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COURT OF APPEAL FOR ONTARIO

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF 1078385 ONTARIO LIMITED, ISLAND COVE DEVELOPMENT LTD., 1128625 ONTARIO LIMITED, 1362317 ONTARIO LIMITED, 1164801 ONTARIO LIMITED, 1099164 ONTARIO LIMITED, O.B. PROPERTIES CANADA LTD., JAM SOUND SPECIALISTS CANADA LTD., and O.B. PROPERTIES LIMITED PARTNERSHIP (Applicants)

BEFORE: **SIMMONS J.A. (In Chambers)**

COUNSEL: **William V. Sasso and Evlynn Lipton**
for the moving party, Randy Oram

Richard B. Jones and Tiffany Little
for Amico Contracting & Engineering (1992) Inc., Amicone Design Build Inc., Amicone Holdings Limited and Boblo Property Finance Inc.

John D. Leslie and Angela D'Alessandro
for Monitor
G.S. MacLeod & Associates Inc., as Receiver and Manager and for New Century Bank, assignee Pramco, IL, LLC and Bank One (Michigan)

HEARD: **December 14, 2004**

Motion for leave to appeal from the orders made by Justice Joseph G. Quinn of the Superior Court of Justice dated November 22, 2004 and November 25, 2004.

[1] Randy Oram requests leave to appeal an order of Quinn J. dated November 22, 2004, sanctioning a plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), and a related vesting order dated November 25, 2004, implementing the plan of arrangement. Pursuant to the terms of those orders, the assets of the applicants (the "debtor companies") were vested in a new company owned

by an affiliate of Amico Contracting & Engineering (1992) Inc., the secured creditor that proposed the plan of arrangement.

[2] The debtor companies are the developers of Bob-Lo Island, which is a relatively small island located in the Detroit River. Randy Oram is a shareholder of at least one of the debtor companies as well as an unsecured creditor. Under the agreement of purchase and sale forming part of the plan of arrangement, the assets of the debtor companies were sold for approximately $11,500,000 in satisfaction of secured creditors' claims totalling $19,219,744.

[3] Randy Oram raises a number of proposed grounds of appeal. However, the focus of his objections is that the plan of arrangement is a secured-creditor-led plan that excludes the unsecured creditors from any realistic prospect of recovery, without requiring the secured creditors to go through the formal process of enforcing their security and without exposing the secured assets to the market.

[4] Randy Oram submits that the significant issue raised for consideration on appeal is a review of the factors that should guide a court's exercise of discretion when considering secured-creditor-led plans of arrangement. He contends that, in this case, the motion judge erred by allowing the secured creditors to use the *CCAA* procedure as a shortcut for liquidating secured assets and by failing to require the secured creditors to proceed with enforcing their security in the ordinary course.

[5] Before hearing this matter on the merits, I dismissed a preliminary motion by Amico to transfer this motion to a panel of this court. Following that ruling (which was released orally), no requests were made to adjourn this motion. However, I permitted the responding parties to file copies of various orders and reports during the course of the hearing without objection from Randy Oram.

[6] For the reasons that follow, the motion for leave to appeal is dismissed.

Background

[7] In November 2003 Randy Oram commenced an oppression application against several of the debtor companies (the "respondent companies") and two shareholders of the respondent companies (John Oram and Gary Oram). On May 3, 2004, within the context of the oppression application, the court appointed KPMG Inc. as receiver of the assets of the respondent companies. However, in early June 2004, KPMG applied to be removed as receiver due to a lack of available funding for operations and costs. As a result of KPMG's application, on June 15, 2004, the court appointed G. S. MacLeod & Associates Inc. as the replacement receiver.

[8] On June 25, 2004, an Initial Order was made with respect to the debtor companies under the *CCAA*. That order stayed proceedings against the debtor companies, authorized G. S. MacLeod & Associates to continue to act as receiver of the debtor companies, and also appointed G. S. MacLeod & Associates as the Monitor for purposes of the *CCAA* proceeding.

[9] In its Seventh Report dated October 25, 2004, the Monitor described the assets and holdings of the debtor companies as follows:

Applicant	**General Description of Property**
1078385 Ontario Limited	Certain unsold lots and undeveloped lands on Boblo Island
Island Cove Development Ltd.	Certain lands held for future development on Boblo Island
1128625 Ontario Limited	Marina and facilities on Boblo Island
1362317 Ontario Limited	Property on the mainland adjacent to ferry dock
1168401 Ontario Limited	Ferries “Crystal O” and “Courtney O” and related assets
1099164 Ontario Limited	Construction Barge used at Boblo Island
O.B. Properties Canada	

Ltd., JAM Sound Specialists

Canada Ltd., OB Properties

Limited Partnership No identified assets

[10] In the same report, the Monitor outlined the status of development on Bob-Lo Island in the period leading up to the *CCAA* application:

> 7. Property development activity had ceased on the island well prior to the appointment of the Receiver. Ferry service had been interrupted for many weeks as a result of the ferries having been taken out of service for extensive repairs. No repair work had been commenced at the time of the Receiver's appointment. The water plants and sewage treatment plant on the island were being operated and maintained by the Township of Amherstburg. The provincial government and the Township had been delayed in starting a contract for the construction of a watermain to the island, to replace the plant that was in a hazardous state of repair, due to the inability to secure certain land easements from 1078385 Ontario Limited.
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> 8. The Township had made interim arrangements for emergency services to the island while the ferries remained out of service, but residents remained concerned about health and safety issues surrounding the island. Many expressed concern that, unless the [debtor companies] could restructure with fresh investment capital, their property values would erode rapidly.
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> 9. On the island there was a partially completed 5-storey, 39-unit condominium on which work had effectively ceased in mid-2003. Although a number of units had been pre-sold, the agreements of purchase and sale had expired and purchasers were seeking the return of deposits. There were substantial liens registered by construction contractors.
>
> 10. The Receiver was given authority from the Court to borrow funds to take steps that it considered necessary and

> desirable to protect and preserve the value of the assets of the [debtor companies]. The Receiver was permitted to ask the Court for any directions that were required to fulfill its mandate.

[11] In addition to the Initial Order, a Claims Procedure Order was made on June 25, 2004, setting out a procedure for creditors to file Proofs of Claim with the Monitor and for the Monitor to assess those claims. Further, paragraph 15 of the June 25, 2004 Claims Procedure Order permitted any creditor to appeal the Monitor's assessment of any Proof of Claim by filing a notice of motion with the court.

[12] Subsequent to June 25, 2004, several additional orders were made in the *CCAA* proceeding that are relevant for the purposes of this leave application. On August 31, 2004, an order was made setting out timelines for the Claims Appeal Procedure and directing the Monitor to advise all creditors who had filed claims that the appeal procedure was intended to resolve voting and distribution rights. The timeline set out in the August 31, 2004 order provided that claims appeals would be heard during the week of October 4, 2004.

[13] On October 4, 2004, an order was made authorizing and approving the activities of the Monitor as outlined in its Sixth Report dated September 30, 2004. In its Sixth Report, the Monitor indicated that there had been no cross examinations scheduled in respect of any unsecured claims appeals. In addition, the Monitor stated that Amico's legal counsel had expressed the opinion that the value of the lands and operations was “such that recovery for unsecured creditors is unlikely under any scenario”. The Monitor indicated that it would support a motion to adjourn the hearing of appeals on unsecured claims “until such time as it is clear that they will be called to vote on a Plan of Arrangement”.

[14] On October 14, 2004, an order was made directing that a meeting of secured creditors be held on November 1, 2004 to consider a plan of arrangement proposed by Amico. Further, in an order dated November 22, 2004 (not the order that Randy Oram seeks leave to appeal), the court authorized and approved the activities of the Monitor as outlined in its Seventh Report dated October 25, 2004 and as outlined in its Eighth Report dated November 4, 2004.

[15] In its Seventh Report dated October 25, 2004, the Monitor described Amico's plan of arrangement and the process for approving it, set out the Monitor's valuation analysis of the debtor companies’ assets and opined that the plan of arrangement was favourable to the interests of the secured creditors.

[16] The Monitor's Seventh Report set out the stated purpose of the Amico plan of arrangement as being “to effect a reorganization of the secured creditors of the [debtor

companies] in a manner that provides consistent and equitable treatment among Secured Creditors and maintains the business and assets of the [debtor companies] as a going concern".

[17] The Monitor indicated that the proposed purchase price for the debtor companies' assets was $11,500,000. The cash component of the purchase price would be distributed by the Monitor to repay the Receiver's borrowings, outstanding fees and disbursements of the Receiver and Monitor, and unremitted payroll source deductions of the debtor companies. The balance of the purchase price would be debt instruments issued in final satisfaction of secured creditors' claims. In addition to the $11,500,000 purchase price, Amico would assume the existing obligations of the debtor companies with respect to the statutory liens of the Township of Amherstburg for municipal taxes and the construction liens on the condominium property.

[18] As part of its valuation analysis, the Monitor outlined the allocation of the $11,500,000 purchase price in the proposed agreement of purchase and sale, explained that it (the Monitor) had obtained independent property valuations disclosing a total value for the debtor companies' assets of $11,997,182, and provided its assessment of how certain of the asset valuations compared to the purchase price of those assets in the proposed agreement of purchase and sale. Further, the Monitor indicated that the valuation that it had obtained of the island lands was based on a "Development Approach", while the appraisal of the mainland properties was based on the "Direct Comparison Approach".

[19] Turning to liabilities, the Monitor stated that it had accepted secured claims totalling $19,219,744[1] and lien claims of $692,011. The Monitor also noted that there was a further lien claim in excess of $5 million yet to be assessed by the court. The Monitor expressed the view that "the assets of the [debtor companies] are of insufficient value to generate any recovery for unsecured creditors".

[20] In addition, the Monitor opined that if the plan of arrangement fails "it would be very difficult to maximize value on a forced realization basis". Further, the Monitor indicated that it would be very difficult, in a liquidation scenario, "to realize values that compare to those attainable on a going concern basis".

[21] Among other reasons for recommending the plan of arrangement, the Monitor referred to having discussions with Amico indicating that Amico "has long term residential development plans for the island which would benefit the island residents

[1] The November 22, 2004 order lists secured claims totalling $17,688,663.16. However, as noted in paragraph 17 of these reasons, under the plan of arrangement, Amico assumed the obligations of the debtor companies for municipal taxes owing to the Town of Amherstburg and for the construction liens on the condominium property.

compared to a forced realization scenario". The Monitor described the plan of arrangement as being advantageous because "[i]t is a going concern solution that generates higher overall returns than would be achieved in a forced realization".

[22] In its Eighth Report dated November 4, 2004, the Monitor reported that a majority in number (13 of 17) of eligible Secured Creditors representing 89.6% of the value of such secured claims voted to approve the plan of arrangement as amended at the November 1, 2004 meeting.

The Motion Judge's Reasons

[23] In oral reasons, the motion judge noted that there are three criteria for assessing whether a plan of arrangement should be sanctioned:

> i) there must be strict compliance with all statutory requirements;
>
> ii) all materials filed and procedures carried out must be examined to determine if anything has been done, or purported to be done, that is not authorized by the *CCAA*; and
>
> iii) the Plan must be fair and reasonable.

[24] The motion judge stated that he was satisfied that the first two criteria were met as he had supervised the proceedings from their commencement. In deciding to approve the plan, he referred to the following seven factors:

> i) A majority of the secured creditors has approved the Plan.
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> ii) The Monitor has recommended that the Plan be sanctioned.
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> iii) There was only one Plan before the court. Mr. John Oram filed a Plan at the opening of court on this day. This Plan has not complied with the *CCAA* rules and cannot be considered.
>
> iv) Next, the alternative to the Amico Plan is bankruptcy; substantial, additional legal costs; and delay.

> v) Next, I find that the debt of the secured creditors exceeds the equity.
>
> vi) Next, the unsecured creditors will not recover under the proposed Plan, and will not recover if the Plan is not approved.
>
> vii) The Plan proposes to develop the island as originally proposed. There are no guarantees it will be successful. If the proposed Plan is successful, it will limit the losses of the secured creditors and will maintain the equities of the existing residential owners.

[25] The motion judge reviewed Randy Oram's objections and rejected them. First, while acknowledging that the proposed Plan benefited the secured creditors only, the motion judge found that “there is no equity in the island to satisfy any claims of the unsecured creditors”. Second, although he agreed that the Plan does not maintain the debtor companies as going concerns, the motion judge noted that the Plan does propose to continue their enterprise. Third, although he accepted that, to a certain extent, the Plan permits shortcuts in the realization of assets, the motion judge found that to be the nature of the *CCAA*. He noted that there were provisions in place to safeguard the creditors and that any issues with regard to any debt or asset could have been raised during the course of the proceeding. Finally, the motion judge disagreed that there had been no effort to expose the assets to the marketplace. He said that the principal of Amico had offered to assign his position but that no one was willing to accept it, that no one had made an alternate proposal and that valuations of the property had been filed.

Analysis

[26] Although section 13 of the *CCAA* does not particularize the grounds upon which leave to appeal may be granted, this court will grant leave "only sparingly", when satisfied that there are "serious and arguable grounds that are of real and significant interest to the parties": *Re Air Canada* (2003), 45 C.B.R. (4th) 163 at para. 2 (Ont. C.A.); *Re Country Style Food Services Inc.* (2002), 158 O.A.C. 30; *Re Blue Range Resources Corporation* (1999), 12 C.B.R. (4th) 186 (Ont. C.A.); and *Re Canadian Red Cross Society*, [2003] O.J. No. 5669 (C.A.).

[27] In this case, Randy Oram submits that there are serious and arguable grounds for suggesting that, by sanctioning Amico's Plan and granting a vesting order to a non-arm's length purchaser, the motion judge erred in the application of the legal principles for determining if a *CCAA* plan is fair and reasonable. In particular, the Randy Oram contends that the plan:

> i) is contrary to the broad, remedial purpose of the *CCAA*, namely to give debtor companies an opportunity to find a way out of financial difficulties short of other drastic remedies;
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> ii) is a proposal by the secured creditors for the exclusive benefit of the secured creditors, designed to liquidate the property of the debtor companies without regard to the interests of the debtor companies, their lien claimants, unsecured creditors or shareholders;
>
> iii) does not provide for the continued operation of the debtor companies as going concerns;
>
> iv) does not provide for the marketing and sale of the property to maximize its value for all of the debtor companies' stakeholders;
>
> v) rather than leaving unsecured creditors as an unaffected class, releases their claims against the property, the debtor companies, Amico, and the purchaser;
>
> vi) eliminates any right of the debtor companies or their other creditors or shareholders to recover anything in the event of the profitable development of Bob-Lo Island; and

> vii) is a secured creditor only plan in circumstances where the intended beneficiaries of the Plan may have security of questionable validity and priority.

[28] In addition, Randy Oram contends that, in the specific circumstances of this case, rather than approving the proposed Plan, the motion judge should have required the secured creditors to proceed with enforcing their security in the ordinary course. He relies, in particular, on the following comments of Ground J. in *Enterprise Capital Management Inc*. v. *Semi-Tech Corp*. (1999), 10 C.B.R. (4th) 133 at 142-143 (S.C.J.):

> The application now before this Court is somewhat of a rarity in that the application is brought by an applicant representing a group of creditors and not by the company itself as is the usual case...
>
> In the absence of any indication that Enterprise [secured creditor] proposes a plan which would consist of some compromise or arrangement between Semi-Tech [the Company] and its creditors and permit the continued operation of Semi-Tech and its subsidiaries in some restructured form, it appears to me that it would be inappropriate to make any order pursuant to the CCAA. If the Noteholders intended simply to liquidate the assets of Semi-Tech and distribute the proceeds, it would appear that they could do so by proceeding under the Trust Indenture on the basis of the alleged covenant defaults, accelerating the maturity date of the Notes, realizing on their security in the shares of Singer and recovering any balance due on the Notes by the appointment of a receiver or otherwise.
>
> If any such steps were taken by the Noteholders, Semi-Tech could at that time bring its own application pursuant to the CCAA outlining a restructuring plan which would permit the continued operation of the company and its subsidiaries and be in conformity with the purpose and intent of the legislation.

[29] I reject Randy Oram's submission that the proposed appeal raises serious and arguable grounds that satisfy the test for granting leave to appeal for nine reasons.

[30] First, although the question of whether a plan of arrangement under which the assets of the debtor company will be disposed of and the debtor company will not

continue as a going concern is contrary to the purposes of the *CCAA* may not have been resolved by this court, contrary to Randy Oram's written submissions, this is not the first time a secured-creditor-led plan, which operates exclusively for the benefit of secured creditors and under which the assets of the debtor company will be disposed of and the debtor company will not continue as a going concern, has received court approval: see *Re Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), aff'd on other grounds [2002] O.J. No. 2606 (C.A.). (See also the discussion of the purposes of the *CCAA* in the cases referred to in *Re Anvil Range Mining Corp.*, *supra* at para. 11 (S.C.J.)).

[31] Moreover, the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement[2] does not, of itself, negate the fairness and reasonableness of a plan of arrangement: *Re Anvil Range Mining Corp.*, *supra* at para. 31 (C.A.).

[32] Second, this case is distinguishable from *Enterprise Capital Management* and, in any event, the comments from *Enterprise Capital Management* on which Randy Oram relies are *obiter*. In this case, the issue to be decided by the motion judge was not whether the *CCAA* procedure should be invoked by a secured creditor proposing nothing more than a liquidation of a debtor company's assets, but rather it was whether a proposed plan of arrangement put forward in the context of an ongoing *CCAA* proceeding was fair and reasonable. In my view, while not irrelevant to determining whether the plan of arrangement was fair and reasonable, the comments in *Enterprise Capital Management* (which were made after Ground J. had decided that the *CCAA* did not apply to the debtor company) were not made in the same context and cannot be read as determining that issue.

[33] Third, although there was evidence before the motion judge of prior valuations indicating a substantially higher value for the debtor companies' assets than the valuations obtained by the Monitor, only one of the prior valuations was actually filed before the motion judge.[3] That valuation projected gross profits of US$37,400,000 for the development of the island, based on 607 lots, 160 boat docks and a budget of US$80,100,000. As there was no proposal before the motion judge to provide a budget of US$80,100,000, the valuation evidence before the motion judge did not undermine the

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[2] As I read paragraph 7.6 of the plan of arrangement in this case, it does not provide a formal release of the debtor companies by the unsecured creditors. However, the practical effect of the plan of arrangement is that the unsecured creditors have no realistic prospect of recovery against the debtor companies.

[3] None of the valuation evidence that was before the motion judge appears to be included in the materials filed with this court. The evidence relied upon by Randy Oram is referred to in paras. 30-33 of the Goodwyn affidavit. However, the one valuation that was appended as an exhibit to that affidavit was not included in the material filed on this motion. Moreover, the valuation report obtained by the Monitor is not in the material filed on this motion. However, there is an executive summary of the valuation attached to the Monitor's Fifth Report and the valuation results are summarized in the Monitor's Seventh Report.

Monitor's conclusion that “the assets of the [debtor companies] are of insufficient value to generate any recovery for unsecured creditors”.

[34] Fourth, there was no valuation evidence before the motion judge to support Randy Oram’s position that requiring the secured creditors to enforce their security in the ordinary course would produce a level of recovery in excess of that generated by the plan of arrangement. In particular, apart from the evidence referred to in paragraph 33 of these reasons, Randy Oram did not file valuation evidence indicating the likely return in the event of creditor realizations in the ordinary course.

[35] Fifth, there was no valuation evidence before the motion judge capable of undermining the Monitor's conclusion that if the plan of arrangement failed “it would be very difficult to maximize value on a forced realization basis” and that it would be very difficult, in a liquidation scenario, “to realize values that compare to those attainable on a going concern basis”. As already noted, apart from the evidence referred to in paragraph 33 of these reasons, Randy Oram did not file valuation evidence indicating the likely return in the event of creditor realizations in the ordinary course. Moreover, particularly because the assets of the debtor companies were held in different names and were subject to the claims of different secured creditors, the Monitor’s conclusions are consistent with common sense.

[36] Sixth, apart from the valuation evidence referred to in paragraph 33 of these reasons and a general assertion that the valuation reports obtained by the Monitor did not account for the value of the secured claims, before me, Randy Oram did not advance specific criticisms of the valuation evidence obtained by the Monitor. In fact, the valuation report obtained by the Monitor was not even filed on the leave motion.

[37] In my view, it is not the function of a valuator to account for monies invested in an asset. Moreover, the secured creditors’ approval of a plan of arrangement that did not provide them with full recovery, the absence of conflicting valuation evidence, and the fact that no alternative plan was forthcoming belie Randy Oram's suggestion that some more favourable option was available.

[38] Seventh, although Randy Oram contends that G. S. MacLeod & Associates failed to fulfill the obligation imposed on it in the receivership order to evaluate all options for maximizing the value of the debtor companies’ assets and to report to the court concerning its findings, G. S. MacLeod & Associates contests the existence of that obligation, and the receivership order is not before me. Even if G. S. MacLeod & Associates had the obligation that Randy Oram relies on, it was open to Randy Oram to seek an order in the *CCAA* proceeding compelling G. S. MacLeod & Associates to fulfill that obligation. Randy Oram did not do so.

[39] Eighth, although Randy Oram submits that the validity of many of the secured creditors' claims is suspect, in my view, the fact that the claims procedure permitted any creditor to challenge the Monitor's determination of a particular claim by appealing to the court is a complete answer to this proposed ground of appeal.

[40] I am aware that Randy Oram contends that the Monitor has acknowledged that, for a variety of reasons (including the short time for reviewing creditors' claims, the incomplete records of the debtor companies and the complexity of certain claims), its analysis of the creditors' claims was limited. In addition, he submits that the principal development company was insolvent as of 2000, therefore calling into question the validity of any security granted after that date. However, given that Randy Oram and the other unsecured creditors had the opportunity to raise any and all such concerns in court, within the context of the *CCAA* claims procedure, I fail to see how this submission raises a serious issue on appeal.

[41] Ninth, although the plan of arrangement did not provide for the debtor companies to continue as going concerns, it did propose continuing their enterprise, including the aspects of the enterprise that would provide continuing benefits to the existing residents of the island *e.g.* the ferry service.

[42] Based on the foregoing reasons, I conclude that Randy Oram failed to demonstrate arguable grounds for appealing the motion judge's finding that "the debt of the secured creditors exceeds the equity [in the debtor companies' property]". Randy Oram has not therefore established any reasonable possibility that he has an economic interest in the assets forming the subject matter of the proposed appeal. In addition, I conclude that to the extent there may be any arguable merit in the issue of whether the proposed plan of arrangement was contrary to the purposes of the *CCAA*, Randy Oram failed to demonstrate that there is sufficient merit in that issue to justify granting leave to appeal in the circumstances of this case.

[43] As I have concluded that Randy Oram did not meet the test for granting leave to appeal, it is not necessary that I determine whether registration of the vesting order on November 25, 2004 renders the proposed appeal moot. However, I do not accept Randy Oram's submission that the fact that the recipient of the vesting order was a non-arm's length party somehow changes the considerations leading to the conclusion that, following registration, a vesting order is no longer subject to appeal: see *Re Regal Constellation Hotel Ltd.*, [2004] O.J. No. 2744 (C.A.). I also note that Randy Oram did not provide an explanation for failing to seek terms that would have permitted him to appeal the vesting order. Both of these factors militate against the viability of the proposed appeal.

Disposition

[44] Based on the foregoing reasons, the motion for leave to appeal is dismissed.

[45] The parties agreed that $10,000 was a reasonable figure for costs of the leave motion. However, Randy Oram did not agree that Amico and the Monitor should each be entitled to costs in that amount. I agree.

[46] In my view, since Amico did not file a factum addressing the merits of the leave motion, and since the Monitor did not file a factum at all, a global award of $10,000 would be excessive. In the circumstances, costs of the leave motion are awarded to Amico and the Monitor on a partial indemnity basis, fixed at $4,000 in favour of Amico and $2,500 in favour of the Monitor, both inclusive of disbursements and applicable G.S.T.

"Janet Simmons J.A."