determination which I've taken you a lot to. They have one argument that Callidus didn't  
22 suffer a loss because it has its own internal insurance policy. I frankly don't follow that.  
23 They rely on tort principles of double recovery from the *Ratych v. Bloomer* case which,  
24 with respect, isn't appropriate or relevant to contract. I mean I think it goes without saying  
25 that as a matter of insurance law, if I have an insurer that insures me against loss, I have an  
26 obligation to still go after the primary obligor and in any event, the insurer would then have  
27 a subrogated claim and set into my shoes, if there was any payment and there certainly is  
28 no evidence of a payment being made under any policy.

29

30 The rest of it is really -- it's general allegation of breaches of the credit agreement. The  
31 evidence is often just Mr. Baumann's statement in an affidavit and I'm just cautioning that  
32 because I expect I will be making some objections of my friend's arguments about -- what  
33 I will say in his brief, are assertions of fact that are not based on evidence, even when you  
34 go to the transcripts themselves. If anything, they are inferences to be generous and they're  
35 leaps with respect to the inference that is made.

36

37 But, there's no real evidence of anything that create a prejudice or an increased risk under  
38 the guarantee. There's no evidence or any action actually complained of that would  
39 constitute bad faith and then with respect to the realization of assets I've already highlighted  
40 and I think, Your Honour, has already indicated where you feel on that being a collateral  
41 attack on the receivership order.

1  
2 So, at page 18 of my argument and again this -- much of my argument I'm going to flip  
3 ahead because much was -- much of this was under the premise of the previous complaint  
4 that there was under advances or what they call drip feeding. That seems to have gone  
5 away, so I'll jump ahead and some of the provisions in the case law are still worth nothing  
6 and keeping in mind.

7  
8 At paragraph 72 I note that the relationship between a financial institution lender and its  
9 customer is a purely commercial relationship of creditor and debtor, in the absence of some  
10 special relationship or exceptional circumstances the lender owes a no duty of care to the  
11 borrower. And this is specifically in the context of misrepresentations, as well, and you  
12 know, I say that that's the same here. Callidus owed no duty to Mr. Baumann. He was  
13 very sophisticated. He had counsel. It's clear in the negotiations that I took you, that there  
14 was bargaining going on. This wasn't, you know, the typical, little old lady handed the  
15 standard form 28-page, small font mortgage agreement that we all know she's not going to  
16 read. This is not the situation, at all.

17  
18 The relationship was purely one of creditor and debtor. He was not subject to Callidus'  
19 power with respect to the negotiation of the credit facility and the guarantee terms that he  
20 agreed to. He had the opportunity to read the agreements with the benefit of legal advice  
21 and there was no inequality in that respect.

22  
23 So then going then to the issues to be determined here, it's really whether or not, the actions  
24 of Callidus constituted material change, that changed the risk and that is at *Agriculture*  
25 *Financial Services* case at tab H, at paragraph 59. In this case, what the issue was, was that  
26 there was that there was a -- other than the -- sorry in considering the law in terms of the -  
27 - this was an improvident realization of the receiver as a defence for the guarantee claim.

28  
29 At paragraph 59, the Court noted: (as read)

30  
31 The contractual obligation of the guarantors is clear and the failure of  
32 each guarantor to meet those contractual obligations is also clear.

33  
34 The only issue that arises is whether the guarantors have an equitable  
35 shield that would relieve them from their contractual obligations.

36  
37 That's really the lens we're looking at this case. Is there an equitable shield that relieves  
38 Mr. Baumann of his contractual obligations? The Court then went onto consider *Case*  
39 *Credit* and specifically look at why the wording of the guarantees matter and are dispositive  
40 of it.

41

1 Citing from the *Case Credit* case, in paragraph 47 of the *Case Credit* case is referenced  
2 there and they look at the bank not liable clause: (as read)

3  
4 The Bank does not owe you any duty (as a fiduciary or otherwise) and  
5 you hereby waive any right to make any claim or counterclaim and to  
6 raise any right of set off, equitable or otherwise, arising from any of  
7 alleged breach of a duty owed to you, or the Customer or any other  
8 person. The Bank will not be liable to you nor shall you make any  
9 claim for any negligence or any breaches ...

10  
11 There's no set-off or counterclaim, on the next page 14 and the clause that the bank doesn't  
12 need to exhaust its recourse as against the customer.

13  
14 Paragraph 48: (as read)

15  
16 It has been held that where a guarantor signs a guarantee which  
17 includes clear provisions that release a Bank, as against a guarantor  
18 from the duty to realize on security held in a commercially reasonable  
19 manner pursuant to the Personal Property Security Act, the guarantor  
20 will be deemed to have given up its right thereafter to hold the Bank  
21 to that standard.

22  
23 I'll pause there just to say, case law has kind of gotten a little bit away from that. You still  
24 have a duty to act commercially reasonable and we'll admit that.

25  
26 MASTER FARRINGTON: Right.

27  
28 MS. ROBERTSON: But, nothing -- nothing here can point to  
29 anything that Callidus has done that was commercially unreasonable. There's no evidence  
30 before the Court that a prudent person would have done a), b) and c). All we have is Mr.  
31 Baumann saying I don't like what they did. I think it would have turned out different if  
32 they had done something else.

33  
34 And at paragraph 64, the Court kind of confirms this: (as read)

35  
36 In summary, the law states only that a person in AFSC's position must  
37 not do anything wilful or reckless with the underlying pledged asset.  
38 The facts here not only fully satisfy that test ...

39  
40 I do have another case that is relevant to this issue which is *Servus Credit Union* and sorry  
41 I did not provide this to my friends, it's not in the brief.

1  
2  
3  
4  
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37  
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41

MASTER FARRINGTON: Yes.

MS. ROBERTSON: This is *Servus Credit Union v. Waylon Mechanical* a 2009 decision of the Alberta Queen's Bench. I do after the *Green* have the Court of Appeal decision, it was affirm on appeal, but, I'll just rely on the reasons of the Queen's Bench.

And this is very similar, we had a situation where there was a guarantee that given for a limited amount of \$250,000. It was found to -- the Court found that the intention was not that this was going to be an all indebtedness guarantee of all credit facilities wherever they arise, which is the case here and I'm taking Your Honour to that provision. But, the Court said that wasn't the intention here. It was supposed to only guarantee a specific credit facility of \$250,000 and so you can't change that.

So technically, there was a breach in the lengthening what the guarantee was and an increase in the obligations. But, that being said, the Court found that it was still enforceable as against the guarantor for full and at page 6 is where Court talks about: (as read)

... because the Credit Union loaned in excess of \$250,000 to Waylan without providing notice to the Guarantors, the Guarantees have been rendered void and the Guarantors relieved of liability to repay the claimed amounts to the Credit Union

This issue also raises the effect of the so-called "Bauer clause" in the Guarantees (named after the Supreme Court of Canada decision of *Bauer v. Bank of Montreal*).

So they talk about that \$250,000 and at paragraph 26 confirm that it was n issue. But, at paragraph 25, sorry, paragraph 25 : (as read)

As a preliminary point, I note that the Guarantors are compensated guarantors, not accommodation guarantors. "Accommodation sureties" are guarantors "who entered into the guarantee 'in the expectation of little or no remuneration and for the purpose of accommodating others ...

"Compensated sureties," on the other hand, are guarantors "whose business consists of guaranteeing performance and payment in return for a premium".

1 And compensated sureties have been expanded to include people that are the investors in  
2 business because they are getting the benefit of a business carrying on. (as read)

3  
4 In this case, there was evidence that Waylan agreed to pay a fee for  
5 each year ... There was also evidence that neither 3A nor D2 received  
6 this fee or any other amounts from Waylan; however, this, in my view,  
7 does not affect the characterization. The Guarantees were incidental  
8 to substantial investments ... in Waylan. The Guarantees were  
9 provided not only on the promise of a fee, but also to promote the  
10 potential for profit of the investments.

11  
12 And I say that's the same case here. We have a compensated surety in that Mr. Baumann  
13 had the benefit of any upswing in the business as it's principal and shareholder.

14  
15 So then we get to paragraph 27: (as read)

16  
17 I have determined that the Guarantees should be rectified so as to  
18 apply to indebtedness of Waylan arising under or in relation to the  
19 AOD loan in the amount of \$250,000. Thus, these were specific rather  
20 than general and continuing guarantees. This distinction traditionally  
21 has been an important consideration for courts in determining whether  
22 or not the guarantor's liability under a guarantee should be discharged  
23 because of a variation ...

24  
25 Then he goes to the test, material variation: (as read)

26  
27 The first issue is whether the Credit Union's honouring of cheques  
28 above the limit of the loan constitutes a material change to the  
29 principal debt and thus to the risk of the Guarantors. If there is a  
30 material change, it is necessary to consider the effect of the *Bauer*  
31 clause.

32  
33 So we go to whether or not there was a material change and that goes to prejudice. At  
34 paragraph 29, there's a quote from *Canada Trust Co Mortgage Co and Bank of Montreal*  
35 *v. Korico* where starting at the last end of the third line down: (as read)

36  
37 The guarantor will not benefit from this protection if the changes were  
38 specifically authorized by the guarantor or if they were within the  
39 contemplation of the contract. It will be a question of contract  
40 interpretation as to whether such changes were authorized or  
41 contemplated.

1  
2 And I say on the terms of the guarantee they were and I took you to the  
3 (INDISCERNIBLE), the credit could be increased, it could be reduced, could be over  
4 advanced, it could be indulgence, all of that was there. (as read)  
5

6 The origins of this analysis is the English case of *Holmes v. Brunskill*  
7 (1878). The rule in *Holmes v. Brunskill* is that any material variation  
8 of the terms of the principal contract will discharge the guarantor. A  
9 variation is considered material where:

10  
11 ... it is not necessarily beneficial to the surety or otherwise  
12 prejudices him, and where any lack of prejudice or benefit is  
13 not evident without enquiry. If the benefit or lack of prejudice  
14 is not self-evident, then the court will not embark on an enquiry  
15 as to whether the variation was indeed beneficial to the surety  
16 or otherwise unprejudicial.  
17

18 So then it goes into a couple of -- look at some of the cases. At paragraph 35, the Court  
19 notes on page 9: (as read)  
20

21 It is not self-evident that this variation would benefit the Guarantors,  
22 or even that it would not cause prejudice to them. Because of limits  
23 on the amount of the Guarantees, it is clear that the variation does not  
24 change the maximum exposure of the Guarantors. But an increase in  
25 the principal amount of the loan may increase the likelihood that the  
26 loan will not be fully repaid, and thus change the risk of exposure of  
27 the Guarantors.  
28

29 And I say that's kind of the same thing here. I think that's what Your Honour was getting  
30 to, there's still an increased risk. But, the Court says: (as read)  
31

32 Of course, it was not the intention of the Credit Union to increase  
33 either its own or the Guarantors' risk of exposure. Rather, the intent  
34 was to refrain from actions that would precipitously force Waylan out  
35 of business, and to take reasonable steps to facilitate Waylan's  
36 continued ability to carry on business, for the benefit of Waylan and  
37 all of its creditors, including the Guarantors who were investors in  
38 Waylan. But the applicable legal principles do not depend on the  
39 intent of the Credit Union and do not permit a detailed inquiry into the  
40 existence of prejudice. The Guarantors may have been prejudiced by  
41 the increase in the loan amount, and thus the Credit Union's decision

1 to authorize an increase without their consent would result in their  
2 discharge, unless it is authorized by the *Bauer* clause.

3  
4 So in other words, even if this change and this increase was continuing to do business was  
5 a default under the credit agreement and we don't necessarily say that it is and it increased  
6 risk to Mr. Baumann, if it's clear on the terms of the guarantee that it doesn't give the basis  
7 for a defence, it will not relieve him of his liability.

8  
9 The Court looks at *Granata Trust v. Royal Bank*: (as read)

10  
11 In that case the Credit Agreement between the bank and the primary  
12 creditor was amended after the guarantee was signed without the  
13 consent of the guarantor, increasing the credit facility available to the  
14 primary debtor. The guarantee in question was limited to a specific  
15 amount, as in this case, but in contrast to this case, it was a general  
16 [which is the case here with Mr. Baumann's guarantee] it was a  
17 general "all accounts" guarantee, rather than a specific guarantee.  
18 Swinton J. (as she then was) held that the change in the credit facility  
19 was not a material variation and the guarantee was not discharged:

20  
21 The guarantor did not provide a specific guarantee for a  
22 discrete loan, but rather a continuing guarantee for all  
23 indebtedness of Robertson Foods, whether incurred before or  
24 after the guarantee was signed. The fact that there were  
25 changes in the amount loaned did not change the exposure of  
26 the guarantor, which was at all times limited to \$1.5 million.

27  
28 And then she goes on for the next page and it's a repeat of this principle over and over again  
29 in the cases. In the *Royal Bank v. Maxwell* at paragraph 39: (as read)

30  
31 In other words, a continuing limited guarantee which covers a series  
32 of transactions is not invalidated by moneys being lent which total  
33 more than the amount stipulated in the guarantee, although the surety  
34 cannot be made liable for more than the figure prescribed by the  
35 guarantee . . .

36  
37 So we can't go above \$6 million plus interest as a result of those further advances, but, we  
38 aren't precluded in our recovery of the guarantee because of them.

39  
40 And again, *Bank of Montreal v. Murphy* in paragraph 41: (as read)

41



1 The circumstances of these decisions are in many ways similar to the  
2 present case, with one notable and, in my view, very important  
3 distinction. In each of these cases the guarantee was a general and  
4 continuing one, which, the courts found, contemplated further  
5 dealings between the bank and the primary debtor, .... In contrast ...  
6 these ones applied only to that one loan.  
7

8 So then at page 11, the Court looks at the Bauer clause and at paragraph 45: (as read)  
9

10 Under the Bauer clause in the Guarantees the Guarantors agreed that  
11 “the Credit Union, without exonerating in whole or in part the  
12 Guarantor, may grant time, renewals, extension, indulgences . . . and  
13 otherwise deal with the Customer” [emphasis added].  
14

15 It's pretty much verbatim what ours says: (as read)  
16

17 The Guarantors point out that the clause does not expressly permit the  
18 Credit Union to grant increases in the loan amount.  
19

20 Ours does, it said increases and decreases in about three points up from the indulgences  
21 section: (as read)  
22

23 With regard to the references to indulgences and other dealings, the  
24 Guarantors argue that these are ambiguous ...  
25

26 And it goes into the *contra proferentem*. At paragraph 48, the Court concludes:  
27

28 Although I have found there was a material alteration to the contract  
29 as defined in the case law, I agree that the evidence does not support  
30 the view that the Guarantors suffered any actual prejudice as a result  
31 of the Credit Union’s decisions to honour Waylan’s cheques above  
32 the \$250,000. Those decisions were made in an effort to preserve  
33 Waylan’s ability to continue in its business, and, as was observed in  
34 *Amormino*, could actually be said to have had the effect of decreasing  
35 the risk that the Guarantors would be called upon to honour the  
36 Guarantees.  
37

38 The Guarantors agreed in the *Bauer* clause that the Credit Union could  
39 grant “indulgences” to and “otherwise deal” with Waylan. In my  
40 view, those words are not ambiguous and do apply to the Credit  
41 Union’s actions. The Credit Union’s decision to honour Waylan’s



1 examination is there in our brief. And it's my respectful submission, she should address  
2 that at the outset. I mean it's only things that come out of left field that are unanticipated  
3 et cetera that are properly the subject of reply, in my submission.  
4

5 MASTER FARRINGTON: The -- on Mr. Williams, the only point you made  
6 in relation to Mr. Williams, was the difference in the terminology between fair market  
7 value and fair value.  
8

9 MS. ROBERTSON: M-hm --  
10

11 MASTER FARRINGTON: Early in my career I worked on a matter  
12 involving chartered business valuers and I was familiar that chartered business valuers  
13 are very careful in their wording on that and they have a specific concept that's known to  
14 them that they use that's fair value and they're quite protective of that concept. So it didn't  
15 surprise me to read the transcript in the way --  
16

17 MS. ROBERTSON: You're in a better position than Mr. Robertson  
18 and I then.  
19

20 MASTER FARRINGTON: And it didn't surprise me to read some of the  
21 discussion because they're very protective of that term.  
22

23 MS. ROBERTSON: It was lawyer brain saying huh?  
24

25 MASTER FARRINGTON: So in terms of -- I understand your point Mr.  
26 Bodnar, but, in terms of that, I think we've, I think identified some issues today so I'm  
27 content to let her deal with that in rebuttal.  
28

29 MS. ROBERTSON: Just in my position on that --  
30

31 MASTER FARRINGTON: Yes?  
32

33 MS. ROBERTSON: -- is that the onus has now shifted and that's the  
34 reason why I think this is appropriate in reply because the primary case --  
35

36 MASTER FARRINGTON: Right.  
37

38 MASTER FARRINGTON: -- in my submission has been proven, the onus  
39 has shifted, this is almost like -- it's an affirmative defence.  
40

41 MASTER FARRINGTON: You say you've made out the case for summary

1 judgment --  
2  
3 MS. ROBERTSON: Yes.  
4  
5 MASTER FARRINGTON: -- and you're saying it's up to Mr. Bodnar to show  
6 (INDISCERNIBLE) merit for trial.  
7  
8 MS. ROBERTSON: Correct.  
9  
10 MR. BODNAR: Yes and my friend said that she had a big  
11 surprise, I didn't want to ruin the surprise in terms of her submissions on Mr. Williams --  
12  
13 MASTER FARRINGTON: So that's fine --  
14  
15 MR. BODNAR: -- I figure we may as well have it now.  
16  
17 MS. ROBERTSON: My attempt at humour has (INDISCERNIBLE)  
18 --  
19  
20 MR. BODNAR: This is a good place to break, I mean I'll have to  
21 take some time to look at this case --  
22  
23 MASTER FARRINGTON: Sure.  
24  
25 MR. BODNAR: -- I'm sure why we only got it two hours into the  
26 application, but, in any event --  
27  
28 MASTER FARRINGTON: I want to throw out and this will sound absolutely  
29 odd -- but one of the things we're always careful about is there any cases binding on us and  
30 are there any cases that are particularly helpful? When I was a much younger lawyer,  
31 Master Waller one time just casually, after a matter was argued he said, has counsel heard  
32 of such-and-such a case that just came out? And he described briefly what it was and I  
33 spent my whole career trying to find it and I've never found it. But, it might have some  
34 bearing on if anybody ever finds it and he described it as, he said it was a case of Justice  
35 Ritter, and that would be R-I-T-T-E-R, in a receivership context dealing with the obligation  
36 to -- and it might be different to this extent -- it was a sale to the plaintiff, but, arguably one  
37 might make that argument here that it was a sale to the plaintiff; dealing with the obligation  
38 to seek a sale to plaintiff in terms of a deficiency, of fixing a deficiency at the earliest  
39 reasonable date.  
40  
41 MS. ROBERTSON: It was receivership, not a mortgage --

1  
2 MASTER FARRINGTON: He said it wasn't a mortgage context, he said it  
3 was a receivership context and that has so many applications in so many different ways  
4 and I've never found the case. So --  
5  
6 MS. ROBERTSON: I think I've seen that in the mortgage concept.  
7  
8 MASTER FARRINGTON: Exactly and I've never found the case, but, I  
9 throw that out there just in case it exists and because I always thought that would be a really  
10 interesting case to see if it does exist. So I throw that out there for whatever it's worth for  
11 both sides.  
12  
13 MS. ROBERTSON: Can you give a narrower time line?  
14  
15 MASTER FARRINGTON: On no, this was probably ten years ago, he said  
16 this and I've never been able to find it. Every time I go try and look for it in some context  
17 I never find it.  
18  
19 So thank you and I think we're okay starting at the regular time tomorrow.  
20  
21 MR. BODNAR: Thank you, Sir.  
22  
23 MS. ROBERTSON: Thank you.  
24  
25 MASTER FARRINGTON: Thank you every one.  
26  
27 THE COURT CLERK: Order in chambers.  
28

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30 PROCEEDINGS ADJOURNED TO 2:00 PM, MARCH 21, 2018  
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I, Amanda Williams, certify that this recording is the record made of the oral evidence of the proceedings held in courtroom 902, Calgary, Alberta Court of Queen's Bench, on Tuesday, March the 30th, 2018 and that I was the court official in charge of the sound recording machine during these proceedings.

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I, Su Zaherie, certify that

(a) I transcribed the record, which was recorded by a sound recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record and

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