CITATION: Moroccanoil Inc. v. Conforti Holdings Limited, 2026 ONSC 1360
COURT FILE NO.: BK-20-02675583-0031
DATE: 20260306

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

IN THE MATTER OF THE PROPOSAL TO CREDITORS OF CONFORTI HOLDINGS LIMITED, A CORPORATION INCORPORATED UNDER THE ONTARIO BUSINESS CORPORATIONS ACT, R.S.O. 1990, C. B.16

RE: Moroccanoil Inc., Applicant

AND:

Conforti Holdings Limited, Respondent

BEFORE: Cavanagh J.

COUNSEL: *Clifton Prophet and Thomas Gertner,* for the Applicant

James Zibarras and Erin Craddock, for the Respondent

HEARD: January 8, 2026

ENDORSEMENT

Introduction

[1] Morrocanoil, Inc. ("MO") brought a motion by way of appeal from the decision of Crowe Soberman Inc ., the proposal trustee appointed in a proceeding commenced by Conforti Holdings Limited ("CHL") under the *Bankruptcy and Insolvency Act*, (the "Proposal Trustee"). In this proceeding, MO filed a Proof of Claim against the estate of CHL. The Proposal Trustee disallowed MO's Proof of Claim. On this appeal, MO asks for an order declaring that its claim against the estate of CHL as set out in its Proof of Claim be allowed in full as a valid and subsisting claim.

[2] In MO's Proof of Claim, it claims that CHL breached a Settlement Agreement with an effective date of July 15, 2013 made between MO, CHL (then named Salon Distribution Inc.), and CHL's principal, Anthony Conforti, that was made to resolve certain litigation. The Settlement Agreement required CHL to purchase a specified value of MO products over a limited period of time and at a premium above the then-current salon prices. The Settlement Agreement includes provisions with respect to counterfeiting and diversion of MO products.

[3] Argument of this appeal took place on February 11, 12, and 13, 2025. On June 9, 2025, I released an endorsement in which I concluded that the Proposal Trustee made a palpable and overriding error in finding that MO had failed to prove that 9 MO products and one box alleged to contain 6 MO products (that were found at the Suki store in Macau at the time of four visits to the Suki store by personnel directed by MO) were parts of four orders place by CHL with Venus

Beauty Supplies Inc. ("Venus"), CHL's distributor, that were sold and shipped by Venus to CHL. I concluded that MO did prove this fact.

[4] In my endorsement, I wrote that on the hearing of the appeal, I did not receive submissions on what, if any, inferences should be drawn from this factual circumstance. I requested further submissions on this question, specifically, whether an inference should be drawn: (i) that the box associated with order #406809 found at the Suki store contained 6 products under this order, (ii) that CHL dealt with the Suki store in diverted products in breach of the Settlement Agreement , and (iii) concerning the extent of such dealing (arising from the factual circumstance that products shipped to CHL were found for sale at the Suki store).

[5] I received written and oral submissions as requested. For the reasons given in my previous endorsement and the reasons given in this endorsement, MO's appeal is allowed.

[6] The background facts are set out in my previous endorsement.

Analysis

Objection by MO to new issue raised by CHL as part of its supplementary submissions

[7] In response to my earlier endorsement, a timetable was approved for the exchange of additional written submissions and a hearing for oral submissions was set.

[8] In its written submissions, CHL made the submission that under the Settlement Agreement, properly interpreted, CHL did not agree to be responsible for diversion or counterfeiting of MO's product generally, and agreed only not to deal in diverted or counterfeit products that it received from third parties. This submission was not requested in my endorsement.

[9] MO objected to having this new argument being raised at this stage of the appeal on the basis that (i) it is unrelated to the questions concerning inferences as requested in my endorsement; (ii) CHL had an opportunity to raise any issue in respect of interpretation of the Settlement Agreement during the three day hearing of this appeal, and chose not to do so, (iii) the position advanced by CHL contradicts findings made by the Proposal Trustee in its Notice of Disallowance, and (iv) CHL's submission contradicts its submissions made during the main hearing.

[10] At the hearing, I ruled that the new argument raised by counsel for CHL concerning the interpretation to be given to the Settlement Agreement was not properly raised as part of the limited and specific request for additional submissions for this appeal. I declined to hear argument on this issue or to make an adjudication of its merit.

Legal principles concerning inferences to be drawn from circumstantial evidence

[11] In *Borrelli v. Chan*, 2018 ONSC 1429, Penny J. provided a summary of the applicable legal principles with respect to inferences to be drawn from circumstantial evidence:

> [159] I agree with the defendant that the plaintiff's case is largely one of circumstantial evidence, which requires inferences to be drawn. This is because (unlike direct evidence, where the only issue is whether the trier of fact accepts the evidence as true) there is an "inferential gap" between the facts proved and the facts

sought to be inferred. There is nothing wrong with circumstantial evidence. It is perfectly admissible, but the inference drawing process is conceptually different and that difference must be recognized.

[160] Permissible inferences can only be based upon proven facts. Even then, only inferences which logically and reasonably flow from proven facts are permissible inferences. An inference which does not proceed logically and reasonably from proven facts is speculation.

[161] The line between a reasonable inference and impermissible speculation is drawn by the laws of logic. If there is logical probability that an inferred fact follows from proven evidence, the trier of fact is given the opportunity to draw the conclusion. If there is a reasonable probability that the conclusion flows from the proven fact, the inference may be drawn.

[162] Ultimately, however, the court must act on such a preponderance of evidence as to show whether the conclusion the plaintiff seeks to establish is substantially the most probable of the possible views of the facts, *Clarke v. The King*, (1921) 1921 CanLII 603 (SCC), 61 S.C.R. 608 at para. 34.

[163] The defendant suggests that a higher onus exists in cases involving allegations of fraud. I do not agree. As I discussed in *Indcondo Building Corporation v. Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160, at para. 59, the Supreme Court of Canada decision in *C. (R.) v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41 established that in civil matters there is only one standard of proof. Although some cases involve more serious consequences by virtue of the nature of the allegations made in them, the seriousness of the allegations does not alter the standard of proof in civil cases. There is only one standard of proof in all civil cases and that standard is "proof on a balance of probabilities."

Whether an inference should be drawn that the box associated with order #406809 was full (contained 6 packaged MO products) when it was received at the Suki store

[12] MO submits that I should find that the box found at the Suki store contained 6 MO products (that is, it was a full box) when it was transferred to and received by the Suki store.

[13] CHL submits that no inference should be drawn that the box contained 6 MO products. CHL submits that MO failed to provide evidence as to whether the box contained any products. CHL submits that in the absence of such evidence, any inference that the box contained MO products when it was received by the Suki store would be speculation and conjecture and would require the court to engage in guesswork.

[14] CHL also relies on evidence from Easy Cheuk, the owner of the Suki store. Mr. Cheuk gave evidence that he used empty boxes in his store to fill up the space. His evidence is that he would not keep so much inventory, and he asked people to provide him with empty boxes to make the store layout look good. Mr. Cheuk also gave evidence that the Suki store resells Canadian MO products as do other stores in Macau. He acknowledged that he also received full boxes of MO product at the Suki store. He deposed that he does not deal with Canadian suppliers and does not know CHL, Venus, or Mr. Conforti.

[15] The Proposal Trustee addressed Mr. Cheuk's evidence in its Reasons, at pp. 38-40. The Proposal Trustee considered the reliability and weight of Mr. Cheuk's evidence to be unclear, and noted that a factor tending to undermine his testimony is that he "arguably seems to be of questionable commercial morality, at least by Canadian standards". The Proposal Trustee did not consider Mr. Cheuk's testimony to be material.

[16] MO submits that there is direct evidence to support the finding that the box contained MO products when it was transferred to and received by the Suki store. MO relies on evidence from the Declaration of Manami Sakamoto, a legal analyst for MO. In her declaration, Ms. Sakamoto states that she visited the Suki store in Macau on January 15, 2015. She states that while at the Suki store that day, she took photographs which depict MO products she saw on display. Ms. Sakamoto states that she also took a photograph of a case code from a case of Morrocanoil Hydrating Mask, 250 ml., a copy of which she attached to her declaration as Exhibit G. She states that the case code reads: 4344067. Six product tracking codes associated with this order are shown in Trackback reports appended as exhibits to Ms. Sakamoto's declaration as associated with an order by Venus.

[17] The photograph at Exhibit G shows an open box with a tracking code on one flap of the box bearing code number 4344067. Inside the box shown in the photograph is what appears to be a packaged product with the letters "MAS" visible. In the photograph, the edge of the box flap obscures any text after these letters. MO submits that the visible letters "MAS" are the first three letters of the work "MASK" which appears on the product in the box. This is a logical and reasonable inference.

[18] When Ms. Sakamoto was cross-examined on her declaration in the New Jersey litigation, she was asked about the photograph at Exhibit G of her affidavit. She answered that this box was on a shelf in the store and she saw the product inside the box. She answered that there is product shown on the picture. She was asked whether she looked inside the box and answered that she did.

[19] MO submits that this direct evidence from Ms. Sakamoto establishes that the box contained MO products when it was transferred to and received at the Suki store.

[20] MO also relies on the circumstantial evidence that the box identified as being at the Suki store was part of an order placed by CHL with Venus that was supplied by Venus to CHL. MO submits that the box would have been full when it was shipped by Venus to CHL. MO submits that this fact logically and reasonably supports the inference that the box was full and contained 6 MO products when it was received at the Suki store.

[21] MO submits that there is no evidence that would justify an inference that an empty box that was previously in the possession of CHL, after the products inside the box were removed, would be transferred to and received at the Suki store. MO submits that there is no evidence that a "jobber" or other person was collecting empty Morrocanoil boxes in Toronto and shipping them to Asia.

[22] Ms. Sakamoto's direct evidence that she saw the box at the Suki store, looked inside it, and saw MO product in the box is supported by the photograph she took and appended as Exhibit G to her declaration. I accept this evidence. Even apart from this direct evidence, I find that the presence of the box at the Suki store which had been supplied, full, to CHL is a fact that logically and reasonably permits an inference that the box contained 6 MO products when it was transferred to

and received by the Suki store. This inference is substantially more probable than any alternative view of the facts. I draw this inference.

[23] Alternative views of the facts, involving a shipment of an empty box from Canada to Asia, or a shipment of a full box to another destination in Asia and supply of an empty box to the Suki store, are not supported by proven facts and are speculative. I note that there is no evidence that any MO products that were supplied to CHL by Venus were found at grey market retailers in Macau, other than the Suki store. The evidence from Mr. Cheuk that he received some empty boxes that were on display at the Suki store, even if accepted, does not detract from the inference I draw.

[24] I find that the box associated with order #406809 found at the Suki store was full and contained 6 MO products when it was transferred to and received by the Suki store.

Whether an inference should be drawn that CHL dealt with the Suki store in diverted products in breach of the Settlement Agreement

[25] The Settlement Agreement provides, at section 5:

> As used in this Agreement, the terms "divert", or "diverted" or "diversion" shall mean or refer to Moroccanoil Products which have been sold or transferred to persons or entities outside of Moroccanoil's "salon only" channel of distribution, typically for sale in unauthorized "brick and mortar" retail locations or Internet websites. Defendants, and each of them, represent and warrant that they shall never directly or indirectly, knowingly or unknowingly, manufacture, purchase, acquire, store, transport, sell, deliver, market, advertise, hypothecate, broker or otherwise deal in ("Deal In") any diverted or counterfeit products bearing any Moroccanoil Trademarks or Moroccanoil Trade Dress anywhere in the world.

[26] Under section 2 of the Settlement Agreement, CHL is authorized to purchase MO products for “professional use” in Qualifying Salons. The Settlement Agreement provides that “[a]s used in this Agreement, ‘professional use’ means that the Moroccanoil Products purchased will be used only for professional services performed in a Qualifying Salon or for sale to individual customers of the Qualifying Salons in amounts consistent with such customer's personal and family use, in transactions made on the floor of the Qualifying Salon that are taxed by the governing retail taxing authority”.

[27] MO submits that the only reasonable inference that can be drawn based on the June 9, 2025 endorsement and the terms of the Settlement Agreement is that diversion has occurred in breach of the Settlement Agreement. MO submits that (i) in order for products previously shipped by Venus to CHL to have ended up at the Suki store and made available there for sale, they must have been transferred or sold to the Suki store, either directly or indirectly by CHL, or someone who acquired these products from CHL outside of the authorized salon distribution channel; and (ii) the Suki store is an unauthorized “brick and mortar” retail store within the meaning of this term in section 5 of the Settlement Agreement that is not an authorized distributor of MO products.

[28] MO submits that CHL has provided no plausible explanation as to how MO products that were supplied to it by Venus ended up at the Suki store.

[29] CHL submits that MO has failed to establish a breach of the Settlement Agreement. CHL submits that the presence of MO products that had been supplied by Venus to CHL is not proof of a breach of the Settlement Agreement in circumstances where CHL did not undertake to police all possible ways an MO bottle could end up at a store in Macau.

[30] CHL submits that there are no records, such as purchase orders, invoices, receipts, payment records, shipping records, or correspondence showing any sale or transfer by CHL to the Suki store of MO products. CHL points to evidence from Mr. Conforti, Floriana Ottaviana (CHL's office coordinator), and Mr. Cheuk (the owner of the Suki store) that there was no business relationship between CHL and the Suki store. Mr. Cheuk's evidence was that he did not know of CHL or Mr. Conforti, he did not purchase products directly from Canada, none of his suppliers had any relationship to CHL, and payments for MO products he purchased were between two banks in Hong Kong. CHL points to evidence from representatives of Venus that they had no knowledge or evidence of CHL diverting products to Macau.

[31] The fact that there are no business records showing legitimate sales of MO products by CHL to the Suki store, and that the representatives of CHL and the Suki store do not know each other, is not evidence that logically and reasonably permits an inference that the MO products that had been supplied to CHL and were found at the Suki store did not find their way there through a breach of the Settlement Agreement. If CHL dealt in diverted MO products, in contravention of the Settlement Agreement, one would not expect to find business records showing legitimate sales. It would not be unexpected that intermediaries may have been used in connection with any dealings by CHL in diverted product.

[32] CHL submits that the evidence shows that the following are more likely ways that the MO products found at the Suki store could have ended up there:

(a) Evidence that legitimate means (purchases of MO products by third parties who then shipped the product overseas) could explain the presence of MO products at the Suki store;

(b) Evidence that "jobbers" exist, that is, intermediaries who buy products in bulk and resell them to other retailers. CHL notes that at the material times, it had 46 salons in the GTA, many of which were located in close proximity to one another. CHL submits that jobbers could legitimately purchase MO products from salons and other locations and resell them to other retailers or third parties, locally and overseas.

(c) Evidence that theft could have been committed by any of the approximately 1,000 stylists, or by salon customers, from retail areas or styling stations or chairs, or hair wash stations, at CHL's 46 salons, or by persons who were not salon stylists or customers but merely passed by one of CHL's salons.

(d) Evidence that jobbers from other suppliers were sourcing MO products from multiple sources and shipping them to Macau and other locations, which could explain the presence of the MO products found at the Suki store;

(e) Evidence that two years after MO stopped selling products to CHL, the Suki store continued to sell MO products, showing that the Suki store's source of MO products was someone other than CHL.

[33] CHL submits that this evidence shows that there are numerous ways that the MO products found at the Suki store could have made their way there, such that any inference that these MO products were transferred to the Suki store in breach of the Settlement Agreement would be pure speculation and conjecture, contradicted by direct evidence, and impermissible.

[34] The mere possibility for a legitimate buyer or buyers to have purchased MO products from a CHL salon for personal or family use and to then have shipped such products to the Suki store in Macau for re-sale is not evidence of facts that logically and reasonably permits an inference to be drawn that the full box and the other 9 MO products found their way to the Suki store in this way. In the absence of evidence of legitimate purchasers of MO products shipping them overseas, the inference suggested by CHL is not permissible because it does not proceed logically and reasonably from proven facts.

[35] With respect to the possible involvement of jobbers, Mr. Conforti, when asked whether he is aware of any particular jobber working in the Toronto area responded that "[y]ou hear the things every day". He acknowledged that he has no personal knowledge of any jobber that has taken products obtained from salons in the Toronto area and shipped those products to Asia. Floriana Ottaviana acknowledged that she has no personal knowledge that there are collectors operating around Toronto that sell products to Asia.

[36] In his deposition, David Cohen, MO's Executive Chairman, deposed that there are suppliers unconnected to CHL or Mr. Conforti, including jobbers, in the Macau market. When he was asked whether jobbers might be in Canada, he responded that he does not remember. Christopher Buckley, a representative of Venus, deposed that his knowledge of jobbers was from general information around the industry. He provided no evidence of jobbers being active in Toronto. Mr. Cheuk did not give evidence that jobbers were active in Toronto. Vincent Riverso, a representative of Venus, deposed that customers of the Hair Treasure chain of salons were purchasing MO products to bring to China for their relatives or friends.

[37] Gerardo Ludert, MO's Chief Operating Officer, provided evidence that it would not make sense, financially, for someone to buy salon products at the retail price and resell them. Ms. Ottaviani gave evidence that a sticker with the suggested retail price was applied to the bottle of the MO product at the salon. CHL has not provided evidence that it was selling MO products below their suggested retail price. There is no evidence explaining how it would make financial sense for a retail purchaser of MO products from a CHL salon to ship them overseas to a grey market re-seller such as the Suki store.

[38] Beyond the mere possibility of jobbers actively operating in the Toronto area and purchasing MO products from salons at prices below the suggested retail price for re-sale at a profit through re-sellers in Asia, the evidence does not establish that this occurred with respect to MO products supplied to CHL on any occasion. In the absence of such evidence, an inference that the MO products that were present at the Suki store found their way there through the activities of jobbers does not logically and reasonably flow from proven facts, and is impermissible. Such an inference would be nothing more than speculation.

[39] The possibility that MO products may have been stolen by thieves working at CHL salons, or by other thieves, and transported to Macau for sale, is not evidence of a fact which logically and reasonably permits an inference that the box containing 6 MO products and the other 9 MO products found at the Suki store were stolen from one or more CHL salons and transported to the Suki store. In the absence of evidence beyond the mere possibility of such thefts, such an inference is purely speculative.

[40] The fact that the Suki store continued to sell MO products more than two years after MO stopped selling products to CHL is not evidence that logically and reasonably permits an inference that the source of the box of MO products and the 9 other MO products found at the Suki store was someone other than CHL. It has been proven that these MO products were parts of orders originally supplied by Venus to CHL. The evidence does not permit an inference to the contrary.

[41] The evidence that a full box containing packaged MO products and 9 additional MO products that had been supplied by Venus to CHL were later found at the Suki store for re-sale logically and reasonably permits an inference that these products were, in contravention of the Settlement Agreement, directly or indirectly, knowingly or unknowingly, sold or transferred by CHL to persons outside of MO's "salon only" channel of distribution for sale in an unauthorized "brick and mortar" retail location. In other words, this evidence logically and reasonably permits an inference that the MO products that had been supplied to CHL under orders with Venus and were later found at the Suki store were "diverted" products within the meaning of section 5 of the Settlement Agreement that were dealt with by CHL in contravention of the Settlement Agreement.

[42] I conclude that the facts proven by the evidence do not permit an alternative inference such as the ones suggested by CHL.

[43] Even if I had accepted CHL's submission that there are other permissible inferences which, if accepted, would lead to the conclusion that CHL did not breach the Settlement Agreement, the preponderance of the evidence supports my conclusion that it is reasonably probable that the presence of MO products at the Suki store that were previously supplied to CHL, including a full box of packaged MO products, resulted from CHL's contravention of the Settlement Agreement. This conclusion is substantially the most probable of the possible views of the facts.

What, if any, inference should be drawn with respect to the extent of CHL's dealing with diverted products?

[44] MO submits that it is not required to prove diversion beyond the products that were shown to have been diverted to prove breach of the Settlement Agreement. MO's position is that the MO products found at the Suki store that had been supplied to CHL were part of a greater diversion by CHL involving larger quantities of MO product made available for sale at the Suki store.

[45] MO relies on the Salon Agreements that were incorporated into the Settlement Agreement. The Settlement Agreement provides that each Qualifying Salon must execute a Salon Contract in the form attached to the Settlement Agreement as Exhibit C. The required form of Salon Agreement provides, at paragraph 8:

> In the event Moroccanoil detects DIVERSION of any product from any shipment of Moroccanoil Products to Salon, it shall be conclusively presumed that all Products in that shipment were also diverted.

[46] The 9 products and the box found at the Suki store were parts of four purchase orders (406809, 403209, 418387, and 401577) which totalled (with taxes and freight) $171,040.38 CAD with a suggested retail price of over $286,000 CAD.

[47] MO relies on the evidence of Manami Sakimoto that when she visited the Suki store, there were 150 to 200 cases of MO product at the Suki store and at least 500 individual products. MO submits that this evidence is uncontradicted and logically and reasonably supports the inference that diversion of MO product by CHL occurred on a large scale.

[48] The evidence that the Suki store continued to sell MO products long after MO stopped supply CHL supports a permissible inference that the Suki store had sources of MO product other than, directly or indirectly, CHL. On the evidence before me, I am unable to make a finding as to the extent of diversion of MO products by CHL. Given the provisions of the Settlement Agreement and the Salon Agreement, it is not necessary for me to make such a finding.

Has MO shown a "material" breach of the Settlement Agreement?

[49] CHL refers to section 7 of the Settlement Agreement which provides that it may be terminated by either party in the event of a material breach of the agreement, provided the breach is not cured. CHL submits that this means that the Settlement Agreement cannot be terminated for minor or *de minimus* breaches.

[50] CHL submits that it has now been determined that when MO terminated the Settlement Agreement, such termination was over 9 bottles of product, with no evidence that CHL was involved in getting these bottles to the Suki store. CHL submits that there has been no material breach of the Settlement Agreement.

[51] CHL submits that a finding that 9 products and a box containing 6 products found at the Ski store were products diverted by CHL in contravention of the Settlement Agreement is not a finding that there was a "material" breach of the Settlement Agreement.

[52] The Settlement Agreement, in paragraph 5, contains CHL's warranty that it will not deal in any diverted or counterfeit products anywhere in the world. This warranty is not limited to a particular number of products in excess of any minimum number of such products.

[53] MO submits that under the Salon Contract, in the event that MO detects diversion of any product from any shipment of MO products to a salon, it shall be conclusively presumed that all products in that shipment were also diverted. MO submits that this shows that the parties agreed that there has been diversion of a total of 8,111 products with a suggested retail price of over $286,000.

[54] There has not been a finding that 9 products and the box containing 6 products found at the Suki store are the only products that were diverted by CHL in breach of the Settlement Agreement. No finding has been made in respect of the many boxes of MO product on display at the Suki store or the extent of diversion of MO products by CHL.

[55] In the Settlement Agreement, the parties acknowledged the challenges facing MO in detecting diversion and proving the extent of diversion. They agreed on a presumption that would apply where MO detected diversion of any product. Given the clear purpose of section 5 of the

Settlement Agreement, the diversion of any products by CHL in breach of the Settlement Agreement would be a matter of serious concern to MO. Proof of diversion of even a small number of MO products, in this case from four separate orders placed by CHL, is not a minor or *de minimus* breach.

[56] I do not accept CHL's submission that the diversion of products by CHL in breach of the Settlement Agreement is not material.

Amount of MO's Proven Claim

[57] MO, in its Proof of Claim, claims the following amounts as owing pursuant to the Settlement Agreement: $374,279 in purchase requirement damages, $860,000 of liquidated damages for diversion, $1,237,465 for legal fees, and $336,013.12 for interest.

[58] In my previous endorsement, I wrote that if it is necessary to address the amount of MO's claim, I would do so in my supplementary reasons on this appeal.

Purchase Requirement Damages

[59] In its decision, the Proposal Trustee decided that the purchase requirement damages claimed by MO in the amount of $374,279 were correctly calculated. The Proposal Trustee wrote that it would have allowed this part of MO's claim had MO proven liability for product diversion.

[60] The amount of purchase requirement damages has been proven by MO.

Liquidated Damages for Diversion

[61] The Settlement Agreement provides that for any breach involving diversion by CHL or Qualifying Salons, the liquidated damages shall be three times the suggested retail price of each MO product diverted.

[62] CHL submits that the liquidated damages stipulated in the Settlement Agreement are not permissible because they are a penalty and not a genuine pre-estimate of damages. CHL submits that the multiplier applied to the actual retail price of diverted product renders the clause in the Settlement Agreement unconscionable and not a genuine pre-estimate of damages.

[63] In *660 Sunningdale GP Inc. v. First Source Mortgage Corporation*, 2024 ONCA 252, the Court of Appeal, at para. 35, held that the accepted definition of a "penalty" is the payment of a stipulated sum on breach of the contract, irrespective of the damage sustained. The Court of Appeal cited its decision in *Peachtree II Associates - Dallas L.P. v. 857486 Ontario Ltd.*, 2005 CanLII 23216 (ON CA) where, at para. 22, Sharpe J.A. said that the "essence" of a penalty clause "is a payment of money stipulated as in terrorem of the offending party".

[64] In *Peachtree*, at para. 24, the Court of Appeal confirmed that the common law penalty rule involves an assessment of the stipulated remedy clause only at the time the contract was formed, and if the stipulated remedy represents a genuine attempt to estimate the damages the innocent party would suffer in the event of a breach, it will be enforced. The Court of Appeal quoted with approval from the decision of Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd.*, [1915] A.C. 79, 23 C.L.T. 106 (H.L.), at pp. 86-87, that "[i]t will be held to be

a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proven from the breach".

[65] In the Settlement Agreement, the parties addressed their minds to the multiplier to be used to calculate liquidated damages and agreed that because of the difficulty of calculating the dollar amount of damages that MO would suffer if CHL or Qualifying Salons divert MO products, the amount of liquidated damages and the methods of calculation stated in the Settlement Agreement are fair and reasonable approximations and should be used to determine the amount of MO's damages.

[66] It was reasonable for the parties to accept the difficulty in calculating the dollar amount of damages based on diversion of product. This case is an example of this difficulty, where there is direct evidence of a limited number of diverted products, but difficulty determining the full extent of diversion. I see no reason to question the reasonableness of the parties' agreement to the method of calculation of liquidated damages, using a multiplier of three applied to the retail price of diverted product. I conclude that the clause in the Settlement Agreement providing a method for calculating liquidated damages is not a penalty clause because it is a genuine attempt to estimate the damages that MO would suffer in the event of a breach of the Settlement Agreement by CHL, and it is not extravagant and unconscionable in comparison with the greatest loss that could conceivably be proven from the breach.

[67] In the Proposal Trustee's Notice of Disallowance, it held that MO had correctly asserted that the amount claimed for liquidated damages is calculated as three times the suggested retail price of any products that CHL diverted, as set out in section 6(a) of the Settlement Agreement. The Proposal Trustee noted that MO's assertions about the quantity of diverted product to be used in the calculations are drawn from the conclusion in the Neches Report (an expert report relied upon by MO) on that issue. The Proposal Trustee noted that the Neches Report assumes that CHL diverted all the product found at the Suki store and that the boxes at the Suki store were full, assumptions that the Proposal Trustee concluded may not be well founded. The Proposal Trustee wrote that it would not have allowed anything for this part of MO's claim due to inadequate proof of the amount of any diverted product.

[68] CHL submits that the Proposal Trustee was correct to reject MO's claim for liquidated damages based on the lack of evidence proffered by MO. CHL observes that Mr. Wilson's calculation is arithmetic and does not establish that products were actually diverted.

[69] MO submits that contrary to the Proposal Trustee's conclusion that MO did not provide evidence in support of its claim for liquidated damages, the Proposal Trustee failed to consider the evidence in the declaration of Anthony Wilson. Mr. Wilson is the General Counsel, Americas, of MO.

[70] As I have noted, the form of Salon Contract appended to the Settlement Agreement that each Qualifying Salon was required to execute provides that "[i] in the event Moroccanoil detects DIVERSION of any product from any shipment of Moroccanoil Products to Salon, it shall be conclusively presumed that all Products in that shipment were also diverted". MO has proven that products associated with four shipments from Venus to CHL, shipments under orders 406809, 403209, 418387 and 401577, were diverted in breach of the Settlement Agreement.

[71] Mr. Wilson appends to his declaration a spreadsheet showing the amount of MO's claim for liquidated damages for diversion based on these four orders. Mr. Wilson's spreadsheet shows the suggested retail price for each product in each of the four orders, which total CDN $286,995.80. He calculates the liquidated damages based on three times the suggested retail price, being $860,467.40. MO claims the rounded amount of $860,000.

[72] I conclude that MO has established a claim for liquidated damages under the Settlement Agreement in the amount claimed, that is, $860,000.

Damages for legal fees

[73] MO includes in its Proof of Claim a claim for legal fees in the amount of $1,237,465. The legal fees were billed in U.S. dollars and were converted to Canadian dollars for purposes of the Proof of Claim at the Bank of Canada rate on the date of filing of the NOI.

[74] The Settlement Agreement provides that "[i]n any action or proceeding arising from or related to this Agreement, the prevailing party shall be entitled to its reasonable attorneys' fees."

[75] In *Bossé v. Mastercraft Group Inc.*, 1995 CanLII 931 (ON CA), the Court of Appeal explained the principles that apply where there is a contractual right to costs:

> The costs of and incidental to a proceeding or a step in a proceeding are, subject to the provisions of a statute or the rules of court, in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid: *Courts of Justice Act*, R.S.O. 1990 c. C-43, s. 131(1); rule 57.01 of the *Rules of Civil Procedure*. As a general proposition, where there is a contractual right to costs the court will exercise its discretion so as to reflect that right. However, the agreement of the parties cannot exclude the court's discretion; it is open to the court to exercise its discretion contrary to the agreement. The court may refuse to enforce the contractual right where there is good reason for doing so - where, for instance, the successful mortgagee has engaged in inequitable conduct or where the case presents special circumstances which renders the imposition of solicitor and client costs unfair or unduly onerous in the particular circumstances.

[76] The Settlement Agreement provides that any dispute related to it shall be decided by the application of New Jersey law. No evidence was tendered of the content of New Jersey law. In the absence of evidence of New Jersey law, I apply Ontario law, as did the Proposal Trustee. The parties did not agree in the Settlement Agreement that reasonable attorneys' fees would be determined through the principles that apply to costs to be awarded under the *Courts of Justice Act* or the *Rules of Civil Procedure*. Under the general proposition confirmed in *Bossé*, where there is a contractual right to costs, the court will exercise its discretion so as to reflect that right. The court retains discretion to refuse to enforce the contractual right where there is good reason for doing so.

[77] Under the Settlement Agreement, MO, as the prevailing party, has a contractual right to payment of its reasonable attorneys' fees, and not just a percentage of such fees. The Proposal Trustee accepted the amount claimed as a reasonable amount for full indemnification, but would have applied a discount to reflect an award of costs under the *Courts of Justice Act* and the *Rules of Civil Procedure* on a partial indemnity scale or a substantial indemnity scale.

[78] CHL has not provided evidence that calls into question the reasonableness of the amount claimed for legal fees. The Proposal Trustee accepted this amount. There is no basis for me to exercise discretion to refuse to enforce MO's claim for reasonable attorneys' fees as claimed.

[79] I conclude that MO's claim for reasonable attorneys' fees in the amount claimed should be allowed.

Claim for interest

[80] In its Proof of Claim, MO claims interest on all amounts owing as damages under the Settlement Agreement.

[81] In its Notice of Disallowance, the Proposal Trustee concluded that the claims for interest are correct for the amounts claimed by MO.

[82] MO's claim for interest under the Settlement Agreement is allowed.

Disposition

[83] For the reasons given in my earlier endorsement, and for the reasons given in this endorsement, I allow the appeal of MO from the Proposal Trustee's Notice of Disallowance and make an order that the claim of MO against the estate of CHL as set out in its Proof of Claim, as filed, be allowed in full as a valid claim.

[84] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon by counsel (with reasonable page limits) and approved by me.

Cavanagh J

Date: March 6, 2026