

**Court of Appeal File No. C70020  
Court File No. 35-2481393**

**COURT OF APPEAL FOR ONTARIO**

**IN THE MATTER OF THE BANKRUPTCY OF SIRIUS CONCRETE INC.**

**B E T W E E N :**

**AYERSWOOD DEVELOPMENT CORPORATION**

**Respondent  
(APPELLANT)**

**and**

**BDO CANADA LIMITED  
as Trustee for the Estate of SIRIUS CONCRETE INC.**

**Applicant  
(RESPONDENT)**

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**RESPONDENT'S FACTUM**

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March 10, 2022

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## PART I – OVERVIEW

### The Parties

1. Sirius Concrete Inc. (“**Sirius**”) operated as a subcontracting firm that specialized in the construction of modern super-structures throughout southwestern Ontario, including a project at 45 Yarmouth Street, Guelph, Ontario (the “**Guelph Project**”).

*Reference: Fourth Report at s. 1.1.4, Tab 11 of the Respondent’s Compendium (pages 614-743)*

2. Ayerswood Development Corporation (“**Ayerswood**” or the “**Appellant**”) is the owner of the Guelph Project.

*Reference: Fourth Report at s. 2.1.1, Tab 11 of the Respondent’s Compendium (pages 614-743)*

3. BDO Canada Limited (“**BDO**” or the “**Trustee**” or the “**Respondent**”) is the trustee appointed over the bankrupt estate of Sirius.

*Reference: Fourth Report at s. 1.1.5, Tab 11 of the Respondent’s Compendium (pages 614-743)*

### The Guelph Project

4. Sirius commenced work on the Guelph Project in April 2018, and issued a total of eleven (11) invoices to Ayerswood for labour and services provided by Sirius to the Guelph Project. In the normal course, Ayerswood would pay such invoices at the start of the second month following issuance of same.

*Reference: Fourth Report, at s. 2.1.2 to 2.1.4, Tab 11 of the Respondent’s Compendium (pages 614-743)*

5. On January 30, 2019, Sirius issued Invoice #19.001, in the amount of \$381,578.40 (exclusive of holdback, inclusive of HST), to Ayerswood (the “**January Invoice**”).

*Reference: Fourth Report, at s. 2.1.4 and 2.1.5, Tab 11 of the Respondent’s Compendium (pages 614-743)*

6. On March 1, 2019, Ayerswood paid the January Invoice in full in the normal course and prior to Sirius’ assignment in bankruptcy (the “**March Payment**”).

*Reference: Fourth Report, at s. 2.1.5, Tab 11 of the Respondent's Compendium (pages 614-743)*

7. On February 28, 2019, an additional invoice was issued to Ayerswood by Sirius prior to its assignment in bankruptcy for the amount of \$176,280 (the "**February Invoice**"). Ayerswood did not pay the February invoice prior to Sirius' assignment.

*Reference: Fourth Report, at s. 2.1.7, Tab 11 of the Respondent's Compendium (pages 614-743)*

8. Sirius made a voluntary assignment into bankruptcy pursuant to the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "**BIA**") on March 4, 2019, and BDO was appointed as Trustee.

*Reference: Fourth Report at s. 1.1.5, Tab 11 of the Respondent's Compendium (pages 614-743)*

9. At the date of Sirius' bankruptcy, BDO took possession of the cheque for the March Payment as part of the bankrupt estate

*Reference: Second Report, at s. 2.1.4 and 2.1.5, Tab 9 of the Respondent's Compendium (pages 346-513)*

### The Claims Procedure Order

10. BDO developed a Claims Administration Procedure (as detailed in the First Report of the Trustee dated March 11, 2019 (the "**First Report**")), which was approved by the Court pursuant to the Order of the Honourable Justice Mitchell dated April 2, 2019 (the "**Claims Procedure Order**"). The Claims Administration Procedure was developed to determine the status of all claims against Sirius in relation to all ongoing construction projects, provide an orderly distribution pursuant to their priority status, and determine all payables and receivables of Sirius in relation to same.

*Reference: Fourth Report at s. 1.1.7 and 1.1.9, Tab 11 of the Respondent's Compendium (pages 614-743)*

11. BDO has taken steps with regard to the administration of Sirius' bankrupt estate, as set out in the First Report, the Second Report of the Trustee dated August 1, 2019 (the "**Second Report**"), and the Third Report of the Trustee dated October 28, 2019 (the

“**Third Report**”), including the review and disposition of claims made under the Claims Administration Procedure by Creditors of Sirius, and the entering into of settlements regarding certain of Sirius’ ongoing projects. All projects under the Claims Procedure Order have been fully administered.

*Reference: Fourth Report, at s. 1.1.10 and 1.1.13, Tab 11 of the Respondent’s Compendium (pages 614-743)*

### The Within Motion

12. Ayerswood takes the position that the March Payment does not form part of the bankrupt estate of Sirius and should be returned.
13. The Trustee brought the within motion that is the subject of this appeal (the “**Motion**”) for approval of the Fourth Report of the Trustee dated March 3, 2020, and the Supplement to the Fourth Report dated October 16, 2020 (The Fourth Report and Supplement to the Fourth Report collectively, the “**Fourth Report**”), and directions with respect to the March Payment.
14. The Appellant takes the position that the Trustee was not clear regarding the directions it was seeking from the court on the Motion and the further position that the March Payment was held in trust by Sirius for the benefit of Ayerswood as a result of the doctrine of resulting trust and did not vest with the Trustee on Sirius’ assignment in bankruptcy.
15. The relief sought in the Motion Record of the Trustee dated March 10, 2020, included the following:

“An Order directing the Trustee’s action with respect to the pre-bankruptcy payment received by Sirius from Ayerswood on March 1, 2019, and Ayerswood’s claim for repayment of same;”

16. At section 3.1.1 of the Fourth Report, the Trustee’s request for directions specifically states as follows:

“3.1.1 We submit this Fourth Report to the Court in support of our Motion respectfully requesting this Court to:

- (i) Provide direction to the Trustee with respect to the \$381,578.40 payment received by Sirius on March 1, 2019.”

*Reference: Fourth Report, at s. 3.1.1, Tab 11 of the Respondent’s Compendium (pages 614-743)*

17. The Fourth Report outlined that Ayerswood’s position is that March Payment is held in trust for Ayerswood and should be returned. Further, the Fourth Report outlines that the Trustee was seeking directions from the Court regarding the characterization of the March Payment.

*Reference: Fourth Report, at s. 2.2.1 and 2.3.1, Tab 11 of the Respondent’s Compendium (pages 614-743)*

18. The Honourable Justice George’s (the “**Learned Motions Judge**”) endorsement, dated December 14, 2020 (the “**December 14 Endorsement**”), ordered that the Fourth Report was approved and that the March Payment of Ayerswood forms part of the estate of Sirius and that it is to be distributed to the creditors of Sirius pursuant to the Claims Administration Procedure and/or scheme of distribution in the BIA. The Appellant was unable to establish the imposition of a trust with respect to the March Payment.

*Reference: Tab 7 of the Respondent’s Compendium (pages 322-328)*

19. The Learned Motions Judge held that there was nothing to distinguish the character of the March Payment from other payments made by Ayerswood to Sirius in respect of prior invoices issued by Sirius and paid by Ayerswood.

20. The Learned Motions Judge further held that none of the affidavit evidence provided by John Camara as a representative of Ayerswood (the “**Camara Affidavit**”) could lead to the imposition of a trust, and that the March Payment was simply a payment of an outstanding invoice in the normal course.
21. The Learned Motions Judge found that to allow the relief sought by Ayerswood would allow for every payment made pursuant to an invoice rendered for work completed prior to the date of bankruptcy to be impressed with a trust and that such a decision would cause chaos and undermine the purpose of the BIA.
22. The Learned Motions Judge further found that Ayerswood had an acceptable remedy in filing a proof of claim with BDO for the deficiencies it claims exist and attempt to establish that Sirius breached its contractual obligation.
23. The Appellants appeal the December 14 Order and the December 14 Endorsement (collectively, the “**Order**”).

## **PART II – STATEMENT OF THE FACTS**

24. The Respondent accepts as correct the facts contained in paragraphs 3, 4, 5, 6, 7, 8, 11, 12 of the Factum of the Appellant.
25. The Respondent disagrees with the facts contained in paragraphs 9 and 10 of the Factum of the Appellant. As stated above, the Trustee made clear what directions it was requesting from the Court.

## **PART III – RESPONSE TO APPELLANTS’ ISSUES**

### **ISSUES ON APPEAL**

26. The Appellant appeals the Order on the grounds that:

- a. The Learned Motions Judge erred by proceeding to decide disputed substantive issues on a motion for directions brought by the Trustee under s. 34(1) of the BIA;
- b. The Learned Motions Judge erred by basing his determination on facts not in evidence and generalised assumptions or conclusions unsupported or insufficiently supported by evidence;
- c. The Learned Motions Judge erred in proceeding to determine disputed substantive issues in the absence of an adequate evidentiary record and without affording the opportunity to both Ayerswood and BDO to adduce such evidentiary record;
- d. The Learned Motions Judge erred in his public policy analysis and analysis of how the BIA regime is supposed to work; and,
- e. The Learned Motions Judge erred in holding that a trust has not and cannot be established by Ayerswood.

27. The Respondents position can be summarized as follows:

- a. The Learned Motions Judge exercised the powers available to him pursuant to the BIA, the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “**Rules**”) and the *Courts of Justice Act*, R.S.O. 1990, c. C-43 (the “**CJA**”);
- b. The Fourth Report is admissible evidence before the Court and was sufficient for the Learned Motions Judge to base his decision on;
- c. The evidence submitted by Ayerswood did not establish any substantive issues to be determined on the Motion, or in the alternative the Learned Motions Judge had a sufficient evidentiary record before him, including the Fourth Report, to proceed to determine any disputed substantive issues;



- d. Allowing Ayerswood to claim a trust over the March Payment which was made prior to Sirius' bankruptcy would result in a preference to Ayerswood over other creditors, would undermine the purpose of the BIA, and would lead to chaos.
- e. No trust exists or attaches to the March Payment;
- f. The Appellant's case on appeal is largely an attempt to re-litigate and reverse findings of fact; and,
- g. The Appellants seek to re-argue the facts afresh on this appeal.

### **Standard of Review**

28. The standard of review to be applied depends on whether the identified error on the part of the Learned Motions Judge involved fact finding or the making of factual inferences, which calls for deference; or whether it involved the characterization of the proper legal standard to be applied, the failure to consider a required element of a legal test or some other error in principle, calling for a standard of correctness.

*Reference: Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc. 2005 CarswellOnt 2297 (C.A.) at paras 31-32, at Tab A1 of the Respondent's Book of Authorities, Tab 14 of the Respondent's Compendium (pages 825-845).*

29. On an appeal under the BIA, if the Learned Motions Judge made an error of principle or of law, the standard of review is correctness. If an error of fact, the decision is subject to review on the palpable and overriding error standard. If the Learned Motions Judge erred in the exercise of discretion, he must not fail to take into account or to give proper weight to relevant factors.

*Reference: Northstone Power Corp. v R.J.K. Power Systems Ltd. 2002 ABCA 201 at paras 4-8, at Tab A2 of the Respondent's Book of Authorities, Tab 15 of the Respondent's Compendium (pages 846-851); and Integris Credit Union v. Mercedes-Benz Financial Services Canada Corp., 2016*

*CarswellBC 1462 at para 23 at Tab A3 of the Respondent's Book of Authorities, Tab 16 of the Respondent's Compendium (pages 852-872)*

30. A palpable and overriding error of fact must be plainly seen.

*Reference: Housen v Nikolaisen, [2002] 2 SCR 235 at para. 6, at Tab A4 of the Respondent's Book of Authorities, Tab 17 of the Respondent's Compendium (pages 873-997)*

31. The Respondent submits that the factual determinations made by the Learned Motions Judge on the within motion are entitled to deference and are subject to a reasonableness standard.

32. The Respondent submits that the Learned Motions Judge made a finding of fact with respect to the characterization of the March Payment as a pre-bankruptcy payment of a debt to Sirius, and that this finding of fact is subject to review on the palpable and overriding error standard and should be entitled to deference.

33. The Respondent further submits that the Learned Motions Judge made a finding of law with respect to the non-existence of a trust and the policy analysis of the BIA, and that this finding of law is subject to review on the standard of correctness.

**A. Issue: Did the Learned Motions Judge err in proceeding to decide disputed substantive issues on a motion for directions brought by the Trustee under s. 34(1) of the BIA**

34. The respondent submits that there were no substantive issues to be determined on the Motion and that the Learned Motions Judge simply provided directions to the Trustee with respect to the March Payment.

35. The Trustee requested that the Court "Provide direction to the Trustee with respect to the \$381,578.40 payment received by Sirius on March 1, 2019" and took the position that the

March Payment formed part of the bankrupt estate. The Learned Motions Judge did so and directed that the March Payment formed part of the bankrupt estate of Sirius.

36. Section 34(1) of the BIA states that a trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

*Reference: BIA s. 34(1), at Tab B1 of the Respondent's Book of Authorities, Tab 35 of the Respondent's Compendium (pages 1702-1703)*

37. In the alternative, Rule 37.13 of the *Rules* states that on the hearing of a motion, the presiding judge may grant the relief sought or dismiss or adjourn the motion in whole or in part and with or without terms.

*Reference: Rules of Civil Procedure, R.R.O. 1990 Reg. 194, Rule 37.13, at Tab B2 of the Respondent's Book of Authorities, Tab 36 of the Respondent's Compendium (pages 1704-1705)*

38. The Respondent submits that the court acted within its jurisdiction in granting the order sought by the Respondent on the within motion as the return or retention of the March Payment was a matter affecting the administration of the estate by providing direction in writing to the Respondent with respect to the issues on the within Motion.

**B. Issue: Did the Learned Motions Judge err by basing his determination on facts not in evidence and generalised assumptions or conclusions unsupported or insufficiently supported by evidence**

39. Section 16(4) of the BIA provides that a trustee has the same status as an interim receiver. This status obliges the trustee to act equitably and prudently, to cooperate with the court and generally, to contribute to the proper administration of justice.

**Reference:** *BIA, s. 16(4), at Tab B3 of the Respondent's Book of Authorities, Tab 37 of the Respondent's Compendium (pages 1706-1707), Beetown Honey Products Inc., Re, 2003 CarswellOnt 3755 at para 22 at Tab A5 of the Respondent's Book of Authorities, Tab 18 of the Respondent's Compendium (pages 998-1007), and GMAC Commercial Credit Corp. – Canada v TCT Logistics Inc. 2006 SCC 35 at para 90, at Tab A6 of the Respondent's Book of Authorities, Tab 19 of the Respondent's Compendium (pages 1008-1167)*

40. A receiver, and by virtue of section 16(4), a trustee, is an officer of the court. A report by a court appointed officer is recognized by the common law as being admissible evidence in a proceeding, and further, that affidavits sworn by a trustee are not typically required.

**Reference:** *Bell Canada, Re., 2003 CarswellOnt 4537 at paras 7-9, at Tab A7 of the Respondent's Book of Authorities, Tab 20 of the Respondent's Compendium (pages 1168-1173), Mortgage Insurance Co. of Canada v Innisfil Landfill Corp., 1995 CarswellOnt 43 at para 5, at Tab A8 of the Respondent's Book of Authorities, Tab 21 of the Respondent's Compendium (pages 1174-1192)*

41. The report of a trustee in bankruptcy is not typically in the form of a sworn affidavit and it is the common practice of the courts to admit such reports as evidence in proceedings before the court.

**Reference:** *Monitor Business Corp. (Trustee of) v Goldfinger, 2011 ONSC 2044 at paras 9-36 at Tab A9 of the Respondent's Book of Authorities, Tab 22 of the Respondent's Compendium (pages 1193-1203); Martellacci, Re, 2014 ONSC 5188 at paras 8-16 and 23, at Tab A10 of the Respondent's Book of Authorities, Tab 23 of the Respondent's Compendium (pages 1204-1212)*

42. The report of an officer of the court is considered to be evidence as an “official statement”, which is an existing exception to the hearsay rule. Hearsay evidence that falls within an exception of the hearsay rule is presumptively admissible so long as it is supported by indicia of necessity and reliability.

**Reference:** *R v Khelawon, [2006] 2 SCR 787 at para 42, at Tab A11 of the Respondent's Book of Authorities, Tab 24 of the Respondent's Compendium (pages 1213-1357)*

43. The Respondent submits that it is an officer of the court and as a result the Fourth Report was admissible as evidence on the Motion.

44. The Respondent further submits that the court has traditionally treated reports of receivers and trustees alike as evidence admissible in proceedings and that the Fourth Report should be considered as same.

**C. Issue: did the Learned Motions Judge err in proceeding to determine disputed substantive issues in the absence of an adequate evidentiary record and without affording the opportunity to both Ayerswood and BDO to adduce such evidentiary record**

45. The Respondent submits that the evidence presented by the Appellant on the Motion did not raise any substantive issues to be determined by the Learned Motions Judge and that the Learned Motions Judge provided directions to the Trustee with respect to the March Payment as requested.

46. If it is determined that there was a substantive issue to be determined on the Motion, the Respondent submits that, for the reasons listed above, the Fourth Report constituted evidence admissible in the within Motion and that as a result, the Learned Motions Judge had the full evidentiary record before him when issuing the Order.

47. The Respondent submits that the Learned Motions Judge had sufficient evidence before him in the form of the Camara Affidavit and the Fourth Report to make a substantive determination regarding the disputed March Payment, while not necessary.

48. Additionally, the Respondent submits that the Learned Motions Judge made a determination on a question of law.

49. The Appellant cites the case of *Ontario Securities Commission v Money Gate Mortgage Investment Corporation*, 2020 ONCA 812 (“*Moneygate*”) as authority for the position that the Learned Motions Judge could have made a substantive determination using an approach modelled upon that used on motions for summary judgment if the Learned Motions Judge had a sufficient evidentiary record before him.

*Reference: Ontario Securities Commission v Money Gate Mortgage Investment Corporation, 2020 ONCA 812 at para 61, at Tab A12 of the Respondent’s Book of Authorities, Tab 25 of the Respondent’s Compendium (pages 1358-1379)*

50. The Respondent submits that, as a result of the Fourth Report being an official statement of an officer of the Court and therefore admissible as evidence, that the Learned Motions Judge did have the ability to determine the disputed substantive issue with respect to the categorization of the March Payment.

**D. Issue: Did the Learned Motions Judge err in his public policy analysis and analysis of how the BIA regime is supposed to work**

51. The Respondent submits that Ayerswood holds an unsecured claim, and therefore, restitution of the March Payment would run counter to the letter and spirit of the BIA and would prefer Ayerswood in relation to the other unsecured creditors of Sirius’ bankrupt estate.

52. The Respondent submits that the imposition of a constructive trust would cause an injustice to the other unsecured creditors of Sirius and create a chaotic situation where any creditor could claim a trust over any pre-bankruptcy payment. This is contrary to the priority scheme of the BIA.

53. It is the Respondent's position that Ayerswood is attempting to bootstrap itself ahead of the other unsecured creditors of Sirius by arguing the existence of a trust.

**E. Issue: Did the Learned Motions Judge err in holding that a trust has not and cannot be established by Ayerswood**

The March Payment was Made in the Normal Course, Pre-Bankruptcy

54. It is the Trustee's position that the March Payment constituted a pre-bankruptcy account collectable of Sirius, which payment of same was made in the normal course by Sirius from Ayerswood. As a result, and unlike the amounts owing under the February Invoice, did not constitute a payment subject to a setoff claim under the Claims Administration Procedure.

55. Instead, and absent evidence of the existence of a trust, the March Payment formed part of the estate of Sirius on the date of its assignment in bankruptcy.

56. As set out in the Fourth Report, and above, the normal practice between Sirius and Ayerswood was that Sirius would issue an invoice to Ayerswood at the end of a month for work performed, and Ayerswood would pay the amounts owing under such invoice within the first week of the second month thereafter.

57. This pattern of invoicing by Sirius and payment from Ayerswood was followed in the ten (10) invoices paid between April 25, 2018, and the March Payment on March 1, 2019.

58. There are no facts pled by Ayerswood to indicate that the January Invoice and the March Payment were in any way different than the nine (9) preceding invoices and payments. As such, there are no facts which would indicate that the March Payment was fundamentally any different from any other pre-bankruptcy payments received by Sirius, and which vested in the Trustee upon Sirius' assignment into bankruptcy along with the balance of Sirius' property.

The March Payment is Not Recoverable Under the BIA

59. Absent evidence that the March Payment was held in trust by Sirius for the benefit of Ayerswood, the March Payment, along with all other money and/or cheques held by Sirius, vested in the Trustee on the assignment of Sirius into bankruptcy.
60. As the March Payment vested in the Trustee, it forms part of the estate of Sirius to be distributed to the creditors of Sirius pursuant to the Claims Procedure Order (in the case of lien claimants and other parties falling under that Order) or the Scheme of Distribution set out in the BIA.
61. While Ayerswood has pled the existence of a trust over the monies constituting the March Payment, it has not pled any facts which would indicate that Ayerswood's claim against Sirius is that of a secured creditor.
62. Absent evidence of a trust, Ayerswood would rank as an unsecured creditor in the bankruptcy of Sirius in relation to any amounts that it claims as owing to it by Sirius, including the March Payment, or any amount thereof necessary to satisfy the alleged deficiencies, the quantum of which shall be determined by the Trustee in the normal course, and would be paid in accordance with the Scheme of Distribution set out at s. 136 of the BIA.
63. The Trustee submits that there is no mechanism under the BIA for creditors of a bankrupt to claw back property of the bankrupt vesting in the Trustee; indeed, allowing such an action would utterly defeat the purpose of that statute and the bankruptcy regime as a whole.



64. Ayerswood takes the position that the Trustee is holding the March Payment in Trust for Ayerswood.

65. Pursuant to the BIA, property held in trust by a bankrupt at the time of their assignment does not vest in the trustee.

**Reference:** *BIA s. 67(1)(a) at Tab B4 of the Respondent's Book of Authorities, Tab 38 of the Respondent's Compendium (pages 1708-1710)*

66. Ayerswood must evidence the existence of a common law trust in order to bring the March Payment within the meaning of s. 67(1)(a) of the BIA. No such evidence is on the record before this Honourable Court.

#### No Common Law Trust

67. Ayerswood has pled that a trust attaches to the March Payment, such that those monies did not form part of the estate of Sirius, and therefore did not vest in the Trustee and must be returned to Ayerswood. It is unclear whether Ayerswood has pled a resulting, or a remedial (constructive) trust.

68. The Trustee submits that no common law trust can be found on the evidence available.

69. To find a resulting trust, a Court must determine that the following factors exist:

- a. A gratuitous transfer of property from the beneficiary to the trustee, namely a transfer without corresponding value given. Such a transfer creates a rebuttable presumption in favour of a trust; and,
- b. The actual intention of the grantor was for the grantee to hold the property in trust for the grantor.

**Reference:** *Kerr v. Baranow, 2011 SCC 10, at para 18 at Tab A13 of the Respondent's Book of Authorities, Tab 26 of the Respondent's Compendium (pages 1380-1505)*

70. In the case of a *constructive* trust, the intention of the grantor is not determinative. Rather, the doctrine of constructive trust is fundamentally linked to that of unjust enrichment, namely the unlawful enrichment of Sirius at the expense of Ayerswood.

*Reference: Kerr v. Baranow, 2011 SCC 10, at para 50 at Tab A13 of the Respondent's Book of Authorities, Tab 26 of the Respondent's Compendium (pages 1380-1505)*

71. Regardless of which type of trust is pled by Ayerswood, the Trustee respectfully submits that such an argument must fail.

#### No Gratuitous Transfer

72. Ayerswood has stated that the Truest Quantity Surveyors Report (the "**Quantity Report**") is evidence that the March Payment was gratuitous, that Sirius was overpaid by \$702,551.61 (the "**Overpayment Claim**") and that Sirius misrepresented the work completed and invoiced for in the January Invoice, such that the March Payment should be returned to Ayerswood as beneficiary of a trust.

73. In relation to allegations of gratuitous transfer and/or unjust enrichment, the Trustee submits that the March Payment was not gratuitous.

74. While there *may* be deficiencies in the work completed by Sirius (the "**Deficiencies**") (for which it invoices) or work to be completed due to Sirius' bankruptcy (which was not invoiced), such work does not reflect a gratuitous transfer; Sirius provided labour and materials to the Guelph Project, invoiced Ayerswood accordingly in the January Invoice, and was paid in full by way of the March Payment.

75. The Overpayment Claim represents funds that could potentially be categorized as gratuitous payments within the meaning of the relevant law. However, the Overpayment Claim was settled in full as between the Trustee and Ayerswood by way of set-off of

amounts owing by Ayerswood to the Trustee under the February Invoice and cannot be relied on by Ayerswood in advancing its claim herein.

76. Second, the Quantity Report is vague, and provides neither a detailed explanation of the alleged deficiencies or overpayments, nor does it indicate clearly which of these alleged deficiencies and overpayments can be linked to the disputed January Invoice. The Trustee submits that the evidentiary value of the Quantity Report is insufficient to support Ayerswood's claims of a resulting or constructive trust.
77. As the March Payment was not gratuitous, and as there is no standalone statutory trust attaching to these monies, the Trustee respectfully submits that Sirius was not, and could not have been, unjustly enriched by same at Ayerswood's expense. Rather, the March Payment constituted payment for work performed by Sirius on the Guelph Project, and any argument of a trust must fail as a result thereof.

### Knowledge

78. Regarding knowledge, the Trustee notes that the January Invoice was issued to Ayerswood thirty (30) days prior to the March Payment and included a schedule of values indicating the work done, the percent of completion, and the amount owing in relation to each item.
79. Ayerswood was provided with sufficient time in which to inspect the work done by Sirius and to both raise any alleged deficiencies, and, if necessary, to hold back any amounts for which it claimed represented amounts necessary to remedy same. Ayerswood now intends to rely on its own negligence in failing to inspect the work done by Sirius at the Guelph Project in order to avoid paying the February Invoice in full.

80. Further, the Trustee is aware that the transfer of the cheque constituting the March Payment from a representative of Ayerswood to a representative of Sirius on or about March 1, 2019, occurred on the premises of the Guelph Project.
81. As such, Ayerswood, or its agents, employees and/or principals, were given an opportunity to inspect the work done by Sirius in person prior to making the March Payment and did not raise any issue of deficiency at that time.
82. It is the respectful submission of the Trustee that, should such deficiencies have existed, Ayerswood knew, or should reasonably have known, about them given the period of time between the January Invoice and the March Payment, and the fact that Ayerswood or its agents were able to attend at and inspect the Guelph Project in person prior to transfer of the March Payment to Sirius. If Ayerswood noted any deficiencies which they intended to dispute it was their option to not pay the January Invoice in full. Ayerswood's decision to assume the risk of accepting deficient work by not adequately inspecting the work done by Sirius should not be borne by Sirius' other creditors.

#### Intention

83. Ontario Courts have determined that purposeful payments by a party to another party in the face of a breach of contract or contractual deficiency may constitute evidence of waiver, regardless of the payor's subjective motivation.

*Reference: Motors Insurance Corp. v. Old Republic Insurance Co., 2009 CarswellOnt 4163 (SC) at paras 37 and 45-52 at Tab A15 of the Respondent's Book of Authorities, Tab 28 of the Respondent's Compendium (pages 1535-1545)*

84. The Trustee submits that, by making the March Payment in full, Ayerswood indicated its unequivocal and conscious (i) acceptance of the work done and invoiced for by Sirius in

the January Invoice, and its (ii) intention to pay Sirius in full for such work via the March Payment, as it had done with each preceding invoice

85. Consequently, Ayerswood cannot now claim that this payment must be returned due to deficiencies not raised at the time of payment. That Ayerswood chose not to inspect the site in the thirty days following issuance of the January Invoice is not the fault of Sirius or the Trustee

86. The Trustee submits that such payment, in addition to waiving any alleged breach by Sirius of its contract with Ayerswood, evidences a clear intent on the part of Ayerswood to pay Sirius for value received, and that such intention defeats any presumption in favour of a resulting trust.

87. With regard to the Deficiencies and Overpayment Claim, such amounts constitute a claim in favour of Ayerswood as against Sirius; as such, they form an unsecured claim in the bankruptcy of Sirius, to be paid via the Scheme of Distribution as set out in the BIA, and do not form a trust within the meaning of the BIA.

88. As the March Payment was not held in trust for Ayerswood, it forms part of the estate of Sirius and therefore vested in the Trustee upon Sirius' assignment into bankruptcy.

#### No Constructive Trust – Unjust Enrichment

89. The Trustee submits that no constructive law trust can be found on the evidence available based on the doctrine of unjust enrichment.

90. It is established law that a party seeking a finding of unjust enrichment must establish an enrichment by the opposing party, to the deprivation of the claimant, and which enrichment/deprivation is not supported by any juristic reason.

**Reference:** *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at para 38 at Tab A16 of the Respondent's Book of Authorities, Tab 29 of the Respondent's Compendium (pages 1546-1576)

91. The March Payment relates to labour and materials provided by Sirius to the Guelph Project pursuant to the Contract as between Sirius and Ayerswood. Sirius provided labour and materials to the Guelph Project, invoiced Ayerswood accordingly in the January Invoice, and was paid in full via the March Payment. Sirius continued to work on the Guelph Project following the January Invoice, to the date of bankruptcy, and issued an invoice (the February Invoice) for such work.

*Reference: Supplement to the Fourth Report to the Court of the Trustee dated October 16, 2020, at paras 2.2.1 – 2.2.4.*

92. Ayerswood chose to make this payment, notwithstanding the fact that it had apparently taken no action to inspect the work of Sirius in the period between the issuance of the January Invoice and the date of the March Payment, despite ample opportunity to do so.

93. As the March Payment represented a contractual payment for labour and materials provided, and as the intention (or here, the hypothetical intention) of Ayerswood is not determinative of the existence of a constructive trust, the receipt of the March Payment itself cannot be said to be unlawful absent evidence that this payment was “in clear breach” of the Contract. As the March Payment was made pursuant to the terms of the Contract, it respectfully submitted that the test for unjust enrichment is not met on the facts.

*Reference: Brown & Collett Ltd., Re, [1996] O.J. No. 625 (Gen. Div [Commercial List]) at para 62 at Tab A17 of the Respondent’s Book of Authorities, Tab 29 of the Respondent’s Compendium (pages 1546-1576); Kerr v. Baranow, 2011 SCC 10, at para 50 at Tab A13 of the Respondent’s Book of Authorities, Tab 26 of the Respondent’s Compendium (pages 1380-1505)*

94. The March Payment was made on account for services rendered pursuant to the Contract between the parties. In paying the March Payment, Ayerswood accepted the risk that deficiencies could be found in Sirius’ work subsequent to payment. That deficiencies are

alleged does not make the underlying transaction unlawful, nor does it show misrepresentation on the part of Sirius; such misrepresentation, at its best and highest as alleged by Ayerswood, would relate only to Sirius' alleged misrepresentation regarding its imminent bankruptcy, which is addressed below.

No Constructive Trust – Debtor Misconduct

95. A finding of constructive trust based on misconduct, and absent unjust enrichment, must satisfy the following factors:

- a. The alleged trustee must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;
- b. The assets in the hands of the alleged trustee must be shown to have resulted from deemed or actual agency activities of the trustee in breach of his equitable obligation to the alleged beneficiary;
- c. The alleged beneficiary must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the alleged trustee remain faithful to their duties; and,
- d. There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case, e.g., the interests of intervening creditors must be protected.

**Reference:** *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 [Soulos] at para 45 at Tab A18 of the Respondent's Book of Authorities, Tab 31 of the Respondent's Compendium (pages 1607-1658)

96. The bar to prove a constructive trust in a bankruptcy proceeding is high, and the remedy of a constructive trust absent unjust enrichment is an extraordinary one requiring misconduct by the bankrupt.

*Reference: Pemberton Music Festival Limited Partnership (Re), 2017 BCSC 2398 at para 94  
 [“Pemberton”] at Tab A19 of the Respondent’s Book of Authorities, Tab 32 of the Respondent’s  
 Compendium (pages 1659-1684)*

Ayerswood’s Position

97. Ayerswood’s position in this regard can essentially be framed as follows:

- a. Sirius provided labour and materials to the Guelph Project and issued the January Invoice for certain of the work done;
- b. Ayerswood was unhappy with the pace of the work being completed by Sirius on the Guelph Project, and considered holding back payment of Sirius’ invoices as a tool to motivate an improvement in the pace of Sirius’ work;
- c. At Sirius’ request, and in reliance on Sirius’ representations that it would improve its work, Ayerswood made the March Payment to Sirius for the January Invoice;
- d. Ayerswood would not have made this payment had it been aware of Sirius’ impending bankruptcy; and,
- e. Subsequent to Sirius’ bankruptcy and the March Payment, Ayerswood identified a number of alleged deficiencies in the work done by Sirius.

98. It is the Trustee’s position that the facts as pled by Ayerswood do not give rise to a constructive trust.

No Equitable Obligation

99. It is the Trustee’s position that no equitable obligation existed as between Sirius and Ayerswood which would give rise to a constructive trust, nor has Ayerswood made any clear argument that such an obligation existed in its own materials.

*No Unjust Enrichment, Breach of Fiduciary Duty, or Breach of Duty of Loyalty*



100. While not exhaustive, the Supreme Court has identified a number of categories giving rise to a constructive trust, including: unjust enrichment, breach of fiduciary duty, fraud, or breach of duty of loyalty.

*Reference: Soulos, at paras 36-39 at Tab A18 of the Respondent's Book of Authorities, Tab 31 of the Respondent's Compendium (pages 1607-1658)*

101. Mere damages for breach of contract have not been identified as a factor giving rise to a trust based on debtor misconduct, and in fact is a factor weighing against the existence of a constructive trust.

*Reference: White, Re, [2006] O.J. No. 4202 (ONSC) at para 23 ["White"] at Tab A20 of the Respondent's Book of Authorities, Tab 33 of the Respondent's Compendium (pages 1685-1694)*

102. The contractual, business relationship as between Sirius and Ayerswood does not fall into the categories set out by the Supreme Court. As submitted above, there are no grounds on which to find that Sirius was unjustly (unlawfully) enriched by the March Payment. Further, there are no grounds to find, and Ayerswood has not argued, that the relationship between Sirius and Ayerswood was a fiduciary one, or one engendering a duty of loyalty.

103. Sirius' duties did not extend beyond the four corners of its contract with Ayerswood to include any of the types of relationships set out in *Soulos*. Sirius provided labour and materials and was paid for same pursuant to its Contract with Ayerswood.

*No Fraud or Misrepresentation*

104. It is the Trustee's further submission that Ayerswood has also failed to establish any form of fraud or misrepresentation which would give rise to such an obligation.

105. Sirius provided the labour and materials for which it issued the January Invoice. Although the quality of the work was impugned by Ayerswood subsequent to Sirius'

bankruptcy, there has been no argument that Sirius engaged in fraudulent activity or bad faith conduct in relation to this work.

106. Instead, the alleged misrepresentation relates to the alleged representations from Tomas Waite that Sirius would improve its work if paid for the January Invoice. The Trustee submits that these alleged misrepresentations do not create a trust relationship.

107. First, the email communications cited by John Camara in support of his allegation that he was induced to pay do not, in fact, provide any evidence of such inducement.

*Reference: Affidavit of John Camara sworn October 9, 2020, at paras 8-9 and Exhibit "D" thereto [the "Camara Affidavit"] at Tab 13 of the Respondent's Compendium (pages 753-824)*

108. Second, and as stated above, the intention of the alleged beneficiary of a constructive trust is not determinative in establishing the existence of such a trust. Absent evidence of an equitable relationship giving rise to a constructive trust, Ayerswood's intention in making or withholding the payment is immaterial.

109. Third, the alleged misrepresentation related to future work to be done by Sirius, not to past work completed. In contrast, the March Payment related to services rendered by Sirius and for the January Invoice which was due and payable 30 days after receipt.

*Reference: Camara Affidavit, paras 6-7, 10-11, Camara Affidavit, at Exhibit "A" thereto at Tab 13 of the Respondent's Compendium (pages 753-824)*

110. Further, given that Ayerswood's evidence is that it would have withheld the March Payment had it known of Sirius' imminent bankruptcy, any notice to Ayerswood may have resulted in a deprivation of the other creditors of Sirius by reducing the amount in Sirius' estate available for distribution.

111. Fourth, any alleged deficiencies would not establish a trust. While the Contract contains indemnity provisions and provisions requiring Sirius to address and remedy any

deficiencies at its own expense; it does not provide for the withholding of payment. As Sirius is bankrupt, any amounts otherwise owing by Sirius to Ayerswood in this regard forms an unsecured claim in Sirius' bankruptcy.

112. As stated by the Court in *Investit Financial Inc. v. Ingersoll 10 Mission Development Ltd.*, Ayerswood was aware, or should reasonably been aware, that it was not in a fully secured position – Ayerswood provided the March Payment to Sirius “at its own risk” and cannot now use a trust argument to lever its relationship with Sirius into one creating a trust.

*Reference: Investit Financial Inc. v. Ingersoll 10 Mission Development Ltd., 2006 ABQB 231 at para 17 at Tab A21 of the Respondent's Book of Authorities, Tab 34 of the Respondent's Compendium (pages 1695-1701)*

113. The Trustee submits that no equitable obligation of Sirius to Ayerswood has been established, and that no such relationship existed between the parties.

#### No Breach

114. Should this Honourable Court find that an equitable obligation existed in relation to the March Payment, the Trustee submits that Ayerswood has failed to meet the second part of the test set out in *Soulos*.

115. A constructive trust will only be established if the alleged beneficiary can demonstrate a causal relationship between the property over which the trust is claimed, and the alleged wrongdoing giving rise to the trust.

116. Ayerswood has relied on Sirius' alleged misrepresentation regarding its intention to continue work as the alleged wrongdoing, and the March Payment as the alleged trust monies to which the wrongdoing relates.

*Reference: Camara Affidavit, paras 8-11, at Tab 13 of the Respondent's Compendium (pages 754-825)*

117. It is the Trustee's submission that there is no causal connection between these two factors which would give rise to a trust.
118. As stated above, the March Payment related to labour and materials already provided by Sirius to the Guelph Project and invoiced for in the January Invoice.
119. The March Payment did not relate to future work to be performed by Sirius on the Guelph Project, nor, as stated above, did the Contract provide Ayerswood with the right to withhold payment. The March Payment represents monies due and owing to Sirius by Ayerswood, and no representations from Sirius regarding future work were necessary to trigger Ayerswood's obligation to pay.
120. The Trustee submits that, even if an equitable obligation did exist by Sirius to Ayerswood (which is denied), there is no causal connection which would give rise to a trust.

#### No Legitimate Reason

121. If the first two parts of the test in *Soulos* are met, the trust claimant must still establish that a pecuniary remedy (namely, damages), is not appropriate in the circumstances.
122. As stated by the Court in *White, Re*, a creditor seeking to claim a trust over monies simply because other, preferable remedies are not available will not be sufficient to establish a trust, stating:
- I do not find any evidence of a legitimate reason for Caicos to seek a proprietary remedy here, other than to bootstrap itself ahead of the other creditors of Steven and Marla, and otherwise upset the scheme of orderly distribution of the BIA. This does not engage the Court's conscience. (emphasis added).*

*Reference: White, at para 23 at Tab A20 of the Respondent's Book of Authorities, Tab 33 of the Respondent's Compendium (pages 1685-1694)*

123. Creditors should not seek to “bootstrap” themselves ahead of the interests of other creditors through the use of a trust while perhaps unsatisfactory, the scheme of distribution set out by the BIA provides unsecured creditors with a method of pecuniary reimbursement for any losses suffered.

124. Here, Ayerswood claims that it is owed monies by Sirius for deficient work which has resulted in monetary damaged to Ayerswood in excess of the value of the March Payment. It seeks to have these monies returned through the establishment of a constructive trust.

*Reference: Camara Affidavit, para 13 at Tab 13 of the Respondent's Compendium (pages 753-824)*

125. As stated above, the Contract between the parties contains language indicating that Sirius must indemnify Ayerswood for damages, and/or must address deficiencies in work at its own cost. The Trustee submits that such language does not extend a trust over the March Payment, but instead establishes a claim for damages in favour of Ayerswood (if proven).

126. Any such claim of Ayerswood would be an unsecured claim provable in bankruptcy, and Ayerswood would be compensated via the BIA scheme of distribution along with all other creditors of Sirius.

The Imposition of Trust would be Unjust

127. The final factor in the test for a constructive trust is an overarching, general one, to ensure that, in granting an equitable remedy to an otherwise deserving claimant, the Court does not contribute to a greater injustice to other innocent parties.

128. It is the Trustee's position, as stated above, that Ayerswood is attempting to bootstrap itself ahead of the other unsecured creditors of Sirius by arguing the existence of a trust.

129. Many of the other unsecured creditors of Sirius are subtrades of Sirius, who also claim money owing from Sirius for labour and materials rendered pursuant to their contracts with Sirius. The establishment of a trust over the March Payment would deprive these innocent creditors of a substantial portion of the monies available for distribution by the Trustee.

*Reference: White, at para 24 at Tab A20 of the Respondent's Book of Authorities, Tab 33 of the Respondent's Compendium (pages 1685-1694)*

130. The Trustee submits that the intervening insolvency should act as a bar to any finding of a constructive trust, in particular given the extraordinary nature of the remedy sought, and the fact that the March Payment constitutes a significant source of remuneration for a number of unpaid subtrades of Sirius, and for all other unsecured creditors, including Ayerswood.

#### **PART IV – ORDER REQUESTED**

131. The Respondent requests the following:

- a. An Order dismissing the Appellants' appeal;
- b. An Order for costs on a substantial indemnity basis; and
- c. Such further and other relief as this Honourable Court may deem just.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of March, 2022**



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**SCHEDULE “A”****AUTHORITIES TO BE CITED**

*Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc.*, 2005 CarswellOnt 2297 (C.A.)

*Northstone Power Corp. v R.J.K. Power Systems Ltd.*, 2002 ABCA 201

*Integris Credit Union v. Mercedes-Benz Financial Services Canada Corp.*, 2016 CarswellBC 1462

*Housen v Nikolaisen*, [2002] 2 SCR 235

*Beetown Honey Products Inc., Re*, 2003 CarswellOnt 3755

*GMAC Commercial Credit Corp. – Canada v TCT Logistics Inc.*, 2006 SCC 35

*Bell Canada, Re.*, 2003 CarswellOnt 4537

*Mortgage Insurance Co. of Canada v Innisfil Landfill Corp.*, 1995 CarswellOnt 43

*Monitor Business Corp. (Trustee of) v Goldfinger*, 2011 ONSC 2044

*Martellacci, Re*, 2014 ONSC 5188

*R v Khelawon*, [2006] 2 SCR 787

*Ontario Securities Commission v Money Gate Mortgage Investment Corporation*, 2020 ONCA 812

*Kerr v. Baranow*, 2011 SCC 10

*Saskatchewan River Bungalows v. Maritime Life Assurance*, [1994] 2 SCR 490

*Motors Insurance Corp. v. Old Republic Insurance Co.*, 2009 CarswellOnt 4163 (SC)

*Pettkus v. Becker*, [1980] 2 S.C.R. 834

*Brown & Collett Ltd., Re*, [1996] O.J. No. 625 (Gen. Div [Commercial List])

*Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217

*Pemberton Music Festival Limited Partnership (Re)*, 2017 BCSC 2398

*White, Re*, [2006] O.J. No. 4202 (ONSC)

*Investit Financial Inc. v. Ingersoll 10 Mission Development Ltd.*, 2006 ABQB 231



**SCHEDULE “B”**

**RELEVANT LEGISLATIVE PROVISIONS**

*Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 34(1)*

*Rules of Civil Procedure, R.R.O. 1990, Regulation 194, Rule 37.13*

*Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 16(4)*

*Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 67(1)(a)*

AYERSWOOD DEVELOPMENT COPORATION

and

BDO CANADA LIMITED as trustee for the  
estate of SIRIUS CONCRETE INC.

Respondent (Appellant)

Applicant (Respondent)

**Court of Appeal File No. C70020**

**Court File No. 35-2481393**

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***ONTARIO COURT OF APPEAL***

Proceeding originally commenced at  
London

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**RESPONDENT'S FACTUM**

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