Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.

REPLY FACTUM OF GROWTHWORKS CANADIAN FUND LTD.
(Distribution, Termination and Discharge Order)
(Returnable January 19, 2023)

January 16, 2023

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Overview

1. This motion was originally scheduled for December 13, 2022. Until the day before the hearing, there was no objection to any of the relief sought. However, on that day the Former Manager[1] advised that it had a potential objection to the proposed distribution to it upon the dissolution of the Fund. Accordingly, the motion was adjourned to January 19, 2023 to allow the Former Manager's issue to be addressed. Since the CCAA stay would otherwise have expired on December 31, 2022, the CCAA stay and a contract between the Fund and Crimson Capital were extended on an interim basis to January 20, 2023.

2. The Former Manager has now filed an affidavit and a factum in respect of the distribution issue. It remains the case that, aside from the Former Manager's objection with respect to distribution, no one objects to the relief sought in the motion. Accordingly, on the rescheduled hearing date the Fund will be seeking all of the relief sought in the motion, on an unopposed

[1] Any capitalized terms used and not otherwise defined in this factum have the meanings given to them in the Affidavit of C. Ian Ross sworn December 2, 2022 ("**Ross Affidavit**"), Motion Record of GrowthWorks Canadian Fund Ltd. dated December 2, 2022 ("**Motion Record**"), Tab 2.

basis aside from the Former Manager's objection with respect to its distribution (the Former Manager has made clear that it does not object to the motion aside from the issue of its own distribution).

3. The Former Manager's objection should be rejected. The Former Manager is not entitled to a payment of $672,390.61 (the "**Claimed IPA Dividend**") upon the Dissolution Event, much less in priority to the Fund's 115,859 Class A retail shareholders:

(a) When properly interpreted, section 4.2(e)(ii) of the Fund's articles provides that the relevant date for calculating the Former Manager's entitlement to a payment is the date of the Dissolution Event, not (as the Former Manager claims) the (long ago) dates of disposition of particular investments.

(b) Even if the Former Manager's interpretation were correct, the Former Manager has not established that it was entitled to the payment as of the dates of disposition of the investments that it identifies. The Former Manager cannot plug the hole in its case by reference to the 2017 trial before the Honourable Justice Wilton-Siegel. That trial did not address the issue that now arises on this motion, so neither *res judicata* nor issue estoppel arises.

(c) If, contrary to the foregoing, the Former Manager is entitled to a payment, the Former Manager's claim to priority over other shareholders is incorrect. Section 4.1(d) of the Class C Share terms expressly provides that the Class C Shares (of which the IPA Shares are a series) rank equally with the Class A Shares on a dissolution.

The relevant date is the date of the Dissolution Event, not past dates of disposition

The applicable principles of interpretation

4. Corporate articles are interpreted in accordance with the principles of contractual interpretation.[2] Those principles are well familiar to this Court from such cases as *Sattva Capital Corp. v. Creston Moly Corp.*[3] The applicable principles in this case are: (i) the text must be read in conjunction with the surrounding circumstances or factual matrix, without allowing the latter to overwhelm the former and with the language being read in accordance with its ordinary and grammatical sense; (ii) the language must be read as a whole; and (iii) the language must be read in a manner that achieves commercial efficacy.[4]

Application of the principles

5. There is no dispute that the operative provision is section 4.2(e)(ii) of the IPA Share terms:

> **4.2(e)(ii)** On a Dissolution Event, the holder of the IPA Shares shall be entitled to receive … an amount equal to *the cumulative dividends to which the holder of the IPA Shares would have been entitled pursuant to paragraph (d) above,* whether or not dividends were actually declared by the directors, assuming that all Venture Investments had been disposed of as of the date of the Dissolution Event at the estimated fair value of such investments calculated in accordance with the Fund's usual valuation policies.[5]

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[2] *Rogers v Rogers Communications Inc.*, 2021 BCSC 2184 at para. 81.

[3] 2014 SCC 53 ("***Sattva***").

[4] As a matter of completeness, the Fund notes that in *Polar Multi-Strategy Master Fund v. The Stars Group Inc.*, 2018 ONSC 4397, a decision of the Commercial List, Wilton-Siegel J. stated at para. 18 that "[t]he applicable principles for the interpretation of corporate articles and by-laws are similar to the principles that govern ***statutory*** interpretation." [Emphasis added.] However, His Honour went on to describe an interpretive process consistent with the principles of ***contractual*** interpretation and cited *Sattva*, stating that in para. 19 that *Sattva* "is also understood to apply in the present context." It is therefore not clear that the reference to "statutory" interpretation is correct.

[5] IPA Share Terms, s. 4.2(e)(ii), Exhibit M to the Ross Affidavit, Motion Record, Tab 2M, p. 379.

6. The section provides a ***condition*** that must be met for the Former Manager to be entitled to a payment on a Dissolution Event, and creates an ***assumption*** that must be applied in determining whether the condition has been met. The *condition* (shown in red and italics above) is that the Former Manager must be entitled to dividends under section 4.2(d). The assumption (shown in blue and underlining above) is that all Venture Investments were disposed of as of the date of the Dissolution Event at their fair value.

7. Section 4.2(d) of the IPA Share terms provides that the Former Manager may be entitled to dividends if certain conditions are met. These dividends were not part of the Former Manager's ordinary compensation for its services before it was terminated for good cause. The Former Manager has already received substantial annual management and administration fees for its services.[6] These dividends are incentive payments based on the performance of the Fund's Portfolio.

8. Section 4.2(d)(ii) provides three tests that must be met in order for the Former Manager to be eligible to receive these payments, which ensure that the Fund's investments have performed well, both individually and collectively, before the Former Manager is entitled to an incentive payment. The three tests are:

(a) The Portfolio Test, which requires that the annual rate of return on the Fund's entire Portfolio exceed the average annual rate of return on a five-year GIC plus

[6] Ross Affidavit at para. 7, Motion Record, Tab 2.

2%.[7] The purpose of this condition is to ensure that satisfactory returns have been generated on the Fund's Portfolio as a whole.

(b) The Venture Investment Test, which requires that the annual rate of return from the particular Venture Investment to equal or exceed 12%. The purpose of this condition is to ensure that significant returns have been generated on the particular Venture Investment in respect of which the Former Manager is claiming an incentive payment.[8]

(c) The Principal Test, which requires that the Fund have recovered cash at least equal to the principal investment in the particular Venture Investment. The purpose of this condition is to ensure that adequate cash has been generated to make these incentive payments.[9]

9. The Former Manager concedes that each of these tests must be met before IPA dividends are payable, that the tests set a high bar and that the purpose of the tests is to "ensure that the other classes of shareholders of the Fund have received the substantial benefit of investment performance".[10]

10. The assumption in section 4.2(e)(ii) requires that, on a Dissolution Event, these tests are applied as of the date of the Dissolution Event. The assumption is in essence a deeming disposition, akin to the deemed distribution of capital property upon death that occurs in order to

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[7] IPA Share Terms, s. 4.2(d)(ii)(A), Exhibit M to the Ross Affidavit, Motion Record, Tab 2M, p. 378.

[8] IPA Share Terms, s. 4.2(d)(ii)(B), Exhibit M to the Ross Affidavit, Motion Record, Tab 2M, p. 378.

[9] IPA Share Terms, s. 4.2(d)(ii)(C), Exhibit M to the Ross Affidavit, Motion Record, Tab 2M, p. 378.

[10] Affidavit of Derek Lew sworn December 23, 2022 at para. 4 ("**Lew Affidavit**"), Responding Motion Record of GrowthWorks WV Management Ltd. dated January 3, 2023 ("**Former Manager Record**"), Tab 1.

trigger capital gains tax. The commercial purpose is to look at the Former Manager's performance at the date of the Dissolution Event, and reward that performance if justified as at that date. The provision is not backward looking so as to permit a retroactive reward to the Former Manager for events long ago, particularly in the face of catastrophically poor performance of the Fund's portfolio.

11. The uncontested and unchallenged evidence before the Court is that the Fund's portfolio of Venture Investments will have a negative annualized rate of return as of the date of the Dissolution Event.[11] The Former Manager has filed no different evidence, and has not challenged the Fund's evidence on cross-examination. The result is that the Portfolio Test is not met and the Former Manager is not entitled to any payment under section 4.2(e)(ii).

12. This result is consistent with the commercial purpose of the IPA Shares and the Portfolio Test. At this stage, when the Fund is preparing to make distributions to its Class A shareholders, the Fund's Portfolio has not generated positive returns that will benefit its Class A shareholders which the Former Manager should participate in. The performance of the Fund's Portfolio has been negative. Any incentive payment that is made to the Former Manager will only deepen the losses that Class A shareholders have suffered on their investments.

13. The Former Manager asks this Court to read the language of the *condition* in isolation (contrary to the principles of interpretation) and ignore the assumption in section 4.2(e)(ii) to find that the Former Manager "earned" a dividend upon the divestment of these four portfolio investments over a decade ago, regardless of the subsequent performance of the Fund's Portfolio.

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[11] Ross Affidavit at para. 37, Motion Record, Tab 2.

14. This interpretation would render the Portfolio Test inapplicable where the Former Manager is receiving a payment on a Dissolution Event, despite section 4.2(e)(ii) incorporating that test by reference. This interpretation fails to give effect to all of the words in section 4.2(e)(ii). The interpretation also fails to achieve commercial efficacy, as it would provide the Former Manager with a payment in circumstances where the Fund's other shareholders are not receiving a benefit.

The language difference cited by the Former Manager

15. The Former Manager points to the following difference in language between sections 4.2(e)(ii) and 4.2(f)(ii) of the IPA Share terms:

4.2(e)(ii) Dissolution – On a Dissolution Event, the holder of the IPA Shares shall be entitled to receive … ***an amount equal to*** the cumulative dividends to which the holder of the IPA Shares would have been entitled pursuant to paragraph (d) above, whether or not dividends were actually declared by the directors, assuming that all Venture Investments had been disposed of as of the date of the Dissolution Event at the estimated fair value of such investments calculated in accordance with the Fund's usual valuation policies.[12]	**4.2(f)(ii)** Manager Termination – Upon termination of the holder of the IPA Shares as a manager of the Corporation, the holder of the IPA Shares is entitled to receive … ***dividends in an amount equal to*** the cumulative dividends to which the holder of the IPA Shares would have been entitled pursuant to paragraph (d) above, whether or not dividends were actually declared by the directors, assuming that all Venture Investments had been disposed of as of the effective date of such termination at the estimated fair value of such investments calculated in accordance with the Fund's usual valuation policies.[13]

16. The difference in language does not evince an intention to create different thresholds for a Dissolution Event and a termination of the Former Manager. The difference in language

[12] IPA Share Terms, s. 4.2(e)(ii), Exhibit M to the Ross Affidavit, Motion Record, Tab 2M, p. 379.

[13] IPA Share Terms, s. 4.2(f)(ii), Exhibit M to the Ross Affidavit, Motion Record, Tab 2M, p. 380.

reflects the simple reality that a termination presumptively results in a continuing entity that would be able to pay dividends (if and when the statutory solvency test and other applicable conditions are met), while a Dissolution Event results in payments to shareholders which are not dividends but rather a distribution of the remaining property of the corporation.

Even if the correct date is in the past and not the date of the Dissolution Event, the Former Manager is not entitled to any payment

17. Even if the Former Manager's stretched interpretation of the IPA Share terms were accepted and it could irrevocably "earn" dividends upon the disposition of particular Venture Investments, the Former Manager has not established that it met the three tests as at the time of disposition of the particular Venture Investments between 2010 and 2013.

18. Determining whether these tests have been satisfied requires complex calculations given the breadth of the Fund's investment portfolio – the Fund held venture investments in 71 Portfolio Companies as of the commencement of the CCAA Proceedings – and the fact that the Fund made one or more follow-on investments in many of these companies.[14] The Former Manager has conceded that these tests are "substantial".[15]

19. The documentation filed by the Former Manager to support these complex calculations of two of the three tests (the Venture Investment Test and the Principal Test) with respect to four separate investments consists of a four-page spreadsheet purporting to show various calculations without providing any of the documentation upon which these calculations are based. The Fund

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[14] Affidavit of C. Ian Ross sworn January 6, 2023 at para. 12 ("**Ross Reply Affidavit**"), Reply Motion Record of GrowthWorks Canadian Fund Ltd. dated January 6, 2023 ("**Reply Record**"), Tab 1.

[15] Lew Affidavit at para. 4, Former Manager Record, Tab 1.

is unable to verify these calculations due to the lack of supporting documentation.[16] In any event, the Former Manager has not placed before this Court ***any*** calculations or supporting documentation in relation to the Portfolio Test.[17]

20. The Former Manager must demonstrate that all three tests are met in order to be entitled to payment of the Claimed IPA Dividend. It has not done so, certainly not to the level that one would expect considering that the Former Manager is seeking to reduce the funds available for distribution to the Fund's Class A retail shareholders by $672,390.61.

Res judicata/issue estoppel do not arise because of the 2017 trial

21. Perhaps realizing its inability to establish that it meets the requisite tests, the Former Manager attempts to rely on findings in the 2017 trial before Justice Wilton-Siegel. This effort must fail.

22. The formal judgment from the trial expressly states that the claim that is now asserted in this motion was, at the time of the trial, merely a "potential claim" which was not at issue in the trial:

> 2. THIS COURT ORDERS that the claim of the Former Manager for $672,390.61 for unpaid incentive payment amounts ('IPA') as a result of the termination of the Management Agreement, but not any potential claim for IPA based on a Dissolution Event at defined in the Articles of Amendment for Class C Shares (***which potential claim was not before the court in this trial***), is dismissed.[18]

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[16] Ross Reply Affidavit at para. 13, Reply Record, Tab 1.

[17] Ross Reply Affidavit at para. 13, Reply Record, Tab 1.

[18] Exhibit E to the Ross Affidavit, Motion Record, Tab 2E, p. 295 [emphasis added].

23. It cannot be that a 2017 trial that did not address the Former Manager's entitlement upon a Dissolution Event (an event that was not even in contemplation at the time) could somehow bind the Court and the parties when a Dissolution Event occurs in 2023.

24. Going behind the formal judgment to the reasons for judgment from the trial confirms this conclusion. Justice Wilton-Siegel described the issue that was actually before him in the following terms:

> [380] The Fund does not dispute that this amount was earned in the sense that the Former Manager is entitled to receive dividends in such amount pursuant to the provisions of section 4.2(d)(i) of the share conditions of the IPA Shares, ***subject to compliance with the terms of that provision***. However, it submits that ***the Former Manager is not entitled to be paid such amount in the absence of a Board resolution declaring a dividend in such amounts on the IPA Shares, which the Board is prevented from passing in view of the solvency provisions of section 42 of the CBCA***. In my view, the language of section 4.2(f)(ii) does not support the Former Manager's position that it is entitled to payment of the amount claimed by way of an IPA Dividend on the IPA Shares in the present circumstances...[19]

25. This is not a finding on the quantum of a potential IPA payment upon a future Dissolution Event, nor a finding that such a payment had been "earned" once and for all, for all time and for all purposes. Like the Fund,[20] Justice Wilton-Siegel concluded that whether the payment was "earned" (for purposes of the claim that was actually before him) was a moot point, as dividends on the IPA Shares had not been declared by the Board and could not have been declared because the Fund did not meet the solvency test in section 42(b) of the CBCA.[21]

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[19] *GrowthWorks WV Management Ltd. v. GrowthWorks Canadian Fund Ltd.*, 2018 ONSC 3108 at para. 380 ("**2017 Trial Reasons**") [emphasis added].

[20] Ross Reply Affidavit at para. 8, Reply Record, Tab 1.

[21] 2017 Trial Reasons at para. 382.

26. Justice Wilton-Siegel merely noted that the Former Manager had ***asserted*** that an IPA payment in the amount of $672,390.61 had been earned.[22] Justice Wilton-Siegel stated that the Former Manager's entitlement to the Claimed IPA Dividend was "subject to compliance with the terms of that provision."[23] Justice Wilton-Siegel did not make any findings at trial regarding whether the conditions set out in the share terms for the payment of dividends on the IPA Shares – such as compliance with the Portfolio Test – had been met.[24] In any event, the word "earned" is a red herring by the Former Manager. It is a descriptive word chosen by Justice Wilton-Siegel in his reasons for judgment. It is not a word used in the IPA Share terms – the relevant word there is "entitled".

27. The doctrines of *res judicata* and issue estoppel have no application.

An accrual in the financial statements does not transform a potential dividend into an existing debt obligation

28. The Fund acknowledges that the financial statements of the Fund for the year ended August 31, 2013 recorded an accrual for IPA dividends of approximately $1.2 million.[25] However, while this accrual is listed as a liability of the Fund, the notes to the financial statements clearly indicate that it was payable as a dividend, not as a debt.[26] The notes to the

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[22] 2017 Trial Reasons at para. 380.

[23] *Ibid*.

[24] Ross Reply Affidavit at para. 10, Reply Record, Tab 1.

[25] Financial Statements of the Fund for the year ended August 31, 2013 ("**2013 Financial Statements**"), Exhibit "N" to the Ross Affidavit, Motion Record, Tab 2N, p. 386.

[26] 2013 Financial Statements, Motion Record, Tab 2N, p. 440.

financial statements further set out that before these dividends could be paid, the three tests including the Portfolio Test would have to be met.[27]

29. In any event, the ***accounting*** treatment of the payments in the financial statements of the Fund does not define their ***legal*** character. This point was an express holding of Justice Wilton-Siegel in the 2017 trial:

> [385] Second, the concept of a liability for accounting purposes is broader than the concept of a legally enforceable obligation at law. In fact, the accrual of a contingent liability in respect of the IPA Shares demonstrates this reality. There is, therefore, no necessary inference of a legally enforceable obligation to be derived from the accounting treatment of this claim in the financial statements of the Fund.[28]

There is a certain irony that the Former Manager chooses to ignore this express holding from the 2017 trial, while urging this Court to find *res judicata* or issue estoppel in respect of matters from the 2017 trial that were neither addressed nor decided in that trial.

If the Former Manager is entitled to any distribution, it has no priority and ranks equally with the Class A shareholders

30. The IPA Shares are a series of Class C Shares and subject to the terms governing that class of shares.[29] Section 4.1(d) of the Class C Share terms expressly provides:

> 4.1(d) Dissolution – The Class C shares shall rank equally with the Class A shares on any Dissolution Event…[30]

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[27] 2013 Financial Statements, Motion Record, Tab 2N, p. 440.

[28] 2017 Trial Reasons at para. 385.

[29] IPA Share Terms, s. 4.2, Exhibit M to the Ross Affidavit, Motion Record, Tab 2M, p. 377.

[30] Class C Share Terms, s. 4.1(d), Exhibit L to the Ross Affidavit, Motion Record, Tab 2L, p. 370.

31. The Former Manager's interpretation of the IPA Share terms – that it "earns" IPA dividends once and for all as the Fund disposes of various Portfolio Investments and then is entitled to those dividends on a Dissolution Event in priority to the Class A Shareholders – is simply inconsistent with the express language of the Class C Share terms. If the Former Manager is entitled to a payment, section 4.1(d) applies and the payment is *pari passu* with the Class A shareholders.

A final comment on the status of the CCAA stay

32. The CCAA stay currently expires on January 20, 2023. If as a result of the hearing on January 19, 2023 the matter is taken under reserve, another interim extension of the stay and the Crimson Capital contract will be required. Such an interim extension would in no way be problematic, as no one objects to an extension of the stay and the Crimson Capital contract. There is therefore no urgency to render a decision from the bench on January 19, 2023, provided that another interim extension of the stay and the Crimson Capital contract is put in place. The Fund requests such an interim extension if necessary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of January, 2023.

McCarthy Tétrault LLP

Lawyers for GrowthWorks Canadian Fund Ltd.

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Rogers v Rogers Communications Inc.*, 2021 BCSC 2184
2. *Sattva Capital Corp. v. Creston Moly Corp,* 2014 SCC 53
3. *Polar Multi-Strategy Master Fund v. The Stars Group Inc.*, 2018 ONSC 4397
4. *GrowthWorks WV Management Ltd. v. GrowthWorks Canadian Fund Ltd.*, 2018 ONSC 3108

SCHEDULE "B" – LIST OF STATUTES

Nil.

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Proceeding Commenced at Toronto

REPLY FACTUM OF THE APPLICANT (Distribution, Termination and Discharge Order)

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