COURT OF APPEAL FOR ONTARIO

CITATION: Hybrid Financial Ltd. v. Flow Capital Corp., 2022 ONCA 820
DATE: 20221125
DOCKET: C70359

van Rensburg, Pardu and Copeland JJ.A.

BETWEEN

Hybrid Financial Ltd.

Applicant (Appellant)

and

Flow Capital Corp.

Respondent (Respondent)

Kevin D. Sherkin and Jeremy Sacks, for the appellant[1]

James Renihan, for the respondent

Heard: September 19, 2022

On appeal from the order of Justice Susan Vella of the Superior Court of Justice, dated February 7, 2022, with reasons reported at 2022 ONSC 892.

REASONS FOR DECISION

[1] Jeremy Sacks appeared but made no written or oral submissions on behalf of the appellant.

I. Factual Background

[1] Flow Capital Corp. (“Flow”) advanced $750,000 to Hybrid Financial Ltd. (“Hybrid”). In return Hybrid was obliged to make payments to Flow. Here the issue is whether the exercise of a buyout option by Hybrid would result in Flow’s receipt of a criminal rate of interest, contrary to s. 347(1) of the *Criminal Code*, R.S.C., 1985, c. C-46 (the “*Criminal Code*”).

The Agreement

[2] The appellant, Hybrid, carries on business as a sales and distribution company involved in the provision of capital market services, investor relations, asset management, and shareholder services. The respondent, Flow, provides growth capital for companies in North America and the United Kingdom. In 2017, Hybrid was indebted to the Bank of Montreal, and Hybrid’s CEO, Steven Marshall, secured the debt with a personal guarantee. In a search for alternative financing to pay off the bank loan, Mr. Marshall approached Flow. The parties agreed to a transaction with terms reflected in a document entitled the “Amended and Restated Royalty Purchase Agreement” (the “Agreement”), dated August 10, 2017.

[3] Under the Agreement, Flow agreed to provide $750,000 to Hybrid, paid in two installments. In exchange, Flow acquired rights to receive payments in return, subject to a buyout option exercisable by Hybrid. Hybrid was obliged to make a

minimum monthly payment described as a “royalty” of $15,625 during an initial period of the Agreement. As of January 1, 2019, the monthly payment was to be the greater of $15,625 or an amount tied to Hybrid’s revenues based on a trailing 12-month revenue figure. Flow did not acquire any shares in Hybrid, nor did it receive a right to play a role in the governance of Hybrid. There was no obligation on Hybrid to repay the initial $750,000 provided by Flow by any fixed date, but there was an acceleration clause requiring, at Flow’s option, payment of the amount advanced and any outstanding royalty payments, upon the occurrence of an “Event of Default” or “Bankruptcy Occurrence” as defined by the Agreement.

[4] The buyout option gave Hybrid the right to end the obligation to make monthly payments once Hybrid had made payments totalling at least $750,000.[2] The option required Hybrid to pay the greater of $1,500,000 or 5 per cent of Hybrid’s net equity value. Unless it exercised the buyout option, Hybrid was required to make the stipulated monthly payments in perpetuity.

[5] In June 2020, Hybrid gave notice of its intention to exercise the buyout option. At the time, Hybrid had paid $828,205.34 in monthly payments, thus

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[2] Flow had an option to advance further amounts up to a maximum of an additional $1,250,000 (a “Subsequent Installment”). The Agreement refers to the advance of $750,000 (paid over the course of two installments) plus any Subsequent Installment, collectively, as the “Aggregate Installment Amount”. Hybrid did not receive any Subsequent Installments.

satisfying the condition precedent of the option. Flow rejected Hybrid's offer to buy out the royalties for $1,500,000 over three years, insisting the payment be paid as a lump sum. Flow suggested the parties engage an independent valuator to determine Hybrid's net equity value pursuant to the terms of the Agreement. On July 16, 2020, Hybrid notified Flow that there was now a dispute as defined by s. 2.8 of the Agreement. According to s. 2.8, the parties remain bound to the terms of the Agreement during the dispute. On July 30, 2020, the parties jointly retained KPMG to conduct a valuation of Hybrid's net equity. Beginning in July 2020, Hybrid ceased to provide the required financial disclosure under the Agreement to Flow, thus preventing the calculation of the amount of monthly royalty payments due. Flow responded by sending invoices for the minimum monthly payment of $15,625, without prejudice to its right to claim any outstanding balance that may be due under the net equity valuation formula. Hybrid made late monthly royalty payments from June to October 2020 but ceased to do so as of November 2020.

[6] KPMG delivered a draft valuation report on November 16, 2020. It estimated Hybrid's net equity value to be approximately $75,500,000. Using the 5 per cent net equity valuation stipulated in the Agreement, the cost of exercising the option to terminate the monthly payments would be $3,775,000. Hybrid disputed this valuation and claimed the net value of the company was under $30,000,000. On November 26, 2020, for the first time, Hybrid asserted its claim that the Agreement

was in violation of s. 347 of the *Criminal Code*. Hybrid also refused to provide requested comments to KPMG on its draft report and instructed KPMG not to complete the report. Hybrid subsequently brought an application seeking an order that the financial formula stipulated in the Agreement exceeds the criminal interest rate under s. 347 of the *Criminal Code*. Flow brought its own application for an order declaring Hybrid in default under the Agreement and requiring Hybrid to pay the buyout amount.

II. The Decision of the Application Judge

[7] The application judge dismissed Hybrid's application and granted the relief sought by Flow. This relief included an order that: (a) requires Hybrid to instruct KPMG to complete its valuation report and provide its feedback as requested by KPMG; and (b) finds Hybrid in breach of its obligations under the Agreement.

[8] First, the application judge assessed whether the $750,000 provided by Flow to Hybrid falls within the meaning of "credit advanced" under s. 347(2) of the *Criminal Code*. The application judge indicated that the Agreement had characteristics of both a traditional loan or credit transaction and an equity investment, and thus was appropriately characterized as a hybrid agreement. Her inquiry then focused on the interpretation of the Agreement's provisions to assess whether it was predominantly an equity arrangement or a credit arrangement. In

concluding that the Agreement, read as a whole, does not support a characterization as predominantly a loan agreement or credit facility agreement, she emphasized:

(i) the Agreement's characterization of Flow's $750,000 payment as consideration for the "purchase" of royalties, rather than as a loan, debt, or credit;

(ii) the Agreement's characterization of Hybrid's corresponding payment obligations as "royalty payments", rather than interest payments, and the absence of an allocation of these payments between principal and interest; and

(iii) the absence of a requirement on Hybrid to repay the $750,000 sum and the statement that the royalty payments are to be made "in perpetuity".

[9] In concluding that the Agreement lacked most of the benchmarks of a loan, debt or credit facility, the application judge referred to the following terms or aspects of the Agreement at para. 91 of her reasons:

a) it is styled as a "Royalty *Purchase* Agreement" (emphasis added);

b) the subject royalties are described throughout as a "purchase" not a loan;

c) the royalty payments, after the second year of the Royalty Agreement, are tied to Hybrid's revenues;

d) the buyout amount for the royalties is tied to Hybrid's net equity value;

e) the advancements of capital to buy the two royalties are termed the "Initial Installment" and "Second Installment" respectively, and the royalties are stated

to be “purchased” from Hybrid for the stipulated sums ($425,000 and $325,000) “plus all applicable Taxes”;

f) potential third parties that could contribute to further royalty purchases are described as “investors” and in s. 2.1(c) as “co-investors” with Grenville (now Flow);

g) Flow is provided with an opportunity to purchase more royalties from Hybrid (to a maximum amount) and this opportunity is called a “potential investment” under s. 2.1(c);

h) It contains no provision requiring the repayment of any amount of fixed debt; and

i) the only section that expressly references an “interest” rate is s. 2. 4(f), and it only applies to any late payment made under the Royalty Agreement.

[10] Second, the application judge considered whether the repayment mechanism under the Agreement provided for the payment of “interest”. She concluded that, even if the Agreement provided for an advance of credit in exchange for payment in return within the meaning of s. 347 of the *Criminal Code*, it was taken out of the application of the section because the payments required were not “interest” because they were not sufficiently fixed or readily calculable.

[11] Finally, in the event that she was wrong in her conclusion that the Agreement was not captured by s. 347 of the *Criminal Code*, the application judge concluded that Hybrid voluntarily triggered the alleged criminal rate when it exercised its right to end the stream of payments to Flow. After citing para. 58 of *Garland v. Consumers’ Gas Co.*, [1998] 3 S.C.R. 112, for the proposition that a

criminal rate of interest cannot be triggered by the voluntary act of the borrower, the application judge observed that there was nothing in the Agreement that mandated Hybrid to trigger the buyout option, and she concluded that Hybrid's voluntary act would take the payment outside the reach of s. 347.

III. Arguments on Appeal

Did the Aggregate Installment Amount Constitute "Credit Advanced" for the Purposes of Section 347 of the *Criminal Code*?

[12] Hybrid submits that the application judge erred by focusing on the form of the Agreement, rather than its substance. Hybrid asserts that the application judge erred by failing to consider the Agreement's equivalent of an acceleration clause, namely that, at Flow's option, it required payment to Flow of an Aggregate Installment Amount (in this case, the initial payment of $750,000) where there was an Event of Default or Bankruptcy Occurrence by Hybrid (s. 2.12) or the contractual provision which explicitly dealt with the consequences of any potential illegality in the interest rate charged (s. 6.13).

[13] Flow's position is that the application judge's conclusion that the Agreement was more akin to an equity investment rather than a credit arrangement is owed deference. She engaged in an extensive review of the terms of the Agreement, leading her to conclude that Flow's advance of $750,000 did not amount to an

advance of credit. Since there was no advance of credit within the meaning of s. 347, any payments required of Hybrid could not be characterized as interest within the meaning of that section.

Did the Mode of Calculating the Amounts to Be Paid by Hybrid Remove the Agreement from the Application of Section 347?

[14] Hybrid argues that the amount it has to pay to end its monthly payment obligations to Flow is a charge or expense in return for the advance of $750,000 and constitutes “interest” within the meaning of s. 347 of the *Criminal Code*.

[15] Flow submits that the calculation of the amount to be paid by Hybrid if it elected to end its monthly payment obligations to Flow required valuation of Hybrid’s net equity value, an inherently subjective calculation, and that such amounts cannot qualify as “interest”. It submits that “interest” has to be a fixed, ascertainable amount that can be determined with certainty. If it has to be assessed, Flow argues, this is fundamentally inconsistent with the notions of interest or debt.

Was the Exercise of the Buyout a Voluntary Act by Hybrid and Is Section 347 Inapplicable to the Payment?

[16] Hybrid submits that it cannot have been contemplated by the parties that Hybrid would make monthly payments to Flow in perpetuity. Commercial reality

suggests that payment of the buyout was contemplated by the parties, who expressly provided for an Adjusted Rate (of one percentage point less than the prohibited rate) in the event that the exercise of the buyout resulted in payments in excess of a rate prohibited by law. Under these circumstances, the exercise of that choice should not be characterized as a voluntary act of a debtor transforming what would otherwise be a lawful rate of interest into a criminal rate.

[17] Flow submits that Hybrid freely chose to exercise the buyout option and that *Garland* recognizes that there is no violation of s. 347 where the payment of interest at a criminal rate is triggered by the voluntary act of the debtor.

IV. Analysis

Standard of Review

[18] In *Garland* and its companion case, *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90*,* the Supreme Court of Canada treated the issue of whether the penalty charged for late payment amounted to interest exceeding the rate permitted by s. 347 of the *Criminal Code* as a question of law reviewable on correctness: *Garland*, at para. 48.

[19] The respondent relies on *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633. *Sattva* deals with a question of determination of the parties' intentions as expressed in their contract and provides for review on

the more deferential basis owed to questions of mixed fact and law (barring extricable questions of law): at paras. 50-55.

[20] The issue here depends less on a determination of the intention of the parties as reflected in the Agreement in light of the surrounding circumstances, but more on the application of the *Criminal Code* to the Agreement, a question of law.

[21] On either view of the standard of review, there were errors of law in this case. The application judge failed to consider the substance of the Agreement as opposed to its form, and she failed to give effect to the specific contractual provision dealing with the possibility that the amounts to be paid by Hybrid might exceed the rate prohibited by s. 347 of the *Criminal Code*.

The Statutory Provisions

[22] Subsection 347(1) of the *Criminal Code* makes it an offence to enter into an agreement or arrangement to receive interest at a criminal rate or to receive payment of interest at a criminal rate.

[23] Subsection 347(2) defines key terms applicable to the section. “Credit advanced” means, for the purposes of this appeal, the money “actually advanced under an agreement or arrangement”.

[24] “Criminal rate” means “an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that

exceeds sixty per cent on the credit advanced under an agreement or arrangement".

[25] "Interest" means "the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced".

Application of Section 347 of the *Criminal Code*

[26] As noted in *Garland* at para. 51, the interpretation of "interest" mandated by s. 347 "may not follow intuitively from the concepts of "credit" and "interest" as those terms are employed at common law and in everyday life". What is crucial is the substance of the transaction and, as the Supreme Court goes on to note at para. 52, the "plain terms of s. 347 must govern its application."

[27] Stripped to its essence, the substance of the transaction here was that Flow advanced money to Hybrid, and Hybrid was required to pay money in return. The money Hybrid had to pay in return was an expense incurred for the advance of credit and was subject to the strictures of s. 347.

[28] The application judge erred in limiting her inquiry to whether the Agreement contained provisions with watertight compartments consistent with debt or credit

transactions, as opposed to those amounting to equity investments, and she lost sight of the breadth of the statutory language. As noted in *Garland*, "[t]he thrust of the definitions of "credit advanced" and "interest" is to cover all possible aspects of any transaction to ensure that the cost of using someone else's money never exceeds the criminal rate. […] Clearly the intention of the legislature was to concentrate on the substance of the transaction, not on its mechanics or form": *Garland,* at para. 51, citing *Mira Design Co. v. Seascape Holdings Ltd.* (1981), 34 B.C.L.R. 55 (S.C.), 22 R.P.R. 193, at p. 60. In the present case, the application judge emphasized the form of the transaction over its substance. That the payments Hybrid had to make were styled as "royalties" did nothing to alter the substance of the Agreement.

[29] The Agreement required Hybrid to pay "royalty" payments consisting of a minimum monthly amount up to December 31, 2018, and then the higher of that amount and an amount tied to its revenues thereafter. Flow was entitled to repayment of the principal sum advanced, referred to as the "Aggregate Installment Amount". Focusing on the wording and not the substance of the Agreement, the application judge stated that there was "no requirement to repay the principal sum of $750,000", and she referred instead to Hybrid's obligation to make royalty payments in perpetuity, or to exercise the buyout option. In fact, the Agreement guarantees to Flow the repayment of the principal sum, whether

through the continued royalty payments or as a condition for the exercise of the buyout option. The failure to make a payment is an Event of Default. In characterizing the Agreement as predominantly an equity agreement, the application judge focused on the fact that Hybrid's obligations were unsecured and no personal guarantee was offered. However, she ignored Flow's remedies on default or bankruptcy, which permitted, at Flow's option, the acceleration of the principal amount, and required the continuation of the royalty payments, and the fact that there was no risk of loss of the principal amount (except upon default), and no sharing in the risk of Hybrid's enterprise. Indeed, the royalty payments were tied to Hybrid's revenues, and not profits.

[30] In her characterization of the Agreement, the application judge also failed to give proper consideration to s. 6.13, which provided:

> **6.13 Maximum Permitted Rate**
>
> Under no circumstances shall a Purchaser be entitled to receive nor shall it in fact receive a payment or partial payment (whether in the form of Royalty Payments, Buyout Payments or otherwise) under or in relation to this Agreement at a rate that is prohibited under Laws. Accordingly, notwithstanding anything herein or elsewhere contained, if and to the extent that under any circumstances the amounts received or to be received by a Purchaser pursuant to this Agreement or any agreement or arrangement collateral hereto entered into in consequence or implementation hereof would, but for this Section 6.13, be a rate that is prohibited under Laws, then the effective annual rate, as so determined, received

> or to be received by a Purchaser shall be and be deemed to be adjusted to a rate that is one whole percentage point less than the lowest effective annual rate that is so prohibited (the "**Adjusted Rate**"); and, if such Purchaser has received a payment or partial payment which would, but for this Section 6.13, be so prohibited then any amount or amounts so received by such Purchaser in excess of the lowest effective annual rate that is so prohibited shall and shall be deemed to have comprised a credit to be applied to subsequent payments on account of other amounts due to such Purchaser at the Adjusted Rate. (emphasis added)

[31] The Maximum Permitted Rate provision expressly stipulated that Flow could not receive a payment at a rate prohibited under laws. We have not been referred to any law that would apply to this transaction and would prohibit a rate other than s. 347 of the *Criminal Code.* The application judge rejected the relevance of this provision because it did not specifically reference s. 347 and did not specify that the royalty payments or buyout amount constituted interest. She also described s. 6.13 as a "general provision intended to provide a fallback position in the event that [a] royalty payment, buyout payment or any other payment required under the [Agreement] was found to be in violation of any applicable law (as defined)", stating that "[i]t does not transform an otherwise legal agreement into one that is in violation of the law." In essence, the application judge concluded that this provision had no application since she had already determined that the Agreement was predominantly an equity investment. However, the parties must have intended that

s. 6.13 would have legal effect and significance. The application judge erred in failing to give effect to this provision in her characterization of the Agreement. Section 6.13 was not a "general provision"; by its terms it provided for an Adjusted Rate – one full percentage point less than the lowest effective annual rate that was prohibited, where Flow was to receive a payment under the Agreement at a prohibited rate. The inclusion of s. 6.13 means that the parties contemplated that payments under the Agreement might engage s. 347, and they contracted for an adjusted rate in that event.

Did the Buyout Constitute an "Interest" Payment?

[32] The application judge ultimately concluded that the repayment mechanisms in the Agreement lacked the features of "interest" as defined in the *Criminal Code*, and applied in the jurisprudence.

[33] Pursuant to s. 2.9 of the Agreement, if Hybrid elected to "extinguish all (but not less than all) of the amounts owing or to become owing", Flow was entitled to a Buyout Payment equal to the greater of:

> (i) an amount equal to two times the Aggregate Installment Amount [the full amount advanced by Flow to Hybrid] as at the date of the Buyout Notice; and
>
> (ii) an amount equal to A multiplied by B multiplied by C, where:

> (A) A is equal to the Aggregate Installment Amount as at the date of the Buyout Notice divided by $12,000,000;
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> (B) B is equal to 0.8; and
>
> (C) C is equal to the net equity value of the Hybrid Group as determined by a third-party valuator mutually agreed upon by [Flow] and [Hybrid] ….

[34] Flow argues that the buyout payment was not "interest", because only payments of a fixed amount can qualify as interest, whether the agreement was a debt instrument or equity investment. Even if Hybrid paid for an advance of credit, it submits that "[w]here quantifying a payment requires a valuation subject to different opinions, that payment cannot be interest."

[35] However, this is not a case where there will be competing valuations because, in these circumstances, the Agreement specifies that one valuator, KPMG, will conduct the valuation of Hybrid's net equity. The parties chose a contractual mechanism to resolve the issue of how much had to be paid. The amount to be paid can be determined with precision by following the method required by the Agreement. That different valuators might come to different conclusions about value is not a factor here, as it was in *Cirius Messaging Inc. v. Epstein Enterprises Inc.*, 2018 BCSC 1859, 16 B.C.L.R. (6th) 380, and other cases relied on by Flow. This is not a matter of valuing conversion rights, shares or warrants.

[36] Section 347(2) defines “interest” very broadly as “the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement” (emphasis added). In this context, the buyout payment is an expense payable for the advancing of credit under the Agreement, and therefore constitutes interest for the purposes of s. 347 of the *Criminal Code*.

Should Flow Be Insulated from the Consequences of Section 347 Because Hybrid Elected to Pay Out Its Obligations?

[37] Here the Agreement does not on its face require payment of illegal interest. An interest rate that exceeds 60 per cent was triggered based on when Hybrid chose to exercise the buyout option.

[38] Given this fact, Flow contends that, even if s. 347 would apply to the payments under the Agreement, to the extent they were triggered by Hybrid’s voluntary act, s. 347 would not apply. As noted in *Dancorp* at para. 30, “[a] lender who enters into an agreement to receive interest under ambiguous terms bears the risk that the agreement, in its operation, may in fact give rise to a violation of s. 347. The principle in [*Nelson v. C.T.C. Mortgage Corp.* (1984), 59 B.C.L.R. 221

(C.A.), 16 D.L.R. (4th) 139, aff'd [1986] 1 S.C.R. 749] protects the lender from incurring such liability in circumstances that are beyond its control."

[39] In *Nelson,* a mortgagor elected to prepay amounts owing on a mortgage. The agreement on its face did not require payment of illegal interest, but the result of the prepayment was that the interest rate exceeded 60 per cent. The rationale of *Nelson* was that a lender "who has entered into a lawful agreement should not, as the result of the voluntary act of the debtor, be guilty of a criminal offence": *Dancorp*, at para. 36.

[40] In *Garland,* a criminal interest rate was triggered by a penalty associated with the late payment of a gas bill. The gas company argued that, because a criminal rate was not triggered if the customer waited more than 38 days to pay after the due date, the criminal rate was triggered by the voluntary act of the debtor, and was not in violation of s. 347. The Supreme Court rejected this argument. In summarizing the principles governing the interpretation of s. 347, the court stated, at para. 58, that "[t]here is no violation of s. 347(1)(b) where a payment of interest at a criminal rate arises from a voluntary act of the debtor, that is, an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement" (emphasis added). At para. 61, the court concluded that, in this context, the customer's payment of the

penalty was not a voluntary act that would trigger an illegal rate of interest because the penalty was “automatically triggered by an event specified in the arrangement between the parties”.

[41] In this case it is unnecessary to consider the scope and application of the voluntary act exception outlined in *Nelson*, *Dancorp*, and *Garland* because of the inclusion in the Agreement of s. 6.13, the Maximum Permitted Rate provision. The application judge erred in failing to consider this provision when assessing this issue.

[42] Section 6.13 stipulates that “under no circumstances” will Flow receive a payment, including a buyout payment, that is at a “rate that is prohibited under Laws”. The provision goes on to state that, in the event a payment to be received by Flow “would, but for this Section 6.13, be a rate that is prohibited under Laws”, the effective rate shall be adjusted to a rate that is one percentage point “less than the lowest effective annual rate that is so prohibited”.

[43] In this case, when Hybrid elected to pay out its obligations, to the extent that the buyout amount would otherwise have exceeded the prohibited rate of interest, the parties had provided for a reduced rate. There is no question of Hybrid’s unilateral act rendering an otherwise legal rate of interest illegal. Rather, by

including s. 6.13, the parties provided in the Agreement for a lawful rate of interest if the buyout option were exercised.

[44] Both parties are sophisticated in commercial matters and were assisted by lawyers. They must have recognized that there was a risk that payments under the Agreement could run afoul of s. 347 of the *Criminal Code* so they included a contractual term to deal with that possibility. There is no reason why they should not be held to their agreement.

V. Conclusion

[45] The issues raised in this appeal go beyond the interests of the immediate parties. The form of this agreement may find its way into other contexts where both parties are not as sophisticated, and one party may be vulnerable to exploitation by another. It is important to remain cognizant of the breadth of the statutory language and the dictates in *Garland* to give effect to the substance of the agreement.

[46] There is no dispute that if the buyout amount would otherwise require interest payments at a criminal rate of interest, the Maximum Permitted Rate clause of the Agreement, s. 6.13, governs.

[47] The valuation process to determine that amount is not yet complete, and the record does not permit this court to calculate the precise amount owing, particularly

given the passage of time. Although the respondent does not dispute the appellant's calculations before this court, out of an abundance of caution, we remit the matter back to the Superior Court for determination of the buyout amount, pursuant to the Maximum Permitted Rate provision as well as any other amounts owing pursuant to the Agreement.[3]

[48] Paragraph 1 of the order of February 7, 2022, is set aside, and in its place a declaration will issue that the buyout amount is to be determined by application of the Maximum Permitted Rate clause in the Agreement. The matter is returned to the Superior Court for determination of that amount.

[49] Costs of the appeal are awarded to Hybrid in the agreed sum of $20,000 all-inclusive. If the parties are unable to agree as to the treatment of the costs awarded by the application judge, they may make brief written submissions on this issue, due from Hybrid within 14 days of the release of this decision and due from Flow within 21 days of the release of this decision.

"K. van Rensburg J.A."
"G. Pardu J.A."
"J. Copeland J.A."

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[3] There may be issues of monthly payments or interest owed.