In the Court of Appeal of Alberta

Citation: PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 16

Date: 20210125
Docket: 1901-0255-AC;
1901-0262-AC;
2001-0174-AC
Registry: Calgary

1901-0255-AC

Between:

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

Appellant
(Plaintiff)

- and -

Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose

Respondents
(Defendants)

- and -

Orphan Well Association

Intervenor

- and -

Canadian Natural Resources Limited

Intervenor

- and -

Cenovus Energy Inc.

Intervenor

- and -

Torxen Energy Ltd.

Intervenor

1901-0262-AC

And Between:

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

Respondent
(Plaintiff)

- and -

Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose

Appellants
(Defendants)

2001-0174-AC

And Between:

PricewaterhouseCoopers Inc., in its personal capacity

Appellant
(Not Party to Application)

- and -

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

Respondent
(Plaintiff)

- and -

Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose

Respondents
(Defendants)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice D.B. Nixon
Dated the 15th day of August, 2019
(2020 ABQB 6, Docket: 1801 10960)

Appeal from the Decision by
The Honourable Mr. Justice D.B. Nixon
Dated the 26th day of August, 2020
Filed the 9th day of September, 2020
(2020 ABQB 513, Docket: 1801 10960)

Memorandum of Judgment

The Court:

[1] These appeals involve a challenge by the Trustee in Bankruptcy, PricewaterhouseCoopers Inc., to one step in a pre-bankruptcy, multi-step corporate reorganization and sale of assets, called the Aggregate Transaction. The Trustee in Bankruptcy challenges a component of the Aggregate Transaction, called the Asset Transaction, on the basis that it was at an undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. The transaction is also challenged under the statutory corporate oppression provisions, as well as on public policy grounds. There is a related claim against the respondent Susan Riddell Rose for breach of her duties as a director.

[2] The Trustee in Bankruptcy appeals the striking or summary dismissal of large parts of the claim: ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***, 2020 ABQB 6. The respondents cross-appeal with respect to portions of the claim that were not struck out or dismissed. There is also an appeal of the subsequent ruling on costs: ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***, 2020 ABQB 513.

Facts

[3] The challenged transaction was a part of the disposition of some of the oil and gas assets owned by the Perpetual Energy group of companies. The parent of the group is a public company, Perpetual Energy Inc. (the "Perpetual Energy Parent"). The respondent Ms. Rose was the president and Chief Executive Officer of Perpetual Energy Parent.

[4] The assets of the group were actually held in the Perpetual Operating Trust. In general terms, there were three categories of asset in the Trust:

(i) The "KeepCo Assets" that were not a part of the challenged transaction, and were to be retained by the Perpetual Energy group,

(ii) A subset of the KeepCo Assets called the "Retained Interests", and

(iii) The Goodyear Assets, which were the subject of the challenged transaction, and which form the basis of this litigation.

The Perpetual Operating Trust held the beneficial interest in the assets, the sole beneficiary of the Trust being Perpetual Energy Parent. The legal title to the assets, and the regulatory licences to them, were held by Perpetual Energy Operating Corp. Prior to the Aggregate Transaction, Perpetual Energy Operating Corp. had no other business interests, and it only existed to be the

trustee of the Perpetual Operating Trust. Ms. Rose was the sole director of Perpetual Energy Operating Corp. until the closing of the transactions. Perpetual Energy Operating Corp. changed its name to Sequoia Resources Corp. during the Aggregate Transaction, so it can conveniently be referred to as Perpetual/Sequoia. Perpetual/Sequoia subsequently assigned itself into bankruptcy, and therefore plays the central role in this litigation.

[5] The assets in the Perpetual Operating Trust included the "Goodyear Assets", which were shallow natural gas assets, described as "mature legacy assets". They had been operating with a negative cash flow for some time, were subject to high fixed operating costs, and were associated with significant future Abandonment and Reclamation Obligations, being the costs relating to the anticipated expenses of reclaiming oil and gas properties at the end of their productive life: see *infra*, paras. 85-89. The Goodyear Assets were perceived as having negative net value.

[6] Perpetual Energy Parent negotiated with Kailas Capital Corp. to sell the Goodyear Assets for $1. Perpetual Energy Parent announced that the transfer of these assets would improve the Perpetual group's Licensee Liability Rating with the Alberta Energy Regulator: see *infra*, para. 9. There would be a 71% reduction in forecast corporate liabilities, and a significant reduction in its Abandonment and Reclamation Obligations. Perpetual Energy Parent would be relieved of the ongoing negative cash flow associated with the Goodyear Assets. Perpetual Energy Parent expressed to public markets its opinion that the transaction would be in its best interests, because of these advantages.

[7] The sale of the Goodyear Assets was accomplished in October 2016 by a multi-step transaction, described collectively as the Aggregate Transaction:

a) The Perpetual Operating Trust transferred the beneficial interest in the Goodyear Assets to its trustee Perpetual/Sequoia for $10 (plus some expense adjustments), through the "Asset Transaction". The legal and the beneficial interests in the Goodyear Assets, together with the related regulatory licences, were therefore combined in Perpetual/Sequoia. The Perpetual Operating Trust continued to hold the beneficial interest in the KeepCo Assets that were to be retained by the Perpetual Energy group.

b) Perpetual Operating Corporation was created to be the "New Trustee" for the Perpetual Operating Trust. Perpetual/Sequoia then transferred to the New Trustee the legal title to the KeepCo Assets held in the Trust, other than the Retained Interests, separating them from the Goodyear Assets.

c) In the "Share Transaction", Perpetual Energy Parent sold all of the shares of Perpetual/Sequoia for $1 to a numbered company ("198Co"), incorporated for that purpose by Kailas Capital Corp. It was at this point that Perpetual Energy Operating Corp. changed its name to Sequoia Resources Corp.

d) Ms. Rose resigned as the sole director of Perpetual/Sequoia. The parties signed a Resignation & Mutual Release.

e) New Trustee then demanded the transfer to it of the Retained Interests, which had been beneficially owned by Perpetual/Sequoia for mere minutes. The legal title and licences to all of the KeepCo Assets thereafter rested in New Trustee.

The various steps in the Aggregate Transaction were closed in sequence, separated only by minutes: reasons at para. 92.

[8] The result of the Aggregate Transaction was that Kailas Capital Corp., through its subsidiary 198Co, became the new ultimate parent corporation of Perpetual/Sequoia, which owned the legal and beneficial interests in the Goodyear Assets. Perpetual Energy Parent continued to be the beneficiary of the Perpetual Operating Trust. The Trust held the beneficial interest in the KeepCo Assets that were not included in the transaction, with the legal title and regulatory licences to those assets being held by the New Trustee.

[9] The Retained Interests, a 1% interest in certain producing wells, were treated separately. The Trustee in Bankruptcy alleges that they were dealt with in this way as a method of artificially increasing the Licensee Liability Rating of Perpetual/Sequoia until the transaction closed. The Licensee Liability Rating is the regulatory mechanism used by the Alberta Energy Regulator to control the transfer of oil and gas assets. The concept is described in the ***Redwater*** decision at paras. 18-20, 28-29 (reported as ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5, [2019] 1 SCR 150). Leaving the Retained Interests in Perpetual/Sequoia allegedly enabled the transaction to proceed without regulatory scrutiny. The Perpetual Energy defendants plead that the Retained Interests were dealt with separately to accelerate recovery of legacy Alberta Crown royalty credits. Alternatively, they argue that they were entitled to structure their affairs in order to ensure regulatory compliance.

[10] A part of the Aggregate Transaction was a Gas Marketing Agreement, backed by a put/call agreement with a third party, that protected Perpetual/Sequoia against natural gas price fluctuations for 23 months.

[11] The asserted advantages of the transaction to Perpetual Energy Parent were outlined, *supra,* para. 6. The Trustee in Bankruptcy alleges that as a result of the Asset Transaction Perpetual/Sequoia obtained only $5.67 million in assets, but assumed over $223 million in obligations: reasons at para. 182. The Asset Agreement acknowledged that Perpetual/Sequoia would assume the Abandonment and Reclamation Obligations:

> 2.06(b) under Applicable Law, the Abandonment and Reclamation Obligations and the Environmental Liabilities associated with the [Goodyear] Assets are inextricably linked with such Assets so that Purchaser will be liable for

> Abandonment and Reclamation Obligations and Environmental Liabilities associated with the Assets in the absence of the specific assumption of such obligations by Purchaser in this Agreement or otherwise;

The Trustee in Bankruptcy further alleges that the transaction resulted in a drop of Perpetual/Sequoia's Licensee Liability Rating with the Alberta Energy Regulator. Perpetual/Sequoia became responsible for $87 million of Abandonment and Reclamation Obligations. Approximately 71% of the corporate liabilities related to the Goodyear Assets were transferred to Perpetual/Sequoia.

[12] After the closing of the transaction, Perpetual/Sequoia operated the Goodyear Assets. It reported some initial success, but on March 23, 2018, approximately 18 months after the Aggregate Transaction, Perpetual/Sequoia assigned itself into bankruptcy. The appellant PricewaterhouseCoopers was appointed the Trustee in Bankruptcy.

[13] The appellant Trustee in Bankruptcy asserts that, from the perspective of the bankrupt Perpetual/Sequoia, the Asset Transaction was at an undervalue by over $217 million. It commenced this action seeking remedies against Perpetual Energy Parent, Ms. Rose, and other branches of the Perpetual Energy group, pleading the following claims:

> a) The Asset Transaction relating to the Goodyear Assets was not at arm's-length, it was within five years the bankruptcy, and it was at an undervalue, making it void under s. 96(1)(b) of the *Bankruptcy and Insolvency Act*;
>
> b) The business of the corporation had been operated in an oppressive manner, contrary to the provisions of the Alberta *Business Corporations Act*, RSA 2000, c. B-9;
>
> c) The Aggregate Transaction was contrary to public policy, was illegal, or otherwise was in violation of equitable principles;
>
> d) The respondent Ms. Rose had breached her duties as the sole director of Perpetual/Sequoia; she denied the allegations but responded, in defence, that the Resignation & Mutual Release insulated her from liability.

The Trustee in Bankruptcy applied for summary judgment, and the defendants responded with applications to summarily dismiss or strike the claims. It was agreed that the applications to summarily dismiss and to strike would be addressed first.

The Summary Disposition Reasons of the Case Management Judge

[14] The case management judge originally issued oral reasons for his decision, but later substituted extensive written decisions. The written reasons commenced by identifying the participants in the Aggregate Transaction, and by outlining the nature of that transaction. The reasons summarized the principles applicable to an application to strike out a pleading, and those applicable to an application for summary dismissal. A number of the claims were struck out as not disclosing a cause of action, or were summarily dismissed, or (in the alternative) were both struck and dismissed.

The Section 96 Claim

[15] The Trustee in Bankruptcy argued that the Asset Transaction was at an undervalue, in breach of s. 96(1)(b) of the *Bankruptcy and Insolvency Act*:

> 2. In this Act, . . .
>
> *transfer at undervalue* means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;
>
> 96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against . . . the trustee, . . . - or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor - if . . .
>
> (b) the party was not dealing at arm's length with the debtor and
>
> ...
>
> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it . . .

> (3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

The respondents brought an application to summarily dismiss this claim, on the basis that the Perpetual Energy group (on the one hand) and the Kailas Capital group (on the other hand) were always dealing at arm's length. The application to dismiss proceeded solely on that issue; the other preconditions in the section were not addressed: reasons at paras. 60, 87-90, 102, 107.

[16] Underlying this application were two issues. First of all, in applying s. 96, should the court look at the entire Aggregate Transaction, or should it just look at the challenged step, being the Asset Transaction? Secondly, as a matter of fact, was the relevant transaction negotiated at arm's length?

[17] The case management judge noted that whether parties are dealing at arm's length is a question of fact. Guidance could be found in the income tax cases. While there was a presumption in s. 4(5) of the *Bankruptcy and Insolvency Act* that related parties did not deal at arm's length, that presumption could be rebutted by "evidence to the contrary".

[18] The Perpetual group argued that they could rebut the presumption that they were not dealing at arm's length, because the Trustee in Bankruptcy conceded that the Kailas Capital group exercised "influence" with respect to the Asset Purchase Agreement, and had an "interest" in knowing what assets were in Perpetual/Sequoia: reasons at paras. 59, 93. The case management judge concluded that this claim could not be summarily dismissed, because he was "not comfortable that the quality of the evidence allows me to conclusively adjudicate the action summarily", and that the issue would turn on the credibility of witnesses: reasons at paras. 97-98. It was not possible to determine if the "degree of influence" shown demonstrated sufficient control to rebut the presumption the Perpetual Energy group was not dealing at arm's length: reasons at paras. 98-101.

[19] Since this claim, as pleaded, disclosed a recognized cause of action, it could not be struck under R. 3.68: reasons at paras. 105-106.

The Alternative Section 96 Claim

[20] The Trustee in Bankruptcy pleaded a related claim, which the parties described as the "alternative *BIA* claim". That claim was based on the provision that a "person privy to the transaction" could be liable in damages for an undervalue transaction, if, as set out in s. 96(3), the privy was not dealing at arm's-length, and "receives a benefit or causes a benefit to be received by another person". Paragraph 22.2.5 of the statement of claim reads:

> 22.2.5 PEI [Perpetual Energy Parent], POC [New Trustee] and Rose benefited from and were privy to the Asset Transaction within the meaning of s. 96 of the *BIA*.

There are no pleaded particulars of the benefit alleged to have been received by each of the defendants, or the role that any of them might have played in conferring a benefit on another. The case management judge did not dispose of this issue in the summary disposition reasons. As discussed, *infra* paras. 112-15, this claim should be regarded as still being outstanding and unresolved.

Corporate Oppression

[21] The Trustee in Bankruptcy pleaded that the affairs of Perpetual/Sequoia had been conducted in a way that was oppressive or unfairly prejudicial to the interests of the creditors of Perpetual/Sequoia, contrary to s. 242 of the *Business Corporations Act*: reasons at paras. 117-18. The particular oppressive act pleaded was the entry into the Aggregate Transaction, although it was conceded in argument that it was the Asset Transaction which was alleged to have disregarded the interests of the creditors of Perpetual/Sequoia: reasons at paras. 119, 180.

[22] The *Business Corporations Act* allows a "complainant" to seek an oppression remedy. The first issue was whether the Trustee in Bankruptcy qualified as a complainant. Section 239(b) recognizes that a creditor could be a complainant if, in the court's discretion, the creditor was found to be a "proper person" to make an oppression application. The case management judge considered the status of the Trustee in Bankruptcy as a complainant, concurrently with the merits of the oppression claim as pleaded: reasons at para. 241. Considered together, he concluded this claim should be struck out under R. 3.68 as not disclosing a reasonable claim: reasons at paras. 232, 241.

[23] While the reasoning overlaps, the threshold issue of the Trustee in Bankruptcy's standing as a "complainant" was resolved against the Trustee. Relying in particular on ***Royal Trust Corp of Canada v Hordo*** (1993), 10 BLR (2d) 86 (Ont Ct J (Gen Div)), the case management judge concluded that the Trustee in Bankruptcy was not a "proper person" to be a complainant, for a number of reasons:

> (a) The statement of claim did not contain the particulars necessary to tell if the Trustee in Bankruptcy could meet the ***Hordo*** factors: reasons at paras. 202-203, 237:
>
> > (i) Debt actions should not be turned into oppression actions: reasons at para. 190.

(ii) To be a complainant, a creditor should be in a situation analogous to that of a minority shareholder. The creditor should have an interest in how the company is being managed, without having any control: reasons at para. 191.

(iii) The creditor should not be "too remote to the affairs of the corporation", in the sense that the debt owed to the creditor should be related to the oppression: reasons at para. 192.

(b) The claim was focused too narrowly, because it only focused on two classes of creditors, not all creditors: reasons at para. 238.

(c) The effect of the ***Redwater*** decision was to "nullify the Oppression Claim", making recognition of a complainant pointless: reasons at para. 239.

(d) The Trustee in Bankruptcy's prospect of success was "extremely low": reasons at para. 240.

The case management judge struck out the application for complainant status, but he also would not have exercised his discretion to grant the Trustee in Bankruptcy that status: reasons at paras. 237-39.

[24] The case management judge also concluded that the oppression claim was not sustainable on its merits, and should be struck for that reason as well:

(a) The oppressive conduct was said to disregard the interests of "creditors", but as stated in the ***Redwater*** decision there was no "creditor" associated with the Abandonment and Reclamation Obligations, which dominated the obligations of Perpetual/Sequoia: reasons at paras. 138, 143, 170, 225.

(b) Abandonment and Reclamation Obligations were "inchoate", and because of their contingent nature they were too remote or speculative to be included in the insolvency process: reasons at paras. 147-50, 218, 223-224, 228. They were actually a component of the value of the asset, not a "liability": reasons at paras. 166, 171-72. The case management judge concluded "on the authority of ***Redwater***, I find that the [Abandonment and Reclamation Obligation] is not a liability" and "***Redwater*** has nullified the Oppression Claim": reasons at paras. 224-226. The oppression claim could not succeed to the extent that it was based on the Abandonment and Reclamation Obligations, because "the [Abandonment and Reclamation Obligation] is more properly characterized as an allegation that is based on assumptions and speculations, rather than fact": reasons at para. 232.

(c) The oppression remedy should not be turned into a means by which commercial agreements, legislative regimes or regulatory frameworks are effectively rewritten by a court to accord with what is perceived as being "just and equitable": reasons at para. 188.

(d) While the Trustee in Bankruptcy framed the claim as being on behalf of all creditors, there was only specific reference to (a) unpaid municipal taxes and (b) the Abandonment and Reclamation Obligations: reasons at para. 206. Bankruptcy must be "a collective pursuit, and not a selective pursuit": reasons at paras. 207, 210-211.

Even though Perpetual/Sequoia had some obligations other than the Abandonment and Reclamation Obligations, for a combination of these reasons the oppression claim was struck out.

[25] Since the case management judge concluded the oppression claim should be struck out, it was not necessary to consider whether it should also be summarily dismissed: reasons at para. 233. Although the case management judge had initially concluded in his oral reasons that there were material facts in dispute that precluded summary dismissal, on reflection he concluded that the "***Redwater*** decision nullifies the Oppression Claim" making summary dismissal possible: reasons at paras. 234-35.

The Public Policy Claim

[26] One paragraph of the statement of claim alleged that the Transactions were void for public policy reasons:

> Public Policy, Statutory Illegality and Equitable Rescission
>
> 24. The Transactions are void:
>
>> 24.1. on grounds of public policy, for being contrary to the public policy reflected in Alberta's oil and gas regulatory regime, including the *Oil and Gas Conservation Act*, RSA 2000, ch. 0-6, the *Oil and Gas Conservation Rules*, AR 151/71 and the AER's Directive 001, Directive 006, Directive 011 (the "**Regulatory Regime**");
>>
>> 24.2. on the basis of statutory illegality, as they were expressly or impliedly prohibited by the Regulatory Regime; and
>>
>> 24.3. on equitable grounds, for the reasons and in the circumstances set out in this Statement of Claim.

In this pleading the "Transactions" refers to the Asset Transaction, the Share Transaction, and the Retained Interests Transaction.

[27] The case management judge concluded that "public policy" is not a cause of action, although it could be a basis to refuse relief: reasons at paras. 249, 267, 281. The courts should be cautious about extending public policy beyond established categories, as that infringes on the realm of the legislature: reasons at para. 253. An illegal contract is not enforceable by either party; it follows that illegality is not a cause of action, although it could be a defence: reasons at paras. 250-51, 267, 281. Equitable rescission is a remedy, not a cause of action, and it was only mentioned in one heading in the statement of claim, not in the text of the pleading: reasons at paras. 243, 254, 273-75, 281. Further, at this stage it would be impossible to rescind the agreements and return the parties to their original positions: reasons at paras. 256, 277-78.

[28] The case management judge concluded that the ultimate remedy sought by the Trustee in Bankruptcy was a declaration that the Asset Agreement was "void": reasons at paras. 258, 261. In addition to the issues under s. 96 of the *Bankruptcy and Insolvency Act*, the Trustee's overall argument was that the agreements had been structured in such a way as to allow the Asset Transaction to proceed without regulatory scrutiny by the Alberta Energy Regulator: reasons at para. 261. The Trustee in Bankruptcy, however, had not provided any particulars as to how the Asset Transaction was in violation of any statute or public policy; ". . . the Trustee is fishing but it has neither a hook nor a net": reasons at paras. 263-65. Alternatively, "the decision in ***Redwater*** extinguishes the public policy claim because the [Abandonment and Reclamation Obligation] is not a liability, and the [Alberta Energy Regulator] is not a creditor of [Perpetual/Sequoia]": reasons at para. 281.

[29] The case management judge concluded that the Trustee in Bankruptcy could still argue that the Asset Transaction was void under the *Bankruptcy and Insolvency Act*, but the public policy and illegality claims should be struck: reasons at paras. 281-82. Absent a specific legislative framework, the courts should not search for "some overarching and unarticulated policy" and use it to set aside the Asset Transaction: reasons at paras. 283-84.

The Director's Duties Claim

[30] The Trustee in Bankruptcy made specific allegations against the defendant Ms. Rose. Ms. Rose was the sole director of Perpetual/Sequoia at the time of the Asset Transaction, and the Trustee in Bankruptcy pleaded that Ms. Rose breached her duties as a director in approving that transaction.

[31] The essence of the Trustee in Bankruptcy's claim was that the consideration received by Perpetual/Sequoia in the Asset Transaction was significantly lower than the obligations it assumed. The most significant obligation was alleged to be the Abandonment and Reclamation Obligations. The Trustee in Bankruptcy estimated the deficiency in the consideration as being over $217

million: reasons at paras. 332-336. The case management judge concluded, as a threshold matter, that "***Redwater*** extinguishes any suggestion that Ms. Rose breached her duties": reasons at para. 285. The case management judge, however, went on to further analyse the alleged breach of duty.

[32] The case management judge concluded that because "***Redwater*** held that the [Abandonment and Reclamation Obligation] is not a liability", that nullified any suggestion of breach of fiduciary duty or duty of care. The claim against Ms. Rose for breach of director's duty should accordingly be struck out as not disclosing a cause of action: reasons at para. 341. In addition, and in the alternative, the Director's duty claim against Ms. Rose should be summarily dismissed.

[33] The case management judge concluded that the record was sufficient to summarily dismiss the director's liability claim: reasons at paras. 343, 355, 364, 371. The Trustee in Bankruptcy's Claim rested on the allegation that in the Asset Transaction Perpetual/Sequoia received only $5.6 million of assets, yet incurred obligations of over $223 million. However, ***Redwater*** confirmed that the Abandonment and Reclamation Obligations were not a liability, and they should accordingly be valued at "nil" for the purposes of the analysis. On that basis, there was no shortfall in consideration: reasons at paras. 350-51, 357, 363, 368-69. The defendant Ms. Rose had established on a balance of probabilities that there was no merit to the claim against her, and the Trustee in Bankruptcy had failed to demonstrate an issue that genuinely required a trial: reasons at paras. 365-67, 370.

The Resignation & Mutual Release

[34] The defendant Ms. Rose argued that the Resignation & Mutual Release was an answer to any alleged breach of her director's duty. The case management judge concluded, that "***Redwater*** nullifies the Trustee's assertions concerning the Release": reasons at para. 285. The case management judge, however, went on to further analyze the effect of the Resignation & Mutual Release.

[35] The case management judge noted that execution of the Resignation & Mutual Release was one of the closing conditions of the Share Transaction, which was negotiated at arm's length by Perpetual Energy Parent on the one hand, and Kailas Capital on the other: reasons at paras. 287, 289-90, 314, 324. The Resignation & Mutual Release was accordingly signed by the new directors of Perpetual/Sequoia, after the Asset Transaction had closed, and after Ms. Rose had resigned as a director of Perpetual/Sequoia: reasons at paras. 292, 324. The Resignation & Mutual Release recited that the parties had had an opportunity to consider the consequences of the release; the purpose of a release was to "wipe the slate clean". A valid and enforceable release is a complete defence: reasons at paras. 298, 302.

[36] The case management judge concluded that releasing outgoing directors after a change of control was standard industry practice: reasons at paras. 308, 319. Perpetual/Sequoia was a "special purpose corporation", and a wholly owned subsidiary of Perpetual Energy Parent, and Ms. Rose acted as its director at the request of Perpetual Energy Parent. It was Perpetual Energy Parent that negotiated for the Resignation & Mutual Release, and there was no evidence that Ms. Rose had any control over that decision: reasons at paras. 309-13.

[37] The case management judge concluded that the Resignation & Mutual Release was not contrary to s. 122(3) of the *Business Corporations Act*, which precludes contracts relieving a director of her duties during her tenure. That provision was designed to prevent persons becoming directors under an agreement that they would not be subject to the responsibilities of a director during their tenure. It did not preclude releases of past potential liability on a change of control, as that was needed to create finality: reasons at paras. 316-23.

[38] In summary, the case management judge found that the Resignation & Mutual Release provided Ms. Rose with a complete defence to the Trustee in Bankruptcy's claims: reasons at paras. 327, 330.

Summary of the Summary Dismissal Reasons

[39] In summary:

(a) The claim under s. 96 of the *Bankruptcy and Insolvency Act* could neither be struck nor summarily dismissed.

(b) The oppression claim was struck for failure to disclose a cause of action, because the Trustee in Bankruptcy was not a "proper person" to be a complainant, or alternatively because the oppression claim lacked merit.

(c) The pleading respecting the public policy claim was struck for failure to disclose a cause of action.

(d) The claim against the director Ms. Rose was struck for failure to disclose a cause of action, and it was also summarily dismissed on the merits, and, in any event, because the Resignation & Mutual Release was a complete defence.

<u>The Costs Reasons of the Case Management Judge</u>

[40] The case management judge heard a subsequent application by the respondent Ms. Rose for enhanced costs. He concluded that the Trustee in Bankruptcy should pay 85% of Ms. Rose's

solicitor and client costs, and that the Trustee should be personally liable for those costs: ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***, 2020 ABQB 513[1].

[41] The case management judge summarized the transactions that had been the subject of the summary disposition application. The specific allegations against Ms. Rose were that (a) she benefitted personally from the Asset Transaction; (b) that the Asset Transaction was clearly not in the best interests of Perpetual/Sequoia, thus amounting to oppression or prejudice; and (c) that Ms. Rose caused 198Co to agree to the Resignation and Mutual Release: costs reasons at para. 13.

[42] The case management judge noted that, under the Alberta *Rules of Court,* Ms. Rose was presumptively entitled to costs as the successful party. The judge has a wide discretion over costs, and can award solicitor and client costs, or costs assessed based on Schedule C to the *Rules*. Solicitor and client costs are only awarded in cases of blameworthy conduct during the litigation: costs reasons at paras. 25, 31. The Trustee in Bankruptcy conceded that Ms. Rose was entitled to costs calculated with reference to Schedule C, which concession "sets the floor amount": costs reasons at para. 34.

[43] The Court also has the ability to award costs against a non-party, when that party is the "real promoter of the litigation". That principle applies to insolvency litigation: costs reasons at paras. 35-38. PricewaterhouseCoopers was acting in a representative capacity as Perpetual/Sequoia's trustee, but that did not preclude the possibility of it being personally liable for costs: costs reasons at para. 42. A trustee in bankruptcy will be personally liable for costs if the estate of the bankrupt does not have sufficient assets to indemnify the trustee: costs reasons at paras. 43-44. With respect to bankruptcy proceedings, that possibility is confirmed by s. 197(3) of the *Bankruptcy and Insolvency Act*: costs reasons at paras. 46-47. This litigation, however, was ordinary civil litigation covered by the *Rules of Court,* which provide no special protection for trustees in bankruptcy: costs reasons at paras. 50-51.

[44] A trustee in bankruptcy may only commence litigation with the permission of the inspectors: costs reasons at paras. 55-63. In this case ". . . despite being asked for evidence that the inspectors had approved the Action, the Trustee never produced any evidence of inspector approval of the lawsuit against Ms. Rose": costs reasons at para. 64.

[45] A trustee should only engage in litigation that relates to all the creditors, not just selected creditors: costs reasons at para. 65. A trustee should make proper investigations before suing, and must otherwise act responsibly when litigating: costs reasons at para. 66. A trustee in bankruptcy may be held personally responsible for costs in cases of misconduct, and in appropriate cases costs in bankruptcy proceedings can be awarded on an escalated scale: costs reasons at paras. 67-69. As

[1] References to paragraph numbers in the costs reasons are to the Canlii version.

officers of the court, trustees in bankruptcy are held to higher standards, including when they litigate: costs reasons at paras. 70-75.

[46] Trustees should be careful in presenting the facts to the court, and should not include opinions, arguments, or conclusions of law in affidavits: costs reasons at paras. 76-77. In this case, the trustee in bankruptcy inappropriately:

(a) asserted that "the Asset Transaction was not in the best interests of [Perpetual/Sequoia]"; that was a determination to be made by the Court: costs reasons at para. 78;

(b) provided an opinion that Ms. Rose had "personally benefited" from the transactions, which was also something to be determined by the Court: costs reasons at paras. 79-81.

[47] When investigating the conduct of a director, or suing the director of a public corporation, a trustee in bankruptcy has an obligation to act fairly, which includes conducting "an appropriate investigation", which includes "appropriate participation" of the director: costs reasons at paras. 83-86. When conducting an investigation, the trustee "has an obligation to follow a procedure that is in compliance with the principles of procedural fairness": costs reasons at paras. 89, 93, 113, 114. Disclosure should be made, and the director should be given an opportunity to respond: costs reasons at paras. 90-91. A trustee in bankruptcy who proposes to sue a director must conduct "an appropriate investigation", which includes seeking out relevant and material evidence: costs reasons at paras. 97, 99-100.

[48] The case management judge concluded that duties imposed by the courts of equity on trustees in general (that is, not trustees in bankruptcy) were applicable: costs reasons at paras. 103-110. He also concluded that "I have an ongoing responsibility to expand the common law, where appropriate". If there was no precedent for requiring a trustee in bankruptcy to carry out an appropriate investigation, then one needed to be set: costs reasons at para. 112.

[49] The case management judge then applied these principles to the conduct of the Trustee in Bankruptcy with respect to this particular litigation. Between June 2018 and August 2018 (when the statement of claim was issued) there was a dialogue between the Trustee in Bankruptcy, and the Perpetual group and Ms. Rose. On June 26, 2018 the Trustee in Bankruptcy invited Ms. Rose to provide further comments, and she responded that her reply would come in as timely a fashion as possible and it would "likely be next week". Ms. Rose did not meet her expected deadline, but confirmed on July 6 that she was "working diligently to pull together the additional information": costs reasons at paras. 126-27. The Trustee in Bankruptcy never followed up, and never imposed a deadline for Ms. Rose to reply; the statement of claim was issued on August 2, 2018, causing the case management judge to conclude:

> [132] Based on my review of the June 26, 2018 Trustee Letter, I find that the Trustee: (i) invited further material, but did not specify or request anything particular; (ii) did not set any deadline by which the Perpetual Group was to respond; and (iii) made no reference to a claim against Ms. Rose.

The case management judge criticized the trustee in bankruptcy for failing to wait for further information, failing to follow up, and failing to set a deadline: costs reasons at paras. 167-174, 194-99, 231-32.

[50] The Trustee in Bankruptcy alleged in the statement of claim that Ms. Rose "would benefit personally from the Asset Transaction". (This is the "alternative *BIA* claim", see *supra*, para. 20.) The case management judge concluded that this allegation was made without asking "Ms. Rose a single question concerning the alleged benefit": costs reasons at paras. 134-39. In addition, the allegations about corporate oppression were made without asking Ms. Rose any questions about the exercise of her business judgment. Further, the Trustee in Bankruptcy did not ask the Kailas Capital principals any questions about the transactions: costs reasons at paras. 141-45. Further, no questions were asked about the circumstances leading up to the Resignation & Mutual Release: costs reasons at paras. 146-52.

[51] Based on these considerations, the case management judge found that the Trustee in Bankruptcy failed to undertake the type of investigation required of him, and as a result proceeded on certain erroneous assumptions: costs reasons at paras. 154-57. Overall, the Trustee in Bankruptcy suffered from "tunnel vision", which was a "single-minded and overly narrow focus" of an investigation: costs reasons at paras. 158-164. This was exacerbated by the failure of the Trustee in Bankruptcy to follow up respecting the further information Ms. Rose said was forthcoming, and the failure to make inquiries of the Kailas Capital principals: costs reasons at paras. 167-181.

[52] The failure to ask Ms. Rose any questions about the alleged "benefit" was an "important flaw in the conduct of the Trustee": costs reasons at para. 183. This was another manifestation of "tunnel vision". On the merits, the case management judge was not satisfied that the dealings with the Abandonment and Reclamation Obligations accrued to the benefit of Perpetual Energy Parent, precluding any benefit to Ms. Rose as a shareholder: costs reasons at paras. 188-90. Notice should have been given to Ms. Rose before public allegations of breach of duty were made against her, and she should have been provided an opportunity to respond: costs reasons at paras. 194-200.

[53] The case management judge summarized his conclusions:

> 201 Given the nature of the allegations made by the Trustee (which included: (i) alleged failure to exercise business judgment; (ii) alleged oppression; (iii) an allegation of being unfairly prejudicial; and (iv) an allegation of unfairly disregarding the interests of the creditors of the corporation), and the magnitude of the claim against Ms. Rose (which was in the range of $220 million), I find the

> conduct of the Trustee was egregious. The fact that this tactic was pursued by an officer of the Court is even more concerning.

The allegations about the Resignation & Mutual Release were also made without adequate investigation: costs reasons at paras. 203-210. Specifically, there was "no basis whatsoever to justify the allegation that Ms. Rose caused PEI to cause 198Co to agree to the Release": Costs reasons at para. 215.

[54] The case management judge concluded that the record showed that the Trustee in Bankruptcy "exercised very poor judgment that equates to positive misconduct": costs reasons at para. 228. That conduct was a) a failure to conduct a neutral and thorough investigation, b) a failure to provide Ms. Rose with advance notice of the claim, c) a failure to provide Ms. Rose with a further opportunity to submit information and d) a failure to give Ms. Rose sufficient time to address the issues: costs reasons at paras. 229-32. He concluded that Ms. Rose was entitled to an award of solicitor and client costs, as this was "a circumstance where justice can only be done by a substantial indemnification for costs": costs reasons at paras. 221, 238. The ultimate award was 85% of the bill of costs presented by Ms. Rose: costs reasons at para. 228.

[55] The case management judge also concluded that the Trustee in Bankruptcy was the true "promoter" of the litigation. Since the estate of Perpetual/Sequoia would be unable to pay the costs, the Trustee in Bankruptcy should be directly liable for costs: costs reasons at paras. 234-37.

<u>Issues on Appeal</u>

[56] Three appeals were commenced, and argued together:

(a) Appeal 1901-0255AC, commenced by the Trustee in Bankruptcy, challenging those portions of the decision that struck out or summarily dismissed various parts of the claim.

(b) Appeal 1901-0262AC, in effect a cross-appeal, commenced by the Perpetual Energy group, seeking summary dismissal of the claim under s. 196 of the *Bankruptcy and Insolvency Act*.

(c) Appeal 2001-0174AC, commenced by the Trustee in Bankruptcy, challenging the costs award made in favour of the respondent Ms. Rose.

[57] Interventions were permitted by the Orphan Well Association and jointly by three prominent oil and gas companies: Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd: ***PricewaterhouseCoopers Inc. v Perpetual Energy Inc***, 2020 ABCA 417. The nature and mandate of the Orphan Well Association is described in the ***Redwater*** decision at paras. 22-23. The industry intervenors could provide an industry perspective on the nature and

consequences of abandoned wells, and the way that abandonment and reclamation obligations are dealt with by the industry.

[58] There are three general issues that have an impact on the specific issues raised in the three appeals:

(a) The Reasons for Decision: *infra* paras. 60-67.

(b) The principles governing the summary disposition of claims: *infra* paras. 68-81.

(c) The legal nature of abandonment and reclamation obligations and the ***Redwater*** decision: *infra* paras. 82-97.

[59] The specific issues that require analysis are:

(a) The summary disposition of the s. 196 claim, including whether the proper analysis is at the level of the Aggregate Transaction, or at the level of the Asset Transaction: *infra* paras. 98-111.

(b) The alternative section 96 claim: *infra* paras. 112-115.

(c) The oppression claim, including a) the "complainant" status of the Trustee in Bankruptcy, and b) the merits of the oppression claim: *infra* paras. 116-44.

(d) the public policy claim: *infra* paras. 145-52.

(e) the scope of director's duties: *infra* paras. 153-59.

(f) the legal effect and interpretation of the Resignation & Mutual Release: *infra* paras. 160-75.

(g) the costs decision, including:

(i) Costs in bankruptcy proceedings: *infra* paras. 183-93.

(ii) Approval of the inspectors: *infra* paras. 194-98.

(iii) Trustees as officers of the court: *infra* paras. 199-206.

(iv) The failure to investigate: *infra* paras. 207-219.

(v) Allegations against the respondent Ms. Rose: *infra* paras. 220-25.

The Reasons for Decision

[60] The case management judge gave oral reasons for his decision on the summary disposition application on August 15, 2019. He retained the right to "to review the transcript, and to add in case names and citations", and stated:

> Notwithstanding this is Oral Judgment, I do intend to issue written reasons. I do have a lengthy judgment. I just need to do some refinement and, most importantly, I have certain things like citations checked.

Since the appeal period runs from the pronouncement of the decision, the Trustee in Bankruptcy commenced appeal 1901-0255AC on August 23, 2019, and the Perpetual Energy group appellants commenced appeal 1901-0262AC on August 26, 2019. The case management judge had indicated that the written reasons would be available "in a couple of weeks", but they were not issued until January 13, 2020; they are reported as 2020 ABQB 6. The written reasons are almost twice as long as the oral reasons. They state that in the case of discrepancies "this written decision takes precedence": reasons at para. 1.

[61] A trial judge who pronounces a decision orally undoubtedly has the right to edit any subsequent written version of the decision. That right to edit exists whether or not the right is "reserved" in the oral decision, but there are limits to it: ***Wilde v Archean Energy Ltd***., 2007 ABCA 385 at para. 24, 82 Alta LR (4th) 203, 422 AR 41. In this case the written reasons involved a substantial rewriting and expansion of the analysis, and extended far beyond "editing".

[62] To give one specific example, in the oral reasons the case management judge concluded that the state of the record did not permit summary dismissal of the oppression claim. In the written reasons, he indicated that he had reconsidered the issue, and he had concluded that the dispute on the material facts he identified did not exist: reasons at paras. 233-35. Reversing a decision made in the oral reasons goes far beyond editing.

[63] Further, given that appeal periods are deliberately kept short to promote finality, if a judge proposes to issue written reasons, that must be done promptly, preferably well before the appeal period expires. The reversal of any line of analysis in the oral reasons, or the addition of whole new lines of analysis, are highly undesirable. If the judge's thinking has developed to the point that he or she is able to give oral reasons, it should not be necessary to embellish those reasons when they are reduced to writing.

[64] There are cases where the matter is urgent, and the parties need a decision immediately. In those cases, trial judges will sometimes pronounce the result, in cursory fashion, and issue written reasons at the earliest opportunity: ***Law Society of Alberta v Beaver***, 2016 ABCA 290 at para. 11, 44 Alta LR (6th) 16; ***Liu v Huang***, 2020 ONCA 450 at para. 10. That, however, was not the situation here. The transactions challenged in this litigation occurred in October 2016.

Perpetual/Sequoia assigned itself into bankruptcy in March 2018. There was no urgency, and the effect of the decision was to finally terminate significant portions of the claim. Likewise, there was no urgency in pronouncing the costs consequences of the merits application.

[65] When reasons are issued long after the result is pronounced, there can be a perception of result-driven analysis: ***R. v Teskey***, 2007 SCC 25 at para. 18, [2007] 2 SCR 267. While the problem is more acute in criminal cases, and in cases that are heavily dependent on the trial evidence, it also applies to civil matters like the ones at issue in these appeals. As the court noted in ***Jacobs Catalytic Ltd. v International Brotherhood of Electrical Workers, Local 353***, 2009 ONCA 749 at para. 52, 255 OAC 201:

> 52. While *Teskey* is a criminal case, the rationale applies here. When an adjudicator purports to issue the final reasons for a decision and later issues supplementary reasons, without explaining why the supplementary reasons did not form part of the initial reasons, a reasonable person may apprehend that the adjudicator engaged in results-based reasoning in order to shore up the decision. If the adjudicator had relied on the content of the supplementary reasons in arriving at the decision, those reasons should have formed part of the first set of reasons.

Where the analysis in the written reasons differs from that given in the oral reasons, an appellate court is entitled to review the decision based on the original rationale: ***Nova Scotia (Minister of Community Services) v C.K.Z.***, 2016 NSCA 61 at paras. 61-63, 376 NSR (2d) 113.

[66] In this case, it would have been preferable if the case management judge had simply reserved his decision on the dismissal application, and issued only one set of reasons. On appeal, this Court is entitled to refer to both sets of reasons, and the differences between them, or disregard the later written reasons.

[67] A similar problem arose with the costs reasons, which were first rendered orally on August 26, 2020. Written reasons followed on September 24, 2020: 2020 ABQB 513. The written reasons were not, however, just an edited version of the oral reasons. For example, they included a new section on the case management judge's "responsibility to expand the common law": see the costs reasons at paras. 103-114.

<u>The Principles Governing the Summary Disposition of Claims</u>

[68] Claims can be struck out under R. 3.68 if they disclose "no reasonable claim", or if they are otherwise improper. Claims can also be summarily dismissed under R. 7.3 if there is "no merit" to the claim. While these rules set out distinct procedures, they are both methods of dealing with claims before trial in a proportionate, but fair manner, by weeding out unmeritorious claims at an early stage: ***Hryniak v Mauldin***, 2014 SCC 7 at paras. 27-28, 36, [2014] 1 SCR 87.

[69] Summary dismissal applications are generally brought after pleadings are closed, and are based on affidavit evidence demonstrating that there is no merit to the claim. Summary dismissal is appropriate where the record is sufficiently certain to resolve the dispute on a summary basis, or, in other words, there is no genuine issue requiring a trial. The moving party must establish on a balance of probabilities that there is "no merit" to the claim; the resisting party must put its best foot forward and demonstrate a genuine issue requiring a trial. In the end, the presiding judge must be left with sufficient confidence that the state of the record permits a fair summary disposition: ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 at para. 47, 86 Alta LR (6th) 240.

[70] On the other hand, an application to strike out a pleading under R. 3.68(2)(b) for failure to disclose a cause of action is dealt with based on the pleadings. The facts as pled are assumed to be true, and no evidence is permitted on the motion. A claim will be read "generously", and will only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action, assuming the facts pled are true: ***R. v Imperial Tobacco Canada Ltd***., 2011 SCC 42 at para. 21, [2011] 3 SCR 45. In order to avoid overly restraining the evolution of the common law, a claim will not be struck out merely because it is novel, but a claim will not be allowed to proceed just because it is novel: ***Atlantic Lottery Corp. Inc. v Babstock***, 2020 SCC 19 at para. 19.

[71] As this summary reveals, there are significant differences between an application to strike pleadings, and an application for summary dismissal, even though they both serve the same broader purpose of weeding out unmeritorious claims at an early stage. The analysis underlying the two remedies, in particular, is significantly different; summary dismissal depends on the evidence, whereas striking out precludes the use of evidence. It is for this reason that a "blended" striking/dismissal analysis is unhelpful. The reasons under appeal concluded that some of the claims could be both struck out and summarily dismissed. While the ultimate conclusion may be correct, attempting to analyze the two branches together tends to allow the evidence to colour the assessment of the pleadings, which is to be done without reference to the evidence.

[72] While there are some narrow exceptions to the assumption in an application to strike that the facts as pled are true, that exception should not be allowed to overtake the rule. For example, in ***Operation Dismantle v. The Queen***, [1985] 1 SCR 441 the pleadings alleged that allowing the testing of cruise missiles in Canada would increase the likelihood of nuclear war. The Supreme Court observed that that was an allegation incapable of proof, and it need not be accepted as true. In ***Young v Borzoni***, 2007 BCCA 16 at paras. 30-32, 64 BCLR (4th) 157 unparticularized allegations of misconduct that could "only be viewed as wild speculation" were not accepted at face value. These cases, however, do not contemplate a generalized merit-based assessment of the allegations on an application to strike out a pleading. Contrary to what is implied at paras. 32-36 of the reasons under appeal, there are no wide exceptions to the "no evidence" rule. The "no evidence" rule cannot accommodate assessing permissible evidence on a case-by-case basis.

[73] Some of the cases relied on in the reasons under appeal are on allowing "novel claims" to proceed, a related but different issue: ***HOOPP Realty Inc v Guarantee Co of North America***, 2015 ABCA 336 at para. 19, 607 AR 377; and ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140 at para. 16, 95 Alta LR (5th) 264, 572 AR 354. Deciding whether a claim should be allowed to proceed, even though novel, must still be based on the claim as pleaded, not on evidence. This is a collateral issue that only arises if the pleading does not assert a known claim. However, assessing whether a novel claim should be allowed to proceed depends in part on whether it has a "reasonable prospect" of succeeding. ***HOOPP Realty*** and ***O'Connor Associates*** discuss how to assess "reasonable prospect", and do not create a general exception to the "no evidence" rule on an application to strike pleadings.

[74] There are two subsidiary principles in play on an application to strike pleadings. Firstly, as noted, the pleadings are read generously: ***Fullowka v Whitford***, [1997] NWTR 1, 147 DLR (4th) 531 at pp. 537-38 (CA). If, on an initial reading, the pleading is capable of several interpretations, it should be given the interpretation that will support the pleading. Courts should not artificially read pleadings in a way that leads to a fatal deficiency. Further, a poorly drafted pleading should be amended, not struck out: ***C.H.S. v Alberta (Child, Youth and Family Enhancement Act Director)***, 2010 ABCA 15 at paras. 44-6, 21 Alta LR (5th) 7, 469 AR 359; ***United Petroleum Distributors (Calgary) Ltd v 548311 Alberta Ltd (cob Southern Fuel)***, 1998 ABCA 121 at para. 5, 19, 65 Alta LR (3d) 346, 216 AR 116.

[75] Secondly, pleadings are to allege facts, but not the evidence to be relied on: R. 13.6(2)(a). If a pleading is deficient because it lacks particulars, the remedy is to order production of particulars, not to strike the claim: R. 3.68(1)(b); ***Hughes (Estate) v Brody***, 2007 ABCA 277 at para. 41, 78 Alta LR (4th) 203, 417 AR 52; ***Elbow River Marketing v Canada Clean Fuels Inc***, 2011 ABCA 258 at paras. 2-3, 513 AR 315, 56 Alta LR (5th) 222.

[76] To illustrate the first principle, the case management judge criticized the pleadings because the Trustee in Bankruptcy had pleaded that it was a "proper person" to be a complainant, that it was entitled to equitable rescission, and that there had been "oppressive conduct". The case management judge noted that these were ultimately questions for the trial judge. It was, however, unreasonable to read the pleadings as suggesting they were not. For example, it was unreasonable to read these pleadings as a suggestion by the Trustee in Bankruptcy that it was entitled to "self-appoint" as a complainant in the oppression action. One purpose of pleadings is to avoid taking the other party by surprise, and it is expected that the plaintiff will provide particulars of the allegations and the relief requested: R. 13.6(3). There was nothing inappropriate about this form of pleading that could not have been cured by amendment.

[77] Similarly, there was no basis for criticizing the pleading that the "Asset Transaction was not in the best interests of [Perpetual/Sequoia]": reasons at para. 78. This is a legitimate allegation, forming part of the cause of action, and not any attempt to usurp the role of the court. It is no

different from Ms. Rose's allegation that she exercised sound business judgment in her decisions as a director of Perpetual/Sequoia.

[78] Another example related to the Trustee in Bankruptcy's allegation that Ms. Rose had "caused" Perpetual Energy Parent or Kailas Capital to enter into the Resignation & Mutual Release. It was unreasonable to read this pleading as a suggestion that Ms. Rose had "forced" any of the parties to do anything, or execute documents "against their will": compare costs reasons at paras. 203, 214, 216. Ms. Rose obviously could not force anybody to do anything, and that was never suggested. This allegation clearly meant that Ms. Rose had included the provision of a release among the items to be discussed during the negotiations. On any reasonable reading, these pleadings do not allege any form of duress.

[79] The Perpetual Energy group, in fact, used the same type of wording when they argued that Kailas Capital had influenced the structure of the Asset Transaction and the transfer of the Goodyear Assets. This meant no more than that this was another issue that had to be resolved during the negotiations. Similarly, Ms. Rose pleaded that she acted "in full satisfaction of her fiduciary duties and duty of care" in approving the transaction. Ms. Rose also pleaded that the Trustee in Bankruptcy was <u>not</u> entitled to complainant status for the purpose of pursuing the oppression claim. The pleadings by the Trustee in Bankruptcy as well as by the defendants served one of the main purposes of the pleadings: they identified the issues that had to be resolved. It was unreasonable to read any of these pleadings as usurping the court's authority.

[80] As noted, the second and related principle is that if a pleading lacks particulars, the remedy is to direct the provision of particulars, not to strike out the pleading. In several instances the case management judge relied in part on the absence of particulars to strike out the claim, for example: (a) an absence of particulars to support the claim for complainant status: reasons at paras. 202-203, 206, 237; and (b) an absence of particulars respecting the public policy claim: reasons at paras. 242, 244, 255, 263, 270, 284. If and to the extent that particulars were actually necessary and missing, it was an error of principle to strike out the claim without giving the Trustee in Bankruptcy an opportunity to amend.

[81] In summary, when considering whether any of the pleadings in this litigation should have been struck, consideration should have been given to whether any perceived flaws in the pleadings could be cured by amendment or by the provision of particulars.

<u>The Legal Nature of Abandonment and Reclamation Obligations and the ***Redwater*** Decision</u>

[82] The summary disposition decision under appeal was heavily influenced by the case management judge's interpretation and application of the ***Redwater*** decision. The case management judge held that ***Redwater*** decided that Abandonment and Reclamation Obligations are "neither a liability nor any amount referable to an existing obligation'"; they are "not sufficient to constitute a liability that needs to be considered"; and are "too remote or speculative to be

characterized as a liability"; they are merely "a future burden that has not crystallized into a liability"; they are "an obligation that will arise at a future date, thereby implicitly acknowledging that the ARO is not a current debt or liability": reasons at paras. 170, 171, 172, 224, 239, 357, 366.

[83] The case management judge concluded that the effect of ***Redwater*** was that Abandonment and Reclamation Obligations were "not a liability for purposes of the Oppression Claim"; and since the Alberta Energy Regulator was not a creditor with respect to them, Perpetual/Sequoia "could not have assumed liability in respect of the ARO in conjunction with the Asset Transaction"; and accordingly, ***Redwater*** "nullified the Oppression Claim"; it also "nullifies the Trustee's assertions concerning the Release"; it "extinguished any suggestion" that Ms. Rose breached her duties as a director; it "nullifies the Trustee's arguments concerning fiduciary duty and duty of care"; and justified summary dismissal of the director's liability claim: reasons at paras. 224, 225, 239, 285, 366-69. Because of ***Redwater***, Abandonment and Reclamation Obligations were "more properly characterized as an allegation that is based on assumptions and speculations", and therefore they were not a "true fact for the purposes of R. 3.68(2)(b)"; on an application to strike, they need not be assumed to be true: reasons at para. 232. The overall effect of ***Redwater*** was to "extinguish" any assertion that the Asset Transaction resulted in a net deficit to Perpetual/Sequoia, because the Abandonment and Reclamation Obligations should be valued at "nil": reasons at paras. 365-66.

[84] This part of the reasoning reflects, at best, a significant overreading of the effect of the ***Redwater*** decision. It is therefore necessary to analyze in detail that decision, and the nature of Abandonment and Reclamation Obligations.

Abandonment and Reclamation Obligations

[85] When oil and gas wells are producing, they are valuable assets. However, after they cease to be productive they can quickly turn into significant liabilities. The Alberta Energy Regulator has specific "end-of-life" rules on how a spent well must be rendered environmentally safe by being shut-in and "abandoned". In general terms, the end-of-life obligations of the owner of the well are to cement-in various formations deep underground, to "cap" the well, and to restore the surface to its original condition: Alberta Energy Regulator Directive 020: *Well Abandonment*; ***Redwater*** at para. 16. Compliance with those Abandonment and Reclamation Obligations can be expensive.

[86] Abandonment and Reclamation Obligations (or "end-of-life", or "asset retirement" obligations) are inherent in any oil well, from the moment it is drilled and comes into production. At that point in time the Abandonment and Reclamation Obligations can be said to be "contingent", but only in the sense that the moment when the well will cease production is unknown. However, they are not "contingent" in the sense that they will only come into existence if, and only if, a condition precedent comes to pass: ***Redwater*** at para. 36; ***Canada v McLarty***, 2008 SCC 26 at paras. 14-18, [2008] 2 SCR 79. The only issue is <u>when</u> they will come into existence. A well may

produce for decades. However, while the Abandonment and Reclamation Obligations may not crystallize for some time, they are inevitable; no well produces forever.

[87] The time at which the Abandonment and Reclamation Obligations with respect to any particular well must be performed is variable:

(a) With respect to a newly drilled well the Abandonment and Reclamation Obligations may only manifest themselves decades in the future.

(b) Once the production of a well has peaked, and its most productive years are behind it, it may be possible to predict with some degree of certainty when the Abandonment and Reclamation Obligations will have to be performed. The closer one gets to the end of production, the more precise the date of reclamation will become.

(c) But once a well has been exhausted, production has stopped, and the well has been shut-in, the Abandonment and Reclamation Obligations have crystallized. The Abandonment and Reclamation Obligations may be unperformed, but they are no longer "contingent" in either sense. The owner of the well is under a public duty to shut in the well and reclaim the surface.

The further reclamation is in the future, the more difficult it will be to quantify the Abandonment and Reclamation Obligations. Even if Abandonment and Reclamation Obligations can be said to be "contingent" liabilities, that is sufficient in law for some purposes: ***Tannis Trading Inc v Coldmatic Refrigeration of Canada Ltd***, 2010 ONSC 5747 at paras. 24-25, 85 BLR (4th) 77; ***Manufacturers Life Insurance Co v AFG Industries Ltd***, 2008 CanLII 873 at para. 30, 44 BLR (4th) 277 (ONSC). Further, the present value of the Abandonment and Reclamation Obligations will directly depend on how far into the future they will arise. Abandonment and Reclamation Obligations are unliquidated, some of them may be more immediate than others, and their quantum is uncertain, but they are still inevitable. They exist whether or not abandonment notices have been issued by the Alberta Energy Regulator. Abandonment and Reclamation Obligations may not be entirely a current liability or obligation, but they are a real liability or obligation. They are routinely reported on the balance sheets of oil and gas companies, including those of Perpetual Energy Parent.

[88] The evidence on this record is that prior to the Aggregate Transaction, the Perpetual Operating Trust held oil and gas properties in all these categories. The KeepCo Assets and the Retained Interests were still producing; they did not carry immediate Abandonment and Reclamation Obligations. The Goodyear Assets, on the other hand, were all "mature", and their Abandonment and Reclamation Obligations were more immediate. Further, by the time of the Asset Transaction, the record suggests the Goodyear Assets included 910 shut in wells and 727 abandoned wells, meaning that some portion of the obligation to reclaim was due to be performed

or was imminent. The exact cost of reclamation may have been unknown and unquantified, but the obligation was no longer "contingent"; the obligation was merely unperformed.

[89] The extent of the Abandonment and Reclamation Obligations associated with the Goodyear Assets is not clear at this stage of the proceedings. When Perpetual Energy Parent publicly announced the pending Aggregate Transaction, it advised the market that it expected to relieve itself of $87 million of Abandonment and Reclamation Obligations. Perpetual/Sequoia reported them on its balance sheet at $131 million, and after the transaction closed, Perpetual Energy Parent announced it had shed $131 million of Abandonment and Reclamation Obligations. The Trustee in Bankruptcy estimates that the Abandonment and Reclamation Obligations were actually $218.9 million, comprising $98.8 million of abandonment costs, $93.2 million in reclamation costs, and $26.8 million related to other facilities: reasons at para. 368. For the purposes of these appeals the exact quantum is not material; it is sufficient to note that the amount involved is potentially substantial.

*The Effect of the **Redwater** Decision*

[90] Redwater Energy Corporation was a bankrupt oil and gas company. It had about 20 producing wells that were of value, but it had over 100 other wells that were either depleted or shut in, and had no value. In fact, there was a significant liability associated with the depleted wells, because they had to be reclaimed. In effect, these wells had "negative value": ***Redwater*** at para. 2.

[91] Redwater Energy's trustee in bankruptcy proposed to sell off the valuable wells, and use the proceeds to pay the secured creditor. That would leave the bankrupt shell of Redwater Energy with the depleted wells, and no funds to pay for reclamation. The trustee in bankruptcy needed permission from the Alberta Energy Regulator to transfer the licences for the valuable wells to the third party purchaser. The Alberta Energy Regulator refused to approve the transfers, unless the proceeds were used to reclaim the abandoned wells; those proceeds could not be paid to the secured creditor. The trustee in bankruptcy responded that it did not intend to comply with the environmental remediation orders that had been issued, and that the obligation to reclaim the wells was a "claim provable in bankruptcy": ***Redwater*** at paras. 50-52. As such, the reclamation obligations had to be dealt with within the bankruptcy process, and they would be treated like the claims of all other unsecured creditors. The reclamation obligations would effectively be extinguished by operation of the bankruptcy: ***Redwater*** at paras. 114, 117.

[92] ***Redwater*** held that there was no constitutional conflict between the applicable federal and provincial legislation. The non-constitutional issue in ***Redwater*** was focused: were the reclamation obligations a "claim provable in bankruptcy" under s. 121 of the *Bankruptcy and Insolvency Act*? If they were, those obligations would be extinguished in the bankruptcy. If not, what was the trustee in bankruptcy's obligation with respect to them?

[93] ***Redwater*** at para.119 confirmed the test for determining whether an environmental liability is a "claim provable in bankruptcy", previously set in ***Newfoundland and Labrador v AbitibiBowater Inc.***, 2012 SCC 67, [2012] 3 SCR 443. First, there must be an obligation owed to a "creditor". Second, the obligation must be incurred before the bankruptcy. Third, it must be possible to attach a monetary value to the obligation. The end-of-life obligations did not fit the test, because there was no "creditor". Neither the Alberta Energy Regulator nor the Orphan Well Association was owed any debt; the environmental obligation was owed to the public: ***Redwater*** at paras. 122, 134-35. Further, there was insufficient certainty in the quantum of the Abandonment and Reclamation Obligations to make them a "claim provable in bankruptcy", because there was no certainty that the Alberta Energy Regulator would perform the remediation work: ***Redwater*** at paras. 145, 149, 154.

[94] ***Redwater*** does not stand for the proposition that Abandonment and Reclamation Obligations are not a liability or obligation of the bankrupt corporation. The *Bankruptcy and Insolvency Act* provides that in some circumstances the trustee in bankruptcy is "not personally liable" for environmental obligations. The Supreme Court ruled that these provisions protect the trustee, "while the ongoing liability of the bankrupt estate is unaffected": ***Redwater*** at paras. 74-75. A trustee who "disclaims" assets is protected from personal liability, but "the liability of the bankrupt estate is unaffected": ***Redwater*** at paras. 93, 98. Claims that are "not provable in bankruptcy" remained an obligation that the bankrupt had to discharge to the extent it has assets: ***Redwater*** at para. 118. Having received the benefit of the oil wells, the bankrupt corporation "cannot now avoid the associated liabilities": ***Redwater*** at para. 157. Trustees in bankruptcy must comply with non-monetary obligations that cannot be reduced to "provable claims": ***Redwater*** at para. 160. Accordingly, an order was given that the proceeds of the sale of Redwater's assets could not be paid to its secured creditor, but had to be used to address its "end-of-life" obligations: ***Redwater*** at para. 163.

[95] The case management judge focused on the fact that ***Redwater*** confirmed that the Alberta Energy Regulator is not a "creditor" with respect to the Abandonment and Reclamation Obligations, and accordingly the Abandonment and Reclamation Obligations cannot be a "claim provable in bankruptcy". That much is an accurate reading of ***Redwater***, but it does not mean that Abandonment and Reclamation Obligations are "assumptions and speculations" that do not exist, that they are not an obligation or liability of Perpetual/Sequoia, or that they should be valued at "nil". The Abandonment and Reclamation Obligations are an obligation of Perpetual/Sequoia, owed "to the public" and the surface landowners, but which are nevertheless obligations which the trustee of a bankrupt corporation cannot ignore. Not only did ***Redwater*** confirm that Abandonment and Reclamation Obligations are a continuing obligation of a bankrupt corporation, that decision confirms that those obligations had to be discharged even in priority to paying secured creditors.

[96] The case management judge held that Perpetual/Sequoia "could not have assumed liability" for the Abandonment and Reclamation Obligations, even though the Asset Transaction specifically

confirmed that it had: *supra*, para 11. The Perpetual defendants admitted in their defence that Abandonment and Reclamation Obligations were liabilities of Perpetual/Sequoia:

> 44(c) PEOC/Sequoia's liabilities at the time of the Transaction were comprised of the estimated future costs to be incurred over time by Sequoia in an efficient abandonment and reclamation program at a discount rate commensurate with the discount rate for the other producing assets, and were considered in the value of the Goodyear Assets;

This pleading is consistent with the statement in ***Redwater*** at para. 157, that Abandonment and Reclamation Obligations serve "to depress the tenure's value at the time of sale". The case management judge overlooked this admission, and instead relied on concessions that had been made by the Trustee's counsel in court <u>before</u> the ***Redwater*** decision was released.

[97] Section 96 of the *Bankruptcy and Insolvency Act* addresses "transfers at an undervalue". The extent to which the assumption of obligations, specifically environmental obligations, can "depress the tenure's value", resulting in an "undervalue" as defined in s. 2, is something that can be explored at trial. Abandonment and Reclamation Obligations may not be a conventional "debt", but rather operate by depressing the value of the assets; whichever side of the equation they be on, they could impact whether there is "undervalue" in a transaction. Likewise, the extent to which a director owes a duty to ensure that the corporation discharges environmental obligations owed to the public is unclear. However, none of the claims pleaded in this action can be struck out or dismissed for "failing to disclose a cause of action", or because they "lacked merit" on the basis that ***Redwater*** "nullifies" or "extinguishes" Abandonment and Reclamation Obligations.

<u>The Section 96 Claim</u>

[98] The case management judge concluded that the claim under s. 96 of the *Bankruptcy and Insolvency Act* could neither be struck nor summarily dismissed. This is the claim that the Asset Transaction was void because it was at an undervalue, and not at arm's length. In appeal 1901-0262AC, the Perpetual Energy group challenges this portion of the decision in two steps. First of all, they argue that the proper focus of the analysis should be on the Aggregate Transaction, not on the Asset Transaction. At that level, they argue that the Aggregate Transaction was at arm's-length. Secondly, they argue that there were no issues of fact or credibility that raised a genuine issue for trial, and the case management judge erred in concluding that the record did not permit summary disposition.

[99] It was not disputed that the Perpetual Energy group and their officers and directors (on the one hand), and the Kailas Capital group, 198Co and their officers and directors (on the other hand) were dealing at arm's length: reasons at para. 57. The Aggregate Transaction, which related to the disposition of the Goodyear Assets by the sale of the shares of Perpetual/Sequoia, was at arm's length. The issue was that the Asset Transaction concerned only Perpetual Energy Operating Corp.

(later Sequoia), the Perpetual Operating Trust and Perpetual Energy Parent. Those parties were all related, and were presumed not to deal at arm's length under s. 4(5) of the *Bankruptcy and Insolvency Act*.

[100] The Perpetual Energy group argues, however, that whether persons are dealing at arm's length is a question of fact, and that the presumption that related parties do not deal at arm's length only prevails "in the absence of evidence to the contrary": s. 4(4) and (5). They rely on the acknowledgement by the Trustee in Bankruptcy that the Kailas Capital group had an "interest" in knowing what assets were in Perpetual/Sequoia, and that they had "influence" over the Asset Transaction: reasons at paras. 59, 93. Neither factor, however, is sufficient to rebut the presumption that the Perpetual Energy parties were not dealing with each other at arm's length.

[101] The Kailas Capital group undoubtedly had an "interest" in the assets, in the sense that they were buying the Goodyear Assets, and they needed to know what was included in the sale. This was a commercial interest, not a legal interest: reasons at para. 84. They also needed to know that the legal and beneficial interests in the Goodyear Assets were in fact located in the corporate vehicle they were purchasing: Perpetual/Sequoia. Exactly how the Perpetual Energy group rearranged its affairs to move the Goodyear Assets into Perpetual/Sequoia, and specifically the consideration to be paid under that transaction, was not a matter over in which they had any legal interest, or over which they had any legal control. There is no indication on this record that the acceptability of the overall Aggregate Transaction to the Kailas Capital group depended on the mechanism by, or consideration for which the Goodyear Assets were moved into Perpetual/Sequoia.

[102] The fact that, in the abstract, the Kailas Capital group had some "influence" over the overall structure of the Aggregate Transaction is also not legally significant. The Kailas Capital group had no legal ability to dictate the consideration in the Asset Transaction. Any party that enters into a transaction that is in breach of s. 96 will have some motivation for doing so. The motivation of the party, however, is not a defence to a claim by a trustee in bankruptcy under that section.

[103] Take as an example a corporation that is having difficulty with its banking relationship. The bank says "we are not happy" and "you need to improve your balance sheet", and we look forward to you "doing something". If the corporation then enters into a transaction that is in violation of section 96, is no defence that they were "influenced" to do so by the bank, or that the bank was "interested" in the outcome.

[104] On this record, there is no legally relevant evidence to rebut the presumption that the related members of the Perpetual Energy group who were engaged in the Asset Transaction were not operating at arm's length. The evidence on the present record is that the structure and pricing of the Asset Agreement were under the control of the directors and officers of the Perpetual Energy group. That transaction was not shown to be negotiated at arm's length. Ms. Rose's conclusory statements to the contrary are inconsistent with the documentary evidence and corporate law.

[105] It is also not relevant that the overall Aggregate Transaction was undoubtedly and admittedly negotiated at arm's length. If a transaction is entered into in violation of s. 96, it is no defence that it was connected to a number of other transactions that did not engage s. 96 at all. It follows that when determining whether the transaction was at arm's-length for the purposes of s. 96, the proper focus is on the Asset Transaction, not the Aggregate Transaction. The problem of transfers at undervalue that is addressed by s. 96 persists no matter how the challenged transaction is structured, and each component of a multi-step transaction must meet the statutory requirements. Section 96 is directed at a "transfer at undervalue", and as held in ***Urbancorp Toronto Management Inc (Re)***, 2019 ONCA 757 at para. 46, ". . . the focus in determining whether the dealing was non-arm's length is on the relationship between the parties to the particular transfer". The argument that non-arm's length, undervalue steps in a multi-step transaction can be disregarded is not consistent with the policy behind s. 96.

[106] It has been held that income tax cases can be helpful in determining what, as a matter of fact, amounts to "arm's-length" dealing, but there is no such factual dispute here: see *supra*, para. 99. In any event, it does not follow that cases about the tax consequences of the structure of multi-step transactions apply to transactions which are challenged under s. 96. It has long been accepted that a taxpayer can structure its affairs to reduce its tax liability; that concept does not apply to s. 96 of the *Bankruptcy and Insolvency Act*.

[107] For example, in ***Canada v McLarty*** the Minister taxed a transaction as if it was not at arm's-length, because initially it was between Compton, in its own right as seller, and Compton, as an agent/purchaser for the beneficial purchasers. The Supreme Court concluded that the trial judge was entitled to conclude that Compton was dealing at arm's length with the beneficial purchasers/taxpayers, such as McLarty. McLarty was the one being taxed, and he was not involved in the original transaction. In these appeals the Asset Transaction occurred entirely within the Perpetual Energy group, and there was no external party with a beneficial interest in it analogous to the one held by McLarty.

[108] The decision in ***Teleglobe Inc v Canada***, 2002 FCA 408, [2003] 1 CTC 255 is also distinguishable. In that case the Government of Canada privatized and sold Teleglobe to Memotec Data. When the tax consequences of the transaction were considered, an issue arose as to whether the relevant transaction was that between "Old Teleglobe" and "New Teleglobe", or the overall one between Canada and Memotec Data. The former transaction was not at arm's-length, but it was driven by policy considerations, specifically the need to maintain a debt to equity ratio that would generate consumer telecommunication rates consistent with those charged by other carriers. The court decided that the Canada/Memotec transaction was the appropriate transaction to consider, because the consideration at that level was negotiated at arm's length. It was Canada/Memotec's "agreement which fixed the values in question": ***Teleglobe*** at para. 30. There was no evidence on this record of any equivalent arms-length negotiation of the consideration that was set in the Asset Transaction for the transfer of the Goodyear Assets; that consideration was apparently set in-house, not at arm's-length. The consideration set in the Aggregate Transaction

was disconnected from the consideration set in the Asset Transaction. Further, there were no policy considerations underlying the Aggregate Transaction that are remotely analogous to those in ***Teleglobe***.

[109] The Perpetual Energy defendants accurately pleaded that the Asset Transaction was "a technical step" required before the Share Transaction could close. Ms. Rose fairly deposed that the Kailas Capital group had an interest in "which assets would comprise the Goodyear Assets". The Trustee in Bankruptcy acknowledged that the Asset Transaction was a preliminary step to the Share Transaction, and that the Kailas Capital group needed to have assurances that "the beneficial interest in the Goodyear Assets" had been transferred to Perpetual/Sequoia. None of that, however, displaces the critical fact that, on this record, the consideration paid in the Asset Transaction was apparently set not-at-arm's-length within the Perpetual Energy group.

[110] Finally, the respondents argue that Perpetual/Sequoia failed due to a fall in natural gas prices, not as a result of any transaction at an undervalue. That is not necessarily relevant, because s. 96 can be engaged if, at the time of transfer, the transferor is insolvent: s. 96(1)(b)(ii)(A). Section 96 assumes that the transferor might already have failed by the time of the transfer, or will fail as a result of it.

[111] It follows that appeal 1901-0262AC, seeking the summary dismissal or striking of the s. 96 claim, is dismissed. That claim will have to be resolved at trial.

<u>The Alternative Section 96 Claim</u>

[112] The case management judge did not deal with the related claim, described as the "alternative *BIA* claim", against Perpetual Energy Parent, New Trustee and Ms. Rose. It was alleged that these defendants were "privies" under s. 96(3), and "by reason of the [Asset Transaction], directly or indirectly, received a benefit or caused a benefit to be received by another person": see *supra*, paras. 15, 20. This portion of the claim may have effectively been dismissed as against the defendant Ms. Rose, because the case management judge concluded that the Resignation & Mutual Release was a complete defence for her.

[113] A "privy" need not actually be a party to the challenged transaction, so long as the privy is not dealing at arm's-length with one of the contracting parties. There can be little doubt in these circumstances that the sole director of a corporation does not deal at arm's length with that corporation. This is not a case like ***Piikani Energy Corp (Trustee of) v 607385 Alberta Ltd***, 2013 ABCA 293, 556 AR 200, 86 Alta LR (5th) 203 where the director was dealing on his own account, with respect to his contract of employment. The decisive issue here is therefore whether there was a "benefit" conferred on any of the named defendants.

[114] The Trustee in Bankruptcy did not plead any direct benefit that was received from the Asset Transaction. The argument presented orally was that the Asset Transaction accrued generally to

the benefit of Perpetual Energy Parent, which would cause its shares to rise in value, and that Ms. Rose, as a shareholder of Perpetual Energy Parent would derive an indirect benefit. The record suggests that the shares of Perpetual Energy Parent actually decreased in value after the Aggregate Transaction. Ms. Rose held approximately 1-2% of the publicly traded shares of Perpetual Energy Parent, which may not constitute a sufficiently proximate "benefit" to engage s. 96(3).

[115] On the present record, it is not possible to identify what benefit may have been received by which defendant, and which defendant might have "caused that benefit" to have been conferred. The case management judge did not deal with the issue, and oral argument in this Court did not properly canvass it. Whether the Resignation & Mutual Release can encompass this claim is also an open issue: see *infra*, para. 166. These reasons accordingly do not deal with the alternative *BIA* claim, which remains before the trial court.

<u>The Oppression Claim</u>

[116] The Trustee in Bankruptcy pleaded that the business of Perpetual/Sequoia and its affiliates had been conducted in a way that was oppressive or unfairly prejudicial to its creditors, within s. 242(2) of the *Business Corporations Act*:

> (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, <u>creditor</u>, director or officer, the Court may make an order to rectify the matters complained of.

One potential remedy under s. 242(3)(l) is an order compensating an aggrieved person.

[117] The statement of claim alleges:

> 19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT to enter into and carry out the [Aggregate Transaction]:

> 19.1 Ms. Rose exercised her powers as a director of PEOC and its affiliates in a manner; and
>
> 19.2 PEI and POC carried on or conducted their business or affairs in a manner that was:
>
> oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors.

Under s. 242, the "corporation" in question was "PEOC", that is Perpetual/Sequoia. Perpetual Energy Parent ("PEI") and the New Trustee ("POC") were "affiliates". Perpetual Operating Trust, not being a corporation, did not fit the definition of "affiliate".

[118] Section 242(1) provides that only a "complainant" can apply for an oppression remedy, so a threshold issue was whether the Trustee in Bankruptcy could qualify as a complainant.

[119] The case management judge found that the claim of complainant status by the Trustee in Bankruptcy should be struck. Alternatively, the case management judge would not have exercised his discretion to grant complainant status. Further, even if the Trustee in Bankruptcy was given complainant status, the oppression claim should be struck or summarily dismissed on the basis that the "***Redwater*** decision nullifies the Oppression Claim".

Complainant Status of the Trustee in Bankruptcy

[120] The *Business Corporations Act* defines the "complainants" entitled to seek an oppression remedy:

> 239 In this Part,
>
> (b) "complainant" means
>
> (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
>
> (ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
>
> (iii) a creditor . . .
>
> (B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

In short, a creditor has no automatic status as a complainant in an oppression action, but can qualify as a complainant if the court exercises its discretion to recognize it as a "proper person" to seek an oppression remedy.

[121] Although "any other person", even if not a creditor, could theoretically prove it was "a proper person", the oppression action itself must still be directed at the interests of the four groups identified in s. 242(2): a security holder, creditor, director or officer. Neither "the environment" nor "the public" is listed.

[122] The case management judge considered the threshold issue of complainant status concurrently with the merits of the oppression claim, and appears to have "struck out" the claim for complainant status. This was partly because of an absence of particulars to support the claim for complainant status: reasons at paras. 202-203, 206, 237. As previously noted, if the problem was an absence of particulars, the remedy was to call for the provision of particulars, not to strike out the claim.

[123] Complainant status is a form of standing granted by the court, which is not properly regarded as a pleading that can be "struck out for failing to disclose a cause of action". Being a "complainant" is a recognized legal concept. In this case the Trustee in Bankruptcy pleaded that it was the trustee of Perpetual/Sequoia, and that as such it was a "proper person" to advance an oppression claim on behalf of the creditors. This was not an allegation of either fact or law, rather it was merely a statement of one component of the remedy that the Trustee in Bankruptcy sought: appointment as a complainant in the discretion of the court. Complainant status was not a "fact" that could be presumed to be "true" under R. 3.68(2)(b), as suggested in the reasons at para. 200. As noted, this pleading also did not amount to an assertion by the Trustee in Bankruptcy that it could self-appoint as a complainant.

[124] Seeking recognition as a "complainant" is a question of evidence, not a matter of pleading that is susceptible to being struck out under R. 3.68. The court may or may not exercise its discretion to recognize the proposed complainant, but making a claim for standing is not a matter of "striking out" a pleading for failure to disclose a cause of action. Complainant status is determined based on affidavit evidence presented by the potential plaintiff/complainant, outlining the nature of the alleged oppression, and the proponent's suitability to seek a remedy for that oppression. It was an error of principle to suggest that no evidence supporting the claim for complainant status could be considered on the application: reasons at para. 203. The statement of claim should undoubtedly plead sufficient facts to make out the oppression claim, but there is no requirement that all of the particulars supporting the appointment of the proponent as a complainant must be pleaded. Pleadings are not to contain evidence: R. 13.6(2)(a).

[125] The issue actually before the case management judge was whether the Trustee in Bankruptcy should be afforded complainant status. The case management judge indicated he would not exercise his discretion to do so for a number of reasons: (a) the oppression claim was "selective", rather than "collective", because it only reflected the interests of two classes of creditors: reasons at para. 238; (b) ***Redwater*** "nullified the oppression claim" because Abandonment and Reclamation Obligations are not a liability: reasons at para. 239; (c) the Trustee in Bankruptcy's prospect of success was "very low": reasons at para. 240; (d) the municipality creditors were not shown to be in a position analogous to a minority shareholder, nor was it shown that they had any legitimate interest in the management of the corporation: reasons at para. 202.

[126] Requiring a creditor to apply for complainant status reflects a policy that oppression claims are not to be used as a method of debt collection. The mere fact that a corporation does not or cannot pay its debts as they come due does not amount to oppression. In this litigation, however, the Trustee in Bankruptcy is not merely asserting the failure to pay a debt. The allegation here is that the corporation has been re-organized in such a way that it has been rendered unable to pay its debts. For example, the Asset Transaction, which resulted in the separation of the Goodyear Assets from the KeepCo assets, was alleged to be unfairly prejudicial to the creditors.

[127] In declining to grant the Trustee in Bankruptcy status as a complainant under the *Business Corporations Act* the case management judge failed to appreciate the collective nature of the role of a trustee in bankruptcy, namely that the oppression action was being brought by the Trustee in Bankruptcy on behalf of the estate of Perpetual/Sequoia, not on behalf of individual creditors. This was largely occasioned by the argument of the Trustee in Bankruptcy, which focused on two liabilities of particular concern, the Abandonment and Reclamation Obligations and the municipal taxes owed. He viewed the oppression claim as articulated by the Trustee in Bankruptcy as directly engaging the issue of whether the Abandonment and Reclamation Obligations were associated with creditors in the sense used both in ***Redwater*** and in the *Business Corporations Act*. He concluded that because ***Redwater*** made clear that there was no creditor associated with the Abandonment and Reclamation Obligations, the oppression action was doomed to fail.

[128] Section 242 contemplates that conduct can be oppressive respecting "any" security holder, creditor, director or officer. In circumstances like this, one creditor could apply for complainant status, effectively on behalf of all creditors, or only on its own behalf. It follows that there is nothing inherently unreasonable about a trustee in bankruptcy applying for complainant status. That could be a legitimate part of the trustee's duties to maximize the value of the bankrupt estate for the benefit of all of the creditors.

[129] The respondents rely on the ***Hordo*** case, which identified four criteria for determining if a creditor (and by analogy a trustee in bankruptcy) qualified as a complainant. The allegations in ***Hordo*** were very unusual, and indeed implausible. While that decision outlines some relevant considerations, it does not set out any binding preconditions to complainant status for a creditor. In order to qualify as a complainant, it is undoubtedly true that a creditor must demonstrate more

than that it is owed a debt. However, the creditors of a corporation do have a legitimate interest in preventing management from conducting the business of the corporation a way that prevents it from satisfying its obligations. The creditors may not have any assurance that their debts will be paid, but they do have a reasonable expectation that the corporation's business and assets will not be unfairly re-structured in such a way that payment of those debts becomes impossible: ***Tannis Trading*** at paras. 25-26; ***Manufacturers Life*** at para. 31; ***JSM Corp (Ontario) Ltd v Brick Furniture Warehouse Ltd***, 2008 ONCA 183 at para. 66, 41 BLR (4th) 51; ***Gestion Trans-Tek Inc v Shipment Systems Strategies Ltd***, [2001] OTC 860 at paras. 30-36, 20 BLR (3d) 156.

[130] There is no hard rule that the creditor must be in a position analogous to that of a minority shareholder to qualify as a complainant, if only because s. 242 identifies "creditor" as a distinct category of complainant. Further, that requirement is somewhat circular, because if the business of the corporation is conducted in a way that unfairly disregards the interests of the creditors, one could argue that the creditors are in a position analogous to that of an oppressed minority shareholder.

[131] The case management judge concluded that an oppression claim by a creditor should be "collective" in the sense that it should be for the benefit of all of the creditors. A single creditor should not use the oppression remedy to collect its own debt. That, however, would not generally be a barrier to a trustee in bankruptcy seeking complainant status, because trustees in bankruptcy, by definition, represent all of the creditors of the bankrupt. The aggregate claims in a bankruptcy always consist of a number of individual claims. The case management judge's objection was that the Trustee in Bankruptcy focused his arguments on the two main obligations of Perpetual/Sequoia: the Abandonment and Reclamation Obligations and unpaid municipal taxes. As set out in the next section of these reasons, the Abandonment and Reclamation Obligations cannot support "creditor" status for the purposes of an oppression action, but they are still relevant to whether a claim of oppression exists and is properly brought by creditors of the estate through its representative the Trustee in Bankruptcy: see *infra*, paras. 140-41. That narrows, but does not necessarily eliminate, the Trustee in Bankruptcy's claim to complainant status.

[132] The Trustee in Bankruptcy did not provide particulars of the debts of Perpetual/Sequoia existing at the time of the Asset Transaction that remained unpaid on the date of bankruptcy. As a matter of pleading, that level of detail would not be necessary. Further, if the detail was of concern, the answer was to seek particulars, or to cross-examine the Trustee in Bankruptcy on his affidavit, not to strike the pleading.

[133] It is admittedly not clear from the record to what extent Perpetual/Sequoia assumed responsibility for any debts in the Asset Transaction, other than the Abandonment and Reclamation Obligations and municipal taxes. Nevertheless, the collective pursuit of all of those outstanding taxes in an oppression action would be "collective" not "selective". There is no rule that a creditor oppression action can only be launched if there are diverse debts owing to diverse creditors.

[134] If the judge concludes that there is no possible merit to the oppression claim, it would be pointless to grant complainant status to a creditor. That, however, is not the same thing as saying that the proposed complainant is unsuitable. That is one factor to consider, but is not a conclusive consideration in determining his complainant status.

[135] In summary, it was unhelpful to blend the analysis of the "complainant" status of the Trustee in Bankruptcy, with the substance of the oppression claim. The former is not a matter of "striking a pleading". On this record, it was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person".

The Merits of the Oppression Claim

[136] The case management judge concluded that the oppression claim could be struck out because it failed to disclose a cause of action. In his oral reasons he concluded that the oppression claim could not be summarily dismissed, but in the subsequent written reasons he concluded that summary disposition would have been possible as an alternative: reasons at paras. 233-35.

[137] The case management judge concluded that the ***Redwater*** decision was a complete answer to the oppression claim for two reasons. First of all, ***Redwater*** "nullified" the claim because it held that Abandonment and Reclamation Obligations were not a true obligation or liability, but merely "an allegation that is based on assumptions and speculations". Secondly ***Redwater*** concluded that Abandonment and Reclamation Obligations were owed to the public, and not to any "creditor"; neither the Alberta Energy Regulator nor the Orphan Well Association were creditors for that purpose. As previously noted, the first conclusion arises from a misreading of ***Redwater***. However, ***Redwater*** did conclude that there was no "creditor" with respect to Abandonment and Reclamation Obligations, and to that extent ***Redwater*** is relevant to these appeals.

[138] For the reasons previously given, Abandonment and Reclamation Obligations are a real obligation and liability of an oil and gas company: *supra*, paras. 85-89. The outcome of ***Redwater*** was that the proceeds from the sale of Redwater Energy's valuable assets had to be used to discharge those obligations, and could not be paid to the secured creditor. That in itself demonstrates the reality of these obligations. ***Redwater*** did not "nullify" Abandonment and Reclamation Obligations.

[139] What ***Redwater*** did decide, however, was that there was no "creditor" associated with Abandonment and Reclamation Obligations. As a result, Abandonment and Reclamation Obligations could not be "claims provable in bankruptcy". These appeals are concerned with the *Business Corporations Act*, not the *Bankruptcy and Insolvency Act*, but there is no principled basis to distinguish ***Redwater*** on this point, and find that there is a "creditor" associated with Abandonment and Reclamation Obligations for the purposes of s. 242. The definition of "creditor" for oppression purposes may be wider than it is in other contexts, for example by including contingent claims: ***Tannis Trading*** at paras. 24-25; ***Manufacturers Life*** at para. 30. However,

given the finding in ***Redwater*** that Abandonment and Reclamation Obligations are not associated with a creditor, they cannot directly be used to support complainant status in an oppression claim brought by "creditors".

[140] The conclusion that there is no creditor associated with Abandonment and Reclamation Obligations is not fatal to the oppression claim. The oppression claim can still be advanced by the Trustee in Bankruptcy on behalf of all other creditors who were owed money at the time of the alleged oppressive conduct, and remained unpaid on the date of bankruptcy. As previously noted, the quantum of debts of that nature owed to the recognized creditors of Perpetual/Sequoia is unclear on this record. The respondents argue that, with respect to municipal taxes, there are only three municipalities still owed taxes from before 2017, and they have all entered into deferred payment plans.

[141] Further, even though the Abandonment and Reclamation Obligations may not be associated with a "creditor", that does not mean that they are irrelevant to an oppression claim brought on behalf of creditors. As ***Redwater*** confirms, Abandonment and Reclamation Obligations are real liabilities or obligations of oil and gas companies. It is possible that the directors and officers of a corporation might manage those Abandonment and Reclamation Obligations in a manner that is unfairly prejudicial to the interests of creditors.

[142] The case management judge also concluded that the proposed oppression claim was contrary to the policies of the Alberta Energy Regulator: reasons at paras. 120-25. He concluded "the Trustee asks the Court to frame a legal regime that has been rejected by the legislature": reasons at para. 125. The Trustee in Bankruptcy points to two threshold problems with this analysis: no evidence is permitted in an application under R. 3.68(2)(b), and in any event the evidence relied on by the case management judge was not placed on the record by the parties. It was an error for the case management judge to attempt to resolve this complex issue without a proper evidentiary record, and proper submissions from the parties.

[143] The extent to which the Asset Transaction is consistent with public policy may well be a central issue at trial. Further, the public policy of the Alberta Energy Regulator is not as clear as the case management judge suggested. In ***Redwater***, the Alberta Energy Regulator stated that its policy was to require that all the assets of the corporation be used for reclamation, but that the Regulator would not go outside the corporation to impose liability on others: ***Redwater*** at paras. 104, 107-108. If that policy were applied here, it could mean that the Regulator's policy was that recourse could be had to the KeepCo Assets, but it not would not extend beyond that. It is not obvious that the Trustee in Bankruptcy's claim is inconsistent with any policy.

Summary of the Oppression Claim

[144] In summary, the case management judge erred in his analysis for several reasons including conflating the determination of whether to grant complainant status with the merits of the claim.

There was no principled basis to deny the Trustee in Bankruptcy complainant status to launch an oppression action. It was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person". Further, while the oppression claim may be narrower than the Trustee in Bankruptcy anticipated, the pleadings do disclose a cause of action. The claim cannot be struck out on this record. Further, the state of the record and the complexity of the issues does not permit a fair disposition of this claim on a summary basis.

Public Policy and Illegality

[145] The statement of claim pleaded that "the Transactions are void" on grounds of public policy, on the basis of statutory illegality, and on equitable grounds: see *supra*, para. 26. The case management judge concluded that neither "public policy" nor "illegality" were causes of action, although they might be defences. Equitable rescission was a remedy, not a cause of action, and in any event, rescission would be impossible at this stage of the transactions. The Trustee in Bankruptcy's argument was that the structure of the Asset Transaction was inconsistent with the policy of the Alberta Energy Regulator, but no particulars were provided. Further, the case management judge held that ***Redwater*** extinguished the public policy claim because the Abandonment and Reclamation Obligations are not a liability: *supra*, paras. 27-29.

[146] The case management judge correctly held that neither "public policy" nor "illegality" were causes of action that would support a claim for damages. The Trustee in Bankruptcy, however, never suggested otherwise; the pleading was simply that the challenged transactions were "void", meaning that they could not be relied on by the defendants to justify their actions. This portion of the statement of claim, when read generously, does not advance a cause of action, but was a response to an anticipated defence. This pleading might have been placed in a Reply to the statements of defence, but it was not inappropriate for the Trustee in Bankruptcy to include it in the statement of claim. If further clarification of this pleading is required, the remedy is to amend, not to strike.

[147] A central issue underlying this litigation is whether an oil and gas company can arrange its affairs so as to avoid regulatory scrutiny, in a manner that is analogous to income tax law. For example, does the Alberta Energy Regulator's policy enable a technique such as leaving the Retained 1% Interests in Perpetual/Sequoia for a few minutes in the middle of this transaction in order to bypass regulatory scrutiny? The public policy pleading alleges that this type of strategy is not permissible, and that avoiding regulatory scrutiny is not necessarily equivalent to regulatory compliance. The statement of defence filed by the Perpetual Energy group asserts that the transactions are "fully compliant" with "public policy reflected in the Regulatory Regime and the law". It further pleads that the transactions were not structured "to be completed without regulatory intervention". As noted, it cannot be determined from this record whether the policies of the Alberta Energy Regulator have been violated: *supra*, paras. 142-43.

[148] ***Redwater*** does not provide an answer to this portion of the pleadings. ***Redwater*** does not hold that Abandonment and Reclamation Obligations are not a liability: *supra*, paras. 90-97. The ultimate effect of ***Redwater*** was actually that the attempt, in that case, to separate Redwater Energy's valuable assets from its abandoned wells was ineffective. ***Redwater*** held that the public is the beneficiary of the environmental obligations inherent in the Abandonment and Reclamation Obligations: reasons at para. 221, ***Redwater*** at para. 122. It is in this sense that "public policy" is engaged by this litigation. The exact scope and enforceability of the public interest is uncertain, but that is no reason to strike out pleadings at this stage. These are the type of novel issues that must be tested at trial.

[149] The case management judge concluded that the Trustee in Bankruptcy was attempting to impose liability for environmental claims on directors, contrary to the intentions of the Legislature. That, however, is not the thrust of this litigation. The Trustee does not seek to make directors liable for environmental damage, but rather to hold them to account for allegedly having structured the affairs of the corporation (Perpetual/Sequoia) in such a way that made it impossible for that corporation to discharge its public obligations. This may be a novel position, but it is not one that should be resolved summarily.

[150] The respondent Ms. Rose argues that the assumption by Perpetual/Sequoia of the Abandonment and Reclamation Obligations in the Asset Transaction had no negative effect on it. She argues that, as the holder of the regulatory licences, Perpetual/Sequoia was exposed to the Abandonment and Reclamation Obligations both before and after the Asset Transaction. Exactly where the burden of these obligations lies will have to be resolved at trial. The Trustee's argument, however, is that whatever burdens Perpetual/Sequoia had before the Asset Transaction were set off by the positive value of the KeepCo Assets. It was partly the separation of the Goodyear Assets from the KeepCo Assets that allegedly tainted the transaction.

[151] The case management judge correctly held that rescission is likely unavailable as a remedy, because the parties could not be restored to their original positions. However, where an equitable remedy is blocked, the court might grant an alternative remedy in damages. Directors owe their corporation fiduciary duties, which are equitable in nature. In any event, "equitable rescission" is only mentioned in one of the headings in the statement of claim, and is not asserted as a cause of action.

[152] In summary, the "public policy" pleadings (set out *supra*, para. 26) should not have been struck out. To the extent necessary, they could have been clarified by amendment, or enhanced with particulars. On the whole they set out and engage an important underlying issue in this litigation that can only be resolved at trial.

Breach of Director's Duties

[153] The statement of claim alleges that Ms. Rose, as the sole director of Perpetual/Sequoia at the time the Asset Transaction was approved, was in breach of her duties to Perpetual/Sequoia.

[154] Under the *Business Corporations Act* the management of the affairs of a corporation is placed in the hands of the directors:

> 101(1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.

Some of the duties of a director are set out in the statute:

> 122(1) Every director and officer of a corporation in exercising the director's or officer's powers and discharging the director's or officer's duties shall
>
> > (a) act honestly and in good faith with a view to the best interests of the corporation, and
> >
> > (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The power to manage, and these director's duties, are universal to all corporations. There is no exception for a "special-purpose corporation that was a wholly owned subsidiary", or because "this was Perpetual Energy doing this transaction through a subsidiary", as suggested in the reasons at paras. 312-13.

[155] A fundamental principle of corporate law is that each corporation is a separate legal person. It owns its own assets, and controls its own affairs. The shareholders may be the ultimate owners, and they may have the power to elect and replace directors, but in the absence of a unanimous shareholders agreement it is the directors who manage the corporation. The statutory duties of directors fall on their shoulders. It was an error of law to conclude that Ms. Rose did not control, and was not the "directing mind" of Perpetual/Sequoia as held in the oral reasons for decision. The director's resolution approving the Asset Transaction, which recited that the director believed it was in the best interest of the corporation, was in fact signed by Ms. Rose; no one else was authorized to do so.

[156] Ms. Rose had an obligation to ensure that the Asset Transaction was in the best interests of Perpetual/Sequoia: *Business Corporations Act,* s. 122(1)(a); ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69 at para. 66, [2008] 3 SCR 560. Ms. Rose argues that she had no alternative but to do the bidding of Perpetual Energy Parent. However, if Ms. Rose did not agree that the instructions she was getting were in the best interests of Perpetual/Sequoia, her obligation

was to resign; her replacement would then have been responsible for any decisions made. If Perpetual Energy Parent had executed a unanimous shareholder declaration, it would have been responsible for all management decisions: *Business Corporations Act*, s. 146(7). As matters stood, however, Ms. Rose was responsible for ensuring that the Asset Transaction was in Perpetual/Sequoia's best interests. Ms. Rose's argument that she was only following the orders of Perpetual Energy Parent is merely an admission by Ms. Rose that she had abdicated her responsibility as a director.

[157] Notwithstanding her assertion that she did not control Perpetual/Sequoia's business, and was merely following orders, Ms. Rose inconsistently alleged that she "took her responsibilities as a director and officer of [Perpetual/Sequoia] seriously, considered the best interests of [Perpetual/Sequoia], its stakeholders, and then exercised her business judgment to the best of her ability": reasons at para 323. The "business judgment rule" provides that the courts will defer to the judgment of the directors on difficult business decisions. It does not support the abdication of a director's decision making responsibility. Further, Ms. Rose deposed that the decision to enter into the Asset Transaction was not governed solely by the interests of Perpetual/Sequoia, but also by the interests of Perpetual Energy Parent and the Kailas Capital group.

[158] Finally, for the reasons previously given, ***Redwater*** did not "nullify" the claim for breach of director's duty, as suggested in the reasons at paras. 285, 341.

[159] In summary, it was not, on the face of it, appropriate to either strike out or summarily dismiss the claim alleging breach of director's duties. That conclusion is subject to analyzing the effect of the Resignation & Mutual Release, discussed next.

<u>The Resignation & Mutual Release</u>

[160] One component of the Aggregate Transaction was that after the change of control Ms. Rose would resign as the sole director of Perpetual/Sequoia, and release the corporation from any claims she might have against it. The new directors of Perpetual/Sequoia, effectively elected by the Kailas Capital group, would grant her a corresponding release of any claims that might arise from her decisions as a director, other than claims relating to fraud, criminal conduct or deceit. Ms. Rose asserts that the resulting Resignation & Mutual Release is a complete defence to the claim that she breached her duties as a director.

[161] The Trustee in Bankruptcy argues that the Resignation & Mutual Release is not legally enforceable against it. Alternatively, the Trustee in Bankruptcy argues that the Resignation & Mutual Release, by its terms, does not cover the claims being made against Ms. Rose.

Legal Effectiveness of the Resignation & Mutual Release

[162] In the abstract, a widely worded release could cover the claims made against Ms. Rose in the statement of claim. The Trustee in Bankruptcy, however, argues that the Resignation & Mutual Release is legally ineffective, referring particularly to s. 122(3) of the *Business Corporations Act*:

> (3) Subject to section 146(7), no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director or officer from liability for a breach of that duty.

On a proper reading of the statute, this provision does not necessarily render ineffective the type of release at issue in this litigation.

[163] There are a number of different scenarios under which a director might be released from liability:

a. A person might agree to act as a director, but only if the corporation entered into a contract relieving that director of liability for any breaches of duty while in office. Such a release would clearly be an attempt to release the director from "the duty to act in accordance with this Act", and would be ineffective under s. 122(3).

b. At the other end of the spectrum, if a director was sued for breach of duty, the director and the corporation might ultimately enter into a settlement agreement. That settlement might involve the director paying damages, and would likely also include a release. Such a release was not intended to be caught by s. 122(3): see Institute of Law Research and Reform, Report No. 36, Proposals for a New Alberta Business Corporations Act, August, 1980, p. 67.

c. A third common scenario arises where there is a change of control of the corporation, and as a condition of closing the existing directors and officers are released from liability for any past breaches and transgressions. This kind of release is very common, and is not within the contemplation of s. 122(3). Since the outgoing directors have resigned, they will not thereafter be under any "duty to act in accordance with this Act". Releasing a director from liability for past breaches of duty is not the same as relieving the director of the obligation to perform those duties. If the purchaser otherwise "gets what it paid for", it knowingly gives up the opportunity to make claims for earlier breaches only discovered after closing. This prevents a windfall to the purchasers such as the one that arose in the seminal case of ***Regal (Hastings) Ltd. v Gulliver***, [1942] 1 All ER 378, [1967] 2 AC 134 (HL). The interpretation of this type of provision suggested in ***McKay-Cocker Construction Ltd v McMurdo***, [2001] OTC 791 at para. 16 is too narrow.

d. A fourth scenario is where the director is involved in negotiating or approving a contract, and in the course thereof is in breach of his or her duties. For example, if a director negotiated a contract where part of the consideration was diverted from the corporation to the director, that would be a breach of fiduciary duty. If the director arranged to have a release included in the contractual documents, that release might not be enforceable, either at common law, or because of s. 122(3). Enforceability of the release might depend on whether the other directors or the shareholders were aware of the inappropriate aspect of the transaction, and the wording of the release: see ***Temple v Bailey***, 2020 NLCA 3 at para. 33, 443 DLR (4th) 633, discussing ***London and South Western Railway v Blackmore*** (1870), LR 4 HL 610 and other cases.

e. The final scenario involves a combination of the third and fourth scenarios. The tainted transaction and the change of control happen at the same time. The allegation is that the director breached his or her duty during the change of control transaction, and a release was given at that time relieving the former director of liability. However, in this scenario the release of the director is given by the new owners, after the change of control.

The final situation is the one faced by the respondent Ms. Rose. It is alleged that Ms. Rose breached her duties during the adoption of the Asset Transaction. The Resignation & Mutual Release and the Asset Transaction were both part of the Aggregate Transaction. The release, however, was granted by 198Co and Kailas Capital, after the change of control.

[164] Given the particular facts on this record, s. 122(3) should not be interpreted as invalidating the Resignation & Mutual Release, in so far as it releases the claims for breach of director's duties and oppression. Kailas Capital and 198Co purchased Perpetual/Sequoia based on the representation that it contained the beneficial interest in the Goodyear Assets, which had inherent in them some Abandonment and Reclamation Obligations. Kailas Capital and 198Co knew all of the details behind the Asset Transaction and the Share Transaction, and knew of Ms. Rose's involvement. They agreed to purchase the Goodyear Assets; in the Resignation & Mutual Release they disclaimed any future ability to seek damages of any kind from Ms. Rose based on breaches of director's duties or oppression that occurred before they purchased Perpetual/Sequoia. The Trustee in Bankruptcy cannot be in any better position. Subject to the issues discussed in the next section of these reasons surrounding the "claims" covered by the release, and considering the context of the transactions and the wording of the various agreements selected by the parties, there is no basis to completely invalidate the Resignation & Mutual Release: ***London and South Western Railway*** at p. 623.

[165] While the issue may not directly arise in this litigation, a proviso should be added that a generalized release of a director may not cover every duty owed. One example is the potential, but

presently ill-defined, obligation of a director of a corporation to ensure that the corporation complies with its environmental and regulatory responsibilities: see J. Sarra, *Fiduciary Obligations in Business and Investment: Implications of Climate Change*, Commonwealth Climate and Law Initiative, Working Paper Series, October 14, 2017. As noted in ***Redwater***, such obligations would potentially be owed to the public, not necessarily to the corporation exclusively. It may not, therefore, be open to a private party such as 198Co to release a director like Ms. Rose from those obligations. The extent to which there are such duties, and whether or how they can be enforced against Ms. Rose is a matter that cannot, and need not be resolved on this record.

[166] One issue that does arise directly on this record is whether a corporation can a) enter into a transaction in violation of s. 96, b) confer a benefit on a "privy" under that transaction in violation of s. 96(3), and c) immediately grant a release to the privy for any liability. A trustee in bankruptcy who subsequently challenges the transaction has a compelling argument that such a release is legally ineffective. This issue is directly relevant to the alternative *BIA* claim, which, as noted *supra* para. 115, is as yet unresolved. The impact of the Resignation & Mutual Release on the alternative *BIA* claim should also be referred back to the trial court for adjudication.

Interpretation of the Resignation & Mutual Release

[167] The next question is the proper interpretation of the Resignation & Mutual Release. The Trustee in Bankruptcy argues that even if it is legally effective, it does not cover the claims now made. The answer is not obvious because of references to inconsistent definitions of "Claims" in the various documents.

[168] The shares of Perpetual/Sequoia were transferred to 198Co under the Share Purchase Agreement (called the "Share Transaction" by the parties), which was part of the Aggregate Transaction. It defines "Claim":

> 1.1 **Definitions**. In this Agreement . . .
>
> > (m) "Claim" means any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing; (EKE A87)

Article 8 of the Share Purchase Agreement, entitled "Closing and Deliveries", includes:

> 8.1 Deliveries of the Vendor.
>
> > (a) At Closing . . . the Vendor shall deliver . . .

> (xviii) resignations of all directors and officers of the Corporation and a release from such directors and officers pursuant to which they release all Claims against the Corporation
>
> 8.2 Deliveries of the Purchaser.
>
> (a) At Closing . . . the Purchaser shall deliver . . .
>
> (xiii) releases signed by the new signing authorities of the Corporation as appointed by the Purchaser releasing the directors and officers of the Corporation from <u>any Claims related to such directors and officers acting as a director or officer of the corporation</u>. (EKE A122-23)

The "Deliveries" contemplated by these clauses were implemented through the execution and exchange of the Resignation & Mutual Release.

[169] In the Resignation & Mutual Release, Ms. Rose resigned as the director of Perpetual/Sequoia, and released Perpetual/Sequoia and its agents from "any and all Claims (as defined in the <u>Share Purchase Agreement</u>)". It then continued:

> 3. PEI [Perpetual Energy Parent] and PEOC [Perpetual/Sequoia] do hereby remise, release and forever discharge Susan Riddell Rose from all Claims (<u>as defined in the Purchase and Sale Agreement</u>) which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or connected with Susan Riddell Rose <u>having acted, at the request of PEI, as a director and officer of PEOC</u>, but which shall exclude any claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose. (EKE A160)

Clause 4.01 of the Purchase and Sale Agreement (called the "Asset Transaction" by the parties), recited that the "Vendor makes the following representations and warranties", including:

> (l) <u>Claims</u>. As it <u>pertains to the Assets only</u>, no suit, action or other proceeding before any court or governmental agency has been commenced against Vendor, or to the knowledge of Vendor, has been threatened against Vendor or any Third Party, which might result in <u>impairment or loss of the interest of Vendor in and to any of the Assets</u> or which might otherwise adversely affect the Assets other than has been previously disclosed; (EKE A67)

The Trustee in Bankruptcy argues that the narrower definition of "Claims" found in clause 4.01(l) of the Purchase and Sale Agreement does not cover the claims against Ms. Rose asserted in the statement of claim.

[170] To summarize, on the face of it there is a disconnection between the various documents:

(a) Section 8.2(a)(xiii) of the Share Purchase Agreement, which is the "blanket" document, envisions a wide release relating to Ms. Rose's conduct as a director: "any Claims related to such directors and officers acting as a director or officer of the corporation".

(b) Likewise, clause 3 of the Resignation & Mutual Release envisions a wide release relating to Ms. Rose's conduct as a director: "Rose having acted, at the request of PEI, as a director and officer of PEOC".

(c) The covenants in the Share Purchase Agreement refer to the wider definition of "Claims" found in that document: "any claim, demand, lawsuit . . .".

(d) The Resignation & Mutual Release contains inconsistent references. Ms. Rose releases Perpetual/Sequoia from all claims, using the wider definition in the Share Purchase Agreement. However, in clause 3 Perpetual/Sequoia purportedly only releases Ms. Rose with respect to the narrower definition of claims in the Purchase and Sale Agreement, relating to "impairment of the Assets".

(e) The reference to "Claims" in clause 3 of the Resignation & Mutual Release limits the released claims to those relating to "impairment of the Assets" only, which creates a disconnect with (i) the later reference in that very clause to "Rose having acted, at the request of PEI, as a director and officer of PEOC", and (ii) section 8.2(a)(xiii) of the Share Purchase Agreement, which refers to claims arising from "acting as director", not with respect to the "impairment of the Assets".

On his reading of the Resignation & Mutual Release, the Trustee in Bankruptcy argues that none of the claims against Ms. Rose relate to the "impairment of the Assets".

[171] The respondent Ms. Rose notes that this issue was not raised before the case management judge. If the issue had been identified, she argues she would have introduced further evidence about the intention of the parties at the time the transactional documents were drafted. Given these potential gaps in the record, and given that this Court does not have the benefit of the analysis of the issue by the case management judge, it is not appropriate to attempt to resolve it at the appellate level. A release must not be interpreted in a vacuum, but rather according to the context in which it was drafted, having regard to the intention of the parties: ***Hill v Nova Scotia (Attorney General)***, [1997] 1 SCR 69 at paras. 20-21. This issue is referred back to the trial court.

Other Issues

[172] The respondent Ms. Rose argues that the Trustee in Bankruptcy did not adequately plead his position with respect to the Resignation & Mutual Release. For example, the Trustee did not

plead that the Resignation & Mutual Release should be "set aside". The pleadings with respect to this issue adequately advised the respondent that the effectiveness of the Resignation & Mutual Release was being challenged. The Trustee in Bankruptcy was entitled to argue that the Resignation & Mutual Release was legally ineffective against it without seeking to have it "set aside" or declared "void". All concerned are well aware of the issues, and in any event, any shortcomings in the pleadings could easily be cured by amendment.

[173] The Trustee in Bankruptcy argues that the wording of the Resignation & Mutual Release is not wide enough to cover unknown claims, or "future claims". The intent, however, is clear; the new owners of Perpetual/Sequoia were to take the company they were purchasing "as is". The intention was obviously to relieve Ms. Rose of any claims that arose before the closing of the Aggregate Transaction, whether they were known or unknown, excepting claims based on fraud, criminal conduct, or deceitful conduct. The commercial efficacy of the Resignation & Mutual Release required that it cover unknown claims.

[174] Further, there is no issue here as to whether the Resignation & Mutual Release is wide enough to cover "future claims"; there are no such claims. The Trustee in Bankruptcy asserts only claims that relate to the conduct of Ms. Rose <u>before</u> the closing of the Aggregate Transaction, and before she resigned as the director of Perpetual/Sequoia. The Trustee in Bankruptcy obviously did not assert these claims until after the Resignation & Mutual Release was signed, but that does not mean they are "future claims" as that term is applied to releases. There is a distinction between claims that relate to conduct that post-dates the signing of the release, and claims advanced after the signing of the release but relating to conduct before the signing: ***Biancaniello v DMCT LLP***, 2017 ONCA 386 at para. 52, 2017 DTC 5061. Further, as previously noted (*supra*, para. 163(a)) while it is questionable whether a release respecting future performance of director's duties can be effective, no such issues are engaged here.

Summary

[175] In summary, while there was facial merit to the claims of breach of director's duties, most of Ms. Rose's potential liability to Perpetual/Sequioa was released by the Resignation & Mutual Release. While some portions of the claim as against the respondent Ms. Rose were properly summarily dismissed, there was no basis on which the claim could be struck for failing to disclose a cause of action. It was not, however, possible to dispose of the alternative *BIA* claim against Ms. Rose on this record, and that and related issues must be referred back to the trial court as previously indicated in these reasons.

The Costs Appeal

[176] In appeal 2001-0174AC the Trustee in Bankruptcy challenges the award to the respondent Ms. Rose of 85% of her solicitor and client costs. The Trustee in Bankruptcy argues that costs should, at most, have been awarded on Schedule C.

[177] The costs award was made on the assumption that Ms. Rose had been completely successful in defending the action against her. As previously noted in these reasons, there are some aspects of the claim that are as yet unresolved. For that reason alone, the costs award must be set aside, and the costs of the summary judgment and striking application must be returned to the case management judge. Strictly speaking, it is not necessary to discuss the costs award further. The issues, however, were fully argued, and there are a number of important issues that cannot be left unresolved.

[178] A trial judge has a wide discretion in awarding costs, although costs are generally awarded based on Schedule C: R. 10.31. Costs awards are designed to partially indemnify the successful party for the legal expenses incurred during the litigation. Party and party costs awards are deliberately set so that they do not fully indemnify the successful party. This discourages unwarranted litigation, it promotes proportionality in litigation that is commenced, and it creates an incentive on all litigants to litigate economically.

[179] The mere fact that a claim is unsuccessful is not sufficient to justify solicitor and client costs: ***Young v Young***, [1993] 4 SCR 3 at p. 134; ***Goldstick Estate (Re),*** 2019 ABCA 508 at paras. 24, 27, 55 ETR (4th) 1. There are some recognized situations when solicitor and client costs can be awarded, generally when there has been reprehensible, scandalous or outrageous conduct by a party: ***Young*** at p. 134. The misconduct alleged must arise from the conduct of the litigation; a distaste for the unsuccessful litigant, its pre-litigation conduct, or its cause of action is not sufficient: ***Luft v Taylor, Zinkhofer & Conway***, 2017 ABCA 228 at paras. 72-73, 53 Alta LR (6th) 44; ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 19 at paras. 8-9, 153, 46 Alta LR (6th) 224. Further, there is no exception that "justice can only be done by the complete indemnification of costs": ***Luft v Taylor, Zinkhofer & Conway*** at para. 74. Any such exception invoking "justice" in the abstract (inappropriately relied on in the costs reasons at paras. 220, 237(b)) is conclusory and would overtake the rule.

[180] The costs reasons are summarized *supra*, paras. 40-55. The case management judge concluded that, in appropriate cases, a trustee in bankruptcy could be personally liable for costs. In this litigation the Trustee in Bankruptcy was the "real promoter" of the litigation, and for that and other reasons he should be personally liable for costs. The Trustee in Bankruptcy had not proven that the litigation was authorized by the inspectors. Trustees were officers of the court, and owed duties to potential defendants. The Trustee in Bankruptcy had commenced this action without a proper investigation, and without giving the defendants an opportunity to respond. The serious allegations against Ms. Rose were particularly egregious. Overall, the Trustee in

Bankruptcy "exercised very poor judgment that equates to positive misconduct": costs reasons at para. 227.

[181] Costs awards are discretionary and should not be interfered with unless they reflect an error of principle or the award is plainly wrong: ***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 at paras. 24-7, [2004] 1 SCR 303; ***Metz v Weisgerber***, 2004 ABCA 151 at paras. 6-7, 33 Alta LR (4th) 17, 348 AR 143; ***Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)***, 2007 SCC 2 at para. 49, [2007] 1 SCR 38; ***Walker v Ritchie***, 2006 SCC 45 at para. 17, [2006] 2 SCR 428. The costs award under appeal contains such reviewable errors.

[182] The costs appeal raises the following specific issues:

(a) Costs in bankruptcy proceedings

(b) Approval of the inspectors

(c) Trustees as officers of the court

(d) The duty to investigate

(e) Allegations against the respondent Ms. Rose

Costs in bankruptcy proceedings

[183] The costs reasons discuss the question of costs awards in bankruptcy proceedings generally, and in particular the personal liability of trustees in bankruptcy for costs.

[184] First of all, it is helpful to note that there is no "Bankruptcy Court" in Alberta, contrary to common parlance and what is suggested in the reasons: costs reasons at paras. 45, 67, 71. There are only three courts in Alberta: the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta, and the Provincial Court of Alberta. Section 183(1)(d) of the *Bankruptcy and Insolvency Act* provides that bankruptcy jurisdiction in Alberta is vested in the Court of Queen's Bench, but as pointed out in Holden, Morawetz & Sarra, The 2019 Annotated Bankruptcy and Insolvency Act, (Toronto: Thomson Reuters, 2019) para. B-13: "Although commonly referred to as the bankruptcy court, this reference is done for convenience only; there is in fact no such tribunal". See also ***Sam Lévy & Associés Inc v Azco Mining Inc,*** 2001 SCC 92 at para. 20, [2001] 3 SCR 978; ***Casson v Lakeside Hotel & Resort Ltd*** (1967), 61 DLR (2d) 421 at pp. 423-24, 59 WWR 65 (BCCA). The correct reference is to the "superior court exercising bankruptcy jurisdiction".

[185] It is true that the Court of Queen's Bench maintains a special "commercial" hearing list that deals with most bankruptcy matters. There is a group of judges that is routinely assigned to hear that list, but that does not constitute them a "bankruptcy court", any more than the existence

of special family law lists creates a "family court". Further, the existence of the commercial list does not in any way diminish the mandate of any other judge of the Court of Queen's Bench to deal with bankruptcy matters.

[186] The appropriate distinction, therefore, is not between proceedings in the "bankruptcy court" and proceedings in the "Court of Queen's Bench". For costs purposes, the proper distinction is based on the type of work being done. Matters related to what may loosely be called the mechanics of the bankruptcy process, and issues that arise within that process, are dealt with under the *Bankruptcy and Insolvency General Rules*, CRC, c. 368, including its tariff of costs. Section 197(1) of the *Bankruptcy and Insolvency Act* provides:

> 197(1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

This provision, by its specific wording, only applies to proceedings "under this Act", that is proceedings related to the mechanics of the bankruptcy.

[187] On the other hand, civil litigation conducted in the Court of Queen's Bench, even by a trustee in bankruptcy, is governed by the Alberta *Rules of Court*, and costs are dealt with under Part 10 and Schedule C of the Alberta *Rules*. While this litigation raises, in part, rights that are created under the *Bankruptcy and Insolvency Act* (specifically, under s. 96), it is primarily an action by the bankrupt estate against third parties. This litigation and its costs consequences are accordingly governed by the Alberta *Rules of Court*.

[188] When a corporation is assigned into bankruptcy, its assets and businesses are taken over by the trustee in bankruptcy. Corporations, including bankrupt corporations, are inanimate legal persons and can only act through human representatives. The trustee in bankruptcy is the personification of the bankrupt corporation. When the trustee commences litigation on behalf of a bankrupt corporation, there is no meaningful distinction to be drawn between the trustee, the estate in bankruptcy, and the bankrupt corporation. It is artificial to suggest that the trustee is the "real promoter" of such litigation, as held in the costs reasons at paras. 35-38. By this standard, the trustee would always be the "real promoter" of estate litigation. The trustee is the person that makes the decision to commence litigation, with the approval of the inspectors, but bankrupt estate litigation is conducted by and on behalf of the bankrupt corporation. In any event, this artificial distinction does not affect the liability of a trustee in bankruptcy for costs.

[189] When a trustee in bankruptcy commences litigation on behalf of a bankrupt, the trustee is always initially liable for costs awards payable to third parties: ***Sigurdson v Fidelity Insurance Co of Canada*** (1980), 110 DLR (3d) 491 at pp. 495-96, 20 BCLR 345 (CA); ***Pythe Navis Adjusters Corp v Columbus Hotel Co (1991)***, 2014 BCCA 262 at paras. 34-36, 61 BCLR (5th) 346; ***Akagi v Synergy Group (2000) Inc,*** 2015 ONCA 771 at paras. 22-23, 128 OR (3d) 64; ***Vancouver Trade Mart v Creative Prosperity Capital Corp*** (1998), 7 CBR (4th) 3 at para. 30

(BCSC). The seminal case is ***In Re Williams & Co; Ex parte The Official Receiver***, [1913] 2 KB 88 at pp. 94-95:

> The question in this appeal is one that is so familiar and so well settled with reference to other jurisdictions that I confess I was surprised to learn that it was thought capable of being argued in bankruptcy. If trustees of a settlement, or executors, or administrators of a deceased person, or a receiver, or a liquidator, raise a contest with another person and bring him into court to defend himself in respect of some claim which is set up against him, and the claim fails, the trustees, or executors, or receiver, or official liquidator, are personally liable to pay the costs. It is immaterial that in making the claim they acted *bona fide* in the belief that they were doing that which was for the benefit of the estate which they represented. They are personally liable as between them and the defendant; they are entitled to an indemnity out of the estate which they are representing unless they have been guilty of misconduct. The question of misconduct is not relevant at all in these circumstances as between the plaintiffs and the defendant whom they have brought into Court; it does not matter whether they have acted *bona fide* or not; they brought an action and failed, and they are personally liable to pay costs, but in a proper case they are, as I have said, entitled to an indemnity. (emphasis added)

The issue of "personal liability" for costs of a trustee in bankruptcy properly relates only to the ability of the trustee to be indemnified for its legal expenses by the bankrupt estate, not to the entitlement of third parties to recover their costs.

[190] Section 197(3) of the *Bankruptcy and Insolvency Act* provides:

> 197(3) Where an action or proceeding is brought by or against the trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

Three things should be noted: (a) this provision only relates to costs arising from "bankruptcy work" not general civil litigation: ***Sigurdson*** at pp. 493-94, (b) the trustee is presumptively entitled to be indemnified from the estate for its expenses relating to "bankruptcy work", in accordance with the priority scheme in s. 196(6), and (c) in the absence of some misconduct the court will not direct that the trustee personally bear the burden of those expenses.

[191] These general rules respecting the personal liability of trustees in bankruptcy in ordinary litigation are summarized in Holden, Morawetz & Sarra, Bankruptcy and Insolvency Law of Canada, 4th ed (Toronto: Thomson Reuters, online) at para. I§84:

> Section 197(3) only applies to proceedings in the bankruptcy court. If a trustee in bankruptcy takes proceedings or has proceedings taken against it in the ordinary

> civil courts, s. 197(3) has no application, and if the trustee is unsuccessful in such proceedings, it will be personally liable for costs. The trustee is, however, entitled to indemnity out of the bankrupt estate unless it has been guilty of some misconduct in bringing the proceedings or has taken them without the permission of the inspectors.

The distinction between the trustee's liability to pay costs, and its entitlement to be reimbursed by the bankrupt estate is not always recognized in the cases.

[192] Thus, when a trustee is said to be "personally liable" for costs in ordinary civil litigation, that can, at best, mean that the trustee is not entitled to be indemnified for those expenses from the estate. This, however, is primarily a matter for the creditors and inspectors. A third party litigant, who has been awarded costs but is a stranger to the bankruptcy itself, is generally not interested in whether the trustee is entitled to indemnity from the estate. That is a concern of the trustee, particularly if the estate lacks resources to indemnify the trustee.

[193] It follows that much of the discussion in the costs reasons respecting whether the Trustee in Bankruptcy should be personally liable for costs was moot. Ms. Rose, as the putatively successful litigant, was entitled to recover her costs from the Trustee in Bankruptcy. Absent any objection from the inspectors, there was no reason for the case management judge to rule on whether the Trustee in Bankruptcy was entitled to indemnity from the Perpetual/Sequoia estate: see the costs reasons at para. 43.

Approval of the inspectors

[194] Section 30(1)(d) of the *Bankruptcy and Insolvency Act* provides that litigation in the name of the estate must be authorized by the inspectors. The case management judge questioned the authority of counsel to commence the action. In response to the inquiry from the case management judge, "Have inspectors given permission for PWC to bring these legal proceedings?", the Trustee in Bankruptcy responded in writing "Yes". Counsel confirmed, in open court, that the proper authorization had been obtained, and offered further evidence "if that's required". In a later proceeding, counsel provided a redacted copy of minutes of a meeting of the inspectors which stated "Proceed as described in Special Counsel's memos". From time to time, some of the inspectors of the Perpetual/Sequoia bankruptcy were present in court.

[195] Despite these assurances, the case management judge held in the Costs Reasons:

> 64. In this case, despite being asked for evidence that the inspectors had approved the Action, the Trustee never produced any evidence of inspector approval of the lawsuit against Ms. Rose.

In the absence of any indication at all that the action had not properly been authorized, the case management judge's insistence on further "evidence" was unreasonable. There was no air of reality to the suggestion that litigation of this magnitude and notoriety had been advanced as far as it had without the inspectors being aware of it.

[196] It is trite law that the submissions of counsel are not evidence, but that does not mean that they can never be relied on. Representations by counsel relating to the conduct of the litigation can be "accepted by the court in the solemn fashion they are provided": ***Peddle v Alberta Treasury Branches***, 2004 ABQB 608 at para. 43. If counsel, as an officer of the court, states in open court that he or she has authority to pursue the litigation on behalf of the client, that representation can be relied on in the absence of actual evidence to the contrary: ***R. v Harrison***, [1977] 1 SCR 238 at p. 246; ***Selangor United Rubber v Cradock***, [1969] 1 WLR 1773 at pp. 1781-82, [1969] 3 All ER at p. 975 (Ch).

[197] The appellant Ms. Rose argued that from the heavily redacted material eventually provided it was not possible to tell if the action commenced was the one actually authorized, and if the authorization included suing Ms. Rose. Whether counsel for the Trustee in Bankruptcy is acting beyond his authority is primarily a concern of the inspectors. The defendants have no legitimate interest in inquiring into the decision making process behind the litigation, or the details of advice received from special counsel. Solicitor and client privilege precludes the defendants or the court from dissecting the trustee's litigation strategy and instructions to counsel. If a defendant has some actual evidence of a want of authority, that is one thing, but a defendant is not entitled to speculate or go on a fishing expedition.

[198] In summary, it reflected an error of principle for the case management judge to place any weight on the alleged deficiency in formal proof that the litigation had been properly authorized.

Trustees in bankruptcy as officers of the court

[199] One foundation of the costs award was inferences that the case management judge drew from the Trustee in Bankruptcy's status as an "officer of the court". Partly as a result of this status, the case management judge criticized the Trustee in Bankruptcy on a number of fronts, such as the very commencement of what the case management judge though was doomed litigation, the failure to properly investigate the claim, the failure to give notice to the defendants before suing, and the content of the pleadings and affidavits. The case management judge recognized that the duties he expounded had not previously been recognized, but reasoned "I have an ongoing obligation to expand the common law, where appropriate": costs reasons at para. 112. The Trustee in Bankruptcy points to the unfairness of identifying new standards of conduct, *ex post facto* and without allowing submissions from counsel, and then criticizing him for not having met them.

[200] It is true that trustees in bankruptcy are officers of the court, and are held to a high standard. In some instances, a trustee in bankruptcy may not even be able to rely on strict legal rights. For

example, in ***Ex parte James*** (1874), LR 9 Ch App 609 a trustee in bankruptcy was directed to repay money that had been paid under a mistake of law, even though the trustee had an undoubted legal right to retain the money. In ***Lehman Brothers Australia Ltd v MacNamara***, [2020] EWCA Civ 321 at para. 95, [2020] 3 WLR 147 the administrators were directed to correct an admitted mutual error in the amount of a claim, even though the claims were supposed to be final, and there was no legal obligation to amend.

[201] Some of the expectations of trustees in bankruptcy are set out in the *Code of Ethics for Trustees*, found in sec. 34-52 of the *Bankruptcy and Insolvency General Rules*:

> 34 Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act. . . .
>
> 36 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care. . . .
>
> 39 Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act . . .

This *Code of Ethics* sets a high standard, but the case management judge's interpretation of the scope of these duties, and whether in fact they were violated here, reflect reviewable error.

[202] Trustees in bankruptcy, as officers of the court, obviously owe some duties to the court and the legal system. The trustee's primary duty, however, is to the creditors of the estate, through the inspectors. The obligation of a trustee in bankruptcy to be "honest and impartial" does not displace this primary duty, or imply some duty to potential defendants in estate litigation. The trustee would be placed in a conflict of interest if it was also under legal duties to third parties, particularly those that are adverse in interest to the bankrupt estate. Lawyers, for example, are also "officers of the court" who are held to high standards, yet they have no duty to third parties to investigate, consult, give notice, etc., of the type suggested by the case management judge.

[203] Further, the obligation of a trustee in bankruptcy to act "impartially" does not mean that a trustee cannot take a proper adversarial role in litigation. As noted in ***Golden Oaks Enterprises Inc (Trustee of) v Scott***, 2019 ONSC 5108 at para. 48:

> 48 The defendants' argument implies that a trustee in bankruptcy must refrain from any advocacy for the position it is taking in litigation. In my view, this is unrealistic and even antithetical to the role of the trustee. A trustee must approach an investigation without any unfounded bias and keep an open mind about what it will find. Having investigated, however, a trustee abdicates its responsibilities under the *BIA* if it fails to apply its expertise and experience to assess the information received and act on that assessment. Once a trustee has reasonably concluded that there are assets belonging to the estate in third party hands and that there are grounds to

> recover them, and it obtains instructions to begin legal proceedings from inspectors, its role necessarily involves some advocacy.

In this case the Trustee in Bankruptcy had investigated the circumstances, and had concluded that Perpetual/Sequoia had claims against various defendants. The Trustee in Bankruptcy was not only entitled, but was obliged to pursue those claims. This is not inconsistent with the role of a trustee in bankruptcy as an officer of the court.

[204] Specifically, a trustee in bankruptcy is not an administrative tribunal: ***Asian Concepts Franchising Corp (Re)***, 2016 BCSC 1581 at paras. 69-70, 40 CBR (6th) 73; ***Royal Bank of Canada v Drummie (Trustee of)***, 2004 NBQB 35 at para. 19, 49 CBR (4th) 90. The duty of good faith imposed on officers of the court precludes taking advantage of the mistakes of others, but it does not come anywhere near to requiring that trustees in bankruptcy conduct investigations in a manner consistent with "the principles of procedural fairness". Those principles of administrative law are not transferable to civil commercial matters; there is no free standing right to procedural fairness: ***Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall,*** 2018 SCC 26 at para. 25, [2018] 1 SCR 750. The decision in ***Cormie v Principal Group Ltd (Trustee of)*** (1989), 66 Alta LR (2d) 340, 99 AR 1 turns on its particular facts, and disclaims any "broader or more wide-ranging duty of fairness". The generic statement in ***Kaiser (Re),*** 2011 ONSC 4877 at para. 20, 84 CBR (5th) 29 that a trustee in bankruptcy is an officer of the court and "must act fairly" is merely conclusory and, in its context, unobjectionable.

[205] A trustee's duty to provide "full and accurate information as required by the Act" obviously relates to information about the bankruptcy process. This duty cannot extend to information in the hands of third parties that the trustee does not have. Here, in any event, the core information about the Asset Transaction and the Aggregate Transaction was known to all. A trustee is under no obligation to reveal his litigation strategy, potential defendants, or the privileged advice he has received from counsel.

[206] Particular criticisms of the Trustee in Bankruptcy call for a separate analysis: the alleged failure to properly investigate, and the nature of the allegations made against the respondent Ms. Rose.

The failure to investigate

[207] The case management judge criticized the Trustee in Bankruptcy for failing to conduct a proper investigation before issuing the statement of claim. As just discussed, there is no general basis for placing such a free standing obligation on trustees in bankruptcy, and it is not usually a proper consideration when awarding costs.

[208] As a threshold consideration, it should be noted that the decision to sue was not that of the Trustee in Bankruptcy alone. The action was approved by the inspectors, based on the advice in

“Special Counsel’s memos”. The Trustee in Bankruptcy was not the only one who thought litigation was warranted, based on the investigation actually done. Neither the case management judge nor the respondents were privy to the nature of counsel’s privileged advice, or the discussions by the inspectors.

[209] The general rule is that the unsuccessful litigant pays costs to the successful litigant. As long as the unsuccessful litigant acted in good faith it does not particularly matter why it lost. Perhaps it failed to investigate, or its witnesses were unreliable, or it could not meet the burden of proof, or it misjudged the law or its legal rights. Whatever the reason, losing should not be double counted. Because the unsuccessful litigant must pay costs, any “failure to properly investigate” has already been taken into account.

[210] On this record, there is also no basis to criticize the Trustee in Bankruptcy’s investigation, or to accuse him of having “tunnel vision”.

[211] Following his preliminary investigations, the Trustee in Bankruptcy concluded that the Asset Transaction might be void for being at an undervalue. On May 28, 2018 he wrote to Perpetual Energy Parent and Ms. Rose, indicating that some of the transactions “may be void”, and that the Perpetual group might be indebted to Perpetual/Sequoia as a result. He demanded the production of the relevant records, but also suggested a “without prejudice meeting with you at the earliest mutually convenient opportunity to discuss the Transfers”. On June 26, 2018 the Trustee in Bankruptcy wrote again, indicating that a further review of the documents since provided confirmed his initial view that the Asset Transaction was void.

[212] It is unclear why this course of conduct should be criticized for involving “tunnel vision”, or otherwise. The Trustee in Bankruptcy was entitled to form an opinion from his investigations that the transactions were in breach of s. 96 of the *Bankruptcy and Insolvency Act*; the summary disposition reasons accepted that this is a viable claim. Having identified a possible undervalue transaction, there was nothing objectionable about the Trustee in Bankruptcy pursuing it: ***Option Industries Inc (Re)***, 2020 ABQB 535 at para. 45; ***Golden Oaks*** at para. 48. In the absence of any evidence to contradict his conclusion, the Trustee in Bankruptcy had no reason to change his opinion. The corporate oppression and director’s duty claims were derivative of that conclusion. Absent any other obvious explanation, the Trustee in Bankruptcy had no reason to go looking down any other tunnels.

[213] There is no rule that a trustee must conduct any, or any particular type of investigation before suing. The trustee in bankruptcy might obviously seek information from the former directors of the corporation, but that is not invariably necessary. There may be ample information available in the corporate records, or from other sources.

[214] With respect to many issues in this appeal, the Trustee in Bankruptcy was entitled to rely on the documentary record. As one example, the case management judge was particularly critical of the Trustee in Bankruptcy’s failure to make more inquiries about the Resignation & Mutual

Release: costs reasons at paras. 203-216. This, however, was an issue that could be analyzed from the documentary evidence. It was known that the Perpetual Energy group and Kailas Capital were dealing at arm's length. The Resignation & Mutual Release was negotiated as part of the Aggregate Transaction. The terms of the Resignation & Mutual Release were known. The timing of the execution of the Resignation & Mutual Release was known, as was the identity of the signatories of that document. The tenure of Ms. Rose as a director of Perpetual/Sequoia was also known, and the alleged effect of the Resignation & Mutual Release on her duties as a director was also known. The Trustee in Bankruptcy's allegation was that, in law, the Resignation & Mutual Release was ineffective and could not be relied on by Ms. Rose. The need for further investigation is not obvious.

[215] The case management judge nevertheless criticized the Trustee in Bankruptcy for not questioning the principals of Kailas Capital about the Resignation & Mutual Release, but it is unclear what relevant information they could have provided. Certainly, the Trustee in Bankruptcy was not required to act on their personal legal opinions about the legal effect of the Resignation & Mutual Release; the Trustee in Bankruptcy had his own counsel for that purpose. The case management judge suggested that the Trustee in Bankruptcy should have asked the principals of Kailas Capital: "Did Ms. Rose cause PEI to require you, the 198Co Principals, to execute the Release against your will?": costs reasons at para. 212. As previously noted (*supra*, para. 78), this is a contrived interpretation of the pleadings. No one suggested that Ms. Rose had forced anybody to do anything against their will, and it would have been absurd for the Trustee in Bankruptcy to pose the suggested question to the principals of Kailas Capital.

[216] As another example, the case management judge held that, with respect to the proper characterization of Abandonment and Reclamation Obligations, the Trustee in Bankruptcy "drew a legal conclusion without asking Ms. Rose for her position on the matter": reasons at para. 136. The characterization of the Abandonment and Reclamation Obligations was an issue of law, depending heavily on the interpretation of the yet-to-be released ***Redwater*** decision. The Trustee in Bankruptcy was entitled to take his legal advice from his own counsel, and Ms. Rose's legal opinion on the matter was irrelevant. As the CEO of a public oil and gas company, if asked she likely would have indicated that Perpetual Energy Parent, and the industry generally, regarded them as being real obligations.

[217] Likewise, there was no point in asking Ms. Rose her opinion about the legal effectiveness of the Resignation & Mutual Release. There was no point in asking Ms. Rose or the principals of Kailas Capital if the Perpetual Group and Kailas Capital/198Co were at arm's-length; they obviously were, and no one suggested otherwise.

[218] The case management judge also criticized the Trustee in Bankruptcy for issuing the statement of claim without waiting for further input from Perpetual Energy Parent and Ms. Rose: see *supra*, paras. 49, 211. To summarize, the Trustee in Bankruptcy had demanded and received certain documents, and on June 26, 2018 he wrote to Ms. Rose, advising of his preliminary

conclusion that the Asset Transaction was in breach of s. 96 and contrary to the interests of Perpetual/Sequoia. He asked Ms. Rose "if there was anything specific you want the Trustee to consider" or "any other aspect you consider relevant". Ms. Rose responded that her reply would come in as timely a fashion as possible and it would "likely be next week". Ms. Rose did not meet her expected deadline, but confirmed on July 6 that she was "working diligently to pull together the additional information": costs reasons at paras. 126-27.

[219] The Trustee in Bankruptcy never followed up, and never imposed a deadline for Ms. Rose to reply. The statement of claim, which had been approved over two months earlier by the inspectors, was issued on August 2, 2018, causing the case management judge to conclude:

> [132] Based on my review of the June 26, 2018 Trustee Letter, I find that the Trustee: (i) invited further material, but did not specify or request anything particular; (ii) did not set any deadline by which the Perpetual Group was to respond; and (iii) made no reference to a claim against Ms. Rose.

This criticism was unwarranted:

(i) The Trustee in Bankruptcy did not "request anything particular" because he had what he needed. The invitation of June 26, 2018 was an open-ended one, enabling Ms. Rose to provide anything she thought relevant that had not previously been produced. This letter was the opportunity the Trustee in Bankruptcy was criticized for not providing: an opportunity for Perpetual Energy Parent and Ms. Rose to provide whatever further input they wished.

(ii) The Trustee in Bankruptcy was not obliged to set any deadline on his open invitation, if only because Ms. Rose had set her own deadline. It is curious that the Trustee in Bankruptcy was criticized for not setting a deadline, but no criticism was directed at Ms. Rose for not meeting the one she imposed herself. The one month that passed before the statement of claim was issued was reasonable.

(iii) There was also no obligation to specifically mention a claim against Ms. Rose. The Trustee's letter indicated that the transaction did not appear to be in the best interests of Perpetual/Sequoia. Ms. Rose was the sole director, and she undoubtedly had access to her own advisers on the legal implications. As noted, there was no general duty on the Trustee in Bankruptcy to give advance notice to potential defendants.

In summary, there was no principled basis on which to award enhanced costs because of any perceived failure to investigate prior to issuing the statement of claim. This pre-litigation conduct cannot support an award of enhanced costs.

Allegations against the respondent Ms. Rose

[220] The case management judge was particularly critical of the claim against the respondent Ms. Rose. This was partly because of the perception that ***Redwater*** "nullified" much of the claim, the perceived "failure to investigate", and the failure to follow up discussed in the previous section of these reasons. As noted, the process followed by the Trustee in Bankruptcy did not justify enhanced costs.

[221] The case management judge specifically concluded that notice must be given before allegations of breach of duty are made against a director of a public corporation. This was because "serious allegations of wrongful conduct, eventually became publicly available". Given the "magnitude and potentially harmful impact on Ms. Rose's reputation" she should have been given advance notice of the allegations and an opportunity to respond: costs reasons at paras. 195-96. He concluded:

> 201 Given the nature of the allegations made by the Trustee (which included: (i) alleged failure to exercise business judgment; (ii) alleged oppression; (iii) an allegation of being unfairly prejudicial; and (iv) an allegation of unfairly disregarding the interests of the creditors of the corporation), and the magnitude of the claim against Ms. Rose (which was in the range of $220 million), I find the conduct of the Trustee was egregious. The fact that this tactic was pursued by an officer of the Court is even more concerning.

On this record, there was nothing "egregious" about the Trustee's conduct, and it was inaccurate to suggest it was a "tactic". As previously discussed, while it may be prudent to do so, there was no "duty of fairness" to investigate, nor a duty to give advance notice that would justify these criticisms.

[222] The allegations against Ms. Rose were facially justified. As outlined previously in these reasons (*supra*, paras. 153-59), the Trustee in Bankruptcy had good reason to plead that Ms. Rose was in breach of her duties as a director. Ms. Rose essentially admitted she had abdicated her responsibility as the sole director of Perpetual/Sequoia, then inconsistently argued that she had exercised her "business judgment". ***Redwater*** did not "nullify" this claim. The size of the claim was what it was; this was not a "tactic".

[223] The case management judge criticized the wording of the pleadings: "unfairly prejudicial", "disregarding the interests", etc. The Trustee in Bankruptcy cannot be faulted for alleging breach of director's duties, and consequential oppression, using the very terminology provided in the *Business Corporations Act*. Any other form of pleading might well be criticized. Pleadings are supposed to outline the case, to avoid surprise. Further, it is doubtful that these pleadings carry the sense of moral opprobrium attributed to them by the case management judge. Directors of publicly

traded companies realize that they owe duties to the corporation, and they realize what those duties are. Others involved with pubic companies would understand the nature of the allegations.

[224] It is worth noting that these pleadings were no more hard-hitting than the allegations in the statement of defence that the claim was "abusive", and was "frivolous, irrelevant, and improper":

> 63. This action is an abusive attempt by Sequoia's trustee to indirectly pursue the agenda of the AER and energy companies that make significant contributions to the orphan well fund, by suing the Perpetual Defendants in relation to a Transaction that fully complied with the Regulatory Regime and the law. That agenda should not be pursued through an abusive lawsuit.

All of the pleadings in this litigation, while sometimes blunt, fairly engaged the underlying issues. Some of the factums filed in these appeals also included extravagant language.

[225] In addition, the case management judge returned repeatedly to his interpretation of the pleadings as alleging that Ms. Rose had "forced" the principals of Kailas Capital to enter into parts of the transaction against their will: costs reasons at paras. 203, 214, 216. Again, the pleadings could not reasonably be read as alleging duress in any form. That implausible reading of the pleadings did not justify enhanced costs.

<u>Summary of the Costs Appeal</u>

[226] As noted, costs awards are discretionary and should not be interfered with unless they reflect an error of principle or the award is plainly wrong. On this record, the award to 85% of solicitor and client costs was not justified. The claim against Ms. Rose was arguable: ***Redwater*** did not "nullify" this claim. The case management judge overstated the implications of a trustee being an officer of the court. A trustee does not have to meet administrative law requirements of fairness. There is no independent duty to investigate owed to third parties. There was no litigation misconduct that would justify enhanced costs.

<u>Conclusion</u>

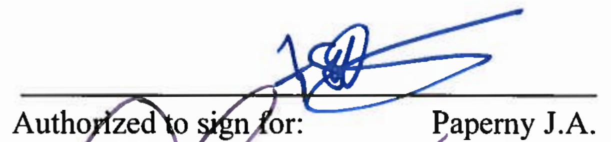
[227] In conclusion, appeal 1901-0255AC is allowed. The corporate oppression and public policy pleadings are restored. The Trustee in Bankruptcy is granted complainant status to pursue the corporate oppression claim if it so elects. The alternative *BIA* claim, and the interpretation, scope and legal effect of the Resignation & Mutual Release are returned to the trial court. The Trustee in Bankruptcy is granted leave to amend any portions of the statement of claim that would benefit from clarification, with any dispute about amendments to be resolved by the case management judge.

[228] Appeal 1901-0262AC is dismissed.

[229] Appeal 2001-0174AC is allowed. The awards of costs for the dismissal application and the application to set costs are set aside and referred back to the case management judge. The words "in its personal capacity" in paragraph 3 of the costs order were inappropriate.

Appeal heard on December 10, 2020

Memorandum filed at Calgary, Alberta
this 25th day of January, 2021



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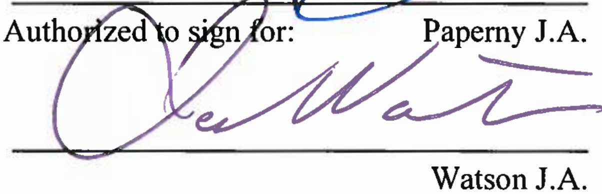

Watson J.A.

Slatter J.A.

Appearances:

R. de Waal/L. Rasmussen
for the Appellant/Cross-Respondent PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity

D.J. McDonald, Q.C./P.G. Chiswell
for the Respondents/Cross-Appellants Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp.

S.H. Leitl/G. Benediktsson
for the Respondent/Cross-Appellant Susan Riddell Rose

C.C.J. Feasby, Q.C./M. Wasserman
for the Appellant PricewaterhouseCoopers Inc., in its personal capacity

K.T. Lentz, Q.C.
for the Intervenor Orphan Well Association

G.S. Watson/C.W. Ang
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