**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR**
**COURT OF APPEAL**

**Citation**: *Ocean Choice International Limited Partnership v. Landvis Canada Inc.*, 2016 NLCA 36
**Date**: 20160715
**Docket**: 201601H0049

**BETWEEN:**

OCEAN CHOICE INTERNATIONAL LIMITED PARTNERSHIP by its General Partner 55104 Newfoundland and Labrador Inc. — APPELLANT

**AND:**

LANDVIS CANADA INC. — FIRST RESPONDENT

**AND:**

LANDVIS, ehf. — SECOND RESPONDENT

**AND:**

ANDREW WISSLER — THIRD RESPONDENT

**AND:**

GUDJON THORBJORNSSON — FOURTH RESPONDENT

**AND:**

PETUR PALSSON — FIFTH RESPONDENT

**Coram:** Welsh, Rowe and Harrington JJ.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador
Trial Division (G) 201601G1650
(2016 NLTD(G) 72)

**Appeal Heard:** June 3, 2016
**Judgment Rendered:** July 15, 2016

Reasons for Judgment by Rowe J.A.
Concurred in by Welsh and Harrington JJ.A.

**Counsel for the Appellant:** Barry Bresner and Maureen Doherty
**Counsel for the Respondents:** Barry Landy and Peter Browne Q.C.

**Rowe J.A.:**

## INTRODUCTION

[1] This is an appeal from a decision of a judge of the Trial Division in which he denied an application by the appellant, Ocean Choice International Limited Partnership ("OCI", a major fishing/processing enterprise operating principally in Newfoundland), for an order to compel the second respondent, Landvis ehf (an Icelandic company) to subordinate the debt it holds from OCI to financing that OCI wishes to put in place with Caisse Centrale Desjardins and a consortium of other financial institutions ("Desjardins").

[2] The appeal was heard on an expedited basis as the offer of financing from Desjardins is open until July 29, 2016. OCI attaches considerable importance to obtaining financing from Desjardins. OCI indicates that without the Desjardins financing it will face great difficulty arising from the requirement to repay debt to Labki, an Icelandic bank, which debt is payable on October 8, 2016.

[3] Desjardins has made its offer of financing conditional on Landvis ehf subordinating its debt to that with Desjardins. OCI emphasizes that Landvis ehf subordinated its debt to that with Labki (which has been assigned to LBI

hf, an Icelandic bank); as well, Landvis ehf had subordinated its debt to an earlier financing with Landsbanki, another Icelandic bank.

[4] As a practical matter, this litigation has arisen because Landvis ehf is at loggerheads with the other major investor in OCI, MBS Investments Inc. ("MBS"), a holding company controlled by Martin and Blaine Sullivan, two businessmen prominent in the Newfoundland fishing industry. Martin and Blaine Sullivan exercise effective control over OCI by virtue of their control of the general partner, 55104 Newfoundland and Labrador Inc. ("55104"). Both Landvis Canada and Landvis ehf are controlled by a group of Icelandic businessmen, notably Peter Palsson.

[5] What is at issue is whether OCI, pursuant to contractual arrangements, can compel Landvis ehf to do what it does not want to do, that is, to subordinate its debt to that which Desjardins would provide.

## FACTS

[6] The trial judge set out the facts in paragraphs 1-42 of his decision (2016 NLTD (G) 72). The facts as set out there are not in dispute.

> [1] The Plaintiff, Ocean Choice International Limited Partnership ("OCI LP"), seeks a final order compelling the Second Defendant, Landvis ehf, to sign a Subordination and Intercreditor Agreement in favour of a consortium of financial institutions willing to refinance the operations of OCI LP, and a Declaration that Landvis ehf is bound by the terms of that Subordination and Intercreditor Agreement.
>
> [2] In the alternative, the General Partner of OCI LP, 55104 Newfoundland& Labrador Inc. ("55104"), seeks an order that it may sign the Subordination and Intercreditor Agreement on behalf of Landvis ehf, pursuant to its authority as General Partner, and/or pursuant to a Power of Attorney granted to it by the First Defendant, Landvis Canada Inc. (Landvis Canada), an affiliate of Landvis ehf.
>
> [3] OCI LP argues that without the signed Subordination and Intercreditor Agreement it will be unable to refinance its operations, with dire consequences for the company, its employees, fishers and the broader community in Newfoundland and Labrador.
>
> [4] OCI LP brings its application by way of a Summary Trial pursuant to Rule 17A of the *Rules of the Supreme Court, 1986,* S.N.L. 1986, c. 42, Sch. D.

[5] This application brings to the fore the principles of privity of contract and contract interpretation, where there are multiple contracts forming part of a larger composite whole.

[6] OCI LP was created to acquire the assets of Fishery Products International ("FPI"), in 2007. It is a global leader in the seafood industry and currently employs approximately 1,700 people in Atlantic Canada, mostly in Newfoundland and Labrador, and has over 1,400 fishers on its annual payroll.

[7] 55104 is the General Partner of OCI LP. It is a corporation continued under the Canada Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA"), on 26 October 2007. The directors of 55104 are Martin and Blaine Sullivan, Chesley Penney ("Penney") and the Third and Fourth Defendants, Andrew Wissler ("Wissler") and Gudjon Thorbjornsson ("Thorbjornsson"). Due to ill health, Penney has not participated in any board meetings, or any aspect of OCI LP's business, since 6 August 2016 [*sic*].

[8] 55104 carries on no business on its own behalf. Its sole function is to conduct the business of OCI LP. As such, its shares have nominal value, as all assets of the enterprise are owned directly, or beneficially by OCI LP.

[9] The Limited Partners of OCI LP are Landvis Canada, Ocean Choice PEI Inc. ("OC PEI") and Ocean Choice International 2005 ("OCI 2005").

[10] OCI LP is not subject to a shareholders agreement. Rather, the relationship between the partners of OCI LP is governed by a Limited Partnership Agreement ("LPA"), dated 30 July 2007, as amended and restated on 14 December 2007, and a Unanimous Unitholders Agreement ("UUA"), also dated 14 December 2007.

[11] Landvis Canada is a corporation incorporated pursuant to the laws of Nova Scotia. It is a wholly owned subsidiary of Landvis ehf, a corporation incorporated pursuant to the laws of Iceland. Landvis ehf is, in turn, wholly owned by Visir hf, a family owned Icelandic fishing company. Landvis Canada, Landvis ehf and Visir hf are affiliates.

[12] Visir hf is controlled by the Fifth Defendant, Petur Palsson ("Palsson") and his family. Palsson is the Chief Executive Officer of Visir hf. However, he is not a member of the board of directors, nor a majority shareholder of Visir hf. He is a director of Landvis ehf and was a member of the board of directors of 55104 from 2007 until February 2011.

[13] MBS Investments Inc. ("MBS") is a holding company continued under the CBCA and registered to do business in Newfoundland and Labrador. MBS, and related entities, own Ocean Choice Holdings Inc. ("OC Holdings") which, in turn,

controls two of the Limited Partners of OCI LP, namely OC PEI and OCI 2005. MBS is controlled by Martin and Blaine Sullivan.

[14] OCI LP was formed by Martin and Blaine Sullivan, acting through MBS on the one hand and Visir hf, acting through Landvis ehf, and its fully-owned subsidiary Landvis Canada.

[15] In addition to being a director of 55104, Wissler is a director and officer of Landvis Canada. Until 10 February 2016 he was also a director of Landvis ehf. Since 2000 he has held the position of Managing Director of Special Assignments for Visir hf.

[16] In addition to being a director of 55104, Thorbjornsson is a director of Landvis Canada. Until 10 February 2016 he was also a director of Landvis ehf.

[17] As of 10 February 2016 Palsson and Andres Oskarssson replaced Wissler and Thorbjornsson as directors of Landvis ehf.

[18] In accordance with the by-laws of 55104, Martin Sullivan, as President, has a casting or deciding vote in the event of a tie. As the board is presently operating with four members, when voting in concert Martin and Blaine Sullivan control the board of 55104, and thereby control OCI LP.

[19] OCI LP's financing structure involves two major forms of debt; senior secured debt and subordinated debt held by affiliates of the Limited Partners.

[20] Landsbanki Islands hf ("Landsbanki") is an Icelandic bank with ties to Visir hf and its principals. On 14 December 2007 Landsbanki agreed to provide $105 million of senior secured debt (the "Landsbanki debt") pursuant to a senior credit agreement (the "Landsbanki Credit Agreement"), in order to facilitate OCI LP's acquisition of the FPI assets.

[21] Also, on 14 December 2007, OCI LP and Landvis ehf signed the Landvis ehf Subordinated Loan Agreement ("LSLA"), pursuant to which Landvis ehf agreed to loan OCI LP $31.3 million of subordinated debt, in order to partially facilitate the acquisition of FPI assets (the "Landvis ehf Subordinated Debt"). The LSLA was amended twice by OCI LP and Landvis ehf, on 1 January 2009 and 29 March 2011.

[22] On 14 December 2007 MBS also agreed to loan OCI LP $5.2 million of subordinated debt pursuant to a Subordinated Loan Agreement.

[23] On 19 December 2007, in accordance with its obligations under the LPA, Landvis Canada executed an irrevocable Power of Attorney and Declaration Form (the "Power of Attorney"), granting the General Partner, 55104, the authority to act on its behalf on the terms set forth therein.

[24] On or around 20 December 2007 OCI LP drew down the funds on its senior secured debt and subordinated debt and acquired the assets, *inter alia*, of FPI. 55104 has been operating the business of OCI LP ever since.

[25] During 2008 to 2011 OCI LP went through a period of financial difficulty and, as a consequence, 55104 attempted to restructure the business and capital of the partnership.

[26] Towards the end of 2008 the Landsbanki Credit Agreement and Landsbanki debt was assigned to Labki Finance Inc. ("Labki"), a subsidiary of Landsbanki. The Landsbanki Credit Agreement remained in force and the Landsbanki debt remained outstanding until 2011.

[27] On 25 February 2011 Labki and OCI LP signed the Labki Credit Agreement, pursuant to which Labki [provided] financing (the "Labki debt") to fully repay the Landsbanki debt. New security documentation was put in place to which OCI 2005, OC PEI, Landvis Canada, MBS and four related companies were added as guarantors. The Labki Credit Agreement was for a five year term, maturing on 8 April 2016.

[28] Pursuant to the Labki Credit Agreement the Landsbanki debt was repaid, and replaced with the Labki debt.

[29] On 1 December 2011 the Labki Credit Agreement and Labki debt was assigned by Labki to LBI hf.

[30] In a letter dated 30 January 2015 LBI hf provided notice to OCI LP that it expected full payment of OCI LP's obligations to it pursuant to the Labki Credit Agreement, when the debt reached its maturity on 8 April 2016. The amount then outstanding was $175 million, but according to Martin Sullivan has now been reduced to $150 million. LBI hf has recently agreed to extend the maturity date to October 2016.

[31] On 27 February 2015 OCI LP, through its management Martin and Blaine Sullivan, engaged Antarctica Advisors LLC ("Antarctica"), a financial advisory and consulting firm with expertise in the seafood industry, to make recommendations to the board of directors of 55104 as to the appropriate course of action for retiring the Labki debt, as assigned to LBI hf.

[32] On 15 May 2015, with the assistance of Antarctica, OCI LP entered into negotiations with various GE companies (collectively "GE Capital") to refinance the Labki debt.

[33] On 24 September 2015 Landvis ehf, Landvis Canada, Wissler and Thorbjornsson, filed a Statement of Claim in this Court against OCI LP, 55104 and others claiming that their interests had been oppressed. The claim was

challenged by OCI LP through its General Partner, 55104. On 12 January 2016 Justice Orsborn set aside the Statement of Claim in its entirety (see *Landvis Canada Inc. v. Ocean Choice International Limited Partnership*, 2016 NLTD(G) 4). This decision is presently under appeal.

[34] The proposed financing with GE Capital did not proceed. However, OCI LP has since secured financing with a consortium of financial institutions, with Caisse Centrale Desjardins as the administrative agent and Desjardins Capitals Markets and Keybanc as co-lead arrangers for all lenders (collectively referred to as "Desjardins").

[35] While not directly germane to the present application, the Defendants generally take issue with OCI LP's contention that refinancing its debt through Desjardins, or an equivalent lender, is the only alternative. They point to the possibility of further equity investment into OCI LP from the partners, or from a third party investor. In this regard, they observe that the UUA contemplated a further equity injection by the Limited Partners.

[36] As a condition precedent to closing the financing with Desjardins, OCI LP is required to satisfy Desjardins that all loans advanced and outstanding to OCI LP by any of the Limited Partners, or any affiliates or nominees of the Limited Partners, are subordinated to the new senior secured indebtedness to be provided by Desjardins. This subordination is to be achieved through the signing of a Subordination and Intercreditor Agreement (the "Desjardins Subordination Agreement").

[37] The commitment from Desjardins will expire on 31 May 2016, if closing and funding of the credit facilities have not occurred by that date.

[38] MBS is prepared to sign the Desjardins Subordination Agreement and subordinate its debt as requested.

[39] OCI LP submits that the only material obligation remaining for the Desjardins financing is confirmation that Landvis ehf will subordinate and postpone its loans by executing the Desjardins Subordination Agreement.

[40] Landvis ehf takes the position that while under no legal duty to do so, it is willing to voluntarily sign a further subordination agreement, but is not prepared to do so on the terms set forth in the Desjardins Subordination Agreement. Landvis ehf maintains that the terms of the Desjardins Subordination Agreement are commercially unreasonable and do not allow OCI LP to respect the obligations to it under the LSLA.

[41] Landvis ehf submits that the purpose of the Landsbanki debt was to assist in OCI LP's purchase from FPI of certain assets together with related transaction fees, costs and expenses**.** On the other hand the purpose of the Desjardins

> financing, to which Landvis ehf is now being asked to subordinate, is much broader in scope. In addition to refinancing prior indebtedness, it includes financing to provide for working capital, capital expenditures, permitted acquisitions, permitted purchases and other general corporate purposes of the borrower and to fund certain fees and expenses associated with the funding of the loans.
>
> [42] While there have been negotiations between the parties, to date Landvis ehf has refused to sign the Desjardins Subordination Agreement, thus prompting the within application for Summary Trial by OCI LP, through its General Partner, 55104.

[7] The trial judge summarized his decision in paragraphs 155 - 156:

> [155] The answer to the questions raised by OCI LP on the within application are, as follows:
>
> (i) Whether the issues are appropriate for a determination by Summary Trial;
>
> Answer: Yes
>
> (ii) Whether the General Partner, 55104, has the authority to execute the Desjardins Subordination Agreement on behalf of and/or in the name of Landvis ehf, without the consent of Landvis ehf;
>
> Answer: No
>
> (iii) Whether the LSLA, as amended, requires that the Landvis ehf Subordinated debt remain subordinate to the Desjardins financing, such that Landvis ehf is contractually bound by its terms to sign the Desjardins Subordination Agreement;
>
> Answer: No
>
> (iv) Whether Landvis ehf is contractually required, pursuant to the UUA, to execute the Desjardins Subordination Agreement.
>
> Answer: No
>
> [156] In conclusion, the within application of OCI LP is dismissed.

The judge awarded costs to Landvis ehf as the successful party.

**ISSUES**

[8] OCI sets out the issues in paragraph 68 of its factum:

> (i) whether Landvis ehf is legally obliged to subordinate the Landvis Subordinated Loan on the demand of 55104 pursuant to the Unanimous Unitholders Agreement; and
>
> (ii) whether the Landvis Subordinated Loan Agreement affects any obligation to subordinate created by the Unanimous Unitholders Agreement.

[9] The respondents set out the issues in paragraph 79 of their factum:

> …[I]s the Appellant entitled to:
>
> a. a mandatory injunction and/or an order for specific performance against Landvis ehf to execute the proposed SIA;
>
> b. a declaration that 55104 has the authority to execute the proposed SIA on behalf of Landvis ehf;
>
> c. a declaration that Landvis ehf is not entitled to repayment of Landvis Subordinated Loan until the repayment of any financing obtained to replace the senior secured credit facility provided to 55104 in its capacity as general partner of OCI LP by IBI hf pursuant to the terms of the LSLA, dated Decembr 14, 2007 and the UUA, dated December 14, 2007; and/or
>
> d. a declaration that Landvis ehf, as affiliate to Landvis Canada, is hereby declared to be subject to all obligations owing or arising from the UUA, dated December 14, 2007, the LPA, dated July 30, 2007 (*sic*) and the Power of Attorney and Declaration Form, dated December 19, 2007.

[10] I would formulate the issues more simply: did the trial judge err such that at law his decision should be set aside and should this Court issue an order compelling Landvis ehf to subordinate its debt to the financing agreement as negotiated with Desjardins?

[11] Key to the foregoing is whether, read together and in the factual context, the Unanimous Unitholders Agreement and the Landvis Subordinated Loan Agreement require Landvis ehf to subordinate its debt to the financing that would be provided by Desjardins.

## ANALYSIS

### (a) Unanimous Unitholders Agreement (Part I)

[12] One of the parties to the UUA is Landvis Canada. It shares in any distribution of profits by OCI, along with a chain of companies ultimately owned and controlled by MBS. Landvis ehf is not a party.

[13] Landvis ehf extended a loan of $31.3 million (Canadian) to OCI. The loan allowed OCI to purchase assets from Fishery Products International, as well as providing working capital for OCI's operations. (A similar loan for $5.2 million was made by MBS.) Under the terms of the loan, OCI is to pay interest to Landvis ehf. For various reasons, this interest has not been paid for several years.

[14] As a practical matter, the dispute between Landvis ehf and MBS relates to the non-payment of this interest by OCI. Landvis ehf alleges that pursuant to the proposed financing agreement with Desjardins, Landvis ehf can be effectively barred from receiving interest on this loan to OCI.

[15] Landvis ehf is not a party to the UUA, as it is not a unitholder in OCI. Rather, its subsidiary, Landvis Canada, is a party to the UUA, as it is a unitholder.

[16] The parties agree that Landvis ehf is an "affiliate" of Landvis Canada. This is so by virtue of the definition of "affiliate" set out in article 1.1(b) of the UUA, which reads (in part):

> (b) "Affiliate" means, with respect to any corporation, any of:
>
> (i) a Person that is an affiliate or associate (as those terms are defined in the *Corporations Act*, RSNL 1990, c. c 36) of the corporation;

Section 2(b) of the *Corporations Act*, RSNL 1990, c. c-36 provides that an affiliate "means an affiliated body within the meaning of section 7". Section 7 reads (in part):

> (1) One body corporate is affiliated with another body corporate when 1 of them is a subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person.

[17] Article 4 of the UUA, "General Financial Matters", reads (in part):

4.1 Loans

As of the date of this Agreement [December 14, 2007] the Loans are as follows:

| Partner | Affiliate | Amount |
|---|---|---|
| OC PEI/OCI 2005 | MBS Investments Inc. | $5,200,000 |
| Landvis | Landvis ehf. | $31,300,000 |

4.2 Demand and Repayment of Loans

Except with the unanimous consent of the Partners, no Partner, Affiliate or Nominee will demand repayment of a Loan and in connection with any Loan or Shortfall Loan, as the case may be, from an Affiliate or Nominee, such Affiliate or Nominee will acknowledge and agree to such limitation in writing to or with the Partnership. If the Partnership repays the Loans or Shortfall Loans, in whole or in part, it will do so only pro rata to the Partners' (together with their Affiliates or Nominees) respective Loans or Shortfall Loan, as the case may be, or outstanding interest thereon at the time of such repayment and in accordance with any applicable agreement in the following order of priority:

(a) interest arrears on Shortfall Loans;

(b) principal of Shortfall Loans;

(c) interest arrears of Loans; and

(d) principal of Loans.

4.3 Loans Subordinated

Each of the Partners (or Affiliates and Nominees, if applicable) will subordinate and postpone all of their respective Loans or Shortfall Loans, as the case may be, to any arm's length financing, including financing by the Bank, or other borrowing by the Partnership to the extent required by the General Partner.

[18] OCI submits that article 4.3 imposes an obligation on Landvis ehf to subordinate its debt to the proposed Desjardins financing.

[19] All this leads to the pivotal question: while the UUA contemplates that Landvis ehf will subordinate its debt, is Landvis ehf legally required to do so, given that it is not a party to the UUA?

[20] The trial judge dealt with this question as follows:

> [134] The named parties and signatories to the UUA are OCI LP, the General Partner, 55104 and the Limited Partners, Landvis Canada, OC PEI and OCI 2005.
>
> [135] While not a named party to the UUA, Landvis ehf is identified in section 4.1 as an affiliate of Landvis Canada whose loan was in the amount of $31,300,000.
>
> [136] Section 4.3 is the cornerstone of OCI LP's submission that Landvis ehf is contractually obligated under the UUA to sign the Desjardins Subordination Agreement. It reads:
>
> > 4.3
> >
> > Each of the Partners (or Affiliates and Nominees, if applicable) will subordinate and postpone all of their respective Loans or Shortfall Loans, as the case may be, to any arm's length financing, including financing by the Bank (Landsbanki), or other borrowing by the partnership to the extent required by the General Partner.
>
> [137] OCI LP argues that Landvis ehf, as an affiliate of Landvis Canada, is contractually bound by section 4.3 of the UUA to subordinate its loan to the extent required by the General Partner. It is thus contractually obligated to sign the Desjardins Subordination Agreement.
>
> [138] In this regard, OCI LP argues that the three factors for the imposition of liability to a third party to the contract have been met see: *1196303 Ontario Inc.* [*v. Glen Grove Suites Inc.*, 2015 ONCA 580].
>
> [139] According to OCI LP, the obligation extends to "any arms length financing". As such, the obligation is not time limited, but in perpetuity, for presumably as long as OCI LP operates and senior secured debt requires subordination. On this basis, OCI LP submits that the LSLA should likewise be treated as open ended, so as to eliminate any appearance of conflict. However, if the Court concludes that the LSLA is limited to two senior lenders (Landsbanki and its Replacement Lender), then OCI LP argues that the conflict is to be resolved in favour of the UUA, as to do otherwise will mean that Landvis ehf has the ability to sabotage future borrowing.
>
> [140] The foregoing position of OCI LP is premised, first of all, on the conclusion that Landvis ehf is bound to the UUA based on a principled exception to the rule of privity of contract and thus bound by its terms, and further that properly interpreted, section 4.3 calls for the perpetual subordination of its loan.

[141] Landvis ehf does not argue that it never had an obligation to subordinate its loan, but rather that it cannot be ordered to subordinate pursuant to the UUA, because it is not a party and there is no principled exception to the requirement for privity which could impose liability on it. Landvis ehf maintains that its obligations to subordinate are as set forth in the LSLA, as amended, as signed by Landvis ehf and OCI LP.

[142] For the following reasons, I agree that Landvis ehf is not contractually bound by the UUA.

[143] Section 2.1 of the UUA provides that it is binding on all persons who execute the Agreement, or become partners from time to time. It reads:

> This Agreement shall be binding upon all persons who execute this Agreement and who become Partners from time to time. By executing this Agreement, Partners shall become subject to the rights, privileges and restrictions set forth in this Agreement and shall be deemed to have agreed to be bound, and shall be so bound, by this Agreement.

[144] By its express terms, the UUA does not purport to contractually bind the affiliates of the Limited Partnership.

[145] Further, it is expressly recognized in the UUA that affiliates of the Limited Partners are not bound by its terms, for section 4.2 recognizes that in order to be so bound, the acknowledgement and agreement of the affiliate is required. It reads:

> 4.2 Demand and Repayment of Loans
>
> Except with the unanimous consent of the Partners, no Partner, Affiliate or Nominee will demand repayment of a Loan and in connection with any Loan or Shortfall Loan, as the case may be, from an Affiliate or Nominee, <u>such Affiliate or Nominee will acknowledge and agree to such limitation in writing to or with the Partnership</u>. If the Partnership repays the Loans or Shortfall Loans, in whole or in part, it will do so only pro rata to the Partners' (together with their Affiliates or Nominees) respective Loans or Shortfall Loans, as the case may be, or outstanding interest thereon at the time of such repayment and in accordance with any applicable agreement in the following order of priority:
>
> (a) interest arrears on Shortfall Loans;
>
> (b) principal of Shortfall Loans;
>
> (c) interest arrears of Loans; and

(d) principal of Loans. [emphasis added]

[146] It is common ground that no written agreement was obtained from Landvis ehf. Were affiliates of the Limited Partners already contractually bound by the UUA, the further requirement in section 4.2 would be unnecessary.

[147] There is no privity of contract between Landvis ehf and the parties to the UUA. As a non-party to the UUA, Landvis ehf is not contractually subject to its terms, including section 4.3 which, on its face, purports to obligate affiliates of the partners to subordinate their loans. Landvis ehf argues, correctly in my view, that while privity may be relaxed in certain circumstances where the contract benefits a third party, the same cannot be said when the contract purports to burden a third party. In addition, the precise definition of who are the parties to the UUA distinguishes this case from that of *Seip* [*& Associates Inc. v. Emmanuel Village Management Inc.*, 2009 ONCA 222], and the first of the three factors identified by *1196303 Ontario Inc.*, as stated, in obiter.

[148] While Landvis Canada and Landvis ehf are affiliates, Landvis ehf is the parent company and Landvis Canada is the subsidiary. I know of no authority whereby the subsidiary could contractually bind its parent without the parent's consent.

[149] There is only a potential conflict between the LSLA and UUA if you accept the premise that Landvis ehf is contractually bound to the UUA. However, commercially sophisticated players such as these can be reasonably presumed not to intend that there be a conflict between the various contracts when viewed collectively. One would have thought that harmony, not discord, would be the objective.

[150] The fact that Landvis ehf signed the LSLA on the same date as the UUA does not lead to the conclusion that by its conduct Landvis ehf accepted that it was contractually bound by the UUA to do so. The Landsbanki Credit Agreement required subordination as a condition of financing and the execution of the LSLA was in response [to] this commercial reality at the time. Landvis ehf's conduct in signing the LSLA, which itself is limited, falls [far] short of a conclusion that Landvis ehf thereby acknowledged that it was bound by the UUA, which according to OCI LP called for subordination in perpetuity.

[151] If I were wrong in concluding that Landvis ehf is not contractually bound by the UUA, I would, nevertheless, interpret section 4.3 not as an obligation in perpetuity, but one which was fulfilled when Landvis ehf signed the LSLA.

[152] OCI LP's interpretation of section 4.3 of the UUA would lead to a commercial absurdity, Landvis ehf would be obliged to subordinate its loan in perpetuity on terms acceptable to OCI LP, and by inference, on terms acceptable to the senior lender. The practical effect would be to convert what is clearly a

> loan into *de facto* equity, contrary to the equity restrictions in the LPA and without any of the benefits of an equity position. The more unreasonable the result the less likely it is that the parties intended it (see: *Bhasin [v. Hrynew,* 2014 SCC 71]).
>
> [153] Pursuant to section 4.3 of the UUA, Landvis Canada agreed to ensure that its affiliate, Landvis ehf, would subordinate its loans to the senior lender. Landvis Canada fulfilled this obligation when Landvis ehf and OCI LP subsequently entered into the LSLA. Thereafter, it is the LSLA that governs Landvis ehf's obligation to subordinate.
>
> [154] To conclude on this issue: Landvis ehf is not contractually obligated by the UUA to sign the Desjardins Subordination Agreement. It is the LSLA which governs its obligation to subordinate, not the UUA.

[21] The judge's analysis set out above was based on his consideration of the law relating to privity of contract which he set out at paragraphs 65 – 75:

> [65] As previously noted, this application engages the age old principle of privity of contract. Namely that "a non party cannot be subjected to the enforcement of a contract or have his or her rights limited by virtue of a term therein" (see: Canadian Encyclopedic Digest, CED Contracts IV.5(a) & 195). A contract is a personal matter between the parties who are privy to its making, such that a third party stranger to the contract cannot argue rights or be subjected to liabilities under it (see: *World Fuel Services Corp. v. "Nordems" (The)*, 2010 F.C. 332).
>
> [66] The Supreme Court of Canada has recognized a principled exception to the doctrine of privity of contact with regard to third party beneficiaries (see: *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108.
>
> [67] In *C&C Technologies International, Inc. v. McGregor Geoscience Ltd.*, 2014 NSSC 440, the contract purported to bind the parties "parent, subsidiary and affiliated companies". C&C brought an action against McGregor and Superport claiming breach of contract. Superport brought an action for summary judgment on the grounds that it was not a party to the contract between C&C and McGregor. The court concluded that it could not determine the relationship between McGregor and Superport without reviewing the corporate records of both, but observed that unless McGregor had authority to bind an affiliate it executed a term that was "nonsensical and unenforceable".
>
> [68] In *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580, the Ontario Court of Appeal made reference, in obiter, to a three part test for the imposition of liability on third parties to a contract (at paragraph 103):

> 103 To summarize, in *Seip & Associates Inc. v. Emmanuel Village Management Inc.*, the privity of contract rule was relaxed and liability imposed where the following three factors were present: 1) the parties to the initial agreement intended to impose an obligation on the third party; 2) the activities of the third party, upon which basis the parties sought to impose liability, were within the scope envisaged under the agreement and 3) the third party had knowledge of the provision assigning it liability and, by its conduct, the third party assumed the agreement. The first two criteria mirror the requirements of *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, *supra*. Arguably, all three criteria are present in this case.

[69] At the same time the court noted that the argument that liability could be imposed on a principled exception to the doctrine of privity of contract was not argued in *Seip & Associates Inc. v. Emmanuel Village Management Inc.*, 2009 ONCA 222 and consequently, "the doctrinal basis for a principled exception to the doctrine of privity of contract when liability is sought to be imposed on a third party will have to await argument another day." (at paragraph 104).

[70] Recognizing that the Ontario Court of Appeal's comments were in obiter, I would observe that with respect to the first part of the test in *Seip & Associates*, while some of the corporations were not mentioned on the signatory page to the contract, they were nonetheless listed as a party to the contract on its front page, evidencing that the contract as a whole was intended to apply to them.

[71] In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 53 the Supreme Court of Canada confirmed that as a matter of mixed fact and law, contractual interpretation involves a consideration of the words of the agreement as a whole and the factual matrix surrounding its execution. The goal being to determine the objective intention of the parties when the agreement, or agreements (as the case may be) were signed (at paragraph 47):

> 47 … the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 per LeBel J., see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at

words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed….In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> [emphasis added]

[72] Where there are multiple contracts forming a large composite whole, as is the case here, where each agreement is entered into on the expectation of the others being executed, then assistance with the interpretation of one agreement may be drawn from the related agreements. (see: *Re Priszm Income Fund*, 2012 ONSC 6144).

[73] While the factual matrix cannot be used to overwhelm the words of the agreement, evidence of the surrounding circumstances can nevertheless shed further light on the mutual and objective intentions of the parties, as expressed in the contract.

[74] While the primary objective of contract interpretation is to give effect to the intentions of the parties, it is generally to be assumed that those parties intended a certain minimum standard of conduct. The more unreasonable the result, the less likely it is that the parties intended it. (see: *Bhasin v. Hrynew*, 2014 SCC 71, at para. 45):

> [45] Considerations of good faith are also apparent in contract interpretations: *Chitty on Contracts*, at para. 1-050; Hall, at p. 347. The primary object of contractual interpretation is of course to give effect to the intentions of the parties at the time of contract formation. However, considerations of good faith inform this process. Parties may generally be assumed to intend certain minimum standards of conduct. Further, as Lord Reid observed in *Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. *235* (H.L.), at p. 251, "[t]he more unreasonable the result the more unlikely it is that the parties can have intended it". As A. Swan and J. Adamski put it, the duty of good faith "is not an externally imposed requirement but inheres in the parties' relation": *Canadian Contract Law* (3rd ed. 2012), at §§ 8.134-8.146.

[75] In the within context, the LPA, UUA, LSLA and Landsbanki Credit Agreement were all executed on the same day, 14 December, 2007, and clearly

> form part of a "larger composite whole", to borrow the language from *Priszm*. The specific language of each agreement is to be considered, of course, as ultimately the factual matrix of the various agreements cannot be used to override the plain words of each agreement. At the same time all of the agreements must be read together in determining the objective intention of the parties. This is particularly relevant where, as here, there is an apparent conflict in the wording of the UUA and the LSLA.

[22] OCI takes issue with the foregoing analysis. In OCI's submission, Landvis ehf comes within a principled exception to the requirement for privity, such that Landvis ehf is bound to continue to subordinate its debt as contemplated by article 4 of the UUA. Before I deal with that, I will turn to the LSLA.

## The Landvis Subordinated Loan Agreement

[23] Also executed on December 14, 2007 was the Subordinated Loan Agreement between Landvis ehf and OCI. Article 2.04 sets out the purpose of the agreement:

> To assist in the financing of [OCI's] purchase from [Fishery Products International] of the Purchased Assets, to provide working capital to the borrower and for general partnership purposes of [OCI].

[24] The judge dealt with the LSLA in paragraphs 108-123 as follows:

> [108] On 14 December 2007 Landvis ehf (described therein as the "Lender") and OCI LP (described therein, as the "Borrower") signed the LSLA. … Landvis ehf's subsidiary, Landvis Canada, signed the LPA and UUA, and OCI LP signed the Landsbanki Credit Agreement.
>
> [109] OCI LP submits that by its terms the LSLA contractually obliges Landvis ehf to subordinate its loan to OCI LP, in favor of Desjardins and to sign the Desjardins Subordination Agreement.
>
> [110] Landvis ehf acknowledges that the LSLA requires it to subordinate its loan on the terms set forth therein, but that these terms only require it to subordinate twice, initially to the Landsbanki debt and then to the "Replacement Lender" (as defined) for the Landsbanki debt, which was Labki in 2011. As Landvis ehf has already subordinated its loan twice, it argues that it has no contractual obligation to do so for Desjardins.
>
> [111] At issue are the terms of the LSLA, as amended, and whether Lakbi was indeed the Replacement Lender for the Landsbanki debt in 2011. There is also an

apparent conflict between the LSLA and the UUA which must be factored into the analysis.

[112] The purpose underlying the LSLA is clear from its recital and section 2.04, as follows:

> **WHEREAS** the Borrower has requested and the Lender has agreed to make available to the Borrower a loan of Canadian $31,300,000 on the terms and subject to the conditions set forth in this Agreement;
>
> …
>
> **PURPOSE**
>
> 2.04 To assist in the financing of the Borrower's purchase from FPIL of the Purchased Assets, to provide working capital to the Borrower and for general partnership purposes of the Borrower.
>
> Except where the Lender agrees in writing, the Loan shall not be used for any other purpose than as above stated, but the fact that the Loan is used for some other purpose shall not affect the obligation of the Borrower to repay the Loan.

[113] Landvis ehf agreed to lend money on an interest bearing basis, as opposed to demanding a larger equity stake in OCI LP, because it was not permitted to own more than 49% of the new business. By its terms the Landvis ehf loan pursuant to the LSLA is precisely that, a loan, on the terms set forth in the LSLA, and not equity.

[114] The loan [is] described as a non-revolving loan in the amount of $31,300,000. (Canadian) with "payments of principal and interest" to be made in Canadian currency (section 2.05). Interest is stated to be payable on the loan in accordance with section 2.06. Subsection 2.06(a), in turn, prescribes the interest rate, and of particular relevance to the within Application, subsection 2.06(c) establishes the interest periods and payment. It reads:

> (c) Interest Periods and Payment
>
> Each Interest Period shall be of 90 days duration. The first Interest Period for the Loan shall begin on the Drawdown Date. Each succeeding Interest Period for the Loan shall begin on the Interest Date of the previous Interest Period. Interest is payable at the later of (a) the end of each Interest Period and (b) the date on which a payment of Interest is permitted pursuant to the terms of the Landsbanki Indebtedness or the terms of credit of any Replacement Lender (as defined below). [emphasis added]

[115] The Landsbanki Indebtedness is the Landsbanki debt made pursuant to the Landsbanki Credit Agreement, dated 14 December 2007.

[116] The term "Replacement Lender" is defined in subsection 2.08(a), as follows:

> "… if the Landsbanki Indebtedness is replaced with indebtedness to another financial institution (the "Replacement Lender")

[117] The insertion of "Replacement Lender" into subsection 2.06(c) thus leaves Landvis ehf with a postponement of any interest due to it until the date on which the payment of interest is permitted pursuant to the Landsbanki Credit Agreement, or if the Landsbanki indebtedness is replaced with another financial institution, the terms of credit of that institution.

[118] The repayment, or prepayment of the principal of the Landvis ehf loan, is governed by section 2.08. It reads:

> 2.08 Repayment
>
> (a) No Repayment until after the Repayment Date
>
> There shall not be a regular repayment or any prepayment without the prior written consent of Landsbanki on account of principal until after the date on which the Landsbanki Indebtedness shall have been repaid in full; and if the Landsbanki Indebtedness is replaced with indebtedness to another financial institution (the "Replacement Lender"), then there shall not be repayment or any prepayment on account of principal without the prior written consent of the Replacement Lender, until after the date on which the indebtedness to such Replacement Lender is repaid in full (in either case, the "Repayment Date").
>
> (b) Regular Repayment
>
> Following the Repayment Date, the principal amount of the Loan shall be repayable in accordance with a reasonable payment schedule set by the Lender and any such payment shall be made in accordance with any applicable *pari passu* agreement between the Lender and MBS Investments Ltd. or the Replacement Lender, as the case may be.
>
> (c) Optional Prepayment
>
> Following the Repayment Date, when not in default, the Borrower may prepay all or any portion of the Loan at any time subject to

> five Business Day's prior written notice to the Lender and without bonus or penalty. [emphasis added]
>
> [119] Repayment or prepayment of the principal is thus dependent on the prior written consent of Landsbanki, until after the Landsbanki indebtedness is paid in full. Should the Landsbanki indebtedness be replaced with indebtedness to another financial institution (the "Replacement Lender") there can be no repayment or prepayment on account of principal without the prior written consent of the Replacement Lender, until after the indebtedness to such Replacement Lender is paid in full (the "Repayment Date").
>
> [120] After the Repayment Date, OCI LP has the option of prepaying all or any portion of the Landvis ehf loan. Regular repayment of the Landvis ehf loan is to be in accordance with a "reasonable payment schedule" set by Landvis ehf subject to an applicable *pari passu* agreement.
>
> [121] Landvis ehf accepts that it was obligated under the LSLA to subordinate its debt, in the first instance to Landsbanki, and then to Labki as the Replacement Lender for Landsbanki. However, Landvis ehf submits that it was only obliged to subordinate twice, first to Landsbanki and then to the Replacement Lender for Landsbanki. Landvis ehf argues that the obligation was not to subordinate indefinitely, to any and all replacement lenders. To do so would be to *de facto* treat what is obviously a loan, as equity, for Landvis ehf could never be assured of repayment, or interest.
>
> [122] I agree that the fact Landvis ehf made a loan to OCI LP is beyond argument, based on the express language of the LSLA. Further, the LSLA speaks in terms of the singular, "the Replacement Lender" and, "such Replacement Lender". Replacement Lender is not defined in the plural as might be the case if more than one replacement lender for Landsbanki were contemplated.
>
> [123] While this conclusion is grammatically correct, and supports the interpretation of Landvis ehf, a full examination of this question requires consideration of the two subsequent amendments to LSLA and the history of OCI LP's senior debt since 2007. As the Supreme Court observed in *Creston Moly* an overly technical approach to the words used is to be avoided.

[25] The judge then dealt with the 2009 and the 2011 amendments to the LSLA. The 2009 amendment provided for capitalization (by way of promisory notes) of the interest that would otherwise be payable to Landvis ehf by OCI. The 2011 amendment made clear that the foregoing promissory notes would not mature until the financing from Labki was repaid in full.

[26] In his analysis the judge held that the LSLA did require Landvis ehf to subordinate its debt to financing first by Landsbanki and then by Labki, but

not to any subsequent financing. The judge reached this conclusion having regard to the references in article 2.08 (reproduced above) to "Replacement Lender". In the judge's analysis, this meant a single replacement lender and that was Labki. Thus, in the judge's analysis, Landvis ehf had fulfilled its obligation to subordinate when it did so with respect to the financing from Labki; accordingly, he concluded that no obligation exists on Landvis ehf to subordinate its debt to financing from Desjardins or any other lender.

[27] The respondents submit that the judge properly interpreted the LSLA in the foregoing analysis. OCI takes a contrary view. In OCI's submission "Replacement Lender" is a category and, as such, the use of the singular does not confine it to one refinancing, but rather refers to however many refinancings may occur.

[28] On this issue I am persuaded by OCI's submissions. It makes no sense in the context of the overall arrangements between the parties for the provisions of the LSLA to operate for two financings and no more. Rather, in the context, "Replacement Lender" as a category permits the LSLA to operate on an on-going basis.

[29] While I, therefore, agree with OCI that the judge made an error on this point, it does not get OCI where they want to go, as the LSLA does not establish an obligation for Landvis ehf to subordinate its debt. Rather, the LSLA deals (in part) with how things operate <u>if subordination has occurred.</u>

[30] I agree with what OCI stated at paragraph 78 of its factum:

> Neither the Landvis Subordinated Loan Agreement nor the [2009 and 2011] amendments to it address the question of subordination. That issue is addressed in the Unanimous Unitholders Agreement.

I turn again to that agreement.

**(c) Unanimous Unitholders Agreement (Part II)**

[31] Did the trial judge err in law when he decided that Landvis ehf did not come within a principled exception to the requirement for privity of contract?

[32] I reproduce (again) paragraphs 145-146 of the decision:

> [145] [I]t is expressly recognized in the UUA that affiliates of the Limited Partners are not bound by its terms, for section 4.2 recognizes that in order to be

so bound, the acknowledgement and agreement of the affiliate is required. It reads:

> 4.2 Demand and Repayment of Loans
>
> Except with the unanimous consent of the Partners, no Partner, Affiliate or Nominee will demand repayment of a Loan and in connection with any Loan or Shortfall Loan, as the case may be, from an Affiliate or Nominee, such Affiliate or Nominee will acknowledge and agree to such limitation in writing to or with the Partnership. If the Partnership repays the Loans or Shortfall Loans, in whole or in part, it will do so only pro rata to the Partners' (together with their Affiliates or Nominees) respective Loans or Shortfall Loans, as the case may be, or outstanding interest thereon at the time of such repayment and in accordance with any applicable agreement in the following order of priority:
>
> (a) interest arrears on Shortfall Loans;
>
> (b) principal of Shortfall Loans;
>
> (c) interest arrears of Loans; and
>
> (d) principal of Loans.
>
> [146] It is common ground that no written agreement was obtained from Landvis ehf. Were affiliates of the Limited Partners already contractually bound by the UUA, the further requirement in section 4.2 would be unnecessary.

(Emphasis added.)

[33] I see no flaw in the logic set out by the trial judge in the foregoing passage. Even if one applies the standard of correctness, I see no error. This conclusion is sufficient to determine the issue and exclude the possibility of a principled exception to the lack of privity.

[34] As well, I would recall what the trial judge said about this:

- "[W]hile privity may be relaxed in certain circumstances where the contract benefits a third party, the same cannot be said when the contract purports to burden a third party." (Emphasis in the original; paragraph 147.)

- "While Landvis Canada and Landvis ehf are affiliates, Landvis ehf is the parent company and Landvis Canada is the subsidiary. I know of no

authority whereby the subsidiary could contractually bind its parent without the parent's consent". (Paragraph 148.)

- "The Landsbanki Credit Agreement required subordination as a condition of financing and the execution of the LSLA was in response [to] this commercial reality at the time". (Paragraph 150); Landvis ehf sees the commercial reality at present quite differently, given its concern that it will not receive payment of interest on its loan to OCI under the terms of the proposed financing with Desjardins.

[35] There was nothing in OCI's submissions to refute persuasively the foregoing points upon which the judge relied. Rather, OCI urges this Court to adopt a test set out in Ontario case law that would result (in OCI's submission) in Landvis ehf being bound by the UUA. OCI relies principally on *Seip and Associates Inc. v. Emmanuel Village Management Inc.*, 2009 ONCA 222 and *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580.

[36] The decision in *Seip* was dealt with in *Glen Grove* in a commentary that was clearly *obiter*. *Glen Grove* was decided on the basis of agency. No such agency arrangement has been shown to exist between Landvis Canada and Landvis ehf, such that Landvis Canada was authorized by Landvis ehf to bind it to obligations in the UUA. The fact that Peter Palsson was the guiding mind for both Landvis Canada and Landvis ehf does not create any such agency.

[37] Here is what was set out in *Glen Grove*:

> [99] In *Seip*, the defendant companies, Emmanuel Village Homes (EVH), Emmanuel Village Management (EVM) and Emmanuel Village Residence (EVR), were owned and operated by the same principal, Hunking. Seip entered into a contract with EVM to consult on the construction of a retirement residence complex and to manage the property for a five-year term when the first tenant moved in. The first page of the contract named EVM and EVH, but only EVM signed the agreement. EVR was not mentioned anywhere in the agreement.
>
> [100] The defendants EVM and EVH terminated the contract and Seip sued. The trial judge found that EVM and EVH were both parties to the contract despite it being executed only by EVM. The trial judge further found that while EVR was not initially a party to the agreement, it had bound itself to the contract, through its conduct. It purchased the complex with full knowledge of the parties' agreement. Once EVR became the owner of the retirement complex, the work

continued as if nothing had changed. EVR had the same principal as the parties to the contract, and Seip was paid by EVR. EVR took the benefit of Seip's work.

[101] On appeal, the appellant submitted that the trial judge effectively pierced the corporate veil and ignored the separate legal personality of each defendant. Gillese J.A. disagreed. She held, at para. 35:

> While the trial judge noted that EVR had the same principal as the other two corporate defendants, it does not necessarily follow that the trial judge pierced the corporate veil. In my view, the trial judge treated Hunking's role in the three corporations as one piece of evidence on which to assess whether EVR had assumed the contract through its conduct and, consequently, was bound by it.

[102] Gillese J.A. also considered article 11.2 of EVM's contract with Seip, which permitted the sale of the project provided the new owner acknowledged in writing its willingness to assume Seip's contract. Although EVR did not give such written acknowledgment, the role played by Hunking in the three corporate defendants, coupled with EVR's conduct, was tantamount to such an acknowledgment. Gillese J.A. observed, at para. 38, that Hunking was the directing mind of all three corporate defendants; that Hunking was well aware that the clear intent of article 11.2 was to bind EVR, as purchaser; and that EVR by its conduct accepted the contract, and accepted the role as owner. She did not give effect to EVR's submission that, as a third party, it had no obligation under the contract, concluding, "The conduct of all parties demonstrated a common intention that the Contract continued with EVR as an owner, in conjunction with the other corporate defendants."

[103] To summarize, in *Seip*, the privity of contract rule was relaxed and liability imposed where the following three factors were present: 1) the parties to the initial agreement intended to impose an obligation on the third party; 2) the activities of the third party, upon which basis the parties sought to impose liability, were within the scope envisaged under the agreement and 3) the third party had knowledge of the provision assigning it liability and, by its conduct, the third party assumed the agreement. The first two criteria mirror the requirements of *Fraser River, supra*. Arguably, all three criteria are present in this case.

[104] As the argument was not made that liability could be imposed based on a principled exception to the doctrine of privity of contract, nor was the decision in *Seip* the subject of submissions, it would not be fair to decide the case on a point counsel did not have the opportunity to address. Consequently, the doctrinal basis for a principled exception to the doctrine of privity of contract when liability is sought to be imposed on a third party will have to await argument another day.

[38] Regarding the foregoing, I would make the following points:

- The Ontario Court of Appeal did not purport to set out definitively a test for a principled exception to the requirement for privity (see paragraph 104);

- Whatever status the foregoing passage has in Ontario, it is not binding in this jurisdiction; OCI argues that it is persuasive;

- I am skeptical about setting out a definitive statement of such a test as, based on what I have written above, it is not necessary to do so.

[39] Nonetheless, without adopting the test set out in paragraph 103 of *Glen Grove*, I will consider the facts of this case having regard to the three factors set out therein.

[40] First, did the parties to the initial agreement (the UUA) intend to impose an obligation on the third party (Landvis ehf)? It is clear that OCI intended to do so. It is less clear what Landvis Canada intended. Certainly, Landvis Canada intended that Landvis ehf would subordinate its loan to OCI to the Landsbanki financing, as that was needed for acquisition of the FPI assets. It is not at all clear that Landvis Canada intended that Landvis ehf would be bound to subordinate its loan to OCI in order to obtain financing <u>in any and all future circumstances</u>. Had this been the intention, Landvis ehf could have made an acknowledgement that it was so bound; no such acknowledgment was made by Landvis ehf.

[41] Second, were the activities of the third party within the scope envisaged under the agreement? One would have to say, yes. One could readily expect that a replacement lender would want Landvis ehf to subordinate its loan, as occurred when financing was provided by Labki.

[42] Third, did the third party have knowledge of the provision assigning it liability and, by its conduct, did the third party assume the agreement? Clearly, Landvis ehf had knowledge of what was set out in the UUA. (Peter Palsson was the guiding mind for both Landvis Canada and Landvis ehf.) However, "by its conduct did [Landvis ehf ] assume the agreement"? It is not clear that it did. While Landvis ehf did subordinate its loan to OCI to Landsbanki and then to Labki, did it do so because it was required to do so by the UUA or did Landvis ehf do so because it chose to do so in light of the commercial realities at the relevant times? I would say the latter. In short, it has not been shown that "by its conduct [Landvis ehf] assume[d] the agreement".

[43] Thus, considering, without adopting, the factors set out in paragraph 103 of *Glen Grove*, I would not find that there exists a principled exception to the requirement for privity. The trial judge did not err in his conclusion.

**Specific Performance**

[44] In light of the above, like the trial judge, I do not need to address the various issues relating to the remedy of specific performance sought by OCI.

**CONCLUSION**

[45] I would dismiss the appeal. I would order that the respondents have their costs in this Court, on a party-and-party basis for two counsel under Column 3.

_____

M. H. Rowe J.A.

I Concur: _____

B. G. Welsh J.A.

I Concur: _____

M. F. Harrington J.A.