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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	**ARNAKI LTD.**
DEFENDANT	**SOLVAQUA INC.**
DOCUMENT	**BRIEF OF EXPORT DEVELOPMENT CANADA**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Field LLP** 400, 444 – 7 Avenue S.W. Calgary, AB T2P 0X8 Lawyer: Douglas Nishimura Phone Number: (403) 260-8548 Fax Number: (403) 264-7084 File No. 50500-8

Clerk's Stamp:

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INTRODUCTION

1. This application concerns competing claims to two pieces of equipment or the proceeds of sale of the same (the "**Equipment**"). The Equipment remains unsold at present and is stored at the premises of Rotating Right (2016) Inc. ("**Rotating Right**") in Edmonton, Alberta. The three competing claimants are creditors of Solvaqua Inc. ("**Solvaqua**"): Arnaki Ltd., Solvaqua's lender ("**Arnaki**"); Export Development Canada, Solvaqua's insurer ("**EDC**"); and Rotating Right.

2. EDC recognizes the validity of Rotating Right's claim for costs of storing the Equipment on its premises. However, it does not agree with its other claims to the Equipment, in respect of separate and distinct debts.

FACTS

3. On April 9, 2020, Vivaventures Inc. ("**Vivakor**") and Solvaqua entered into a written agreement (the "**Project Charter**") for, *inter alia,* purchase of the Equipment by Vivakor from Solvaqua (the "**Transaction**").[1]

4. EDC issued a policy of Export Receivables Insurance for the Transaction to Solvaqua, effective May 1, 2020, bearing policy number SE102960 (the "**Policy**"). The Coverage Certificate shows that the "insured events" include "Default (non-payment)". [2]

5. On August 31 2020, Arnaki agreed in writing with Solvaqua to provide financing of USD $2M for the Transaction (the "**Loan Agreement**").[3]

6. Arnaki took security from Solvaqua in the form of a General Security Agreement. Arnaki subsequently registered a security interest against:

> All present and after-acquired accounts, chattel paper, instruments, securities, money, documents of title and intangibles of Solvaqua Inc. due, payable or delivered to, for or with the debtor, together with all advantage and benefit to be derived therefrom and all of the debtor's right, title and interest in security agreements or interests held in respect of the same.

[1] Affidavit of Dan Barona sworn November 30, 2022 ("**Barona Affidavit**"), at para 3
[2] Barona Affidavit, at paras 4-5
[3] Barona Affidavit, at para 7

> Proceeds: all proceeds of every nature and kind, both present and future, including without limitation all accounts, intangibles, money, goods, chattel paper, investment property, instruments, documents of title, trade-ins, indemnification or compensation for any collateral lost, destroyed or damaged or lawfully or unlawfully taken are injuriously affected and any other property or obligations received when the original collateral or proceeds thereof are sold, dealt with, exchanged, collected, damaged, destroyed or otherwise dealt with.

7. The foregoing registration does not seem to include the Equipment.[4]

8. Arnaki furthered secured its position by requiring, as a condition precedent, that Solvaqua provide evidence of "EDC insurance" over Solvaqua's receivables, assigned in favour of Arnaki.[5]

9. Solvaqua delivered to EDC a written Direction to Pay Arnaki's parent company, Murchinson Ltd. ("**Murchinson**") on September 3, 2020. There was no assignment of the EDC Policy to Arnaki, contrary to the evidence in the Belilo Affidavit.[6]

10. The Policy and the Direction to Pay was important to Arnaki and the Policy was probably the largest determining factor in why Arnaki entered into the Loan Agreement with Solvaqua.[7]

11. After being satisfied with its security, Arnaki advanced funds to Solvaqua which, in turn, paid Rotating Right to manufacture the Equipment for Vivakor.[8]

12. In addition to the Loan Agreement, Arnaki entered into two other similar loan agreements with Solvaqua relating to different transactions, each of which was secured with a similar written and registered GSA and Direction to Pay under a separate but fundamentally identical EDC policy of Export Receivables Insurance.[9]

13. On February 1, 2021, Solvaqua, Vivakor and Rotating Right, following a visual inspection, confirmed in writing that Rotating Right had been fully paid by Solvaqua for the Equipment, that

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[4] Affidavit of Ariel Belilo sworn August 15, 2022 ("**Belilo Affidavit**") at para 11, Exhibit N

[5] Belilo Affidavit at para 7, Exhibit B

[6] Undertaking Response No. 3 of Paul Zogala

[7] Transcript – Questioning of Paul Zogala on December 21, 2022 ("**Zogala Transcript**") at p. 25, line 220 – p. 26, line

[8] Zogala Transcript

[9] Belilo Affidavit, at para 7

Vivakor accepted delivery of the Equipment at Rotating Right's premises, and that Vivakor agreed to fully pay Solvaqua according to the terms of the Project Charter.[10]

14. In July 2021 Solvaqua invoiced Vivakor for the Transaction in the amount of USD $2.5M. Vivakor repudiated the Project Charter and defaulted on payment. Vivakor has failed to make any payments toward the purchase price of the Equipment.[11]

15. From August to November, 2021, Arnaki and Murchinson's lawyer repeatedly requested that EDC pay them out under the Policy for the failed Transaction.[12]

16. The normal process under the Policy is that insured goods should be sold and only thereafter, once the loss is determined, is there a payout. However, Solvaqua advised EDC that it was undergoing severe cash flow requirements due to Arnaki's loans and asked EDC to waive the usual process.[13]

17. EDC paid Murchinson under the Policy $1.386 million US (90% of the approved loss amount of $1.54 million US). [14]

18. Arnaki subsequently exercised its rights as secured creditor under its several GSAs with Solvaqua and appointed the Receiver.

19. Having already achieved substantial recovery from EDC with respect to the value of the Equipment, Arnaki now seeks double recovery by also retaining the Equipment itself or proceeds from its sale.

20. Arnaki has also taken the portion that EDC must pay Murchinson with respect to one other Solvaqua policy where the goods being sold have not been delivered, and where EDC has determined the policy is not payable, as well as in respect of other items not delivered in the Vivakor Transaction. Accordingly, Arnaki is attempting to purchase, through a credit bid, other

[10] Transcript – Questioning of Dan Barona on December 19, 2022 ("**Barona Transcript**") at p. 23, Exhibit 1

[11] Barona Affidavit at para 7

[12] Barona Affidavit at para 7, Exhibit F

[13] Barona Affidavit, Exhibit B, para 8 and Barona Transcript, p. 16

[14] Barona Affidavit at para 7

goods which were the subject of EDC insurance policies and, at the same time, collecting the full value of those insurance policies, for an additional double recovery.

21. Rotating Right has also claimed an interest in the Equipment purportedly through a possessory lien. Rotating Right is apparently seeking storage fees of $91,627.27 with respect to the Equipment. In addition, Rotating Right is claiming the sum of $587,191.17 in respect of amounts owing for three other water treatment units unrelated to the Vivakor Transaction. Rotating Right appears to be claiming those amounts against the Equipment.

22. On December 21, 2022, Arnaki's Affiant, Paul Zogla, was questioned on his Affidavit sworn December 13, 2022. In the course of the questioning, counsel for Anraki objected to several questions. EDC disputes the validity of those objections.[15]

ISSUE

23. Whose interest in the Equipment takes priority, that of Rotating Right, EDC or Arnaki?

24. Are the objections by Arnaki to questions and undertakings valid?

ARGUMENT

Undertaking Responses

25. As an initial point, it is submitted that the "Under Advisement" Undertakings ("**UA**") 1, 2, 4, 5 and 10 to 18, requested of Paul Zogala, which were taken under advisement and subsequently refused must be answered and, that the refusals should, at the very least, raise issues regarding the evidence of Mr.'s Zogala.

26. UA 1 and 2 request the details of the corporate relationship between Murchison and Arnaki and evidence that the condition precedent of EDC's insurance was satisfied. Those questions are relevant since Arnaki, as secured creditor, is making a credit bid using its secured debt as purchase price. Murchison is the first loss payee under the EDC insurance and therefore it is relevant to understand the details of the relationship between Murchison and the secured creditor Arnaki. EDC wishes to establish that Murchison and Arnaki do not operate at arm's-

[15] Affidavit of Elvina Hussein sworn July 6, 2023

length and that proceeds of EDC insurance went directly to the secured debt balance. Further, it is submitted that the insurance was crucial to Arnaki/Murchison advancing funds because it formed part of the security package.

27. The foregoing applies to UA 4 and 5 are relevant to provide evidence as to the expectations of the parties with respect to the EDC's insurance at it related to the provision of loans by our Arnaki/Murchison. There is no evidence that the request to provide information related to EDC in the possession of Arnaki/Murchison is disproportionate.

28. Similarly, there is no evidence that evidence of communications with other parties regarding EDC policies in question is in any way disproportionate.

29. It is difficult to understand how evidence requested in Undertaking 9 as to what assets Arnaki wishes to acquire in the proposed sale are included in the anyway irrelevant to an application to approve the said sale.

30. UA 10 is relevant with respect to the issue of double recovery as set forth in the within written submissions.

31. UA 12 and 13 request the witness inquire with others at Murchison/Arnaki as well as reviewing records. However, the response refers only to Murchison/Arnaki's records. Accordingly, those answers are not fully responsive.

32. Finally, Undertaking Refusal number 2, does not require hearsay or speculation unless the witness does not have actual knowledge, either direct or indirect. Further, hearsay is not an acceptable objection to a question on an affidavit, when much of the affidavit is based upon information and belief in any event.

33. Ordinarily, the relief granted with respect to improper objections in a questioning on affidavit is an adjournment of the relevant application so that answers may be provided. While this may be the remedy the Court grants in the present case, it is submitted that it is also open to the Court to infer that the answers to those questions would not be helpful to Arnaki/Murchison. The end result of such an inference would be the following conclusions:

(a) EDC insurance was a key portion of the security required by Arnaki/Murchison in providing funding to Solvaqua.

(b) Arnaki/Murchison expected that, if the business projects of SolvAqua failed, there would be full coverage for the loans under the EDC insurance and that, therefore, Arnaki/Murchison would have the benefit of the sales in any event.

Sale of Equipment

34. There are strong justifications both in contract and in equity, for giving priority to EDC and against permitting Arnaki to retain the Equipment for which it was already compensated under the Policy and Direction to Pay.

I. Subrogation

35. In brief, EDC's position is that its subrogation as Solvaqua's insurer gives it an equitable lien over the Equipment and that, having paid Solvaqua's financial obligation to Arnaki, EDC is subrogated to the prior secured position of Arnaki to the extent of that payment, and that to find otherwise results in an unjustifiable windfall to Arnaki.

Insurer's Subrogation and Salvage

36. In the insurance context, subrogation is the most common way to prevent double recovery by an insured.[16] Subrogation does not depend on any contract terms but arises from equity in a variety of relationships, one of the most important of which is an indemnity paid by an insurer:

> The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making

[16] *Ratych v. Bloomer*, [1990] 1 SCR 940, at 978 [**Tab 1**]

> good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company.[17]

37. As an instance of subrogation, the insurer that has indemnified the insured to the amount of the insured loss also has an equitable right of salvage in the property itself.[18]

38. The courts have described subrogation and salvage as involving an "equitable lien" for the insurer's benefit. In *Gerrow* the court spoke of an insurer's subrogation remedy as to goods, salvage and restitution being "the plainest equity that could be".[19]

39. Having paid Murchinson on behalf Solvaqua, EDC has equitable rights by way of subrogation in the purchase money owed by Vivakor but also in the Equipment, for which Arnaki and Murchinson have already been compensated under the Policy and Direction to Pay.

40. Consistent with EDC's rights, Solvaqua and EDC agreed that the Equipment was EDC's though it would remain with Solvaqua, which was in a better position than EDC to sell the Equipment to a buyer for the benefit of EDC. In essence, the Equipment became trust property in the possession of Solvaqua for EDC's benefit.[20]

Creditor's Subrogation

41. Whereas in the insurance context it is often stated that the insurer is subrogated to the rights of its insured who is indemnified, this is not the only relevant context for analyzing EDC's subrogation rights in this matter. Another established category that gives rise to subrogation as a restitutionary remedy involves a guarantor or surety of a debtor, or someone in an analogous circumstance, who pays what is due to the creditor and, as a result, becomes subrogated to the

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[17] *Ledingham v. Ontario Hospital Services Commission*, [1974] CanLII 9 (SCC), [1975] 1 SCR 332 at 337, quoting *National Fire Insurance v McLaren* (1886), 12 OR 682 [**Tab 2**]; and *Grebely v Economical Mutual Insurance* 1999 ABQB 97 at par. 17-23 [**Tab 3**]; and *Vujicic v Estate of Leona Donna MacEachern*, 2022 ABCA 263 at par. 82-83 (per Wakeling JA) – [**Tab 4**]

[18] *David Polowin Real Estate v Dominion of Canada General Insurance* [2005] CanLII 21093 (ON CA) at par. 82, 100, 135 (leave to appeal to the Supreme Court of Canada dismissed January 26, 2006) [**Tab 5**]

[19] At par. 9

[20] Affidavit of Chris Tesarski sworn December 6, 2022 ("**Tesarski Affidavit**") at para. 5-9

creditor's rights in respect of the debt.[21] In *Gerrow v Dorais* the Court reviewed relevant authorities on this type of subrogation, finding:

(a) As soon as the surety has paid to the creditor what is due to the creditor under the guarantee, he is entitled, unless he has waived them, to be subrogated ... to all the rights possessed by the creditor in respect of the debt, default or miscarriages to which the guarantee relates. [par. 8]

(b) Subrogation does not arise from contract but "will be granted if it just and equitable to do so." It is an equitable doctrine. Its basis is a principle of natural justice. [par. 10] A surety's subrogation to the position of a creditor upon payment of what is owed by the debtor exists "to prevent an unjust enrichment." [par. 11] "The doctrine of subrogation came into existence for the express purpose of rendering justice where an injustice would otherwise be permitted." [par. 17]

(c) All of the circumstances must be balanced and the Court must find that no injustice will be done through the substitution. [par. 19]

42. Similarly, a third party at the request of a debtor paying off a security interest with a view to obtaining a first ranking security interest on the property, entitles the third party (in this case EDC) to assert in equity the security interest of the secured party (in this case Arnaki).[22]

43. The fact of Arnaki's registration of a financing statement with respect to its GSA does not necessarily defeat the equitable claim of EDC. Section 66(3) of the *Personal Property Security Act* preserves the application of subrogation and other equitable remedies in Alberta as a supplement to the PPSA.[23] In *N'Amerix Logistics Inc, Re* the Ontario court noted that subrogation has been applied "in priority disputes similar to claims under the PPSA".[24] The court found it

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[21] *Gerrow v. Dorais*, 2010 ABQB 560 (CanLII) ("***Gerrow***") - [**Tab 6**]

[22] Roderick J. Wood, *Turning Lead into Gold: The Uncertain Alchemy of "All Obligations" Clauses*, (2004), Alta. L. Rev. 41 801 at 819 – [**Tab 7**]

[23] *Personal Property Security Act*, RSA 2000, c P-7, s 66. ("**PPSA**") [**Tab 8**]; and Roderick J. Wood, *Supplementing PPSA Priorities: The Use and Abuse of Common Law and Equitable Principles*, 56 Cdn. Bus. L. J. 31 at 55-56 - [**Tab 9**]

[24] *N'Amerix Logistics Inc, Re*, [2001] CanLII 28082 (ON SC) at par. 23, 33 - [**Tab 10]**

equitable in that case to apply subrogation so that the position of the secured creditor bank was subordinated to the unsecured position of the competing creditor:

> Based on the material, EBF has paid an obligation of N'Amerix to BNS with the knowledge and approval of all parties on the understanding that EBF would thereby obtain a first priority position over the accounts receivable of N'Amerix charged in favour of BNS. Subject to what is said below, this arrangement meets the criteria for subrogation by EBF to the position of BNS to the extent of the funds advanced by EBF to pay out the operating loan of N'Amerix.[25]

44. Similarly, EDC paid the obligation of Solvaqua to Arnaki with the knowledge and approval of all and with the understanding of at least Solvaqua and EDC that EDC would obtain a first priority position over the Equipment. Permitting Arnaki to now have the benefit of the Equipment (for which it has been paid) would result in a windfall for Arnaki which equity should not permit.[26]

45. Applying the reasoning in *N'Amerix*, Arnaki's nexus with Solvaqua as its secured creditor still exists, but pursuant to EDC's subrogation it exists for the benefit of EDC to the extent that EDC has paid Arnaki for Solvaqua's debt.[27]

46. The Ontario court in *Grahouli v Yassine* reviewed caselaw and summarized a number of key principles of subrogation:

> a. Subrogation is a remedy and not a right: … ;
>
> b. The remedy of subrogation is discretionary: … ;
>
> c. An equitable mortgage if granted under the doctrine of subrogation is the exercise of the court's equitable jurisdiction: … ;
>
> …
>
> e. Where a party at the request of the mortgagor pays off a first mortgage with a view to becoming the first mortgagee of the property, that payor becomes, in default of evidence of intention to the contrary, entitled in equity to stand in the shoes of the original first mortgagee as to the property: … .
>
> f. "Where a third party pays off a first mortgage with a view to becoming a first mortgagee and takes a new mortgage, he is entitled to stand in the shoes of the

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[25] *N'Amerix Logistics Inc, Re*, [2001] CanLII 28082 (ON SC) at par. 35 - [**Tab 10**]

[26] *N'Amerix Logistics Inc, Re*, [2001] CanLII 28082 (ON SC) at par. 34 - [**Tab 10**]

[27] *N'Amerix Logistics Inc, Re*, [2001] CanLII 28082 (ON SC) at par. 43 - [**Tab 10**]

> first mortgagee.": …
>
> …
>
> h. Equitable mortgages of property are created by some act or instrument involving the owner which is insufficient to confer a legal estate but which, being founded on valuable consideration, shows the intention of the parties to create a security or evidences a contract to do so: … ;
>
> …
>
> k. The foundation of the doctrine of subrogation is fairness which is to be determined in light of the circumstances in each case, … ;
>
> l. Absent injury to the party against whom subrogation is sought, courts lean towards granting that remedy: … ;
>
> m. Courts which grant the remedy of subrogation often do so in order to prevent a case of unanticipated windfall or unjust enrichment … ;
>
> …
>
> q. Where a third party at the request of a mortgagor pays off a first mortgage with a view of itself becoming a first mortgagee, such third party in the absence of evidence to the contrary, becomes entitled as to the property to stand in the shoes of the first mortgage paid out by the third party: … ;
>
> r. One principle underlying the grant of equitable relief by subrogation of a party to the rights of the original mortgagee is that such relief not create an injustice, namely whether the relief if granted, will place the recipient in any worse position than existed prior to their receipt of the funds: … .
>
> …[28]

47. The facts of *Grahouli*, briefly, are that Ms. Grahouli and her spouse Mr. Yassine mortgaged their property to TD Bank which registered its mortgage on title to the property as a first mortgage. Mr. Yassine later secured financing from RBC which was used to pay off some of the indebtedness to TD Bank, however, he did so forging the signature of Grahouli. After the spouses separated Grahouli sought a declaration that the RBC charge was invalid. The court concluded that, regardless of the forgery, because the RBC funds were used by the couple (or one of them) to pay down their shared TD Bank indebtedness, RBC was entitled to an equitable mortgage pursuant to subrogation, enjoying the priority of TD Bank's registered mortgage to the extent of the funds it had advanced. While the court in *Grahouli* was concerned with a priority

[28] *Grahouli v Yassine* 2017 ONSC 5108 (CanLII) at par. 213 [**Tab 11**]

contest between a mortgagee under a mortgage registered on title to land and a subsequent unsecured creditor, in equity the principles it states about equitable mortgages should apply by analogy to the secured position of Arnaki and the equitable lien of EDC.

48. In *Coupland Acceptance v Walsh,* funds advanced to the debtor by the second mortgagee were used, as they were intended, to pay off an existing first ranking mortgagee. This earned the second mortgagee the first ranking status to extent of its payment, notwithstanding that its second mortgage was registered after the competing lien.[29] The Supreme Court of Canada quoted the relevant equitable principle in these terms:

> ...where a third party at the request of a mortgagor pays off a first mortgage with a view of becoming himself a first mortgagee of the property, he becomes, in default of evidence of intention to the contrary, entitled in equity to stand, as against the property, in the shoes of the first mortgagee. Even in the case of a purchase of an equity of redemption, where the first mortgagee is at the same time paid off and joins in a conveyance of the property to the purchaser, so that questions of merger arise, it will require strong evidence of contrary intention to preclude the Court from holding that the first mortgage debt is still alive for the purpose of protecting the purchaser of the equity of redemption from mesne incumbrances, whether at the time of purchase he knows of such incumbrances or otherwise.[30]

49. EDC's payment to Murchinson under the Direction to Pay was plainly intended to satisfy Solvaqua's debt obligation to Arnaki under the Loan Agreement and in equity entitles EDC to any security rights of Arnaki/Murchinson to the extent of the payment made by EDC.

II. Marshalling

50. Marshalling is another equitable doctrine "which provides that where there are two creditors of the same debtor, and one creditor has a right to resort to two funds for payment of his debt, and the other a right to resort to one fund only, the court will 'marshal' or arrange the funds so that both creditors are paid as far as possible":

> In its simplest form the doctrine of marshalling dictates that if a creditor has two funds to draw upon to satisfy the debt, the Court will require him to take

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[29] *Coupland Acceptance v Walsh*, [1954] S.C.R. 90 ("***Coupland***") - [**Tab 12**]

[30] *Coupland* - [**Tab 12**]

> satisfaction from that fund upon which another creditor has no security. In Alberta, the seminal case on the doctrine of marshalling is *First Investors Corp. v. Veeradon Developments Ltd.* (1988), 84 A.R. 364, 47 D.L.R. (4th) 446 (Alta. C.A.). In that case, Belzil J.A., in explaining the doctrine of marshalling, noted that the leading formulation of the doctrine of marshalling as a principle of equity is that of Lord Hardwicke in *Lanoy v The Duke and Dutchess of Athol* (1742), 2 Atk. 444. At p. 669 Lord Hardwicke held that if a creditor has two funds, he must take his satisfaction from the fund that has no lien by another creditor. [31]

51. Arnaki is a creditor of Solvaqua pursuant to three different loan agreements and related to those agreements it has rights against a broad swath of the property of Solvaqua, as identified in the GSAs it has registered. EDC is a creditor of Solvaqua only to the extent of its equitable lien over the Equipment, which was intended by Solvaqua to be the property EDC in exchange for the payment of the claim under the Policy. In short, the Equipment and their proceeds are the only fund available to EDC. Arnaki has a claim on the Equipment too, but also on the broader fund, all the remaining property of Solvaqua.

52. Viewed somewhat differently, Arnaki created two funds by securing its position as creditor of Solvaqua in two ways: (i) getting and registering the GSAs, and (ii) securing its right as loss payee under the Policy with respect to this Transaction. Of these two the latter is more narrow and is the only fund that overlaps with the rights of EDC to subrogation and salvage upon payment of the claim. It is equitable in the circumstances for the court to marshal the competing claims of EDC and Arnaki so that EDC has the first claim to the Equipment.

53. Doing so causes no injustice to Solvaqua and none to Arnaki, which can be presumed to have been aware, at the time that it negotiated the Loan Agreement including the condition precedent at art. 3.1(h), that the Policy it asked for intended EDC to benefit from the proceeds of selling the Equipment (clause 20,(c)). Arnaki's evidence is that its counsel reviewed the EDC Policy prior to advancing funds.[32]

54. Whether the remedy comes through marshalling, subrogation, or another equitable principle, there can be little doubt that equity intends Arnaki's interest in the Equipment, for which it has

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[31] *Gerrow* – [**Tab 6**] at par. 21-22; and Roderick J. Wood, *Supplementing PPSA Priorities: The Use and Abuse of Common Law and Equitable Principles*, 56 Cdn. Bus. L. J. 31 at 66 [**Tab 12**].

[32] Zogala Transcript at p.24, line 8-18.

already been compensated under the Policy, to be subordinated to EDC's interest as a matter of fairness and to prevent the unjust enrichment of Arnaki:

> … the doctrine of subrogation came into existence for the purpose of preventing an injustice to a party who is required to pay another's indebtedness, provided that under the circumstances the Court decides it is just and reasonable, having regard to the relationship of the parties.[33]
>
> A surety who pays off the debt to the principal creditor owed by the principal debtor is entitled to succeed to all claims which the principal creditor has against the debtor in order to prevent an unjust enrichment.[34]

55. EDC comes to the Court with clean hands seeking equity. For all of the reasons above EDC requests that the Court declare that its interest in the Equipment takes priority to the interest of Arnaki to the extent of the payment made by EDC under the Policy.

III. Contractual Remedy

56. The Policy provisions clearly provide that all the rights with respect to the Transaction are transferred to EDC upon payout of the Policy. This transfer was confirmed by the Assignment Agreement executed by Solvaqua. Accordingly, all rights of EDC to recover against Vivakor were transferred to EDC.

57. In order to recover against Vivakor, EDC must, by necessity, have the Equipment. Only then could it insist upon specific performance of the Transaction or deliver the goods with a demand for payment. It is otherwise impossible for EDC to give effect to the Assignment Agreement.

58. Further, it is indeed arguable that Vivakor itself already took delivery of the Equipment and is, in fact, entitled to possession but for its lack of payment. Vivakor, Rotating Right and Solvaqua all agreed that Vivakor had taken delivery of the Equipment and that Vivakor simply owed Solvaqua the purchase price.

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[33] *Gerrow* at par. 17, 60 - [**Tab 6**]

[34] *Gerrow* at par. 11 - [**Tab 6**]; and Roderick J. Wood, *Supplementing PPSA Priorities: The Use and Abuse of Common Law and Equitable Principles*, 56 Cdn. Bus. L. J. 31 at 55-56 - [**Tab 12**]

59. Under this analysis, not only does EDC have a claim against the Equipment pursuant to it contractual provisions of the Policy and subsequent registration of a security interest at the Personal Property Registry, it also has an equitable vendor's lien to the extent that the goods were sold to Vivakor, but for which Vivakor has not paid.

60. The law recognizes a vendor's lien as an equitable lien which secures all or any unpaid part of the purchase price and is still available as a remedy in Canada.

Assignment of Claims against EDC held by SolvAqua

61. SolvAqua had existing claims under insurance policies given by EDC which had been denied or only partially paid. SolvAqua rights under insurance policies cannot be assigned to any other party without the consent of EDC. Arnaki/Murchison has refused to answer questions as to whether these claims are to be assigned to Arnaki/Murchison as part of the proposed sale of assets. However, on the assumption that they are, it is submitted that the Court should recognize the contractual terms agreed to between SolvAqua and EDC and require the approval of EDC for any such assignment. EDC does not consent to the assignment.

62. While it is not uncommon in restructuring proceedings to grant assignments without consent of contracting parties even where such consent is contractually mandated, those cases involve consideration of the best interest of all creditors and other stakeholders in a restructured entity. In the present case, those concerns are not present, since this is merely a sale of assets conducted under Court supervision. It is submitted, therefore, that there is no compelling reason to dispense with contractually agreed rights held by EDC.

CONCLUSION

63. In summary:

(a) EDC has either an ownership interest in the subject equipment or security rights pursuant to subrogation.

(b) Arnaki/Murchison with enjoy a double recovery if it receives both the benefit of EDC's insurance over the subject equipment sale and the equipment itself.

(c) The insurance contract implies that EDC obtained an ownership interest upon payment, since the contract itself assigns all rights of recovery under the initial sales contract to EDC. EDC cannot possibly enforce such rights without the ability to deliver the equipment to the buyer.

(d) As the insurance contracts cannot be assigned to a third party without consent of EDC, and since EDC has not granted such consent, both contracts and the rights thereunder should not be assigned in these proceedings.

RELIEF REQUESTED

64. For the foregoing reasons, EDC requests an Order:

(a) Declaring that its rights against the Equipment have priority over those of Arnaki/Murchison;

(b) Confirming that lien rights of Rotating Right are limited to amounts for work done on the Equipment and not other debts;

(c) Awarding costs against Arnaki/Murchison and Rotating Right in favor of EDC on a party party basis; and

(d) Such further and other relief as this Honourable Court may deem just.

Submitted this 6th day of July, 2023.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

FIELD LLP

Per: _____
Douglas S. Nishimura,
solicitor for Export Development Canada

TABLE OF AUTHORITIES

TAB