Court of King's Bench of Alberta

Citation: Orphan Well Association v SanLing Energy Ltd, 2024 ABKB 240

Date: 20240425
Docket: 2101 05013
Registry: Calgary

Between:

Orphan Well Association and British Columbia Oil and Gas Commission

Plaintiffs

- and -

SanLing Energy Ltd.

Defendant

Reasons for Decision
of the
Honourable Justice L.K. Harris

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[1] SanLing Energy Ltd. ("SanLing") is an oil and gas production and exploration company with interests in oil and gas wells and facilities in Alberta and British Columbia. Some of those interests were owned jointly with Canadian Natural Resources Limited ("CNRL")

[2] On April 23, 2021, PricewaterhouseCoopers Inc., LIT (the "Receiver") was appointed receiver and manager of SanLing pursuant to an Order of this Court. The Receiver assigned SanLing into bankruptcy on June 10, 2021, and became SanLing's Trustee in Bankruptcy. Since that time, the Receiver has, amongst other things, been engaged in the disposition of SanLing's assets, undertakings and properties.

[3] By way of an Asset Purchase and Sale Agreement dated October 7, 2021 (the "APA"), between the Receiver and Spoke Resources Ltd. ("Spoke"), Spoke agreed to purchase certain

assets owned by SanLing. Some of those assets included contracts between SanLing and CNRL (the "Assumed Contracts").

[4] At the time of the Receivership, SanLing had accumulated "credits" which were amounts owed to it by CNRL for services performed by SanLing under the Assumed Contracts prior to the Receivership.

[5] The Assumed Contracts required CNRL's approval of the assignment of these contracts to Spoke. The APA also required Spoke, as the assignee, to pay CNRL any funds required to remedy any defaults of SanLing and the Receiver under the Assumed Contracts (the "Cure Costs").

[6] Spoke and the Receiver disagreed on how the Cure Costs owed by Spoke to CNRL were to be calculated. The Receiver, CNRL and Spoke have now brought applications for an Order resolving that issue.

I. Background

[7] Paragraph 2.5(a)(i) of the APA requires Spoke, as Purchaser, to pay Cure Costs in relation to the Assumed Contracts:

> (a) Following Closing, if and to the extent that Purchaser must be novated into, recognized as a party too, or otherwise accepted as an assignee or transferee of Vendor's and/or the Debtor's interest in the Assets or certain of them, including any Title Documents and Assumed Contracts, the following provisions shall apply with respect to the applicable Assets until such novation, recognition or acceptance has occurred:
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> (i) The Purchaser shall use reasonable commercial efforts to obtain, as may be required by the terms of any Assumed Contracts, consents or approvals to the assignment of such Assumed Contracts; provided that to the extent that any Cure Costs are payable with respect to any Assumed Contract, the purchaser shall be responsible for and shall pay all such Cure Costs, which shall be paid directly to the counterparty as and when required in conjunction with the assignment of the Assumed Contracts, and which Cure Costs shall form part of the Purchase Price for the Assets... (emphasis added)

[8] Cure Costs are defined in s 1.1(s) of the APA as:

> …in respect of any Assumed Contract, all amounts required to be paid to remedy all of the Vendor's or the Debtor's monetary defaults under such Assumed Contract or required to secure a counterparty's or any other necessary Person's consent to the assignment of such Assumed Contract pursuant to its terms (including any deposits or other forms of security required by any Governmental Authority) or as may be required pursuant to the Approval and Vesting Order, and includes any other fees and expenses required to be paid to a counterparty or any other Person in connection with the assignment of an Assumed Contract pursuant to its terms or Applicable Laws.

[9] When CNRL was notified of the assignment of the Assumed Contracts to Spoke, it wrote a letter to Spoke dated October 21, 2021, confirming that the Assumed Contracts were subject to the payment of Cure Costs by Spoke in the amount of $140,471.58. CNRL provided a statement of account, and confirmed that in calculating the amount owed, CNRL "netted pre-filing credits accruing under the Assumed Contracts against post-filing obligations". In other words, CNRL deducted the credits it owed to SanLing under the Assumed Contracts pre-receivership from the total amount of Cure Costs owed by Spoke.

[10] The Receiver disagreed with CNRL's calculation of the Cure Costs, taking the position that any pre-Receivership credits owed by CNRL to SanLing must be paid to the Receiver and not used to reduce the Cure Costs owed by Spoke. The Receiver's position was that there was nothing within the APA which permitted Spoke to take the benefit of those credits.

[11] On November 3, 2021, the Receiver's counsel wrote a letter to CNRL, with a copy to Spoke, confirming their position, but proposing that the issue be resolved at a later date once more information was available.

[12] On November 15, 2021, Spoke issued Notices of Assignment seeking CNRL's consent to the assignment of the Assumed Contracts to Spoke.

[13] CNRL then discovered that it had miscalculated the total amount of Cure Costs owed by Spoke. In fact, Cure Costs in the total amount of $685,295.96 were owed by Spoke to CNRL under the Assumed Contracts. No credits were deducted from this amount given the Receiver's position. CNRL advised Spoke that the total amount of Cure Costs needed to be paid before it would approve of the assignment. This caused significant difficulty for Spoke as it was unable to operate under the Assumed Contracts unless it had CNRL's approval.

[14] On December 23, 2021, Spoke and CNRL reached an agreement whereby CNRL conditionally approved the assignment of the Assumed Contracts to Spoke, and Spoke would pay CNRL $277,726.54, which was the total amount of Cure Costs owed ($685,295.96) net of the pre-Receivership credits which CNRL owed to SanLing ($407,569.42), pending a resolution of the dispute over whether Spoke was entitled to the benefit of the pre-receivership credits owed by CNRL to SanLing. CNRL also agreed that it would provide Spoke with "all necessary supporting documentation and back-up information to permit Spoke to audit and confirm the quantum of the outstanding Cure Costs".

[15] The December 23, 2021 letter agreement between CNRL and Spoke also included the following provision:

> Immediately upon the Court determining, or Spoke, the Receiver and CNRL reaching agreement on, Spoke's entitlement to the benefits of the accrued credits in the calculation of Cure Costs, Spoke covenants and agrees to promptly pay CNRL the difference between the Net Cure Costs and the actual Cure Costs as directed by the Court or as otherwise agreed to among Spoke, the Receiver and CNRL.

[16] Several months passed. In May 2022, the Receiver sent an email to Spoke inquiring about whether Spoke intended to apply to the Court to have the issue of whether the pre-Receivership credits should be subtracted from the Cure Costs. Spoke replied that they would look into it. In July 2022, the Receiver sent a second similar email, and again, Spoke replied that they would get back to them.

[17] In December 2022, the Receiver emailed CNRL inquiring about outstanding matters. The Receiver and CNRL discussed the fact that in the Receiver's view, the APA did not provide Spoke with any right to any credits owed to SanLing by CNRL pre-Receivership.

[18] The issue then remained dormant again for almost a year until the Receiver, interested in concluding its mandate, brought an application before this Court returnable December 5, 2023, seeking judgment against Spoke in the amount equivalent to the balance of the Cure Costs owed by Spoke under the APA. CNRL also brought an application, returnable on December 5, 2023, seeking an Order directing Spoke to pay the outstanding Cure Costs.

[19] Around the same time, Spoke became aware that CNRL had released a "13th Month Adjustment" for 2021, which was in effect a retroactive reconciliation of the various amounts and credits owed by the parties under the Assumed Contracts. On November 29, 2023, Spoke wrote to CNRL questioning whether CNRL's calculation of the Cure Costs was accurate. CNRL reviewed the matter, and on December 4, 2023, confirmed with the Receiver and Spoke that it had miscalculated the Cure Costs owed, and that in fact, CNRL now owed Spoke $38,538 for its overpayment of the Cure Costs, without considering the pre-Receivership credits.

[20] The Receiver then advised Spoke that it would not pursue its application against Spoke for the payment of Cure Costs under the APA. In response, Spoke took the position that it wanted its costs paid by the Receiver. The parties appeared before Neilson J who directed Spoke to file its own application for any relief it sought in relation to the Cure Costs, to be heard on a new date (the "Neilson Order"). The Neilson Order specifically made no order with respect to the Receiver's Application or the CNRL Application.

[21] On January 22, 2024, Spoke filed its cross-application. It sought "judgment, damages, or in the alternative damages or restitution for unjust enrichment" in the amount of $277,726.54, or in such other amount as may be determined by the Court, interest, costs in relation to the Applications brought by the Receiver and CNRL and costs "in respect of the balance of this Application".

II. The Receiver's Position

[22] The Receiver says that this matter is simple. Spoke is obliged to pay Cure Costs to CNRL pursuant to the APA. The amount of those Cure Costs changed over time due to the miscalculations of CNRL, but there is nothing within the APA that provides Spoke the right to deduct any pre-Receivership credits that CNRL may owe to SanLing (now the Receiver) from the Cure Costs it owes. Once the Receiver learned that Spoke had overpaid the Cure Costs, it confirmed that it would not proceed with its application. The Receiver argues that it does not owe Spoke costs of the application because the dispute could have been resolved many months prior, without the need for an application, had Spoke responded to the Receiver's inquiries in a timely way.

III. CNRL's Position

[23] CNRL takes no position with respect to the dispute over whether Spoke can claim the benefit of the pre-Receivership credits as that issue is between Spoke and the Receiver, and does not involve CNRL. CNRL's interest is simply ensuring that it pays the pre-Receivership credits to the correct party and seeks an Order providing it with the appropriate direction.

IV. Spoke's Position

[24] Spoke takes the position that it is entitled to payment of $277,726.54. Spoke bases its claim on (a) the wording of the APA and the December 23, 2021 letter agreement, (b) a claim akin to a set off, or alternatively (c) restitution for unjust enrichment. Spoke also claims costs.

V. Analysis

a. Is Spoke Entitled to Pre-Receivership Credits?

[25] The April 23, 2021 Receivership Order granted the Receiver broad-ranging powers over SanLing's property, proceeds, receipts and disbursements. Pursuant to that Order, the Receiver took possession of SanLing's property, including the Assumed Contracts. In furtherance of its authority, the Receiver entered into the APA with Spoke, transferring the Assumed Contracts to Spoke. The APA was approved pursuant to the Approval and Vesting Order dated October 27, 2021 of Nixon J.

[26] It is the APA which determines Spoke's rights and obligations vis-à-vis the Receiver. I must look to the provisions of the APA and assess whether there is anything within it which grants Spoke the right to reduce the amount of Cure Costs it owes to CNRL by deducting pre-Receivership credits owed by CNRL to SanLing.

[27] The Courts' approach to contractual interpretation is described in ***Sattva Capital Corp. v Creston Moly Corp.***, 2014 SCC 53 (CanLII) starting at para 47:

> The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (***Jesuit Fathers of Upper Canada v Guardian Insurance Co. of Canada***, 2006 SCC 21, [2006] 1 S.C.R. 744, at para 27, per LeBel J.; see also ***Tercon Contractors Ltd. v British Columbia (Transportation and Highways)***, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p 574, per Lord Wilberforce)
>
> The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see ***Moore Realty Inc. v Manitoba Motor League***, 2003

MBCA 71, 173 Man. R. (2d) 300, at para 15, per Hamilton J.A.; see also ***Hall***, at p 22; and ***McCamus***, at pp 749-50). As stated by Lord Hoffmann in ***Investors Compensation Scheme Ltd. v West Bromwich Building Society***, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p 115]

[28] While surrounding circumstances are important considerations, they must not overwhelm the words of the contract or effectively create a new agreement contrary to the wording of the agreement itself: ***Sattva*** at para 57. Courts must consider surrounding circumstances even if a contract is not ambiguous; failing to consider the surrounding circumstances when interpreting a contract is a reversible error: ***IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing***, 2017 ABCA 157 (Alta. C.A.) at paras 57, 58, leave to appeal to SCC refused 37712 (5 April 2018). Evidence of surrounding circumstances should only consist of objective evidence about the background facts at the time of the contract execution. The evidence must have been, or reasonably ought to have been, within the knowledge of both parties at the time of or prior to the contract execution: ***Sattva*** at para 58.

[29] There is nothing within the APA itself that gives Spoke any right to claim the benefit of the pre-Receivership credits. Paragraph 2.5(a)(i) is clear that Spoke is responsible for any Cure Costs owed to CNRL arising from SanLing's default, and that the amount of Cure Costs forms part of the purchase price. There is no mention of pre-Receivership credits, or in fact any amounts owed by CNRL to SanLing. Rather, para 2.5(a)(i) provides that Spoke "shall pay all such Cure Costs" without regard to whether such Cure Costs were incurred pre- or post-Receivership, and certainly does not consider the availability of set-off of any other amounts. Based upon the wording of the APA alone, I would conclude that Spoke is not entitled to deduct any of the pre-Receivership credits owed by CNRL to SanLing.

[30] However, even though I find that the wording of para 2.5(a)(i) of the APA is clear as to Spoke's obligation to pay the total amount of Cure Costs without deduction, I must also consider the objective evidence of the circumstances surrounding the execution of the APA.

[31] Spoke relies upon the Affidavit of its principle, Mark Smith. At para 15 of Mr. Smith's Affidavit filed November 30, 2023, he states:

> "I have always understood and intended, and believe that it was mutually understood and intended by Spoke and the Receiver, that the Cure Costs were the net amount owing by and owed to SanLing/the Receiver under the Spoke Assumed Contracts."

[32] This evidence is not admissible evidence under ***Sattva***. It is Mr. Smith's opinion. It may also be hearsay. In ***Vandal v Cousineau***, 2015 ABCA 408 the Court noted that ***Sattva*** does not permit a contracting party to testify "I believe the words of the contract mean such" (at para 9). Evidence of the parties about their subjective intentions is of limited assistance if it is even admissible.

[33] At para 59 of ***Sattva***, the Supreme Court noted:

> It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (***King***, at para 35; and ***Hall***, at p 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties…

[34] I conclude that I cannot rely upon Mr. Smith's statement as to his understanding and intentions with respect to the meaning of para 2.5(a)(i) of the APA.

[35] Spoke also points to the October 21, 2021 letter from CNRL, in which CNRL advised Spoke that the amount of Cure Costs owed was net of the pre-Receivership credits. However, I decline to give this evidence much weight. There is nothing within the letter which indicates CNRL's approach was endorsed by the Receiver. Instead, the evidence is clear that the Receiver did not agree with this approach, and that it promptly took steps to advise CNRL and Spoke of its position. CNRL was not a party to the APA and did not speak for the Receiver. I conclude that CNRL was mistaken in taking this approach.

[36] On the other hand, the Receiver's mandate, in part, was, as set out in the Receivership Order: "to receive, preserve and protect" SanLing property. This is in accordance with its duty "to realize as much as possible from the estate for the benefit of the creditors". A Trustee's actions "should be judged by the reasonableness of the business approach taken at the time of the action": Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th Editon at para 2:36. Preserving the pre-Receivership credits for the benefit of the SanLing Estate is consistent with this duty.

[37] Both the Receiver and Spoke were sophisticated parties, fully capable of ensuring that their rights and obligations were reflected within the APA. One would think that if the parties had an intention to permit Spoke to have the benefit of the pre-Receivership credits, then that would have been provided for within para 2.5.

[38] Finally, the reasonableness of the APA, as drafted, was accepted by this Court in granting the Approval and Vesting Order.

[39] The circumstances speak to the likelihood that the Receiver's overall intent was to maximize the realization from the SanLing Estate for the benefit of the creditors, resolve the SanLing Estate in an orderly and efficient manner. There is no evidence to suggest that the Receiver was prepared to give up the pre-Receivership credits owed by CNRL in order to effect the sale of the Assigned Contracts to Spoke. There is no objective evidence establishing that Spoke's intention was to enjoy the benefit of the pre-Receivership credits, and its assertion to the contrary is nothing more than an attempt to take advantage of the mistaken approach used by CNRL in its October 21, 2021 letter.

[40] There is nothing in these circumstances which suggests that Spoke was entitled to the benefit of the pre-Receivership credits pursuant to the APA. The provisions of the APA must be interpreted as such.

b. Spoke's Claim for $277,726.54

[41] The relief claimed by Spoke has evolved over time.

[42] When Spoke first learned that the Receiver was prepared to abandon its application against Spoke for unpaid Cure Costs, Spoke's response was that it wanted the Receiver to pay its costs. This position is evident from the December 2023 communications between counsel immediately after it was discovered that CNRL had miscalculated the Cure Costs owed by Spoke, and it seemed to be based upon Spoke's position that it had always questioned the Cure Costs calculated by CNRL, but only to the extent that it believed it could deduct the pre-Receivership credits.

[43] As part of an email chain between counsel for the Receiver and counsel for Spoke, counsel for the Receiver states:

> "Having become aware of the below, the Receiver will withdraw its application against Spoke, and will not be seeking any relief against Spoke at tomorrow's application."

[44] In response, counsel for Spoke writes:

> "I am instructed to seek costs against the Receiver in that regard."

[45] There is a further exchange of emails between counsel when counsel for Spoke writes:

> "…Spoke has never, ever wavered from its position that it challenged the Cure Costs claimed by the Receiver and CNRL. It has always asserted that the Cure Costs should take into account both pre and post-receivership filing credits and it was the Receiver's objection to that which caused CNRL to refuse the netting…

[46] This statement is supported by the December 23, 2021 letter from CNRL in which it states in part:

> "Spoke has advised CNRL that it disagrees with the Receiver' s analysis and is of the view that as Operator, CNRL maintains the ability to set-off amounts owing to SanLing…
>
> …
>
> …in order to facilitate the assignment and novation of SanLing's interest under the Assumed Contracts to Spoke while determination of Spoke's entitlement to the Credits remains outstanding and under discussion with the Receiver, Spoke has requested that CNRL endorse the Notices of Assignment and recognize spoke as a counterparty to the Assumed Contracts, subject to certain proposed terms and conditions…"

[47] It wasn't until November 29, 2023, that Spoke raised the issue of a miscalculation by CNRL of the Cure Costs owed. However, even with that realization, and ultimately, the agreement of CNRL and the Receiver, Spoke did not raise the argument that it was entitled to something more than a reimbursement for its overpayment of Cure Costs.

[48] In summary, as of December 4, 2023, Spoke's position was that it was entitled to costs of the Receiver's application because it had been put to the task of responding when its position as to its entitlement to the pre-Receivership credits had always been clear.

[49] Now, however, Spoke argues that it is entitled to something more – "judgment, damages, or damages or restitution for unjust enrichment of the full $277,726.54 it has paid for Cure Costs.

[50] The basis for this argument is unclear.

[51] There is no dispute between the parties that when Spoke queried the calculation of Cure Costs in November, 2023, CNRL agreed that it had overcharged Spoke. Up to that point, the total Cure Costs calculated by CNRL amounted to $685,295.96. Up to that point, Spoke had only paid a portion of that amount, being $277,726.54. With CNRL's recalculation in December 2023, it determined that CNRL owed Spoke $38,538. In other words, the Cure Costs actually owed to CNRL by Spoke under the APA amounted to approximately $239,188.54, which Spoke had already paid.

[52] As determined above, Spoke owes CNRL Cure Costs as part of the purchase price for the Assumed Contracts. There is nothing in the APA which grants Spoke the benefit of the pre-Receivership credits. Accordingly, the APA cannot be the basis for Spoke's claim that it is entitled to $277,726.54.

[53] Next, Spoke argues in its submissions that "the intent of the notion of Cure Costs is to keep the third party (CNRL) whole, not to allow the Receiver to profit from the payment of Cure Costs." Putting aside the fact that there is nothing in evidence that supports this statement, given the definition of Cure Costs within the APA, there is also nothing to suggest that the Receiver is "profiting" in any way from the payment of Cure Costs. Cure Costs are not paid to the Receiver. While Spoke argues that deducting the credits would result in a benefit to the Receiver, this argument conflates two distinct obligations.

[54] Spoke's obligation to pay CNRL Cure Costs under the APA are completely separate and distinct from any obligation CNRL may have to pay SanLing's credits under the Assumed Contracts. The Receiver is not "profiting" by claiming the full amount of those credits. It is simply accepting payment of what was owed by CNRL to SanLing.

[55] Spoke also seems to argue that there should be some form of a set off between the $277,726.54 and the pre-Receivership credits. However, one obligation cannot be used as a set off against the other, despite Spoke's assertion at para 48 of its written submissions.

[56] There is no basis within the APA, as explained above, for any contractual set-off of amounts owed between Spoke and CNRL on one hand and CNRL and the Receiver on the other. Although Spoke urges me to conclude that there should be a right to set off because the APA doesn't expressly prohibit it, with respect, that is asking this Court to read something into the APA when I have no basis to do so.

[57] There is also no basis for an equitable set off. The test for equitable set-off is set out in ***Holt v Telford***, 1987 CanLII 18 (SCC), [1987] 2 S.C.R. 193 at 204, [1987] 6 W.W.R. 385 ("***Holt***"), cited in many decisions including ***Trilogy Energy LP v SemCAMS ULC***, 2009 ABCA 275:

1. The party relying on a set-off must show some equitable ground for being protected against his adversary's demands.
2. The equitable ground must go to the very root of the plaintiff's claim before a set-off will be allowed.
3. A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross claim.

4. The plaintiff's claim and the cross-claim need not arise out of the same contract.

5. Unliquidated claims are on the same footing as liquidated claims.

[58] Here, the mutuality requirement is not met because there is no close connection between Spoke's obligations to CNRL to pay Cure Costs and CNRL's obligations to pay credits to SanLing. Further, I find, given my conclusions on the provisions of the APA above, that it would not be manifestly unjust to allow the Receiver to retain the pre-Receivership credits, as that is exactly what parties intended.

[59] Spoke then goes on at para 54 in its submissions to state that:

> "…Spoke makes no claim to have purchased, pursuant to the Spoke APA or otherwise, SanLing's AR under the Assumed Contracts. Spoke similarly has never purported to have purchased (either pursuant to the Spoke APA or otherwise) SanLing's Credits. As a result, Spoke does not claim a direct right of set off in relation to the AR or Credits, However, for the reasons noted above, it does claim an indirect interest, through CNRL's ability to employ the Netting Approach…"

[60] Spoke also states at para 56 of its written submissions that as long as "Spoke receives the full benefit of" the AR and Credits it does not oppose the Receiver's claim for relief.

[61] Putting aside the fact that these statements appear to be directly at odds with its previous arguments, and are themselves inconsistent, Spoke has not explained the basis for its claim of an "indirect interest" or its claim for "the full benefit" of the Credits, other than to say that it is open to me to award Spoke $277,726.54 "pursuant to the Letter Agreement". This too is problematic as the December 23, 2021 letter agreement between CNRL and Spoke gives no benefit to Spoke relating to the pre-Receivership credits.

[62] Finally, although Spoke's Cross-Application advances a claim for "restitution" and "unjust enrichment", neither Spoke's written nor oral submissions explained the legal basis for such claim. Unjust enrichment may be found where: (1) the defendant has been enriched; (2) the plaintiff has suffered a corresponding loss; and (3) there is no juristic reason for the benefit and corresponding detriment: ***Kerr v Baranow***, 2011 SCC 10 at paras 36-40. Given my findings above, I conclude that none of these three elements are met in this case.

[63] In summary, I conclude that there is no basis to Spoke's claim for $277,726.54. It is only entitled to reimbursement by CNRL of $38,538, being Spoke's overpayment of Cure Costs.

c. Costs

[64] Spoke claims costs as follows:

(a) Solicitor-Client Costs relating to its cross-application as it pertains to resisting the applications of the Receiver and CNRL;

(b) Alternatively, ***McAllister*** costs given the conduct of the Receiver and CNRL;

(c) Finally, costs in relation to its own cross-application.

[65] Spoke claims that the Receiver and CNRL have acted inappropriately, and that this forms the basis for solicitor client or alternatively, ***McAllister*** costs. Spoke argues that the Receiver is

attempting to profit from something it has no entitlement to, that it is taking advantage of Spoke, that it should have known of CNRL's miscalculation of Cure Costs and yet brought its application anyway, relying upon the erroneous hearsay evidence from CNRL about what was owed. Spoke says that the Receiver's Application is improper because it is an Application for "advice and direction". Spoke also says that it was directed to file its Cross-Application by Nielson J and at that time the Receiver's Application remained extant, claiming judgement against Spoke in excess of $400,000. This forced Spoke to expend considerable time and money.

[66] I have considerable discretion in deciding how to award costs of an application. However, my discretion must be exercised reasonably. In ***McAllister v Calgary (City)***, 2021 ABCA 25, the Court states starting at para 21:

> The Rules confer a qualified "entitlement" to costs to the successful party. *Rule* 10.29(1) states that a successful party is "entitled to a costs award against the unsuccessful party" and that the "unsuccessful party must pay the costs forthwith". An award of costs is therefore the prima facie entitlement of the successful party, but that entitlement may not always obtain.
>
> The Supreme Court of Canada, in ***B(R) v Children's Aid Society of Metropolitan Toronto***, 1995 CanLII 115 (SCC), [1995] 1 SCR 315 articulated a rationale for awarding costs to the successful party to be paid by the unsuccessful party at 404-405:
>
> > The long-standing rule regarding costs is that they are <u>generally</u> awarded to a successful party, absent misconduct on his or her part. A successful litigant has a reasonable expectation that his or her costs will be paid by the unsuccessful party. The rationale for this rule is based on the fact that, had the unsuccessful party initially agreed to the position of the successful one, no costs would have been incurred by the successful party. Accordingly, it is only logical that the party who has been found to be wrong must be ready to support the costs of a litigation that could have been avoided. [emphasis in original]

[67] Spoke has not met this first hurdle. It has been entirely unsuccessful in this matter.

[68] *Rule* 10.33(2) sets out a number of factors that I may consider when deciding whether to depart from the general rule that a successful party is entitled to costs. Included is the question of whether "the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action: *Rule* 10.33(2)(a), and "whether a party has engaged in misconduct": *Rule* 10.33(2)(g).

[69] I cannot agree with Spoke that the actions of the Receiver and CNRL rise to the level that warrants a departure from the general rule. The evidence shows that Spoke was less than diligent in responding to the Receiver's inquiries or pursuing its right under the December 23, 2021 letter agreement to audit CNRL's calculation of the Cure Costs. Further, it's evolving position on the relief it was seeking, culminating in the hearing before this Court, has delayed the conclusion of the issue of entitlement to pre-Receivership credits. While CNRL's miscalculation of the Cure Costs certainly contributed to the confusion and delay, I conclude that this does not rise to the

level of justifying an award of costs in Spoke's favour in these circumstances, especially an award of enhanced costs.

VI. Conclusions

[70] The Receiver's application for a declaration that the pre-Receivership credits are for the account of the Receiver, that Spoke has no right, title or interest to the pre-Receivership credits, and to withdraw its Application on a without costs basis, is granted.

[71] CNRL's Application is deemed to have been withdrawn, on a without costs basis.

[72] Spoke's Cross-Application is dismissed.

[73] All parties are to bear their own costs.

[74] If the parties cannot agree on the terms of the Order following this hearing they may seek a hearing before me within 30 days from the date of these Reasons.

Heard on the 12th day of April, 2024.
Dated at the City of Calgary, Alberta this 25th day of April, 2024.

L.K. Harris
J.C.K.B.A.

Appearances:

Randal Van de Mosselaer and Emily Paplawski
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