

Court of King's Bench of Alberta

Citation: Westpoint Investment Trust v Westpoint Capital Corporation, 2024 ABKB 307

Date: 20240527
Docket: 1903 04121
Registry: Edmonton

Between:

Westpoint Investment Trust by its Trustee Munir Virani and Marnie Kiel

Applicants

- and -

Westpoint Capital Corporation, Westpoint Capital Management Corporation, Westpoint Capital Services Corporation, Westpoint Syndicated Mortgage Corporation, Canadian Property Direct Corporation, Westpoint Master Limited Partnership, River's Crossing Ltd., 1897968 Alberta Ltd., 1780384 Alberta Ltd., 1897837 Alberta Ltd. and the Village At Paldi. Ent. Ltd.

Respondents

**Reasons for Decision
of the
Honourable Associate Chief Justice
K.G. Nielsen**

Introduction

[1] The Judicial Trustee of Westpoint Investment Trust (**WIT** or the **Trust**) has proposed a distribution of Trust funds. Robert (Allan) Roberts (**Roberts**) and Sikin Samanani, Salim Samanani, Karen Cheema, Raj Cheema, Edna Tam, and Wei Tam (collectively the **Contesting Noteholders**) oppose the proposed distribution, for different reasons.

[2] Roberts takes the position that he is entitled to be paid first because he is a Redeeming Shareholder who *is not* subject to the relevant Declaration of Trust and related documents. However, if instead the Court finds that he holds a Redemption Security and *is* subject to the Amended and Restated Declaration of Trust and related documents, then Roberts is content with the proposed distribution.

[3] The Contesting Noteholders say that the proposed distribution is contrary to the Amended and Restated Declaration of Trust and related documents, and contrary to the *pari passu* principle of insolvency.

[4] The Judicial Trustee takes no position on the merits of either Roberts' or the Contesting Noteholders' positions. Counsel for the Judicial Trustee advises that the Judicial Trustee has always intended to distribute funds in accordance with the relevant Trust documents once the Trust's assets were liquidated.

Background

[5] WIT is a mutual fund trust established to invest in mortgage and real estate assets for the benefit of investors and unitholders. WIT was the result of a Plan of Arrangement and established by Declaration of Trust dated June 1, 2015. The Declaration of Trust was amended and restated by an agreement on September 3, 2015, retroactive to June 30, 2015 (the **A&R Declaration of Trust**).

[6] Prior to the creation of WIT, the assets of the Trust were part of two Mortgage Investment Corporations (**MICs**) which primarily held mortgages in Alberta and British Columbia. The Trust, once created, held the beneficial interest in the Trust Assets which were mostly mortgages and real estate holdings.

[7] On March 8, 2019, this Court granted an Order appointing BDO Canada Limited (**BDO**) as Judicial Trustee of WIT. The Court also granted an Interim Receiver Order appointing BDO as Interim Receiver of Westpoint Capital Corporation and the other companies named here as Respondents (with the exception of The Village at Paldi Ent. Ltd.)

[8] On April 10, 2019, the Court granted a Receivership Order, appointing BDO as Receiver of these same companies. Finally, on May 30, 2019, a further Receivership Order was granted, adding The Village at Paldi Ent. Ltd. with the other Respondents. I will refer to these Respondents as the **Related Companies**.

Roberts

[9] Roberts originally held shares in one of the MICs. Prior to the Plan of Arrangement and creation of the Trust, Roberts sought redemption of his shares. Roberts asserts that he received a Management Information Circular, which described the upcoming Plan of Arrangement, including the effect the Arrangement would have on the redemption of MIC shares. Essentially, shareholders who had submitted a Redemption Notice prior to the date of the meetings being held to consider the Arrangement, and whose shares had not been redeemed, would receive a Redemption Note from the Trust dated July 1, 2015. Roberts refers to these shareholders, including himself, as Redeeming Shareholders.

[10] Once the Plan of Arrangement was implemented, Roberts received a Redemption Note, dated July 1, 2015, as well as a copy of the June 1, 2015 Declaration of Trust and the Schedule

of Unit Rights (the **Original Schedule**). His Redemption Note provided that his entire principal amount would be repaid in full no later than three years after the issuance date.

[11] The Original Schedule provided the following definition of Redemption Note:

“Redemption Note” means a non-interest bearing, unsecured, subordinate Promissory Note issued by the Trust:

- (i) Pursuant to the Plan of Arrangement in satisfaction of the redemption price for shares tendered for redemption by a Shareholder prior to the Effective Date; or
- (ii) To a Redeeming Unit Holder pursuant to section 6.4(a)(ii) herein.

[12] As noted, the original Declaration of Trust was amended and restated September 3, 2015, with retroactive effect to June 30, 2015, one day prior to the date of Roberts’ Redemption Note. The Schedule attached to the A&R Declaration of Trust (the **Schedule**) included a slightly different definition of Redemption Note:

“Redemption Note” means a non-interest bearing, unsecured, subordinated promissory note issued by Trust to Redeeming Unitholder pursuant to s 6.4(a)(ii).

[13] Specifically, this “new” definition did not include promissory notes provided to shareholders in satisfaction of the redemption price for shares tendered for redemption prior to an Effective Date. The Effective Date is defined in the Schedule as “the effective date of the transfer of Shares to the Trust pursuant to the Plan of Arrangement.” Roberts tendered his shares for redemption prior to the Effective Date.

[14] Roberts’ Redemption Note matured July 1, 2018, and he commenced a court action against the Trust and the Trustees seeking judgment for amounts owing pursuant to his Redemption Note. The action was stayed by the Judicial Trustee Order.

The Trust

[15] As a result of the establishment of the Trust, parties that held shares in the MICs became Unitholders in the Trust. The rights of Unitholders are governed by the A&R Declaration of Trust and the Schedule (together, the **Governing Documents**).

[16] The following definitions from the Schedule are relevant:

Noteholder – holder of a Trust Note.

Redeeming Unitholder – unitholder who has duly tendered units for redemption pursuant to s 6.2.

Redemption Note – non-interest bearing, unsecured, subordinated promissory note issued by Trust to Redeeming Unitholder pursuant to s 6.4(a)(ii).

Redemption Securities – either a Redemption Note or Class D Unit(s), as the case may be.

Trust Note – a Distribution Note¹ or a Redemption Security, as context requires.

¹ In the Trustee’s Second Report, he notes that Distribution Notes have no application to these proceedings.

Unitholders – collectively, all Persons holding Trust Units.

[17] Article 6 of the A&R Declaration of Trust provides for the redemption of trust units.

6.1 Right of Redemption

Subject to the provisions of the Schedule of Unit Rights, each Unitholder shall be entitled to require the Trust to redeem at any time or from time to time at the demand of the Unitholder all or any part of the Trust Units registered in the name of the Unitholder at the prices determined and payable in accordance with the conditions set forth in the Schedule of Unit Rights.

[18] Article 6 of the Schedule provides for redemptions and priorities. Pursuant to Article 6.1, Unitholders are entitled to require the Trust to redeem at the prices determined and payable in accordance with the provisions of the Schedule.

[19] Article 6.2 describes how Unitholders may exercise their redemption rights. Article 6.2(c) provides that Trust Units are deemed to be tendered for redemption on the date and time at which the Trust approves and accepts the Redemption Request.

[20] Article 6.4 sets out how the redemption price is paid:

6.4 (a) Subject to section 6.6 herein (which provides for no redemption in certain circumstances), the Redemption Price payable in respect of the Trust Units tendered for redemption during any calendar month shall be paid to the Redeeming Unitholder on the Redemption Date as follows:

i. Firstly in cash, if and to the extent permitted by section 6.4(b)... and

ii. Secondly:

(a) If the Trust Units for redemption are Class A Units held in a registered plan permitted under the *Income Tax Act* as follows:

(i) If the Unitholder has specifically elected to be issued a redemption note by delivered a written election together with the Redemption Request, then by issuance of a Redemption Note... or

(ii) Otherwise, by issuance of Class D Units...

(b) If the Trust Units for redemption are Class A Units which are not held in a registered plan permitted under the *Income Tax Act*, then by issuance of a Redemption Note...

(c) If the Trust Units for redemption are Class D Units, then by issuance of a Redemption Note...

6.4(b) Notwithstanding any other provision herein, the Trust shall pay the Redemption Price in cash pursuant to section 6.4(a)i only in circumstances where:

- i. the Trust has duly satisfied all payments contemplated by sections 6.8(a) through 6.8(c) hereof to be made in priority to Redemption Requests standing in the Cash Redemption Queue; and
- ii. such cash redemption would not impair the ability of the Trust to carry on its business or otherwise satisfy its liabilities as they fall due, as determined by the Trustees, acting reasonably and taking into account all of the Trust's obligations and commitments.

[21] Essentially, the Trust cannot pay redemption in cash *unless* payments under Article 6.8(a) through 6.8(c) are first duly satisfied. Article 6.8(a)-(d) provides:

6.8 Notwithstanding any other provision herein, payments shall be made by the Trust to Unitholders and Noteholders in accordance with the following order of priority:

- (a) firstly, to Noteholders holding Matured Notes and to Unitholders holding Class D Units for which a Redemption Request has been outstanding for more than 3 years;
- (b) secondly to Unitholders, on account of the Distributions payable, and to Noteholders on account of Redemption Payments, pursuant to sections 4.2 and 4.3 hereof;
- (c) thirdly, to holders of Redemption Securities on account of Terminal Payments owing thereunder in order of priority of such Redemption Securities within the Redemption Security Queue; and
- (d) finally, with respect to Class A Units, to Redeeming Unitholders as payment of their Redemption Price in order of their respective priorities within the Cash Redemption Queue.

For greater certainty, (i) no Terminal Payment shall be made pursuant to section 6.8(c) above to any Noteholder in circumstances where there remains outstanding any Redemption Security ranking in priority to such Redemption Security in the Redemption Security Queue, and (ii) no payments shall be made to any holder of a Distribution Note prior to the Maturity Date thereof in circumstances where there remains outstanding any payments contemplated by this section 6.8.

[22] Thus, Article 6.8 sets out the priority of payments. Generally, redemptions are paid in the order the Unitholders sought redemption. This subordination/priority system is defined in the Governing Documents as the Redemption Security Queue, described in Article 6.5(e); see below.

[23] Article 6.5 also specifies the terms of Redemption Securities:

6.5(a) Redemption Securities shall be unsecured and shall, except to the extent otherwise expressly provided herein, be subordinated and rank subsequent in priority to all other *bona fide* debts of the Trust.

... ..

(d) Unless otherwise expressly agreed by a Unitholder in writing, Redemption Securities shall have a Maturity Date no later than the 3rd anniversary of the Issue Date thereof;

(e) Where there is more than one Redemption Security outstanding, the Redemption Securities shall be placed in a queue, by order of priority based on the applicable Acceptance Time (the Redemption Security Queue). Subject to section 6.5(e) hereof, the Trustees shall, on a monthly basis, allocate and pay an amount equal to 2% of the net asset value of the Trust (the Trust Terminal Payment Amount) to the holders of Redemption Securities on account of the Terminal Payments owing thereunder and based upon their order of priority within the Redemption Security Queue. In circumstances where, pursuant to section 6.5(e), the Trust is unable to allocate and pay the Target Terminal Payment Amount in any given month, the Trustees shall allocate and pay such lesser amount as the Trustees determine prudent in the circumstances, subject always to the order of priority within the Redemption Security Queue.

(f) Notwithstanding any other provision herein, the Trust shall not repay any indebtedness owing pursuant to a Redemption Security if the payment of such Redemption Security would, at the relevant time, impair the ability of the Trust to carry on its business, as determined by the Trustees, acting reasonably, and taking into account all of the Trust's current or pending commitments and liabilities.

[24] As of February 25, 2019, 800 of the Trust's 1,600 Unitholders had redeemed their Trust Units and become Noteholders.

[25] The Trustee advises that there are not enough funds to pay out any investors past the Noteholders holding Matured Notes or Unitholders holding Class D Units for which a Redemption Request has been outstanding for more than 3 years (the group described in Article 6.8(a)).

[26] If Articles 7.1 and 7.2 of the Schedule apply, the subordination/priority system does not apply. They provide:

7.1 In the event of liquidation, dissolution or winding-up of the Trust, the rights of holders (sic) Trust Notes shall rank in priority to the rights of Unitholders, including in respect of their rights to receive Distributable Cash Flow; provided, however, that upon full repayment of a Trust Note, such Noteholder shall not have any other or further right to participate in the remaining property or assets of the Trust.

7.2 In the event of liquidation, dissolution or winding-up of the Trust, the rights of holders of all issued Trust Notes shall rank *pari passu* with one another, regardless of the respective Issue Dates thereof.

[27] Further, Article 14 of the A&R Declaration of Trust deals generally with the termination of the Trust, and Article 14.6 with the subsequent distribution of Trust proceeds or assets.

[28] Articles 14.1 and 14.2 describe the ways the Trust may be terminated.

[29] First, the Trust has a particular term, 21 years after the death of the last surviving issue of Queen Elizabeth II alive on the date of the Trust.

[30] Alternatively, the Trust could be terminated with the approval of voting Unitholders. Following such approval the Trustee shall commence to wind up the affairs of the Trust. The rest of Article 14 describes how termination works. In particular, Article 14.6 indicates how proceeds and assets are distributed:

After paying, retiring or discharging or making provision for the payment, retirement or discharge of all known liabilities and obligations of the Trust and its subsidiaries, including amounts owing under any Trust Notes, and providing for indemnity against any other outstanding liabilities and obligations, the Trustees shall, subject to obtaining all necessary regulatory approvals, distribute the remaining part of the proceeds of the sale of the Trust's property together with any cash forming part of the Trust's property among the Unitholders in accordance with their *pro rata* interests in the class of Trust Units.

[31] At this point there has been no termination pursuant to Article 14. The Trust has not exceeded its term (14.1) and there is no mention in the materials of termination by approval of voting Unitholders.

[32] When the Trust has been terminated, the Trustee shall first pay all known liabilities and obligations of the Trust, including amounts owing under any Trust Notes. After these are paid, the Trustee shall distribute the remaining Trust property among the Unitholders in accordance with their *pro rata* interest in the class of Trust Units.

[33] As noted the Trust has funds available to pay some, but not all, outstanding Redemption Notes. The Trustee proposes the available funds be distributed in accordance with the terms of the Governing Documents, including the Redemption Security Queue.

Positions

Roberts

[34] Roberts relies on the view that the Original Schedule included Redemption Notes issued to Redeeming Shareholders (like him) in the definition of Redemption Notes. After the Original Schedule was amended along with the Declaration of Trust, the resulting Schedule to the A&R Declaration of Trust *no longer* included Redemption Notes given to Redeeming Shareholders in the definition of Redemption Notes.

[35] Roberts interprets this to mean that his Redemption Note is not subject to the vast majority of the provisions in the Schedule. Rather, he argues he is simply a *bona fide* creditor of the Trust, entitled to be paid on his Redemption Note, since the Governing Documents indicate that Redemption Notes are subordinate to *bona fide* creditors.

[36] Roberts argues that, as a Redeeming Shareholder, he ranks in priority to all Trust Notes, which includes Redemption Notes issued to Redeeming Unitholders.

[37] In Roberts' view, the priority of payment of available funds by the Trust should be:

- a) First, to *bona fide* debts of the Trust, that is, not debts owed to either Redeeming Shareholders, nor Redeeming Unitholders, holding Redemption Notes.
- b) Second, to Redeeming Shareholders holding Redemption Notes.

- c) Third, to Redeeming Unitholders holding Redemption Notes (which is subject to the Redemption Security Queue).

[38] Roberts also argues that he appears to be the only party that commenced an action to enforce their claim on the Redemption Notes. Roberts argues that if his Redemption Note is subject to the terms of the Governing Documents, then he takes the position that only valid claims that are not statute-barred can be paid by the Trustee and that many of the Noteholders, whether Redeeming Shareholders or Redeeming Unitholders, are barred by the operation of the *Limitations Act*, RSA 2000, c L-12.

[39] In the alternative, if the Court finds that the Governing Documents apply to Roberts' Redemption Note, he supports the distribution of available funds pursuant to the Governing Documents, including the Redemption Security Queue, which he says is consistent with the Governing Documents.

[40] Roberts argues that, as these proceedings are not insolvency proceedings, the *pari passu* principle does not apply. However, even if these are insolvency proceedings, he argues that jurisprudence clearly indicates that priority agreements are applicable in insolvency situations and do not offend the *pari passu* principle.

Contesting Noteholders

[41] The Contesting Noteholders are a number of Noteholders who sought redemption from the Trust and received Redemption Securities. The Contesting Noteholders have a combination of Redemption Notes and Class D Units.

[42] The Contesting Noteholders argue that the Trustee's proposed distribution conflicts with the process under the A&R Declaration of Trust and the *pari passu* principle and would lead to a grossly inequitable result.

[43] The Contesting Noteholders ask this Court to exercise its discretion to deny the proposed distribution and instead order distribution to the Redeeming Noteholders on a *pro rata* basis.

[44] The Contesting Noteholders say it is clear the Trust is subject to winding up, in liquidation, and insolvent. They rely on the Second Supplemental Report to the Judicial Trustee's Fourth Report (dated August 28, 2023) (the **Second Supplemental Report**), at paras 15(b) and (c), in which the Judicial Trustee notes:

(b) ... While it is correct to say that the Trust is not in receivership and is not bankrupt, it may be inaccurate to say the Trust is not subject to insolvency proceedings.

At the outset of these proceedings, the intent was to appoint a court officer to take control of the assets of the Trust and, in conjunction with the receivership proceedings of the related corporate entities, liquidate the assets and create a fund to distribute the proceeds to the Unit Holders.

In the Judicial Trustee's view this is in essence an insolvency proceeding.

(c) Paragraph 56 (of Roberts's Brief) is correct in that the Judicial Trustee has not applied to wind up or dissolve the Trust, but the Judicial Trustee may in the future make an application to wind up or dissolve the Trust.

[45] However, the Second Supplemental Report also notes at para 14(b), that the Judicial Trustee has not applied to wind up or dissolve the Trust. Paragraph 14(c) of the Second Supplemental Report notes that since the Trust is not being dissolved, section 7.1 of the Schedule does not apply and paragraph 30 of the Contesting Noteholders' Brief does not make sense.

[46] The Contesting Noteholders say the fact of insolvency proceedings alters the distribution process under the A&R Declaration of Trust relied upon by the Trustee in its proposed distribution.

[47] According to section 6.4(c) of the Schedule, in circumstances where the Trust is in receipt of more than one Redemption Request and is permitted, as of the Redemption Date, to satisfy some or all of the Redemption Requests in cash, pursuant to s 6.4(a)(i), such redemption shall be completed and cash payments made, in priority and based on the order in which the Redemption Requests were received by the Trust. Pursuant to s 6.5(e), where there is more than one Redemption Security outstanding, the Redemption Securities are placed in a queue, by order of priority.

[48] However, the priority by queue is modified, pursuant to s 6.4(b) and s 6.5(f) of the Schedule, which prohibits the Trustee from making payments where it would, at the relevant time, impair the ability of the Trust to carry on its business. The Contesting Noteholders say that any such cash payments would clearly impair and impede the ability of the Trust to carry on business, specifically since the Trust is being wound up, most of its assets liquidated, and it has insufficient funds to satisfy its outstanding obligations.

[49] Section 6.8 of the Schedule sets out the priority of payments to Unitholders and Noteholders. First to be paid are Noteholders holding Matured Notes and Unitholders holding Class D Units for which a Redemption Request has been outstanding for more than three years.

[50] Section 7.1 of the Schedule provides that in the event of liquidation, dissolution or winding up of the Trust, the rights of holders of Trust Notes shall rank in priority to the rights of Unitholders. Section 7.2 notes that in the event of liquidation, dissolution or winding-up of the Trust, the rights of holders of all issued Trust Notes shall rank *pari passu* with one another, regardless of respective Issue Dates.

[51] Based on the foregoing, the Contesting Noteholders say that the Trustee's proposed distribution is contrary to the Governing Documents. They note that while operating and solvent, the Trust was to prioritize redemption based on when the redemption request was received, using the Redemption Security Queue. However, in a liquidation situation, holders of Trust Notes are to be treated as a class and rank *pari passu* with one another. The Redeeming Noteholders ought to share *pro rata* from the liquidation of the Trust's assets and its winding down.

Issues

[52] The Trustee seeks to distribute the funds in the Trust and proposes to distribute in accordance with the terms of the Governing Documents, including the subordination/priority provisions. This Court must decide whether the Proposed Distribution should be approved.

[53] Roberts says I must first determine whether all of the provisions of the Governing Documents apply to the Redemption Notes issued to the Redeeming Shareholders, such as Roberts, and the effect that has on the distribution of available funds (the **Roberts Issue**).

[54] Roberts also argues that all other claims of Redemption Noteholders are statute-barred by the *Limitations Act*.

[55] The Contesting Noteholders say that the distribution depends on whether the Trust is insolvent or not. They argue that if the Trust is insolvent, the principle of *pari passu* applies. As well, they argue that if the Trust is in liquidation, dissolution, or winding-up, then Articles 7.1 and 7.2 of the Schedule apply and Trust Noteholders rank *pari passu* (the **Contesting Noteholder Issue**).

Analysis

Roberts Issue

[56] First, I find that the provisions of the Governing Documents apply to Roberts' Redemption Note. In oral argument Counsel for the Judicial Trustee noted that the language in Roberts' Redemption Note clearly indicates the Redemption Note is subject to the Declaration of Trust, and the Trust is required to pay. It is incorrect to say Roberts' Note falls outside of the Trust and the priority system. My review of the Redemption Note leads me to the same conclusion.

[57] Further, reviewing the relevant dates I note that Roberts' Redemption Note is dated July 1, 2015, and the A&R Declaration of Trust and Schedule are retroactive to June 30, 2015. This indicates an intention for the A&R Declaration of Trust and Schedule to apply to Redemption Notes dated July 1, 2015, including Roberts' Redemption Note.

[58] Roberts' Redemption Notes shall be governed by the provisions of the A&R Declaration of Trust and Schedule. Roberts is not a creditor different from other Redemption Noteholders, and his Redemption Note does not fall outside of the Governing Documents.

Limitations

[59] In the Second Supplemental Report, the Judicial Trustee notes that, in its view, resorting to the *Limitations Act* is not open to third parties, such as Roberts, but is only available for the Judicial Trustee to wield as a shield. In these circumstances, the Judicial Trustee has not considered relying on the *Limitations Act* and has not indicated to investors that the Judicial Trustee was considering limitations issues. Rather, the Judicial Trustee has accepted the claims of Redeeming Noteholders and Unitholders who did not redeem, at face value.

[60] I note the case of *Caplink Financial Corp v Petra Corp*, 2016 ABCA 55, in which one of the issues on appeal was whether a competing creditor was entitled to raise a *Limitations Act* defence available to the debtor. The Court noted at para 23:

It is clear that a defence under the *Limitations Act* is only available to a defendant (that is someone against whom a remedial order is being sought) and then only if expressly pled by the defendant; *Makowichuk (Litigation Guardian of) v Makowichuk*, 2013 ABCA 439 (Alta CA). Accordingly, a third party cannot rely upon a limitations defence nor can the court take cognizance of it when it is not properly pled by a defendant.

[61] Given this Court of Appeal authority, Roberts' argument, that all other claims of Redemption Noteholders are statute-barred, fails.

Contesting Noteholder Issue

[62] The Contesting Noteholders argue that the insolvency status of the Trust means that the principle of *pari passu* applies. The Contesting Noteholders rely on Articles 7.1 and 7.2 of the Schedule which provide that in the event of liquidation, dissolution, or winding-up of the Trust, the rights of holders of all issued Trust Notes shall rank *pari passu* with one another, regardless of the respective Issue Dates thereof. Further, the Contesting Noteholders argue that the *pari passu* principle always applies in insolvency proceedings, and the Trust is currently involved in such proceedings.

[63] The *pari passu* principle is to the effect that “the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of insolvency” and has been referred to as one of the “foremost principles in the law of insolvency” (*Re Nortel Networks Corp*, 2015 ONCA 681 at para 23). The principle “is rooted in the need to treat all creditors fairly and to ensure an orderly distribution of assets” (*Nortel* at para 24).

[64] Roberts argues these are not insolvency proceedings; the Contesting Noteholders say they are insolvency proceedings. The Judicial Trustee says that the Trust is not in receivership and is not bankrupt. The Judicial Trustee has not applied to wind up or dissolve the Trust, although the Judicial Trustee may apply to do this in the future. The Judicial Trustee does not comment on whether the Trust is subject to liquidation. The Judicial Trustee *also* notes that in its view, this is in essence an insolvency proceeding.

[65] The *Bankruptcy and Insolvency Act* defines an “insolvent person” as a person “(a) who is for any reason unable to meet his obligations as they generally become due; (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due; or (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations due and accruing due” (s 2(1)).

[66] Even if this is an insolvency proceeding, Counsel for Roberts argues that the *pari passu* rules are merely intended to make sure the pot of available money is fairly distributed. He argues there are two stages in making payment to a class of creditors in an insolvency. At the first stage, one establishes the fund that is available for that class. Second comes the payment of the funds to the parties in the class. *Pari passu* applies at the first stage, when the fund is set. Once money is being distributed, priority and subordination can be applied. Counsel for Roberts cites *Re Maxwell Communications Corp, plc (No 2)*, [1994] 1 All ER 737 which, he says, provides that subordination agreements are perfectly enforceable in bankruptcy.

[67] Counsel for Roberts also cites *Re Air Canada*, 2004 CanLII 34416 (ONSC) where Justice Farley reviewed Canadian cases, articles, and British authority that held that subordination agreements are enforceable in insolvency proceedings.

[68] One case Justice Farley reviewed is *Re Rico Enterprises Ltd*, 1994 CanLII 996 (BCSC), a bankruptcy proceeding. The Court in *Rico* held that subordination/priority agreements are applicable in bankruptcy and set out a roadmap for distribution when subordination agreements are involved. First, the fund available to creditors is established after examining any anti-deprivation issues including violation of the *pari passu* principle. Then distribution occurs; all creditors are allocated their proportionate share of the fund; however, when making payments,

the Trustee applies subordination/priority agreements, and makes payments to senior creditors from funds otherwise available to junior creditors until senior creditors are paid in full.

[69] *Maxwell* and *Air Canada* have also been adopted by the Quebec Superior Court in *Re Homburg Invest Inc*, 2014 QCCS 3135.

[70] Roberts argues that the Governing Documents create a priority/subordination system whereby each Noteholder subordinates their claim in favour of Noteholders who gave redemption notice before them. Such subordination is perfectly acceptable in insolvency or bankruptcy proceedings. The *pari passu* principle is not offended and, in these circumstances, the Redemption Security Queue provided for in the Governing Documents applies.

[71] Generally, I accept the proposition that subordination systems may be used in insolvency or bankruptcy proceedings. However, in this situation, the *general* law on subordination/priority systems does not apply, since the Governing Documents *specifically* set out what happens.

[72] In my view, Articles 7.1 and 7.2 apply in the circumstances.

[73] Articles 7.1 and 7.2 note:

7.1 In the event of liquidation, dissolution or winding-up of the Trust, the rights of holders (sic) Trust Notes shall rank in priority to the rights of Unitholders, including in respect of their rights to receive Distributable Cash Flow; provided, however, that upon full repayment of a Trust Note, such Noteholder shall not have any other or further right to participate in the remaining property or assets of the Trust.

7.2 In the event of liquidation, dissolution or winding-up of the Trust, the rights of holders of all issued Trust Notes shall rank *pari passu* with one another, regardless of the respective Issue Dates thereof.

[74] If Article 7.2 applies, the Trust Notes rank *pari passu* with one another, regardless of the respective Issue Dates.

[75] The Judicial Trustee notes he has not applied for dissolution or winding up; however, it has not commented on whether the Trust, or the Trust assets, are being or have been liquidated.

[76] Neither “liquidation” nor “dissolution” nor “winding-up” are defined in the Governing Documents. This leaves the Court to consider the ordinary grammatical meaning. In *Union of British Columbia Performers v Morton*, 2023 BCCA 57 the British Columbia Court of Appeal noted, at para 36 “The terms of an agreement, including a Trust Agreement, are to be read as a whole, giving the words their ordinary grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract...”

[77] The Canadian Oxford Dictionary, Second Edition, defines liquidation as: “The process of liquidating a company, etc” and “the state or condition of being wound up”. Dictionary.com defines liquidation as: “the process of realizing upon assets and of discharging liabilities in concluding the affairs of a business, estate, etc.”

[78] The Supreme Court of Canada has defined liquidation as “the act of settling, adjusting debts, or ascertaining their amount or balance due, settlement or adjustment of an unsettled account... Applied to a partnership or company, the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and appropriating

the amount of profit or loss” (*Dauphin Plains Credit Union Ltd v Xyloid Industries Ltd*, [1980] 1 SCR 1182 at paras 27-28). In that same case, a majority of the Manitoba Court of Appeal noted as follows:

...we have a perfect example of liquidation in the instant case. Xyloid Industries Ltd. was unable to pay its current debts and the court had to appoint a receiver-manager to manage the property, to gather assets to pay the debts and to turn over what was left to the debenture holder. That was a liquidation, and with respect to those who hold a contrary view, liquidation does not always lead to insolvency, but it leads, more often than not, to the road of insolvency ([1979] 2 WWR 514 at para 26)

[79] The A&R Declaration of Trust provides that the Trust is established for the principal purpose of investment, directly and indirectly, in a portfolio of loans, real property, and related assets and other investments. Trust Assets are widely and broadly defined in the A&R Declaration of Trust as monies, receivables, loans, real properties and other assets held directly or indirectly, by the Trust or by the Trustees on behalf of the Trust, etc.

[80] Article 4.3 provides that assets, liabilities, or transactions of a corporation or other entity wholly or partially owned by the Trust will be deemed to be those of the Trust on a proportionate consolidated basis.

[81] In the First Trustee Report, the Judicial Trustee notes that the Related Companies should be placed into receivership because assets held by these companies are beneficially owned by the Trust. According to the Judicial Trustee the most effective way to draw these assets into the Trust is to appoint BDO as Receiver to manage and/or liquidate assets and address claims in relation to the assets, including addressing the issue of priority of claimants to various assets.

[82] The Judicial Trustee notes the next steps include completing tracing of funds to various assets, marketing, obtaining and closing on offers for various Companies Assets, and others.

[83] Shortly after the 1st Trustee Report, an Order for a Receiver was made for the various Related Companies. Presumably, at that point the Receiver proceeded to “manage and/or liquidate assets”. It seems to be the case that there is and has been liquidation of the Trust.

[84] In the Second Supplemental Report, the Judicial Trustee notes at para 15(b):

...At the outset of these proceedings, **the intent was to appoint a court officer to take control of the assets of the Trust and, in conjunction with the receivership proceedings of the related corporate entities, liquidate the assets** and create a fund to distribute the proceeds to the Unit Holders.

In the Judicial Trustee’s view this is in essence an insolvency proceeding.

(Emphasis added)

[85] Based on my review of these Reports, I find that it cannot be said that the Trust is not in liquidation.

[86] I find the Trust is in liquidation and Article 7.2 applies, which means “the rights of holders of all issued Trust Notes shall rank *pari passu* with one another, regardless of the respective Issue Dates thereof.”

[87] In accordance with the Governing Documents, the Judicial Trustee shall distribute the funds pursuant to Article 7.2.

Heard on the 30th day of August, 2023.

Dated at the City of Edmonton, Alberta this 27th day of May, 2024.

K.G. Nielsen
A.C.J.C.K.B.A.

Appearances:

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