

Court File No. 35-2481393
Estate File No. 35-2481393

**ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE BANKRUPTCY AND INSOLVENCY**

IN THE MATTER OF THE BANKRUPTCY OF
SIRIUS CONCRETE INC. OF THE CITY OF WATERLOO,
IN THE PROVINCE OF ONTARIO

AND IN THE MATTER OF THE
CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30, as amended

**FACTUM OF BDO CANADA LIMITED,
IN ITS CAPACITY AS TRUSTEE OF SIRIUS CONCRETE INC.
(Moving Party)**

September 4, 2020

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TO: Service List

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PART I – THE MOTION

1. BDO Canada Limited in its capacity as Trustee of Sirius Concrete Inc., of the City of Waterloo, in the Province of Ontario (the “**Trustee**”), seeks an Order for, *inter alia*, the following relief:
 - a. Approving the Trustee’s Fourth Report dated March 3, 2020 (the “**Fourth Report**”), filed, and the activities and conduct of the Trustee as detailed therein;
 - b. Seeking directions with respect to the March Payment (as defined in the Fourth Report) made by Ayerswood Development Corporation (“**Ayerswood**”) to the bankrupt, Sirius Concrete Inc. (“**Sirius**”); and,
 - c. Such further and other relief as counsel may advise and this Honourable Court permit.
2. Ayerswood has taken the 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.
3. The Trustee submits that the March Payment was not held in trust by Sirius, and formed part of the estate of Sirius which vested in the trustee, for the following reasons (all capitalized terms as defined below):
 - a. The March Payment was paid by Ayerswood to Sirius in the normal course, and consistent with Ayerswood’s payment of previous invoices. This payment formed

part of the estate of Sirius upon its assignment, and vested in the Trustee for the benefit of Sirius's creditors;

- b. As Ayerswood holds an unsecured claim, "restitution" of the March Payment to Ayerswood would run counter to the letter and spirit of the BIA, and would preference Ayerswood in relation to the other unsecured creditors of Sirius' bankrupt estate;
- c. There is no provision of the CLA and/or the BIA which would create a standalone statutory trust attaching to the March Payment in favour of Ayerswood;
- d. There is no common law trust attaching to the March Payment in favour of Ayerswood, for the following reasons:
 - i. The March Payment was not gratuitous. Ayerswood has conflated the Overpayment Claim and the Deficiencies and Completion Claim in its Statement of Defence and Counterclaim. As the Overpayment Claim has been settled in full via setoff of the amounts owing to Sirius under the February Invoice, the remaining Deficiencies and Completion Claim would form an unsecured claim in the bankruptcy of Sirius, to be paid via the Scheme of Distribution set out in the BIA;
 - ii. Ayerswood was afforded sufficient opportunity to inspect the work completed by Sirius, and raised no objections to same. By making the March Payment, Ayerswood indicated a clear intention to compensate Sirius in full for the work invoiced, and waived any alleged deficiencies in such work.

PART II – FACTS/OVERVIEW

Background

1. The Bankrupt, Sirius, made a voluntary assignment in bankruptcy on March 4, 2019, and BDO Canada Limited was appointed as Trustee.

Reference: Fourth Report, at s. 1.1.5

2. Prior to its assignment, Sirius operated as a subcontracting firm that specialized in modern super-structures throughout Southwestern Ontario. Sirius provided insulated

concrete forms, pre-cast paneling installation, structural block, and cast in place concrete, for numerous construction projects (collectively, the “**Projects**”), including the following:

45 Yarmouth St., Guelph, Ontario (“**Guelph Project**”).

Reference: Fourth Report, at s. 1.1.4

3. As set out in the First Report, the Trustee developed a Claims Administration Procedure (the “**Claims Administration Procedure**”), as approved by the Court via an Order of the Honourable Justice Mitchell dated April 2, 2019 (the “**Claims Procedure Order**”) to determine the status of all claims as against Sirius in relation to the Projects, and to determine all payables and receivables of Sirius in relation to same.

Reference: Fourth Report, at s. 1.1.7 and 1.1.9

4. The Claims Procedure Order required the customers of Sirius, including Ayerswood, to pay all amounts owing to Sirius for work completed prior to March 4, 2020 to the Trustee, and allowed that any dispute by Sirius’ customers regarding such amounts paid to the Trustee would be dealt with via the filing of a proof of claim in the Bankruptcy of Sirius with regard to such amounts.

Reference: Fourth Report, Appendix “C”, paras 6-7 thereof

5. The Claims Procedure Order did not derogate from the Trustee’s exercise of its normal powers under the *Bankruptcy and Insolvency Act* (“**BIA**”); as such, claims not falling under the Claims Procedure Order, including payments made to Sirius prior to its bankruptcy, would be dealt with according to the usual provisions of the BIA.
6. The Trustee has taken numerous steps with regard to the administration of Sirius’ bankrupt estate, as set out in the First, Second, and Third Reports of the Trustee to the Court, including the review and disposition of claims made under the Claims Administration Procedure by creditors of Sirius, and the entering into of settlements with both owners of certain of the Projects, and with certain subcontractors of Sirius.

Reference: Fourth Report, at s. 1.1.10 and 1.1.13

The Guelph Project

7. The project owner of the Guelph Project is Ayerswood Development Corporation (“Ayerswood”).

Reference: Fourth Report, at s. 2.1.1

8. Sirius commenced work on the Guelph Project in April, 2018, and issued eleven (11) invoices to Ayerswood, on a monthly basis, 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

9. Among the eleven invoices issued by Sirius to Ayerswood was Invoice #19.001, in the sum of \$381,578.40 (exclusive of holdback, inclusive of HST), issued to Ayerswood on January 30, 2019 (the “**January Invoice**”).

Reference: Fourth Report, at s. 2.1.4 and 2.1.5

10. Ayerswood paid the January Invoice on March 1, 2019, in the normal course and prior to Sirius’ assignment in bankruptcy, via the March Payment in the full amount of the invoice.

Reference: Fourth Report, at s. 2.1.5

11. At the date of Sirius’ bankruptcy, the Trustee took possession of the cheque payable to Sirius in the sum of \$381,578.40 for the March Payment, which sums are being held in the Trustee’s estate account.

Reference: Second Report of the Trustee dated August 1, 2019, at s. 2.1.4 and 2.1.5, at Appendix “D” to the Fourth Report

12. Sirius issued one further invoice prior to its assignment in bankruptcy on February 28, 2019, in the sum of \$176,280, which was not paid prior to its assignment (the “**February Invoice**”).

13. The Trustee issued a Statement of Claim against Ayerswood dated May 29, 2019 (the “**Statement of Claim**”) seeking payment of, *inter alia*, all holdback amounts owing from Ayerswood to Sirius (the “**Action**”).
14. On November 18, 2019, Ayerswood issued a Statement of Defence and Counterclaim in the Action. Among other issues raised, Ayerswood has taken the following position with regard to the March Payment:
 - a. That there was no schedule for values or progress payments in the contract between Sirius and Ayerswood, and that payments were made based on work completed;
 - b. That Ayerswood had paid the January Invoice based on a misrepresentation by Sirius that the work invoiced had been completed, when in fact the work was unfinished;
 - c. That Ayerswood overpaid Sirius by a sum (less the holdback amounts referenced in para 11, above) totalling \$547,551.61, greater than the sum of the January Invoice, the March Payment, and the February Invoice, pursuant to a quantity surveyor retained by Ayerswood;
 - d. That Ayerswood is owed the return of the March Payment and of any holdback payments made in relation to the January Invoice, in partial satisfaction of the alleged overpayment of \$547,551.61, by way of either restitution or due to the creation of a resulting trust in favour of Ayerswood over such amounts.

Reference: Fourth Report, at Appendix “J” thereto

15. Ayerswood has stated that the report of its quantity surveyor, Truest Quantity Surveyors dated June 10, 2019 (the “**Quantity Report**”), evidences that the March Payment was gratuitous, 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.
16. The Quantity Report set out several separate cost estimates, being:

- a. Costs overpaid by Ayerswood to Sirius on existing invoices of \$170,704.71 (the “**Overpayment Claim**”);
 - b. Cost to complete the Guelph Project, including remedying deficiencies in work - \$531,846.90 (the “**Deficiencies and Completion Claim**”).
17. All issues regarding holdback amounts due and owing by Ayerswood to Sirius have been settled as between the parties.
18. Pursuant to the Claims Administration Procedure, the Overpayment Claim was settled in full as between the Trustee and Ayerswood by setting off the amounts owing by Ayerswood under the February Invoice as against the Overpayment Claim.

PART III – LAW AND SUBMISSIONS

A. THE ISSUES

19. The issues on which the Trustee seeks direction are as follows:
- a. Is the Trustee required to remit the March Payment to Ayerswood, either as restitution or due to the existence of a trust?

B. THE TRUSTEE’S POSITION

20. It is the Trustee’s position that:
- a. The March Payment constitutes a pre-bankruptcy collection of a receivable by Sirius in the normal course, and is not recoverable by Ayerswood under the BIA;
 - b. Any alleged deficiencies in the work performed by Sirius and included in the January Invoice (and/or any damages flowing from such deficiencies), which are denied, would form an unsecured claim in the bankruptcy of Sirius, and would not entitle Ayerswood to the return of the March Payment;
 - c. No trust exists or attaches to the March Payment; and,
 - d. Ayerswood had sufficient opportunity to satisfy itself as to the quality and completeness of the work referenced in the January Invoices, and, by making the March Payment, indicated its clear intention to compensate Sirius for work completed.

The March Payment is not Recoverable Under the BIA

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

21. It is the Trustee's position that the March Payment constituted a pre-bankruptcy collectable of Sirius, which 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.
22. 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.
23. As set out in the Fourth Report, and above, and as admitted by Ayerswood in its Statement of Defence and Counterclaim, 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.
24. This pattern of invoicing and payment was followed in the ten (10) invoices paid between April 25, 2018 and the March Payment on March 1, 2019.
25. 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

26. On the assignment of a person into bankruptcy, all of their property (with the exception of property held in trust for another person or persons) vests in the appointed Trustee, in this case, BDO.
27. Property is defined broadly under the BIA, and includes cash and negotiable instruments, such as the March Payment.

Reference: *Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, at s. 2.*
Trustee's Book of Authorities, Tab 1.

28. 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.
29. 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.
30. 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.
31. 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.
32. Similarly, any damages claimed by Ayerswood as a result of deficiencies in the work done by Sirius on the Guelph Project would also form an unsecured claim provable in Sirius' bankruptcy, to be valued by the Trustee in accordance with section 135 thereof.

Reference: *Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, at s. 121(1).*
Trustee's Book of Authorities, Tab 2.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, at s. 135.
Trustee's Book of Authorities, Tab 3.

33. Ayerswood's claim for damages would not fall under the exceptions set out in section 178 of the BIA, and would not entitle Ayerswood to any special treatment thereunder.

Reference: *Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, at s. 178.*
Trustee's Book of Authorities, Tab 4.

34. Any “restitution” of the March Payment would run counter to the spirit and the letter of the BIA, including the Scheme of Distribution, and would unlawfully prejudice the other unsecured creditors of Sirius by preferencing the claim of Ayerswood over those of other creditors, all of whom claim funds owing to them by Sirius.
35. 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.

The March Payment is Not Held in Trust

36. Ayerswood takes the position that the Trustee is holding the March Payment in Trust for Ayerswood.
37. Pursuant to the BIA, property held in trust by a bankrupt at the time of their assignment does not vest in the trustee.

Reference: *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, at s. 67(1)(a). Trustee’s Book of Authorities, Tab 5.

38. It is the position of the Trustee that the March Payment was not held in trust by Sirius for the benefit of Ayerswood, whether pursuant to the CLA, the BIA, and/or at common law.

Statutory Framework - CLA

39. Section 87.3 of the *Construction Act*, R.S.O. 1990, c. C.30 states that the provisions of the *Construction Lien Act* as it read on June 29, 2018 continue to apply with respect to an improvement if the related contract was entered into prior to July 1, 2018.

Reference: *Construction Act*, R.S.O. 1990, c. C.30, at s. 87.3. Trustee’s Book of Authorities, Tab 6.

40. The contract for the Guelph Project was entered into on or about March 14, 2018. As a result thereof, Sirius’ involvement in the Guelph Project was governed by the provisions of the CLA as they read on June 29, 2018, and all subsequent references to the CLA shall refer to same.

No Statutory Independent Trust - CLA

41. As stated above, the March Payment was a payment on account by Ayerswood to Sirius, for services and materials provided by Sirius to Ayerswood. Such payment was in the normal course, and forms part of the bankrupt estate of Sirius.
42. The Trustee submits that there are no provisions of the CLA and/or the BIA which would create an independent trust in favour of Ayerswood with regard to the March Payment.
43. The Trustee respectfully submits that the trust provisions of the CLA do not act to create a trust in favour of a payer as against a payee. Section 8(1) of the CLA clearly states that the beneficiaries of the statutory trust are subcontractors “and other persons” who have supplied services or materials to the relevant payer. There is no provision of the CLA which states that such obligations run “upwards” from the supplier of such services or materials to the payer, in this case, Ayerswood.

**Reference: *Construction Lien Act*, R.S.O. 1990, c. C.30 at s. 8(1).
Trustee’s Book of Authorities, Tab 7.**

44. Thus, any trust obligations created by the CLA in relation to March Payment would bind Sirius, and the beneficiaries of such a trust would be Sirius’ subcontractors and suppliers, or other persons who supplied Sirius with such services or materials. To find otherwise would require this Honourable Court to impute meaning to the clear provisions of the CLA that is not otherwise found therein.

No Statutory Independent Trust - BIA

45. Neither is there direct statutory support to be found in favour of Ayerswood’s position in the BIA; such statutory deemed trusts mainly concern property either exempt from seizure by statute, or else amounts owing by a bankrupt to the Crown, and such provisions would not apply to Ayerswood and/or the March Payment.

**Reference: *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, at s. 67.
Trustee’s Book of Authorities, Tab 8.**

46. 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 Common Law Trust

47. 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, given that its pleadings refer to both.

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

49. 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, i.e. 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. Trustee's Book of Authorities, Tab 9.

50. 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, i.e. the unlawful enrichment of Sirius at the expense of Ayerswood.

Reference: *Kerr v. Baranow*, 2011 SCC 10, at para 50. Trustee's Book of Authorities, Tab 9.

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

No Gratuitous Transfer

52. Ayerswood has stated that the Quantity Report evidences that the March Payment was gratuitous, 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.
53. In relation to allegations of gratuitous transfer and/or unjust enrichment, the Trustee submits that the March Payment was not gratuitous.
54. First, in its Statement of Defence and Counterclaim, Ayerswood has conflated the Overpayment Claim and the Deficiencies and Completion Claim as set out in the Quantity Report.
55. In other words, while there *may* be deficiencies in the work completed by Sirius (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 via the March Payment.
56. 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 via 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.
57. 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.
58. As the March Payment was not gratuitous, and as there is no standalone statutory trust attaching to these monies, the Trustee 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.

It was the Intention of Ayerswood to Compensate Sirius

59. In the alternative, or in addition to, the above arguments, the Trustee submits that it was the clear intention of Ayerswood to compensate Sirius for the work set out in the January Invoice, and that no trust can attach to these funds as a result thereof.
60. The Trustee submits that any deficiencies in work performed by Sirius and set out in the January invoice were known, or should have reasonably been known, by Ayerswood, and were clearly waived. As a result, Ayerswood cannot now claim the existence of a trust, or any entitlement to restitution of those funds.

Any Alleged Deficiencies were Waived by Ayerswood

61. The Trustee submits that, at the time of the March Payment, no deficiencies were raised by Ayerswood which would indicate to Sirius or the Trustee that such payment was made in anything but the ordinary course, despite Ayerswood possessing sufficient opportunity and means to inspect Sirius' work.
62. With regard to the allegations of deficiency raised in the Statement of Defence and Counterclaim, such allegations are denied by the Trustee.
63. Should this Honourable Court find that such deficiencies existed, however, the Trustee submits that such deficiencies were waived by Ayerswood on making the March Payment.
64. It is established in law that a party may waive a breach of contract by another contracting party. As stated by the Supreme Court in *Saskatchewan River Bungalows v. Maritime Life Assurance*:

The essentials of waiver are thus full knowledge of the deficiency which might be relied upon and the unequivocal intention to relinquish the right to rely on it. That intention may be expressed in a formal legal document, it may be expressed in some informal fashion or it may be inferred from conduct. However, in whatever fashion the intention to relinquish the right is communicated, the conscious intention to do so is what must be ascertained.

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them...

Reference: *Saskatchewan River Bungalows v. Maritime Life Assurance*, [1994] 2 SCR 490, at paras 19-20. **Trustee's Book of Authorities, Tab 10.**

Knowledge

65. 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.
66. 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.
67. 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.
68. 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.
69. 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.

Intention

70. 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. **Trustee's Book of Authorities, Tab 11.**

71. 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
72. 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
73. 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.
74. With regard to the Deficiencies and Completion 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.
75. 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.

PART IV – SUMMARY OF SUBMISSIONS

76. The Trustee makes the following submissions in support of the relief sought herein:
- a. The March Payment was paid by Ayerswood to Sirius in the normal course, and consistent with Ayerswood's payment of previous invoices. This payment formed part of the estate of Sirius upon its assignment, and vested in the Trustee for the benefit of Sirius's creditors;
 - b. As Ayerswood holds an unsecured claim, "restitution" of the March Payment to Ayerswood would run counter to the letter and spirit of the BIA, and would preference Ayerswood in relation to the other unsecured creditors of Sirius' bankrupt estate;

- c. There is no provision of the CLA and/or the BIA which would create a standalone statutory trust attaching to the March Payment in favour of Ayerswood;
 - d. There is no common law trust attaching to the March Payment in favour of Ayerswood, for the following reasons:
 - i. The March Payment was not gratuitous. Ayerswood has conflated the Overpayment Claim and the Deficiencies and Completion Claim in its Statement of Defence and Counterclaim. As the Overpayment Claim has been settled in full via setoff of the amounts owing to Sirius under the February Invoice, the remaining Deficiencies and Completion Claim would form an unsecured claim in the bankruptcy of Sirius, to be paid via the Scheme of Distribution set out in the BIA;
 - ii. Ayerswood was afforded sufficient opportunity to inspect the work completed by Sirius, and raised no objections to same. By making the March Payment, Ayerswood indicated a clear intention to compensate Sirius in full for the work invoiced, and waived any alleged deficiencies in such work.
77. The Trustee submits that the March Payment forms part of the estate of Sirius, to be distributed to the creditors thereof pursuant to the Claims Administration Procedure and/or the Scheme of Distribution in the BIA.

PART IV – ORDER REQUESTED

78. An Order for such relief as is claimed in the Notice of Motion, including an Order directing the parties with regard to the March Payment.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of September, 2020



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SCHEDULE “A”**LIST OF AUTHORITIES**

1. *Kerr v. Baranow*, 2011 SCC 10.
2. *Saskatchewan River Bungalows v. Maritime Life Assurance*, [1994] 2 SCR 490.
3. *Motors Insurance Corp. v. Old Republic Insurance Co.*, 2009 CarswellOnt 4163 (SC).

SCHEDULE "B"**LIST OF STATUTES, REGULATIONS & BY-LAWS**

1. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, at s. 2.
2. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, at s. 121(1).
3. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, at s. 135
4. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, at s. 178.
5. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, at s. 67(1)(a).
6. *Construction Act*, R.S.O. 1990, c. C.30, at s. 87.3.
7. *Construction Lien Act*, R.S.O. 1990, c. C.30 at s. 8(1).
8. *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, at s. 67.

IN THE MATTER OF THE BANKRUPTCY OF
SIRIUS CONCRETE INC. OF THE CITY OF WATERLOO,
IN THE PROVINCE OF ONTARIO

Court File No. 35-2481393
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ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

PROCEEDING COMMENCED AT LONDON

FACTUM

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