Court File No. CV-09-8122-00CL

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 PLAN OF COMPROMISE OR ARRANGEMENT OF INDALEX LIMITED, INDALEX HOLDINGS (B.C.) LTD., 6326765 CANADA INC. and NOVAR INC.

Applicants

REPLY BOOK OF AUTHORITIES
OF THE
UNITED STEELWORKERS
(Motion Returnable July 24, 2013)

July 19, 2013

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TAB 1

Tanar Industries Ltd. v. Outokumpu Ecoenergy, Inc., 1999 ABQB 597

Date: 19990728
Action No. 9403-10356

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF EDMONTON

Between:

TANAR INDUSTRIES LTD.

Plaintiff

- and -

OUTOKUMPU ECOENERGY, INC., KVAERNER ENVIROPOWER, INC., WHITECOURT POWER CORP., AMERICAN HOME ASSURANCE COMPANY, and SIMONS-EASTERN CONSULTANTS, INC.

Defendants

[Note: Additional Reasons for Judgment were filed on October 8, 1999; the text is appended to this Judgment.]

Reasons for Judgment of the
Honourable Mr. Justice D. Lee

I. INTRODUCTION

[1] The Defendant American Home Assurance Company ("American Home") applies under Rule 159(2) of the Alberta ***Rules of Court*** for summary judgment dismissing the action brought against it by the Plaintiff Tanar Industries Ltd. ("Tanar"). The Application is made on the grounds that there is no merit to Tanar's claim under a labour and material payment bond issued by American Home to the former Defendant Outokumpu EcoEnergy, Inc. (now known as Kvaerner Enviropower, Inc. and hereinafter referred to as "Kvaerner") nor any merit to Tanar's claim for damages in relation to American Home's alleged failure to investigate and promptly pay Tanar's claim under the Bond.

[2] In the alternative, American Home appeals under Rule 500 the March 1, 1999 decision of Master Quinn ([1999] A.J. No. 207, online: QL (AJ)) striking out paragraphs 20, 22, 23 and 24 of American Home's Statement of Defence and all of its Counterclaim against the Plaintiff Tanar. American Home argues that it is neither clear nor beyond doubt that the impugned pleadings fail to raise defences and a counterclaim against Tanar which ought properly to be tried with Tanar's action pursuant to section 17(3)(a) of the ***Judicature Act***, R.S.A. 1980, c. J-1.

[3] In the further alternative, American Home seeks leave under Rule 132 to amend its Statement of Defence by adding, prior to discovery, new paragraphs 20, 22, 23 and 24 and a new Counterclaim against Tanar as outlined in Schedule "A" to American Home's filed Notice of Motion/Notice of Appeal herein.

II. FACTS

[4] Tanar's action against American Home is for payment of over $7 million which it claims it is owed by Kvaerner for labour and materials which Tanar supplied to Kvaerner during the construction of a power plant in Whitecourt, Alberta. Tanar sues American Home as a claimant under Labour and Material Payment Bond Number 029-890 (the "Bond") issued by American Home as surety for Kvaerner.

[5] The Bond states:

> NOW THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly make payment to all claimants hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject however to the following conditions:
>
> 1. A claimant is defined as any Subcontractor as defined in the Contract, providing labor, material, or both, used or reasonably required for use in the performance of the Contract, ...
>
> 2. The above named Contractor and Surety hereby jointly and severally agree with Owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. ...
>
> 3. No suit or action shall be commenced hereunder by any claimant:
>
> ...

(c) Other than in the court of competent jurisdiction in and for the Province of Alberta in which the project, or any part thereof, is situated.

Provided that notwithstanding the foregoing the Surety shall be liable for all claims of claimants which have been duly established as liens pursuant to the Builders' Lien Act (Alberta).

[6] Tanar in this Action also claims damages for American Home's alleged failure to investigate and promptly pay Tanar's claim against Kvaerner once American Home was notified of that claim. The specific damages sought include interest on the amount owing from Kvaerner from the date of Tanar's claim on the Bond to the date when payment was made, together with solicitor and client costs and disbursements incurred by Tanar in attempting to recover its claim against Kvaerner.

[7] Cooke J. has provided a thorough recital of the facts and of the various proceedings which have occurred in this matter in his Memorandum of Decision dated September 18, 1996 ([1996] A.J. No. 805 (Q.B.), online: QL (AJ); var'd [1999] 2 W.W.R. 82, [1998] A.J. No. 1027(C.A.), online: QL (AJ)).

[8] In summary, Tanar subcontracted to Kvaerner to supply labour and materials for mechanical erection and piping (the "Tanar Subcontract") for a waste-wood fired electrical power and steam generating power plant located in Whitecourt, Alberta (the "Whitecourt Project").

[9] The Tanar Subcontract provided that any controversy between Tanar and Kvaerner was to be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association.

[10] In December, 1993 a dispute arose between Tanar and Kvaerner concerning extra work on the Whitecourt Project. After about March 31, 1994, Kvaerner failed to make any payments to Tanar for work under the Tanar Subcontract or extras thereto and refused to release the holdback funds to Tanar.

[11] On April 19, 1994 Tanar filed a lien against the Whitecourt Project in the amount of $6,297,506.90 plus interest and taxes respecting work done under the Tanar Subcontract. Other liens were filed later in April and in May, 1994 by or on behalf of subcontractors and suppliers of Tanar on the Whitecourt Project (the "Other Lien Claimants").

[12] On April 20, 1994 Tanar notified American Home that it was claiming under the Bond for payment in the amount of its lien (plus other amounts to be determined). American Home alleges that it learned from Kvaerner's broker on April 25, 1994 that Kvaerner could document

inefficiencies in Tanar's work under the Tanar Subcontract and on April 27, 1994 learned from Kvaerner's lawyers that Kvaerner was denying any basis for Tanar's claim.

[13] On about May 10, 1994 Kvaerner gave notice to Tanar that it was terminating the Tanar Subcontract for convenience pursuant to clause 16 thereof, effective May 12, 1994. Kvaerner filed a Demand for Arbitration claiming damages for delay and back charges against Tanar in a total amount of approximately $2.47 MM CND. The Demand for Arbitration named Tanar and Tanar's surety under performance and labour and material payment bonds as respondents in the arbitration proceedings.

[14] Tanar claims not to have received any response from American Home to its claim under the Bond until May 31, 1994. By letter of that date American Home asked Tanar for all pertinent documentation to support its claim so as to facilitate American Home's investigation. American Home alleges that Tanar never responded to this request.

[15] By Order dated June 3, 1994, the liens filed by Tanar and the Other Lien Claimants were discharged from title to the Whitecourt Project on posting of a lien bond issued by American Home in the amount of $7,640,351.73, representing the total amount of liens filed by Tanar and the Other Lien Claimants plus an allowance for costs and interest.

[16] Dea J. directed Tanar to arbitration by Order dated July 13, 1994 (157 A.R. 366, [1994] A.J. No. 556 (Q.B.), online: QL (AJ); aff'd 157 A.R. 363, [1994] A.J. No. 778 (C.A.), online: QL (AJ)). In his Reasons for this decision Dea J. characterized the issues indicated in the Demand for Arbitration as "the determination of the amounts owing as between the two [Tanar and Kvaerner] - all of which arise out of the contract..." (A.J. para. 39). Tanar's lien proceedings were stayed pending the outcome of the arbitration.

[17] American Home became aware of the Demand for Arbitration in or about July, 1994 but took no steps to be made a party thereto.

[18] American Home was served with the Statement of Claim in this Action on May 3, 1995 and with the Amended Statement of Claim on May 10, 1995. On July 18, 1995 Rooke J stayed this Action pending the earlier of the conclusion of the arbitration or March 31, 1996.

[19] The arbitration award was issued February 5, 1996 and clarified by letter dated February 27, 1996. The arbitrators determined that Kvaerner owed Tanar $2.515 MM CND and that Tanar was not entitled to interest. The claims of Kvaerner were dismissed in their entirety. No reasons were given for any of the findings or amounts included in the arbitration award.

[20] On March 26, 1996 Belzil J. lifted the stay granted by Dea J., established a lien fund for Tanar and the Other Lien Claimants in the minimun amount of $2.515 MM CND and directed that Kvaerner pay into the lien fund the amount which the arbitrators determined Kvaerner owed Tanar. Kvaerner did so on April 4, 1996. Belzil J. also reduced the amount of the June 1994 lien bond to $2 MM CND.

[21] Tanar applied to this Court to recognize and enforce the arbitral award. Tanar sought interest on the amount awarded by the arbitrators and attorney fees and costs of the arbitration. Cooke J. issued his Memorandum of Decision on this matter on September 18, 1996 ([1996] A.J. No. 805 (Q.B.), online: QL (AJ)). He recognized the arbitration award as having determined all of the claims and counterclaims made by Kvaerner and Tanar in the arbitration. He declared Tanar's lien valid in the amount of $2.515 MM CND and gave judgment against Kvaerner for that amount. He denied Tanar's claim for interest on its lien or on the judgment but granted Tanar costs of the builder's lien action. Tanar's surety was awarded up to a maximum of $100,000.00 as compensation for its contribution to the fees and disbursements of the arbitration. Cooke J. granted Kvaerner's Rule 129(1)(b) and (d) application, dismissing the within Action as against Kvaerner. American Home's Rule 129 application was dismissed.

[22] Cooke J.'s decision was varied on appeal ([1999] 2 W.W.R. 82, [1998] A.J. No. 1027, online: QB (AJ)). The Court of Appeal confirmed that Tanar was entitled neither to interest on the money paid by Kvaerner nor to costs of the arbitration. The award of costs to Tanar's surety was overturned. American Home's appeal of Cooke J.'s denial of its application to strike Tanar's claim against it under Rule 129(1) was dismissed.

[23] On January 30, 1997 Master Funduk dismissed American Home's application to strike paragraphs 44 to 46 of Tanar's Amended Amended Statement of Claim [those paragraphs dealing with American Home's alleged failure to investigate Tanar's claim]. The April 23, 1997 appeal of this dismissal before Feehan J. was not successful.

[24] By Memorandum of Decision dated March 1, 1999 Master Quinn granted Tanar's application to strike out paragraphs 20, 22, 23 and 24 of American Home's Statement of Defence and all of its Counterclaim ([1999] A.J. No. 207, online: QL (AJ)). In paragraph 20 American Home claimed to be subrogated to Kvaerner's rights against Tanar, including its right to rely on the arbitration award. Paragraph 22 dealt with the matter of solicitor client costs. In paragraph 23 American Home indicated that it had a claim over against Tanar for any money found payable by it to Tanar. In paragraph 24, American Home alleged that the within Action is an abuse of process as being a circuitous attempt by Tanar to avoid the results of the arbitration

III. SUMMARY JUDGMENT

A. Test

[25] Rule 159 (2) of the ***Alberta Rules of Court*** provides that:

> 159(2) A defendant may, after delivering a statement of defence, on the ground that there is no merit to a claim or part of a claim or that the only genuine issue is as to the amount, apply to the court for a judgment on an affidavit sworn by him or some other person who can swear positively to the facts, stating that there is no merit to the whole or part of the claim or that the only genuine issue is as to

> amount and that the deponent knows of no facts that would substantiate the claim or any part of it.
>
> (3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or defendant.

[26] In order to succeed with this application American Home must satisfy me that it is "plain and obvious" that Tanar's action against it cannot succeed (***German v. Major*** (1985), 30 Alta. L.R. (2d) 270 at 276 (C.A.)). The pleadings and evidence on the motion must clearly demonstrate that the Plaintiff's action is bound to fail (***Zebroski v. Jehovah's Witnesses*** (1988), 87 A.R. 229 at 232 (C.A.)).

[27] In ***Boudreault v. Barrett*** (1998), 219 A.R. 67, [1998] A.J. No. 784, online: QL (AJ) our Court of Appeal referred to the following test for a summary judgment application as set out by O'Leary J. (as he then was) in ***Allied-Signal Inc. v. Dome Petroleum Ltd.*** (1991), 81 Alta. L.R. (2d) 307 at 319 (Q.B.), rev'd without comment on the test set out below (1992), 3 Alta. L.R. (3d) 155 (C.A.), [1992] A.J. No. 565, online: QL (AJ):

> Summary judgment may be granted to a defendant under R. 159 if the court is satisfied that there is no merit to the claim, that is, it does not raise a genuine issue for trial. The court must look at the merits of the claim and the defence and determine whether there is an issue requiring a trial. A defendant must show more than a strong likelihood that he will succeed. To justify deciding the matter without a trial the pleadings and evidence on the motion must show that the claim has no reasonable prospect of success. Where the court is satisfied that there are no genuine issues of fact to be tried but that a question of law exists, it may decide the issue or direct its determination in a summary way.

B. Arguments

[28] In the present case, American Home admits that Tanar had status as a "claimant" to bring suit under the Bond "for such sum or sums as may be justly due claimant". However, American Home submits that there was no amount "justly due" Tanar until the same was determined by arbitration. The Applicant argues that this amount was paid in full by Kvaerner on April 4, 1996 at which time its obligation under the Bond to pay Tanar became void. American Home submits that Tanar's claim accordingly has no merit. The Applicant argues that as surety for Kvaerner's obligation to pay Tanar it was privy to and entitled to rely upon the arbitration award and judgments restricting Kvaerner's obligation to pay Tanar for work done under the Tanar Subcontract to $2.515 MM CDN. American Home pleads *res judicata* and abuse of process in terms of the claims made by Tanar in this Action. American Home further argues that Tanar has suffered no damages as a result of not having been paid until April 4, 1996.

[29] American Home relies in this application for summary judgment on the affidavits of Mark Pessolano and Dominique Sena, and on the pleadings, orders and other record of the Court in this Action and in related Action No. 9403 10106 (the action commenced by Kvaerner seeking a direction to proceed to arbitration and to stay the within Action pending the outcome of the arbitration). The arbitration award and clarification letter are attached as schedules to the September 19, 1996 order of Cooke J. entered in Action 9403 10106, which order is attached as an exhibit to the affidavit of Mark Pessolano. Pessolano deposes that he has been the Assistant Vice-President of Surety Bond Claims for American Home since December, 1994. He swears in his affidavit that he has reviewed the Amended Amended Statement of Claim of Tanar and states that there is no merit to Tanar's claims against American Home. He swears that he knows of no facts that would substantiate those claims.

[30] Tanar argues that there are outstanding issues in this Action, including:

(a) what amounts are owed and when these were "justly due" to Tanar on the Whitecourt Project;
(b) what American Home's obligations are under the Bond;
(c) what American Home did or failed to do to investigate Tanar's claim and pay the claim on a timely basis; and
(d) whether American Home is entitled to rely on the Arbitration Award to foreclose its liability under the Bond.

[31] In addition, Tanar submits that American Home's obligations to Tanar arise under the terms of the Bond and are primary obligations separate and apart from any obligations owing to Tanar by Kvaerner under the Tanar Subcontract. Tanar argues that American Home cannot look to Kvaerner's payment pursuant to the arbitration proceedings to preclude its liability for the costs, interest and other damages sustained by Tanar due to American Home's failure to pay under its Bond. In support of its claim Tanar relies on the express wording of the Bond and the fact that neither the Bond nor American Home's obligations under the Bond were put in issue in the arbitration proceedings.

[32] Tanar attacks the affidavits filed by American Home in support of its application for summary judgment, arguing that they are based on information and belief.

C. Analysis

i. Claims Co-extensive

[33] A claimant under a labour and material payment bond need not seek recovery from the contractor nor from any other source before claiming under the bond (***Johns-Manville Canada Inc. v. John Carlo Ltd.*** (1980), 29 O.R. (2d) 592, 113 D.L.R. (3d) 686 (H.C.J.); aff'd (1981), 32 O.R. (2d) 697, 123 D.L.R. (3d) 763 (C.A.); aff'd [1983] 1 S.C.R. 513).

[34] A claimant may proceed against the surety even if the matter is one which will be dealt with by way of arbitration. Our Court of Appeal in ***Kaverit Steel & Crane Ltd. v. Kone Corp.*** (1992), 82 Alta. L.R. (2d) 287, [1992] 3 W.W.R. 716 considered the ***International Commercial Arbitration Act***, S.A. 1986, c. I-6.6. In speaking for the Court Kerans J.A. stated at Alta L.R. pp. 297-98:

> The power to grant or withhold a reference under the ***International Commercial Arbitration Act*** is very limited, and the statute does not permit a decision on the test invoked by the learned chambers judge, which resembles the forum conveniens test. For the purpose of argument, I accept the possibility (albeit I suspect very slim) of two suits at the same time, and even contradictory findings. Nevertheless, that is the method chosen by the parties.

[35] In two separate actions The Sovereign General Insurance Company ("Sovereign") as assignee of the rights of certain suppliers and subcontractors of Tanar sought judgment against American Home on the Bond in issue in these proceedings. The late Roslak J. refused to grant a stay of these actions, holding that they were not derivative of the Kvaerner/Tanar Subcontract in that the outcome of the arbitration would not resolve the claim of Sovereign on the Bond (Unreported (13 September 1994), Edmonton, #9403-10094/95 (Q.B.). In his view, the actions on the Bond arose by virtue of the terms of the Bond itself. His decision was upheld by the Court of Appeal without reasons. At p. 7 of his decision Roslak J. indicated:

> American Home says that the claims against it are derivative. It says that the terms of the American Home Bond clearly specify that its obligation to pay shall be void if Kvaerner promptly makes payment to all claimants. It argues that since the arbitration will determine what Kvaerner is required to pay Tanar, the outcome of the arbitration will effectively resolve Sovereign General's claim on the Bond. If the arbitration determines that Kvaerner owed Tanar nothing, then Kvaerner has paid all that it is required to pay and American Home's obligation under the Bond will be void. If the arbitration determines that Kvaerner is required to pay Tanar, then counsel states that Kvaerner will promptly pay Tanar and American Home's obligation under the Bond will be void. Regardless of the outcome of the arbitration, American Home says its obligation under the Bond will be void; therefore, it says that the claim against it will be effectively resolved by the arbitration.
>
> However, American Home's reasoning rests on an important assumption. That assumption is that Sovereign General's claim against American Home depends upon Sovereign General's claim against Kvaerner which, in turn, depends on Sovereign General's claim against Tanar. In granting the stay of Action #9403-10095 as against Kvaerner, Dea J. stated:
>
> > ... I bear in mind that Sovereign's position in this litigation arises out of and is, I suspect, ultimately dependant upon Tanar's position

> qua Kvaerner. If that is correct then the arbitration award in the Kvaerner/Tanar arbitration will determine in part Sovereign's position.
>
> While I agree that Sovereign General's claim against Kvaerner is likely dependent upon Tanar's position qua Kvaerner, in my view, Sovereign General's claim against American Home does not depend upon its claim against Kvaerner. Sovereign General's claim on the American Home Bond exists apart from its relationship with Kvaerner. Its claim on the Bond exists by virtue of the terms of the Bond itself. [emphasis mine]

[36] Roslak J. determined that it would be inappropriate to stay the actions as against American Home as the issues being determined in the arbitration did not impact on Sovereign's actions against American Home on the Bond. He concluded that there was no serious question to be tried in the Kvaerner/Tanar arbitration which would be relevant to Sovereign's actions on the Bond. At p. 9 of his decision Roslak J. stated:

> It is not an absurdity that Sovereign General may proceed on its claim under the Bond without being entitled to proceed against Kvaerner. The purpose of a payment bond is to guarantee all "claimants" that they will be paid what they are due under the contract. A claimant is entitled to proceed under the Bond precisely because it has not been paid what it is due. The Bond exists to ensure that the claimant will be paid without being required to exhaust other alternatives, such as proceeding against the contractor (or in this case, the sub-contractor) for breach of contract. It would be antithetical to the very purpose of the Bond if a claimant's right to proceed on the bond was suspended pending a determination of its prospects for effectively bringing a fruitful claim under the contract.

[37] The Court of Appeal upheld this decision. Reasons were not provided.

[38] Unlike the situation with Sovereign, the Tanar proceeding is derivative to the extent outlined by Rooke J. in the following exert from his unreported Reasons for Judgment (18 July, 1995) given on the application to stay the within Action as against American Home pending the outcome of the arbitration (p. 9):

> There was an issue raised in the written arguments of counsel as to whether this is a derivative action or not. It is derivative in the practical sense, if I can use that term loosely, in that it is the same issue to be determined. The issue in this case is the same issue in the arbitration and that is whether there is money owing for material and labour from Kvaerner to Tanar. The fact that the contracts between those two on the one hand, and the bond on the other hand, specify different forums does not change the issue. The issue is the same, and so it is derivative in the practical sense, even if it may not be derivative in the legalistic sense in that it

> may be two different forums determining it. No case has been brought to my attention which makes that fine distinction between forums.

And further at p. 11:

> While there is an "independent claim" (if you can use that term) under the terms of the bond itself, to use Justice Roslak's word, that makes no difference in fact because it still comes back to the same issue: "What is owing for material and labour between Tanar and Kvaerner?" ...
>
> On the other hand I find in this case that American Home's duty to pay Tanar is dependent upon Kvaerner's duty to pay Tanar with whom it has a direct contract.

[39] Rooke J. recognized that the issues to be determined in the arbitration between Tanar and Kvaerner were identical to the central issue in the present Action, i.e. the amount "justly" due Tanar under the Tanar Suncontract.

[40] The purpose of a guarantee is to secure the performance of an obligation by the principal. Generally, the surety is discharged from his liability under a guarantee where the principal pays the debt which the surety has guaranteed. Prima facie a guarantor's obligations are co-extensive with those of the principal debtor, although these are separate and distinct obligations. The nature of the undertaking governs, however. Depending upon the terms of the contract, the guarantor's obligation may persist even if the creditor is unable to pursue the debtor. In ***Canada Permanent Trust Co. v. King Art Development Ltd.***, [1984] 4 W.W.R. 587 (Alta. C.A.) Laycraft J.A. stated at p. 644:

> ... I have difficulty in envisioning the contractual term which would hold a surety liable when the debt guaranteed has been paid. The essence of suretyship contracts is that the surety is to see that the obligations between creditor and debtor are satisfied. A surety may remain liable to the creditor despite a procedural bar on recovery by the creditor against the principal (such as a lapse of a limitation period). Where, however, the surety remains liable despite a substantive bar on recovery by the creditor, the contract is not truly one of suretyship, since the liability of the surety is not secondary.

[41] The authors of ***Scott and Reynolds on Surety Bonds*** (Carswell, 1993; 1995 - Rel 1) at p. 11-18.2(4) cite the following cases in support of their contention that the liability of a labour and material payment bond surety is co-extensive with that of its principal: ***Liverpool Mortgage Insurance Co.'s Case***, [1914] 2 Ch. 617, 84 L.J. Ch. 1, 111 L.T. 817 (C.A.); ***United Aluma Glass v. Bratton Corp.***, 8 F. 3d 756 (11th Cir. 1993); ***Aldgate Enterprises Ltd. v. Pacific Filtration Ltd.*** (1990), 44 C.C.L.I. 14 at 25-27 (B.C.S.C.). At p. 11-18.7 they state:

> Generally, in modern Construction Bonds, the principal is made jointly and severally liable with the surety, so that the bond is the primary obligation of the principal obligor at the same time as it is the secondary obligation of the surety.

[42] In ***Comstock Canada v. Laurentian Shield Insurance Co.***, (1993) 123 N.S.R. (2d) 382, 11 C.L.R. (2d) 25, , aff'd (1994), 129 N.S.R. (2d) 115, 13 C.L.R. (2d) 1, (C.A.) a written subcontract had understated the negotiated price between the subcontractor and contractor by $100,000. The general contractor based his bid to the owner on the lower figure. The subcontractor subsequently claimed an amount under the labour and material payment bond that included the extra $100,000. The trial judge found that the surety was not obliged to pay this extra amount as the subcontractor was bound by the subcontract and the surety's liability did not extend beyond the written contract

[43] I do not agree with American Home's argument that no amount was "justly due" Tanar until such time as the arbitration award was made. The arbitration award did not create the right in Tanar to payment but rather determined what amount was due. Nevertheless, I do agree that the liability of American Home for the amount "justly due" is co-extensive with that of Kvaerner. That leads to the question whether Tanar is estopped from disputing the amount found "justly due" by the arbitration.

ii. Issue Estoppel

[44] In ***420093 B.C. Ltd. v. Bank of Montreal*** (1995), 128 D.L.R. (4th) 488, [1995] A.J. No. 862 [hereinafter ***"420093 B.C. Ltd"***] our Court of Appeal examined the issue of *res judicata.* O'Leary J.A., who delivered the judgment of the court, stated at A.J. p. 4:

> Estoppel by res judicata is a rule of evidence. Where a final judicial decision has been pronounced by a court of competent jurisdiction over the parties and the subject-matter "...any party or privy to such litigation, as against any other party or privy thereto, and in the case of a decision in rem, any person whatsoever as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits": Spencer-Bower and Turner, ***The Doctrine of Res Judicata***, (2nd ed.) at p. 9.
>
> The two forms of estoppel by res judicata are described in Sopinka, Lederman and Bryant, ***The Law of Evidence in Canada***, at p. 997. The first is commonly called "issue estoppel" and is defined as follows:
>
> > ... any action or issue which has been litigated and upon which a decision has been rendered cannot be refuted in a subsequent suit between the same parties or their privies. This principle prevents the contradiction of that which was determined in the previous

> litigation, by prohibiting the relitigation of issues already actually addressed.
>
> ...
>
> A prior decision will not raise an estoppel by res judicata, either issue estoppel or cause of action estoppel, unless (i) it was a final decision pronounced by a court of competent jurisdiction over the parties and the subject matter, (ii) the decision was, or involved, a determination of the same issue or cause of action as that sought to be controverted or advanced in the present litigation; and (iii) the parties to the prior judicial proceeding or their privies are the same persons as the parties to the present action or their privies.

[45] At A.J. p. 7 of ***420093 B.C. Ltd., supra*** O'Leary J.A. noted an additional requirement for *res judicata* as identified by the Supreme Court of Canada in ***Angle v. Minister of National Revenue***, [1975] 2 S.C.R. 248. Dickson J, writing for the majority in that case, stated at p. 255 that: "... the question out of which the estoppel is said to arise must have been 'fundamental to the decision arrived at' in the earlier proceedings."

[46] The parties in the present case do not dispute that the decision of the arbitration panel as recognized by the September 19, 1996 Order of Cooke J. was a final decision pronounced by a tribunal with jurisdiction over the matters before it. The Order of Cooke J. recognized that Tanar's claims against Kvaerner in the within Action were determined by the arbitration award. Accordingly, the Action was dismissed as against Kvaerner. The central claim against American Home involves the same issue, i.e. the amount "justly due" Tanar under the Tanar Subcontract. In order for issue estoppel to be established, however, it would appear that there must be mutuality of parties.

iii. Privity

[47] O'Leary J.A. referred in ***420093 B.C. Ltd., supra*** at A.J. p. 6 to the following passage from Spencer-Bower and Turner's text, ***The Doctrine of Res Judicata, supra*** (pp. 209-210), which outlines the criteria necessary for a finding of privity, the third requirement for issue estoppel:

> Privies include any person who succeeds to the rights or liabilities of the party upon his death or insolvency or who is otherwise identified with his or her estate or interests, but it is essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or subject matter.

[48] The appellant debtor in ***420093 B.C. Ltd., supra***, was nominally different than the defendant guarantors in a prior debt action brought by the respondent bank. The court held that privity existed as the defendants in the previous action owned and controlled the appellant company which in effect was their alter ego.

[49] In his text, ***The Law of Guarantee*** (Toronto: Carswell, 1996), K.P. McGuinness states at p. 6.13:

> Although a surety's liability is contingent upon the principal being liable for the debt, default or miscarriage to which the guarantee relates, a judgment or arbitrarial award against the principal in favour of the creditor in respect of that debt, default or miscarriage is not evidence that may be used to establish the liability of the surety. Unless the surety was a party to the proceeding in which that judgment or award was given, it is merely *res inter alios acta* and, should any proceeding be brought against the surety for recovery, he is free (in the absence of an agreement to the contrary) to contest the liability of the principal debtor in that proceeding. The rationale for this rule was explained by James L.J. in ***Ex. p. Young, In re Kitchin*** [[1881] 17 Ch. 668 at 672 (C.A.)]:
>
> > The principal debtor might entirely neglect to defend the surety properly in the arbitration; he might make admissions of various things which would be binding as against him, but which would not, in the absence of agreement, be binding as against the surety.

[50] Despite what McGuinness suggests in this passage, a surety was found to be in privity with its principal in ***Western Integrated Electrical Ltd. v. Laurentian P & C Insurance Co.*** (1993), 8 C.L.R. (2d) 13 (B.C.S.C.). A subcontractor in that case applied for summary judgment against a surety under a labour and material payment bond when it was unable to execute on its judgment against the contractor. The surety attempted to raise the defences raised originally by the contractor. Finch J. held that the surety was completely identified with the interests of the contractor in the earlier action. As there was privity of interest the surety was estopped from advancing the arguments raised which in essence were an attempt to retry the subcontractor's case against the contractor. At p. 18 Finch J. concluded:

> It would be inconsistent with the surety's joint and several obligation under the bond, and unjust, now, to permit it a second opportunity to litigate issues which were either raised and lost, or not raised at all, in the plaintiff's action against Rice.

[51] In the present case, when Tanar failed to pay some of its subcontractors and suppliers on the Whitecourt Project, Sovereign, its surety under a labour and material payment bond, was called upon and did pay claims on the bond. Sovereign was then given assignments of the rights and interests of those subcontractors and suppliers. Sovereign proceeded to register a statement of lien and commenced an action to enforce its lien rights as assignee. Kvaerner applied for an order to refer the matter to arbitration and for a stay of the action. This application was heard by Dea J. who concluded that Sovereign was not required to submit to arbitration as it was not a party to the arbitration agreement ((1994), 21 Alta. L.R. (3d) 182 (Q.B.), [1994] A.J. No. 556, online: QL (AJ)). At Alta. L.R. pp. 192-193 of his decision he stated:

Sovereign has not agreed to arbitrate its differences with Kvaerner and therefore ought not to be compelled to arbitrate those differences.

Sovereign argues that the reference in the bonds to "incorporating by reference" the contract between Kvaerner and Tanar does not and cannot by any ordinary application of the English language disclose or be interpreted as an agreement between Kvaerner and Sovereign to submit issues between them to arbitration. It may mean, and indeed probably does mean, that an arbitration award on issues between Kvaerner and Tanar will bind Sovereign as to the amounts found by the arbitrators. Little authority was presented on the principal point but the comments in ***Scott and Reynolds on Surety Bonds*** in para. 7.7 are compelling:

> 7.7 Arbitration Provisions
>
> If the bonded contract contains an arbitration clause applicable between the principal and the obligee, is the surety company bound by that arbitration clause? In the absence of a specific arbitration provision in the bond itself the surety is not bound because the bonded contract is incorporated by reference into the bond. It does not purport to bind the surety, it simply binds the principal and obligee. The bonding company, though, might well decide to take part in an arbitration procedure if given notice and particularly if the principal's ability to pay an adverse award is in doubt. [emphasis mine]

[52] The appeal of this decision was dismissed ((1994),157 A.R. 363, [1994] A.J. No. 778, online: QL (AJ) (C.A.), the Court indicating at A.J. p. 3 of its Memorandum of Judgment:

> I just want to add that we do not understand that the learned chambers judge has said that Sovereign is in any way in law bound by the results of the arbitration. That is a matter that awaits determination another day.

[53] In his July 18, 1995 Reasons for granting a stay of the within Action pending the outcome of the arbitration, Rooke J. stated at p. 3:

> That arbitration will determine a number of issues, some of which are not in dispute in this litigation, but one in particular which is in dispute and that is whether there are monies owing by Kvaerner to Tanar for material and labour in the construction. There may be offsetting claims that are not relevant to this litigation in the within action, but that is a matter that will be determined. That action will be binding between Tanar and Kvaerner, but that result may not be binding on either Tanar or American Homes in this case...[emphasis mine]

[54] There may be some doubt as to whether the arbitration award in the present case would be binding upon American Home as a privy of Kvaerner. However, that issue is not before the Court as American Home does not question the arbitration award. The issue is whether Tanar is bound by the award in its action against American Home in relation to the Bond.

iv. Abuse of Process

[55] A party may be prevented from relitigating an issue even in situations where privity is not established and accordingly issue estoppel not available, At A.J. p. 13 of the court's judgment in ***420093 B.C. Ltd. v. Bank of Montreal, supra*** O'Leary J.A. commented as follows:

> An attempt to relitigate issues already decided or deemed to have been decided may be found an abuse of process and barred in circumstances where estoppel by res judicata is not available, for example where only one of the parties to the later action was a party to the earlier one: ***J.H. Rayner (Mincing Lane) Ltd. v. Bank Fur Gemeinwirtschaft A.G.***, [1983] 1 Lloyd's Rep. 462 (C.A.), ***Nigro v. Agnew-Surpass Shoe Stores Ltd., Shankman v. Agnew-Surpass Shoe Stores Ltd.*** (1977), O.R. (2d) 215, 82 D.L.R. (3d) 302, app. dismissed 18 O.R. (2d) 741n, 84 D.L.R. (3d) 256n (C.A.), ***Saskatoon Credit Union Ltd. v. Central Parl Ent. Ltd.*** (1988), 22 B.C.L.R. (2d) 89 (B.C.S.C.).

[56] He continued on the same page:

> In ***Solomon v. Smith***, [1988] 1 W.W.R. the Manitoba Court of Appeal struck out an action on the ground that it was an abuse of process in circumstances where estoppel by res judicata was not applicable. In language apt to the case at Bar, Lyon J.A. said at p. 421:
>
> > I agree... that a plea of issue estoppel is not available. However to permit the statement of claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast, institutionalized rules such as those which attach to the plea of issue estoppel. By encouraging the determination of each case on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as the proper administration of justice can best be avoided... we must be vigilant to ensure that the system does not become unnecessarily clogged with repetitious litigation of the kind here attempted. There should be an end to this litigation. To allow the plaintiff to retry the issue of misrepresentation would be a classic example of abuse of process - a waste of time and resources of litigants and the court and an erosion of the principle of finality so crucial to the proper administration of justice.

[57] In ***Roenisch v. Roenisch*** (1991), 85 D.L.R.(4th) 540, [1991] A.J. No. 1023 (Q.B.) the respondent sought a declaration that his father held a policy of insurance in trust for him. The father defended by denying the trust although the court in a previous matrimonial property proceeding between the father and mother had found that there was a trust. The respondent applied for summary judgment on the basis that the issue was *res judicata*. Given the current development of the doctrine of abuse of process Mason J. declined to rule on the respondent's argument that issue estoppel was unavailable for lack of mutuality . Mason J. referred at A.J. p. 5 to the following remarks of McEachern C.J.S.C. in ***Saskatoon Credit Union, Ltd. v. Central Park Enterprises Ltd.*** (1988), 47 D.L.R. (4th) 431 at 438, 22 B.C.L.R. (2d) 89:

> Without deciding anything about the question of mutuality, it is my conclusion that, subject to the exceptions I shall mention in a moment, no one can relitigate a cause of action or an issue that has previously been decided against him in the same court or in any equivalent court having jurisdiction in the matter where he has or could have participated in the previous proceedings unless some overriding question of fairness requires a rehearing.
>
> The exceptions to the foregoing include fraud or other misconduct in the earlier proceedings or the discovery of decisive fresh evidence which could not have been adduced at the earlier proceeding by the exercise of reasonable diligence: ***McIlkenny, supra*** [***McIlkenny v. Chief Constable of West Midlands Police Force***, [1980] 2 All E.R. 227 (C.A.)], at p. 703.

[58] As indicated in this passage, fraud, collusion, misconduct and fresh decisive evidence unascertainable at the time of the first proceeding by due diligence may preclude a finding of abuse of process. None of these are alleged by Tanar in the present case. If they had been, it would have been incumbent upon Tanar to raise these issues when Kvaerner applied to have the claim against it struck out.

[59] Tanar argues that I am precluded on this summary judgment application from finding an abuse of process in terms of its claim for judgment against American Home under the Bond as this issue itself is *res judicata*.

[60] The issue of abuse of process was raised by American Home both in its Statement of Defence and in its Notices of Motion to strike Tanar's claim under Rule 129(1) and for summary judgment under Rule 159(2). Cooke J. did not grant American Home's Rule 129(1) application, presumably because American Home did not satisfy the onus on it to establish beyond a doubt that it had a complete defence to the whole of Tanar's claim against it.

[61] On appeal of Cooke J.'s dismissal of American Home's Rule 129(1) application ((1998), 223 A.R. 348 at 352, [1998] A.J. No. 1027), the Court of Appeal stated that:

> ... when a Chambers judge dismisses a motion to strike out a statement of claim, an appellate court should reverse him or her only if it is obvious without elaborate argument that there is no cause of action.
>
> Applying the standard of review to the case before us, it was abundantly clear from the argument presented that there are issues that need to be determined at trial. In light of these issues, we cannot say that the pleadings are vexatious or an abuse of process within the meaning of paragraphs (b) and (d) of Rule 129(1). Nor, in our view, can it be said that the pleadings are somehow inadequate ...
>
> We are dealing here with a number of statements of claim, and the strengths of the parties under each may vary. The appellants have failed to satisfy us that this is an appropriate case for us to intervene with the chambers judge's exercise of discretion.

[62] However, the Court of Appeal also emphasized that there is a distinction between applications brought under Rule 129(1) and those brought under Rule 159(2). The test to be applied differs depending upon the Rule which is invoked.

[63] In ***Excelsior Life Insurance Co. v. Zurich Investments Ltd.*** (1988), 59 Alta. L.R. (2d) 209, [1988] A.J. No. 421 (C.A.) the plaintiff commenced an action upon a mortgage and guarantee of that mortgage. Certain of the defendants moved to strike out the statement of claim under Rule 129(1) on the basis of factual and legal arguments. At A.J. pp. 8-9 Côté J.A., who delivered the judgment of the court, expressed the following view:

> ...it is highly undesirable to short-circuit Rule 129(2) and to test the validity of the plaintiff's legal argument under the guise of trying to strike out his Statement of Claim under R. 129(1)(b) or (c), using some evidence, even if that is possible.
>
> In ***German v. Major*** [(1985) 62 A.R. 2 (C.A.)] this Court says (p.4 para.8):
>
> > "A plaintiff could and perhaps should move for summary judgment if faced with such a defence: in Alberta, however, a defendant cannot. He must rely on Rule 129."
>
> Rule 159(2) by amendment is now open to a Defendant. It is quoted above. In our view Rules 159 and 162 are much more suitable forums for this type of argument, if anything short of trial is suitable. That is doubly so because on a summary judgment motion both parties would know that facts were relevant on the merits and could adduce whatever facts they wished. There must be good reason for Rule 159's requirement that the party moving file a certain type of affidavit. The court would soon see if the material facts were admitted or disputed.

[64] In ***Prete v. Ontario (Attorney-General)*** (1993), 110 D.L.R. (4th) 94 at 104 leave to appeal ref'd 110 D.L.R. (4th) vii, Carthy J.A. of the Ontario Court of Appeal also distinguished between the tests on an application to strike pleadings and one for summary judgment, stating for the majority:

> In Ontario we have Rule 20 providing for summary judgment after delivery of the statement of defence and supported by affidavits of persons having knowledge of the contested facts. Judgment may be granted against the plaintiff if it is demonstrated that there is no genuine issue for trial. There is no difference that I can see between the Rule 20 test of no genuine issue for trial and the test suggested by Weiler J.A. of "no chance of success" or "plain and obvious that the action cannot succeed". Applying those tests under Rule 21 [application to strike pleading] to a pleading undermines the purpose of Rule 20, and also avoids the safeguards under Rule 20 of having sworn testimony from both sides to assure the court that there truly is no issue for trial.

[65] As the tests under Rules 129(1) and 159(2) differ and as these rules were intended to serve different functions, I am of the opinion that the remarks of the Court of Appeal on the Rule 129(1) application have not rendered the issue of abuse of process *res judicata.*

D. Summary Judgment Conclusion

[66] In ***Suncor Inc. v. Canada Wire & Cable Ltd.***(1993), 7 Alta. L.R. (3d) 182, [1993] A.J. No. 4 at pp. 8-9, online: QL (AJ) Forsyth J. of this Court observed in relation to Rule 159:

> ... where analysis shows that the law is settled and that the conclusions are inevitable in similar cases, summary judgment should issue. A Plaintiff cannot defend this type of application simply by arguing that the matter is complex and therefore should not be decided on a Chambers application if, in fact, there is no dispute on the relevant evidence and the issues are capable of only one resolution, no matter how complex. On the other hand, if there are triable issues of fact or law, the matter should go to trial.

[67] In the present case, Tanar referred in its written argument to the recital of facts contained in the Memorandum of Decision of Cooke J. dated September 18, 1996 ([1996] A.J. No. 805). There is no apparent dispute between the parties with respect to the relevant facts pertaining to the arbitration and payment of the arbitration award by Kvaerner.

[68] In my view, it is clear that American Home's liability to Tanar under the Bond ended when payment was made by Kvaerner. It would be an abuse of process to relitigate the issue of the amount owing by Kvaerner to Tanar. That issue was decided by the arbitration panel. The obligation of American Home is co-extensive with that of Kvaerner. Tanar's claim for judgment against American Home is dismissed.

[69] The remaining dispute in essence centres on the degree to which American Home was obliged to investigate the claim made by Tanar and, to the extent that there was a breach of the duty to investigate, the amount of resulting damages, if any, suffered by Tanar. I am not prepared to grant American Home's summary judgment application as it relates to Tanar's claim for damages. That claim involves facts which are in dispute. The evidence presented by American Home does not satisfy the burden imposed on the applicant to clearly establish that Tanar's claim for damages is bound to fail.

IV. APPEAL OF MASTER QUINN'S ORDER

[70] In the alternative to its Rule 159(2) application, American Home appeals the Order of Master Quinn striking out its Counterclaim and certain paragraphs of its Statement of Defence. In the event that I am wrong in terms of the manner in which I have disposed of the Rule 159(2) application, I will address this appeal. In three of the impugned paragraphs American Home claims to be subrogated to certain of the rights of Kvaerner. Tanar argues that American Home is not subrogated until such time as it makes a payment under the Bond. American Home responds that the payment aspect of subrogation does not apply to a bond surety seeking to raise as a defence their principal's rights against a plaintiff creditor.

[71] At A.J. p. 2 of his Memorandum of Decision, Master Quinn states:

> If Tanar obtains payment from American Home in an amount greater than what was really owed by Kvaerner to Tanar, American Home as a subrogee of Kvaerner should be entitled to recover from Tanar the amount Tanar received in excess of what it was entitled to. But in order to be in a position to make such a claim American Home must be a subrogee of Kvaerner, and it is not until it pays Tanar.

[72] American Home claims in its Statement of Defence and Counterclaim to be subrogated to certain of the rights of Kvaerner. Use of the term "subrogated" simply appears to be an unfortunate choice of words. As I read those paragraphs of the Statement of Defence and Counterclaim that were struck, American Home is merely asserting that as a surety it is entitled to raise certain defences/claims/set-off which its principal would be entitled to raise. In the result, it is not clear and beyond doubt that these pleadings fail to raise triable defences and a counterclaim. Only in the clearest case should the court strike out a pleading (***Cerny v. Canadian Industries Limited*** [1972] 6 W.W.R. 88 (Alta. S.C.A.D.).

[73] Prior to being struck out, paragraph 24 of the Statement of Defence read:

> Finally, in the circumstances, the within action is a circuitous attempt by Tanar to avoid the binding results of the arbitration which it agreed to in clause 11 of the Tanar Subcontract Tanar's action [sic] and should be dismissed as an abuse of the process of this court.

[74] The defence raised by this paragraph does not depend on any subrogated right on the part of American Home. With respect, I do not agree with the learned Master that there is anything objectionable about this paragraph.

[75] Accordingly, an Order is granted vacating and setting aside the Order of Master Quinn dated March 1, 1999 and dismissing the Plaintiff's application to strike the Counterclaim and paragraphs 20, 22, 23 and 24 of the Statement of Defence.

V. APPLICATION TO AMEND

[76] In the further alternative, American Home has applied under Rule 132 to amend its Statement of Defence and Counterclaim so as to remove reference therein to the term "subrogee" and in its place to plead American Home's right as surety to rely on the defences available to Kvaerner. There is no prejudice to the Plaintiff if American Home is allowed to amend its Statement of Defence and Counterclaim as requested in its alternate application. As the amendments more appropriately express the defences/claim raised by American Home, they will be allowed.

VI. RESULTS

[77] In conclusion, I do not accept American Home's argument that there was nothing "justly due" Tanar until the arbitration panel made its award. However, I am of the view that American Home's liability under the Bond to pay the amount "justly due" Tanar under the Tanar Subcontract ended upon payment by Kvaerner as American Home's liability was co-extensive with that of its principal. It is an abuse of process for Tanar to attempt to relitigate this issue. Accordingly, Tanar's claim for judgment is dismissed. Tanar's claim for damages involves facts which are in dispute. The evidence presented by American Home on this Application has not convinced me that the claim for damages is bound to fail. As a result, I am not prepared to grant American Home summary judgment in terms of this aspect of the action.

[78] In the event that I have erred in my determination of the Rule 159(2) application, I am prepared to grant the appeal of Master Quinn's Order of March 1, 1999 and to allow the amendments to the Statement of Defence and Counterclaim sought by American Home.

[79] Given that the parties have had mixed success of the application and appeal herein, they are to bear their own costs of the same.

DATED At the City of Edmonton
this 28th day of July 1999

J.C.Q.B.A.

Counsel:

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Mr. David C. Rolf
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Supplementary Reasons for Judgment
of the
Honourable Mr. Justice D. Lee

[1] American Home and Tanar have been unable to agree on a form of Order arising from my Reasons for Judgment in this matter issued on July 28, 1999 and reported at [1999] A.J. 919. Accordingly, they have requested that I settle the minutes of this Order. Counsel for the parties have provided me with forms of Order for my consideration together with submissions in relation to these forms of Order.

[2] The form of Order which I have issued indicates that American Home has succeeded in its appeal before me under Rule 500 and its Rule 123 application to amend its pleadings. Counsel for the Plaintiff argues that these forms of relief should be identified in the Order as in the alternative to the decisions which I have rendered on American Home's application for summary judgment. Indeed, American Home's Notice of Motion was framed as a Rule 159(2) application for summary judgment and, in the alternative a Rule 500 appeal from the Master's Order and, in the alternative a Rule 132 application for leave to amend its pleadings.

[3] In my view, the Plaintiff was advancing two claims against American Home. One was for judgment under the Bond. The second was for damages for breach of American Home's duty to investigate Tanar's claim properly or at all and for its failure to pay the claim on a timely basis. The defences dealt with in paragraphs 20, 22, 23 and 24 of the Statement of Defence and the matters raised in the Counterclaim relate to the Plaintiff's claim for judgment under the Bond. They would be relevant only if the Plaintiff's claim for judgment had not been dismissed. For purposes of defending the Plaintiff's claim for damages the Statement of Defence need not necessarily be amended. Nor is the Counterclaim relevant given that the Plaintiff's claim for judgment has been dismissed. However, in the event that I had erred in the manner in which I dealt with the summary judgment application, I chose to deal with the appeal and Rule 123 application. The Defendant therefore is at liberty to amend its Statement of Defence and Counterclaim should it elect to do so.

[4] American Home submits that the Order should refer to the precise paragraphs in the Amended Amended Statement of Claim which raise the claim for damages as this would ensure that it knows the case remaining against it. With respect, I do not see the need to make specific reference in the Order to paragraphs 44 to 46 of Tanar's Amended Amended Statement of Claim, although these paragraphs do speak to the damage claim. American Home's concern seems to be that Tanar may attempt to raise an additional claim for breach of some unspecified obligation under the Bond. However, clearly my summary judgment ruling applies to what has already been pleaded by the Plaintiff.

[5] The Plaintiff sought to have a paragraph added to the Order which indicates that Tanar is barred in its action against American Home from disputing or relitigating the issue as to the amount owed by Kvaerner to Tanar on the Whitecourt Project. In my view, the only paragraph needed in relation to this issue is the one granting American Home summary judgment dismissing the Plaintiff's claim against it for judgment under the Bond. My Reasons for Judgment have been issued. Reference may be made to those Reasons for my rationale in granting this aspect of the summary judgment application.

[6] As pointed out by American Home, I did not deal in my original Reasons with the costs of Tanar's application before Master Quinn to strike out paragraphs 20, 22, 23 and 24 of American Home's Statement of Defence. Given that American Home has been successful in its appeal of the Order of Master Quinn, I am awarding it costs of that application.

[7] The parties also were unable to agree on the preamble to the Order, specifically the affidavits and documents that should be referred to in the preamble. To avoid further problems, I have prepared and signed my own form of Order which I attach hereto as Schedule One.

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And in the Matter of a Plan of Compromise or Arrangement of Indalex Limited, Indalex Holdings (B.C.) Ltd., 6326765 Canada Inc. and Novar Inc.

Court File No. CV-09-8122-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

REPLY BOOK OF AUTHORITIES OF THE UNITED STEELWORKERS (Motion Returnable July 24, 2013)

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