Unofficial English Translation of the Judgment of the Court\*

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| Richer c. Sirois | | | | | 2023 QCCA 693 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No.: | 500-09-029445-210 | | | | |
| (500-17-096324-168) | | | | | |
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| DATE: | May 31, 2023 | | | | |
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| CORAM: | | THE HONOURABLE | | MARK SCHRAGER, J.A.  SOPHIE LAVALLÉE, J.A.  FRÉDÉRIC BACHAND, J.A. | |
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| KEVIN RICHER | | | | | |
| APPELLANT – Defendant/Cross-Plaintiff | | | | | |
| v. | | | | | |
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| SÉBASTIEN SIROIS | | | | | |
| NEON BUDDHA LTD. | | | | | |
| RESPONDENTS – Plaintiffs/Cross-Defendants | | | | | |
| and | | | | | |
| PURE & CO USA LTD. | | | | | |
| PURE & CO LTD. | | | | | |
| BPO SOLUTIONS LTD. | | | | | |
| RESPONDENTS – Cross-Defendants | | | | | |
| and | | | | | |
| BAA LTÉE | | | | | |
| NICOLAS BRABANT-ANGERS | | | | | |
| IMPLEADED PARTIES – Impleaded parties | | | | | |
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| JUDGMENT RECTIFYING  THE JUDGMENT OF MAY 23, 2023 | | | | | |
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1. The judgment rendered on May 23, 2023, is rectified by adding a note to the Annex to the reasons of Schrager, J.A., to address confidentiality of a key exhibit and it will read as follows:

Despite the confidentiality clause 7.1, the parties made no claim to confidentiality before the Court and the terms of the clause (disclosure for enforcement purposes) would rule out any such claim.

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|  | | MARK SCHRAGER, J.A. |
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|  | | SOPHIE LAVALLÉE, J.A. |
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|  | | FRÉDÉRIC BACHAND, J.A. |
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| Mtre Vincent Thibeault | | |
| Mtre Aurélie Gagné | | |
| THIBEAULT JOYAL INC. | | |
| For the Appellant | | |
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| Mtre Hélène B. Tessier | | |
| Mtre Stéphane Roy | | |
| LAPOINTE ROSENSTEIN MARCHAND MELANÇON | | |
| For the Respondents | | |
|  | | |
| Date of hearing: | February 8, 2023 | |

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| Richer c. Sirois | | | | | 2023 QCCA 693 |
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| CORAM: | | THE HONOURABLE | | MARK SCHRAGER, J.A.  SOPHIE LAVALLÉE, J.A.  FRÉDÉRIC BACHAND, J.A. | |
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| KEVIN RICHER | | | | | |
| APPELLANT – Defendant/Cross-Plaintiff | | | | | |
| v. | | | | | |
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| NICOLAS BRABANT-ANGERS | | | | | |
| IMPLEADED PARTIES – Impleaded parties | | | | | |
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| RECTIFIED JUDGMENT  (MAY 31, 2023) | | | | | |
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1. The Court is seized with an appeal from a judgment of the Superior Court, District of Montreal (the Honourable Katheryne A. Desfossés), which granted in part the “Demande introductive d’instance modifiée (2) en annulation d’une entente”; ordered the respondents, Me Nicolas Brabant-Angers and BAA Ltée to return to the plaintiff Neon Buddha Ltd. the sum of $1,050,000 held in trust within three business days of this judgment; granted in part the Summary of Defence and Amended Counterclaim; condemned Sébastien Sirois and Neon Buddha Ltd. solidarily to pay Kevin Richer the sum of $15,000 with interest at the legal rate and the additional indemnity from the date of the judgment; the whole with legal costs excluding the expert's fees.
2. For the reasons of Schrager, J.A., with which Lavallée, J.A., concurs, **THE COURT**:
3. **GRANTS** the appeal in part;
4. **OVERTURNS** the judgment in part;
5. **STRIKES** paragraph 331 of the judgment;
6. **ADDS** the following conclusion to the judgment:

**CONDEMNS** Sébastien Sirois, Neon Buddha Ltd., Pure & Co. Ltd. and BPO Solutions Ltd. solidarily to pay to Kevin Richer $4,850,000 with interest and the additional indemnity from January 1, 2017 plus legal costs (including expertise);

1. **THE WHOLE** with legal costs in appeal against Respondents;
2. For other reasons, Justice Bachand would have dismissed the appeal, with legal costs.

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|  | | MARK SCHRAGER, J.A. |
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| Mtre Vincent Thibeault | | |
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| THIBEAULT JOYAL INC. | | |
| For the Appellant | | |
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| Mtre Hélène B. Tessier | | |
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| LAPOINTE ROSENSTEIN MARCHAND MELANÇON | | |
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| Date of hearing: | February 8, 2023 | |

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| REASONS OF SCHRAGER, J.A. |
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# FACTS

1. The judge described, step by step and chronologically, the detailed facts giving rise to the dispute between the parties. Suffice it to say, for present purposes, that the toy company owned by the Appellant as sole shareholder, Divertissement Wooky Inc. (“**Wooky**”), was in serious financial trouble in 2016. The operating losses as at May 2016 were between $3.7 and $4.2 million. The first-ranking secured creditor providing the operating loan facilities, Royal Bank of Canada (“**RBC**”), notified Wooky in February 2016 of various covenant defaults, stating that it would require repayment of the outstanding advances by the end June 2016.
2. After unsuccessful attempts by the Appellant (“**Richer**” or the “**Appellant**”) to interest new investors or a purchaser, Mr. Sirois (“**Sirois**”) appeared on the scene on the weekend of June 11-12, 2016. After a cursory due diligence review, he agreed with Richer on a plan to salvage Wooky’s business. This plan was set down in a written agreement, which the evidence indicates was signed on June 27, 2016, (the “**Entente**”). The Entente is the cornerstone of the disputed issues. Its text is reproduced in a schedule to these reasons.
3. Three of the four grounds of appeal deal with what Richer is entitled to under the Entente. The fourth ground deals with the disposition of funds held in trust by Sirois’ attorneys. I propose to address all of those grounds in these reasons.
4. At the time that the Entente was signed (or more precisely, shortly thereafter, when Sirois paid Wooky’s three secured creditors), Wooky was indebted to its three secured creditors as follows, in order of rank and in round figures:

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| RBC | $1,000,000 |
| INVESTISSEMENT QUÉBEC (“**I.Q.**”) | $300,000 |
| CAISSE DE DÉPÔT ET PLACEMENT DU QUÉBEC (“**CDPQ**”) | $11,000,000 |

1. Wooky also owed its suppliers approximately $6,500,000 and Richer was owed $350,000 in consideration of a shareholder’s loan. Moreover, Wooky lost $6 million as at its 2015 financial year end.
2. RBC, which was still unpaid on July 11, 2016, sought and obtained the appointment of a receiver (Raymond Chabot Inc. (“**Raymond Chabot**”)) pursuant to s. 243 *Bankruptcy and Insolvency Act* (“***BIA***”).[[1]](#footnote-1) Raymond Chabot took possession of Wooky’s assets, terminated employees and collected accounts receivable.
3. On July 20, 2016, Sirois made an offer to Raymond Chabot to purchase the inventory and intellectual property of Wooky for $500,000 or $1,000,000, subject to adjustments. In both cases, the purchase would be conditional on court approval and the discharge of all secured rights. The offer was refused.
4. During the same time period, Sirois paid CDPQ $1,000,000 with full subrogation in its security. He sought to pay RBC on a discounted basis, but ultimately paid the full amount of the balance due to it of just under $1,000,000 (including a $50,000 prepayment penalty and legal fees) in July 2016, also obtaining subrogation into RBC’s security. As well, Sirois paid I.Q. $292,000 and obtained subrogation to its secured rights.
5. Sirois now stood in the shoes of the three secured creditors. He successfully petitioned the Superior Court to have Raymond Chabot replaced by PriceWaterhouseCoopers Inc. (“**PWC**”) as receiver. The latter essentially ran Wooky’s business for Sirois until the end of December 2016. PWC advised suppliers that the business was continuing. During this period, Sirois rehired employees of Wooky, through his company Neon Buddha Ltd., which was also a party to the Entente. He acquired inventory ready to be shipped to Wooky in the Orient through his company BPO Solutions Ltd.
6. Sirois told Richer not to show up at Wooky’s business premises and instructed PWC not to let Richer attend. PWC so notified Richer, adding that he was not to contact Wooky’s customers or suppliers.
7. On July 22, 2016, Sirois emailed Richer to repudiate the Entente. Here is what he said:

Bonjour Kevin et baa,

As you know, the last few days have been quite eventful and it gave me the opportunity to evaluate what I am ‘buying’.

When I first learned about Wooky, I was most impressed with what it had accomplished and was told that it had money problems. I soon realized that more than money, it needed better operation. Because of the urgency of the situation, the due diligence was almost non existent. As I have been working with the project, I learned about new skeletons in the closet (see email attached) on a daily basis. I do not think that these ‘mistakes’ were intentional but they could easily be labelled as gross negligence and were definitely not disclosed before I signed our contract.

Today, I am left with a Canadian team that was all dismissed, millions in order cancellations, an incompetent and dysfunctional junior team in China and hostile suppliers that were burned for much more than for unpaid bills. I have already invested a few millions and for a cool 2+ million (1m for bank and 1m for kevin), I have the chance to buy this basket of joy. Eventually, one has to decide when to cut his losses and maybe learn from his mistakes.

ln hindsight, CDPQ got too much and Kevin's contract is much too generous for what one is buying (there is actually not much of anything 'free and clear'). After much reflections, I decided that it is no longer a fair deal for me. I know that we have a breakup clause in our contract and I am happy to trigger it today but the delays involved in it would make the whole deal worthless and I am sure that you would not be happy if I offered you $100 to buy my 'nothing'. Instead, I would like to propose the following compromise:

A-if we can sign an agreement between kevin and I today before 3pm to cancel our existing contract, I make a 100k payment to kevin and I guarantee that rbc and IQ release you of all liabilities (Free and clear of all hypothecs charges, liens and encumbrances whatsoever)

B- OR if we can sign an agreement between kevin and I by Monday july 25th before 3pm to cancel our existing contract, I make a 50k payment to kevin and I guarantee that rbc and IQ release you of all liabilities (Free and clear of all hypothecs charges, liens and encumbrances whatsoever)

C-if we cannot agree by Monday, I simply stop digging myself deeper into this mess and move on.

I understand that you are caught at the eleventh hour with few options. I feel just as trapped! The 'brand' is definitely not worth 2m and is not even worth the 1m that I will have to pay rbc to get you a release from a personal bankruptcy. I can confirm that most of the company's AR is contested and most of its stock is seized and consist of older worthless stock. RBC knows that and they believe that they can get some value from your personal real estate or that I will give in to their pressure. Or somehow they think that someone would pay 1m for the lloom incomplete trademark filing with an partially completed Application.

We would of course need to release each other so that we don’t end up suing each other for misrepresentation.

Because of the daily value destruction from rbc, I will not be able to offer much after Tuesday next week.

I am sorry for the change of plan but at some point, one has to stop bleeding. You would not believe all the new liabilities that appear each time that I meet your business partners. It is a sad story.

Sorry,

Sébastien Sirois

Direct line: +1-800-315-4408 Ext 58

Hong Kong Direct number: +852-8199-0171

Skype: pureandcosebastien

1. At the same time, he ordered staff to erase the exchange of emails between him and Richer, but this was not done.
2. Richer replied immediately to Sirois’ email as follows:

Je comprends de tes emails et de nos récentes conversations que tu te désistes de tes obligations prévues à notre entente, bien qu’elle soit toujours valide et applicable. L’offre que tu m’as faite aujourd’hui ne peut pas être acceptée, et je considère qu’il s’agit ni plus ni moins d’un retrait unilatéral de ta part de notre entente.

J’ai demandé à BAA de ne plus agir sous tes instructions, et ils verront dorénavant à agir dans mon seul intérêt et celui de Wooky.

Kevin

1. Richer attempted to regain control of Wooky by petitioning the Superior Court on three occasions, without success. His attorneys also sent a formal demand to Sirois on August 5, 2016, calling upon him to acquire the inventories contemplated by the Entente. This was all to no avail. Richer caused Wooky to file a notice of intention to make a proposal under the *BIA* in November 2016, but given that no proposal was filed, Wooky was declared bankrupt on December 21, 2016.
2. The next day (December 22, 2016), Sirois, who, as secured creditor of Wooky, had submitted a credit bid (in an amount not directly disclosed by the evidence but which was presumably equal to his aggregate payment to the three secured creditors) to PWC for the assets, was declared owner of all the property of Wooky pursuant to the vesting order issued by the Superior Court.
3. These are all facts outlined by the judge.

# DISCUSSION

1. The judge dismissed the principal demand of Sirois, who sought the nullity of the Entente. She concluded that there was no error provoked by fraud and that if Sirois was not fully cognizant of Wooky’s unhealthy financial situation in June 2016, it was because of his own inadequate due diligence.[[2]](#footnote-2) Sirois has not appealed that finding.
2. On the cross-demand filed by Richer seeking to enforce the Entente, the judge concluded as follows:

[246] Puisque la Transaction projetée ne s'est pas réalisée et que le paiement des montants prévus à l’Entente est conditionnel à la réalisation de la Transaction projetée, monsieur Richer n'a pas droit aux sommes additionnelles réclamées en vertu de l’Entente.

This does not appear to have been pleaded by Sirois. Indeed, the fact he sought the nullity of the Entente and his attempt to repudiate it in July indicate that, in his mind, he was bound by the obligations arising from the Entente.

1. I believe the judge committed palpable and overriding errors in her interpretation of the Entente by way of her appreciation (or rather misunderstanding) of the facts (testimonial and documentary) proved before her. Contrary to the judge’s conclusion, I believe that the condition referred to in the Entente – namely the occurrence of a “Transaction projetée” – was satisfied by Sirois’ acquisition of the assets on December 22, 2016. That is what the document provides – i.e., that Sirois will acquire all or substantially all the Wooky assets. The manner of acquisition is not spelled out and it is certainly not stipulated that the acquisition would occur through a private sale agreement between Wooky and Sirois, contrary to what the judge wrote, as explained in more detail below.
2. From the outset, the judge took the following view of the Entente:

[1] Au cours de l'été 2016, Sébastien Sirois et sa société Neon Buddha Ltd (« Neon ») concluent une entente avec Kevin Richer en vue de laquelle monsieur Sirois, Neon et d'autres sociétés contrôlées par monsieur Sirois injectent plusieurs millions de dollars dans Divertissement Wooky inc. (« Wooky »), société contrôlée par monsieur Richer. Si les parties réussissent à sortir Wooky de sa situation d'insolvabilité à l'aide des fonds de monsieur Sirois et de Neon, l'entente détermine les termes du partenariat entre messieurs Sirois et Richer pour la suite des activités de Wooky (I'« Entente »).

(Emphasis added)

1. The Entente makes no reference to Wooky somehow exiting its state of insolvency. The indebtedness and accumulated losses made this virtually impossible. Sirois recognized this when he testified that a bankruptcy scenario was likely. In his testimony, the former Chief Financial Officer of Wooky referred to it “hitting the wall” and Sirois “picking up the pieces”, yet the judge observed that Richer and Sirois never discussed their association in the context of a financial crisis:

[45] Également, dans le cadre des discussions entre les parties, il n'est jamais question que Wooky soit en détresse financière ou dans une situation de crise. La société est insolvable en juin 2016, mais monsieur Richer lui explique cette insolvabilité comme étant dû [sic] au caractère saisonnier des ventes. Puisque la majeure partie des ventes se font à l'automne en vue de la période des fêtes, la société est déficitaire au printemps, mais profitable à l'automne.

1. Moreover, s. 2.3 of the Entente as well as the fourth and sixth recitals of its preamble refer to the business of Wooky to be carried on through a new entity, SiroisCo, which Sirois contemplated in his testimony might be a Hong Kong company. Nevertheless, despite the direct evidence and the millions owed to unsecured creditors, including suppliers, the judge thought the Entente contemplated that Wooky would continue to carry on business, in the normal course. Such a conclusion is erroneous and not supported by the evidence.
2. Section 2.4 of the Entente clearly confirms Sirois’ intention to pay the secured creditors with subrogation, since he renounces any recourse against Richer under a personal guarantee that could accrue to Sirois by subrogation.
3. Later, in adjudicating Richer’s cross-demand, the judge stated the following:

[227] L'Entente prévoit que monsieur Sirois « procédera éventuellement à l'acquisition de la totalité ou d'une partie substantielle des actifs » de Wooky, dont sa propriété intellectuelle.

[228] L'Entente précise les actifs acquis lors de la Transaction projetée et qui donnent lieu à l'application de l'Entente :

( ... ) (i) les gammes de produits telles qu'exploitées par la [Wooky] au montant de la réalisation de la Transaction projetée, incluant toute propriété intellectuelle y afférente, et (ii) toute gamme de produits, projet ou activité exploités par Sirois (par l'entreprise de SiroisCo ou de toute autre entité contrôlée par Sirois) dans laquelle Richer a ou a été impliqué, incluant toute propriété intellectuelle y afférente, mais excluant pour plus de certitude toute propriété intellectuelle en relation avec laquelle Richer n'a pas été impliqué.

[229] La preuve est sans équivoque : la Transaction projetée ne se produit que si l'opération visant à exclure les créanciers garantis de Wooky réussit et que messieurs Richer et Sirois sont en mesure de poursuivre ensemble les activités normales de Wooky. C'est d'ailleurs pour cette raison que l'Entente prévoit un salaire annuel de 200 000 $ payable à monsieur Richer pour la suite si la Transaction projetée se réalise.

[230] La dévolution des actifs de Wooky à Neon par PWC inc. dans un contexte de liquidation de la société après que les agissements de la RBC et du séquestre Raymond Chabot aient enrayé toute possibilité de reprise normale des activités de Wooky ne constitue pas la Transaction projetée envisagée par les parties au moment de la signature de l’Entente.

[231] S'il est vrai que messieurs Richer et Sirois devaient devenir des associés dans la suite de Wooky si une telle suite survenait, il ne faut pas perdre de vue que monsieur Sirois est d'abord et avant tout un créancier de Wooky. Monsieur Richer le reconnaît d'ailleurs.

[232] Lorsque l'attitude intransigeante de la RBC empêche monsieur Sirois de désintéresser cette dernière sans payer les frais importants et inattendus de prépaiement, lui demander de poursuivre en ce sens serait lui imposer plus que ce que l’Entente ou les engagements verbaux entre les parties prévoient.

[233] Monsieur Sirois doit toutefois agir de bonne foi et le Tribunal est convaincu que c'est ce qu'il a fait.

[234] Malgré ses efforts, monsieur Sirois n'arrive pas à désintéresser simplement la RBC alors que la stratégie du séquestre Raymond Chabot est en train d'enrayer toute possibilité de reprise normale des activités de Wooky.

[235] Même s'il est perçu comme le chevalier blanc, monsieur Sirois n'est pas tenu à l'impossible.

[236] À partir du moment où la reprise normale des activités de Wooky n'est plus envisageable, la Transaction projetée ne fait plus partie de l'équation. De là, monsieur Sirois est en droit d’exercer ses droits à titre de créancier garanti, ce qu'il a fait.

(References omitted; emphasis added)

1. The judge insisted that the evidence unequivocally shows that the agreement was conditional on satisfying the claims of the secured creditors – “*désintéresser*”, or “excluding” the secured creditors as she also referred to it – and on the continuity of Wooky’s business. There is no mention of this in the Entente, but, of course, the assets could not be freed up without satisfying the secured creditors. In paragraph 230, she confused the effects of insolvency (i.e., RBC demanding payment of loans and appointing a receiver) with its causes. She appears to have thought (para. 234) that somehow RBC’s claim could be satisfied without payment. It is inconceivable that the first-ranking secured creditor would agree to a discount given the face value of the accounts receivable and inventory, amounting to approximately $6 million as at May 2016, charged by its hypothec. In any event, the judge’s view here is not supported by any evidence, including the Entente and the testimony of Sirois himself.
2. Sirois disclosed that he knew he had to pay the secured creditors and tried to obtain agreements for such payments on a discounted basis. He knew he had to free up the assets from the hypothecary charges held by the secured creditors. Even in a private sale, the debts of the secured creditors would have to be paid because the security would follow the assets into the possession of any purchaser (art. 2733 *C.C.Q.*). Moreover, a private sale could be subject to attack by creditors[[3]](#footnote-3) or a bankruptcy trustee[[4]](#footnote-4) given, *inter alia*, Wooky’s insolvency.
3. The judge wrote that the transfer of assets by PWC pursuant to the vesting order excluded the possibility of continuing Wooky’s business. The judge obviously confused the continuity of Wooky as a corporate entity and the continuity of its business enterprise. The uncontradicted evidence, including Sirois’ testimony, indicates that he carried on that business (perhaps on a reduced level) through his companies for several years after 2016. Indeed, the judge referred to the continuing sale of Wooky products until 2019.[[5]](#footnote-5)
4. Moreover, in Sirois’ discovery testimony, he confirmed that the original plan was an organized bankruptcy: to ship the orders, collect the accounts receivable, and close down Wooky and probably bankrupt it:

(...) To be honest, we ... we ... what we planned to do originally was to have an organized bankruptcy, meaning that we…we knew that the company would eventually have to fold because it has too many liabilities. But we wanted, the most important things is first to ship the orders and after the orders are done, then collect the AR and close the company.

(…)

The main plan was to do an organized bankruptcy. (...) Yeah. So, on an organized bankruptcy, I have paid off the banks, I fund the purchase orders, the money comes in, we pay off the creditors, and then we liquidate whatever is left and the company close [sic]. We sell the IP and people keep their jobs, the suppliers get more orders. Everyone is happy.

1. Mtre Beaupré, who drafted the Entente, indicated that at the time the agreement was committed to writing in the Entente, the manner of transferring the assets had yet to be decided. This dovetails with Sirois’ testimony that the possibility of Wooky’s bankruptcy was contemplated. He certainly (and understandably) made no commitment to assume any amounts payable to creditors other than the three secured creditors. Mr. Tahmazian, Wooky’s Chief Financial Officer, when called to the stand by the Respondents, confirmed this and added that the taking of possession by the receiver appointed by RBC was seen as part of this bankruptcy scenario. Sirois would control the assets while having no obligation to pay unsecured creditors.
2. The judge, however, stated that Wooky needed to resume normal operations in order for Richer to have a claim under the Entente:

[229] La preuve est sans équivoque : la Transaction projetée ne se produit que si l'opération visant à exclure les créanciers garantis de Wooky réussit et que messieurs Richer et Sirois sont en mesure de poursuivre ensemble les activités normales de Wooky. C'est d'ailleurs pour cette raison que l'Entente prévoit un salaire annuel de 200 000 $ payable à monsieur Richer pour la suite si la Transaction projetée se réalise.

1. Sirois also testified that he had agreed to pay $1,000,000 to Richer in December 2016 (as provided for in s. 2.1 ii) of the Entente), because he thought this would be funded by collecting Wooky’s accounts receivable. He testified: “Once the fall [accounts receivable] come in, the company is cash rich, it makes a profit, Kevin gets a million ($1,000,000) and then, we create a new corporation.” He would not be paying unsecured debtors or continuing the business operations through the Wooky corporate entity.
2. In paragraph 236 of the judgment, the judge stated that the resumption of Wooky’s normal operations (“*la reprise normale des activités de Wooky*”) was not possible, such that the “Transaction projetée” was no longer part of the equation. She thus went beyond the wording of the Entente and contradicted Sirois’ view of “an organized bankruptcy”. As mentioned above, in his testimony, Sirois even ventured to say that he thought they might continue Wooky’s business through a Hong Kong company because of the tax advantage. Again, the judge confused the business enterprise of Wooky with the corporate entity.
3. The judge even recognized that from July to December 2016, Sirois was carrying on Wooky’s business through PWC, the receiver appointed by him.[[6]](#footnote-6)
4. Sirois admitted that he continued selling Wooky products through two of his companies and, indeed, the documentary evidence discloses that from January 2017 until February 2020, Sirois carried on Wooky’s business by selling its inventory, as well as new inventory acquired by him under the Wooky trade names, through at least two of his companies – Neon Buddha Ltd. and Pure & Co. Ltd. This is specifically contemplated in the sixth recital of the Entente’s preamble. He appears to have ceased carrying on that business in 2021, when he sold Wooky’s intellectual property for $250,000.
5. The Entente contemplated the acquisition by Sirois (or a company controlled by him) of Wooky’s assets:

**ATTENDU QUE** Sirois procédera éventuellement à l’acquisition de la totalité ou d’une partie substantielle des actifs de la Société (la « **Transaction Projetée** »), dont notamment sa propriété intellectuelle, par l’entremise de l’une ou l’autre des sociétés dont il détient le contrôle (« **SiroisCo** »).

1. It is evident from Sirois’ July 22, 2016 email that once he realized that Wooky’s financial condition was perhaps even worse than he had contemplated in June and that he would not need Richer to help him sell the products, he sought to repudiate the Entente. The sending of a formal demand by Richer’s lawyer in August, calling upon Sirois to give effect to the Entente, is an obvious reaction to such repudiation and does not change the fact that the condition of acquiring the assets was fulfilled in December, when Sirois acquired the assets through the vesting order pursuant to his credit bid.

\* \* \*

1. In *Uniprix v. Gestion Gosselin et Bérubé inc.*, the Supreme Court established that courts of appeal should not intervene in matters of contractual interpretation absent a palpable and overriding error. Similarly, the determination of whether a contract is clear or ambiguous is subject to the same standard of intervention.[[7]](#footnote-7) Where the words of a contract are clear or unambiguous, judges should give effect to its terms and apply them to the facts of the case.[[8]](#footnote-8) Where, however, a court finds ambiguity in the words, it should interpret the contract (i.e., what the parties intended) by considering the evidence.[[9]](#footnote-9)
2. I believe that in interpreting the Entente, the judge went beyond its clear wording to find an ambiguity and resolve same with the evidence. This is contrary to the teachings of the Supreme Court in *Uniprix* and constitutes a palpable and overriding error.[[10]](#footnote-10) Faced with a clear clause, a court should apply, and not interpret, a contract.[[11]](#footnote-11)
3. The Entente is clear that an acquisition of the assets by Sirois or one of his companies satisfies the condition that there be a “Transaction projetée”. The parties did not specify in the Entente how the assets would be acquired, and the testimony indicates that this had not yet been determined. The judge should not have added to the Entente by specifying conditions for the acquisition of the assets which the parties themselves chose not to spell out. They did not specify the manner of the transfer because, as Mtre Beaupré testified, at the time of signing, they did not yet know how the transfer would be effected. Sirois distinctly foresaw a transfer through a bankruptcy, as he testified.
4. The judge need not have gone beyond the terms of the Entente. If, however, such an exercise was justified, then, the uncontradicted evidence indicates that the parties, particularly Sirois, foresaw an acquisition of assets in a bankruptcy as a possible scenario and that the “Transaction projetée” condition was fulfilled by the transfer of assets pursuant to the December 2016 vesting order. Accordingly, the sums payable to Richer under the Entente are due. The judge’s interpretation of the Entente is tainted by a palpable error given that it disregards this uncontradicted evidence that was provided by Sirois himself and was confirmed by Mtre Beaupré, who also testified to the possibility of acquiring the assets through a bankruptcy. The error is overriding as it completely changes the result.
5. I believe the judge misconstrued the evidence, which led her to conclude that the Entente did not obligate Sirois because the “Transaction projetée” had not occurred. A different conclusion drawn from the proven facts, where credibility is not in issue, is a mixed question of fact and law, in respect of which an appeal court may intervene in the presence of a palpable and overriding error.[[12]](#footnote-12) This process is not a retrying of the case. There is no assessment of credibility or new fact-finding. All the facts I refer to herein are either those ascertained by the judge or uncontradicted facts found in documents and testimony, in many instances the testimony of Sirois himself. Such intervention on mixed questions of fact and law is part of the appellate mandate.[[13]](#footnote-13) As the Supreme Court has said: “(…) The issue in this appeal is not so much what happened as the legal characterization and effects of the events. (…).”[[14]](#footnote-14)
6. If I have described numerous errors, it is because of the quantity of errors made by the judge: the number of errors mentioned speak to their overriding nature and not, I repeat, to any effort to retry the case.
7. I hesitate to state that the judge viewed the evidence through a “distorting lens” given the comments of the Supreme Court in *Salomon v. Matte‑Thompson*[[15]](#footnote-15) to the effect that the standard of manifest error is not somehow supplanted by that metaphor. Nevertheless, a trial judge’s misreading or misunderstanding of a contract leading to the trial judge’s distorted view of the evidence has been held to constitute a palpable and overriding error.[[16]](#footnote-16) For that matter, a misapprehension of the evidence as a whole will meet the threshold of palpable error justifying appellate review.[[17]](#footnote-17) The result is nothing less than unreasonable and should not be allowed to stand.
8. By way of example comparable to the present case, the Court has intervened where it observed that the trial judge’s finding that the contract between the parties was subject to a condition which was not substantiated by the evidence.[[18]](#footnote-18) Here, the evidence does not substantiate the judge’s finding that the realization of the “Transaction projetée” was conditional upon the consummation of some additional consensual contract between Sirois and Richer. Mtre Beaupré, who drafted the Entente, confirmed that the manner in which Wooky’s assets would be acquired had not yet been determined at the end of June (when the Entente was signed) and a bankruptcy was one possibility: “Ç’aurait pu aussi se faire via un processus de faillite.” This dovetails with Sirois’ discovery testimony quoted above.
9. I conclude that the judgment is affected by palpable errors and, at the risk of repeating myself, I would summarize as follows. The judge erred in finding that the “Transaction projetée” set forth in the Entente had not occurred, because she disregarded Sirois’ own testimony that an “organized bankruptcy” was planned. It was through the vesting order issued by the bankruptcy court that he acquired Wooky’s assets. Rather than finding that this acquisition satisfied the condition set out in the Entente, the judge found that this transfer of assets excluded the possibility of Wooky continuing to do business, which she found to be a further precondition. She thus erred by confusing the corporate entity with the business enterprise, the latter having been continued by Sirois for three years, again according to his own testimony. The sixth recital of the Entente’s preamble specifically refers to the business being continued by a Sirois company. The judge’s insistence on the need to satisfy the secured creditors compounds the error, since they were paid by Sirois, who was subrogated to them (as contemplated in s. 2.4 of the Entente), and thus “excluded”. The subrogation allowed him to cause the sale of the assets to his company (Neon Buddha Ltd.) via his credit bid and the vesting order. The erroneous inferences the judge drew from the proven facts led her to err in concluding that the “Transaction projetée”, referred to in the Entente as the acquisition of Wooky’s assets by a company controlled by Sirois, had not occurred. Such error is overriding as it completely changes the outcome of the case – i.e., that the Entente did not produce binding obligations for Sirois.

\* \* \*

1. At the hearing before the Court, the Respondents’ attorney was asked whether Sirois’ conduct could be construed so as to render absolute the obligations under the Entente. In other words, if the judge and the Respondents are correct that some consensual transaction between Sirois and Richer had to occur for the condition of the “Transaction projetée” to be fulfilled, then would it not be the case that Sirois prevented the condition from being fulfilled? He repudiated the Entente in his email of July 22, 2016, he did not consummate any kind of transaction in August when called upon to do so by Richer’s attorneys, and he had Richer physically excluded from Wooky’s premises by the PWC team and, indeed, locked him out of the business. This evidence is not contradicted and constitutes a fault since Sirois was bound by the Entente (as the judge decided in dismissing his action in nullity) and deliberately prevented the “Transaction projetée” from occurring. Therefore, as a matter of law pursuant to Article 1503 *C.C.Q.*, Sirois’ obligations under the Entente would no longer be conditional on the occurrence of a second contract, as the judge and the Respondents would have it:

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| **1503.** A conditional obligation becomes absolute when the debtor whose obligation is subject to the condition prevents it from being fulfilled. | **1503**. L’obligation conditionnelle a tout son effet lorsque le débiteur obligé sous telle condition en empêche l’accomplissement. |

Though this point was not argued in the court below, it arises as a point of law from the proven facts and the parties had the opportunity to address it during oral argument. As such, it is properly considered by the Court.[[19]](#footnote-19)

\* \* \*

1. Given my view that the judge erred and that the sums are due to Richer, it is now a matter of determining the quantum. The amount of $1,000,000 under s. 2.1 ii) is clearly due to Richer.
2. With respect to s. 2.3, which deals with the salary to be paid to Richer pursuant to an employment agreement to be entered into with a “SiroisCo”, such agreement could be terminated by the employer upon payment of an indemnity in lieu of notice, so that, in the circumstances, I would arbitrate the amount due under s. 2.3 at $200,000, being the equivalent of severance pay of one year’s salary.
3. As to the sharing of profits of the new business, which is contemplated in s. 3 of the Entente, s. 3.1 provides that the proceeds arising from the use of the “Actifs Richer” (as defined in the Entente) would be applied to Sirois’ advances. Then, $3,650,000 would be paid to Richer from those proceeds. Thereafter, Richer and Sirois would share those proceeds on a 50/50 basis. Sirois is shown to have operated Wooky’s business through his other corporations until at least 2020. He did not respect his obligation to keep a separate accounting for Wooky’s business, as required by s. 3.2 of the Entente. Sirois testified that it was a losing proposition, albeit without any probative documentary evidence in support of such verbal assertion.
4. The evidence does not allow for any cogent calculation of what the profits might have been. The in-house accounting sheets of Sirois’ operation during 2017, 2018 and 2019 are not substantiated in any manner. They are self-serving calculations with no probative value. In such regard, Richer’s expert concluded that the profits could not be calculated because Sirois did not keep a separate accounting and did not provide decipherable information on the sales or cost of sales of Wooky products in his companies. Consequently, the expert worked with the known data. The Respondents did not produce an expert report regarding the calculation of profits that would be owed to Richer pursuant to the Entente.
5. To establish the cost, Richer’s expert took the total paid by Sirois to secured creditors ($927,091 to RBC, $1,000,000 to CDPQ and $292,000 to I.Q.) plus the initial payment of $350,000 to Richer, for a total of $2,569,091. He subtracted this from the value of the assets other than intangibles[[20]](#footnote-20) ($10,263,176) taken from the PWC reports. This left a surplus value of $7,694,085 as at the end of July 2016. Thus, he concluded that in addition to the $1 million due in virtue of s. 2.1 (ii) of the Entente, $3,650,000 was due to Richer under s. 3.1(ii). Also, 50% of the balance, or $1,522,043, accrues to Richer pursuant to s. 3.1 (iii).
6. The expert’s calculations are validated in part by PWC’s final report as Wooky’s receiver as at April 30, 2017. It remitted to Neon Buddha Ltd. $3,426,057 as the net proceeds, after expenses, of the receivership. This figure exceeds Sirois’ payment to the three secured creditors by $1,206,966. Such sum would be due to Richer pursuant to s. 3.1(ii) in the absence of any other proof, but we know that Sirois continued to carry on Wooky’s business beyond the receiver’s activities. The judge confirmed that he continued selling Wooky products until the end of 2019 and then sold the intellectual property for $250,000 in February 2020. The above-mentioned $3,426,057 remitted by the receiver to Neon Buddha Ltd. does not take into account these other Wooky business activities – i.e., the sales of inventory acquired by Sirois through his company BPO Solutions Ltd. in Asia, or sales in the United States through Pure & Co. Ltd. – nor the sale of the intellectual property.
7. The judge said:

[251] Le rapport et témoignage de l'expert Michel Thibault ne permettent pas d'établir les gains et bénéfices générés, le cas échéant.

[252] Le Tribunal comprend que cette impossibilité résulte en partie du fait que les informations financières transmises par monsieur Sirois et ses sociétés sont incomplètes ou erronées et qu'ils n'ont pas tenu une comptabilité distincte pour l'exploitation des actifs de Wooky.

...

[254] Toutefois, considérant la conclusion du Tribunal quant à l'absence de Transaction projetée, il est difficile de reprocher à monsieur Sirois de ne pas avoir tenu une comptabilité distincte.

[255] Au surplus, la force probante de l'évaluation des gains et bénéfices générés par l'exploitation des actifs proposée par l'expert Thibault est faible.

[256] D'une part, la qualité d'expert en comptabilité de monsieur Thibault est établie, mais il n'est expert ni en juricomptabilité ni en évaluation ou en quantification de dommages.

[257] Son expertise établie aux fins du présent dossier se limite à l’explication et à l’interprétation de données comptables, ce qu’il fait lorsqu’il explique au Tribunal en quoi les informations financières transmises par monsieur Sirois et ses sociétés sont incomplètes ou erronées.

[258] Au-delà de l'opinion de monsieur Thibault à cet égard, son expertise est limitée.

...

[261] Enfin, monsieur Thibault reconnait [sic] qu’il n’a effectué aucune analyse ni ajustement pour établir les données et calculs qu'il propose. Il reconnaît également que les importantes avances effectuées par monsieur Sirois et ses sociétés n'ont pas été considérées ni l'impact sur le marché des compétiteurs *Make lt Real et Tween Team*.

1. There is no analysis of the exercise that the expert Thibault executed as described above based on the data available in the Court record.
2. To award nothing where Sirois did not keep a separate accounting for Wooky’s business would be to reward Sirois for not respecting his obligation under the Entente:

(…) the perpetrator of a wrongful act should not profit thereby, as that would encourage wrong doing.[[21]](#footnote-21)

1. In application of that principle, the Court has awarded damages where a commercial party who was the victim of a breach of contract failed to prove its loss.[[22]](#footnote-22)
2. Here, one cannot accurately calculate the profit derived by Sirois, but the Court, based on the available evidence and based on the expert’s opinion, can arbitrate to determine that, at the very least and on balance, the first threshold amount of $3,650,000 is due to Richer by Sirois.
3. Accordingly, I would overturn the judgment and replace it with a condemnation of Sirois, Neon Buddha Ltd., Pure & Co. Ltd. and BPO Solutions Ltd., solidarily, to pay Richer $4,850,000 with interest plus costs (including expert fees) in first instance and in appeal. The Cross-Defendants other than Sirois and Neon Buddha Ltd. were not signatories of the Entente. However, the evidence reveals that Sirois used BPO Solutions Ltd. to purchase Wooky products for resale. He filed profit and loss statements of Pure & Co. Ltd. in evidence and testified that all sales of Wooky products in the United States were made through it. It thus appears that these companies, through their actions (as instruments of Sirois), adhered to the Entente and should be liable for the amounts due to Richer thereunder.
4. Interest and the additional indemnity should run from January 1, 2017 because though Sirois was put in default by Richer’s lawyer’s letter of August 5, 2016, the first payment of $1 million under the Entente became due on December 31, 2016.
5. Lastly, I fail to see how Sirois’ attorneys can be ordered to remit the $1 million plus held in their trust account to Richer in satisfaction of the judgment I propose. The funds were supposedly the “war chest” to pay Wooky’s secured creditors and perhaps others as the events in the late spring of 2016 unfolded. These funds, however, were not deposited to secure sums to become due under the Entente – and thus not the condemnation which I propose for the sums due to Richer under the Entente. The Court cannot invent novel means to provide for the execution of its judgments even if they might appear equitable in the circumstances.

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| MARK SCHRAGER, J.A. |

**ANNEX TO THE REASONS OF SCHRAGER, J.A.**

*Despite the confidentiality clause 7.1, the parties made no claim to confidentiality before the Court and the terms of the clause (disclosure for enforcement purposes) would rule out any such claim.*

**[translation]**

**AGREEMENT ON EARNINGS AND PROFIT SHARING**

**BETWEEN:** **KEVIN RICHER**, businessman, domiciled and residing at 3685 du Tamaris Street, Saint-Bruno-de-Montarville, Quebec J3V 089;

**Hereinafter referred to as “Richer”;**

**AND: SÉBASTIEN SIROIS**, businessman, domiciled and residing at 99/3 T. Thawangtaan, A. Saraphi, Chiangmai, Thailand;

**Hereinafter referred to as “Sirois”, and together with Richer as the “Parties”;**

**TO WHICH INTERVENES:**

**NEON BUDDHA LTD**, a corporation governed by the statutes of Ontario, having a place of business at 7 Fairhaven Drive, St. Catharines, Ontario L2S 3N4, represented by Sébastien Sirois, its president, duly authorized as he so declares;

**Hereinafter referred to as “Neon Buddha”**

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**WHEREAS** Richer Kevin is currently the president and sole director of Divertissement Wooky Inc. (the “**Corporation**”), a business operating principally in the areas of the design, manufacture, distribution, and sale of games and toys intended for children and adolescents;

**WHEREAS** to date, Richer holds all of the voting and participating shares in the Corporation through management companies and a trust;

**WHEREAS** as at this date, Richer has given the Corporation interest-free advances totalling $270,000 (the “**Advances**”);

**WHEREAS** Sirois will eventually purchase all or substantially all of the Corporation’s assets (the “**Planned Transaction**”), including its intellectual property, through one of the companies he controls (“**SiroisCo**”);

**WHEREAS** Sirois recognizes the value added by the ideas and creative spirit of Richer and accordingly wishes to retain his services as Chief Creative Officer for Richer Assets (as this term is defined below) in the event of the occurrence of the Planned Transaction;

**WHEREAS** the Parties verbally agreed to compensation payable by Sirois to Richer in relation to the Planned Transaction and an earnings and profit-sharing method arising from the future operation of the Richer Assets by SiroisCo;

**WHEREAS** the Parties wish to record and confirm these verbal agreements in writing and detail their respective rights and obligations towards the Richer Assets and their operation in the event the Planned Transaction occurs;

**WHEREAS** this agreement is and must remain confidential and may not be disclosed by either of the Parties;

TO THIS END, THE PARTIES AGREE AS FOLLOWS:

**(1) INTERPRETATION**

**1.1 Terminology**

The following words and expressions, when they appear in this Agreement or in any supporting documentation, are interpreted according to the definitions hereunder, subject to an implicit or explicit exception in the language of the text:

(1.1.1)Richer Assets

means, collectively and exclusively, (i) the product lines as operated by the Corporation upon the occurrence of the Planned Transaction, including any related intellectual property, and (ii) any product line, project, or activity operated by Sirois (through SiroisCo or any other entity Controlled by Sirois) in which Richer is or was involved, including any related intellectual property, but for greater certainty, excluding any intellectual property with which Richer was not involved;

(1.1.2) Control

means (i) with regard to a corporation, at a given date, the fact that a natural or a legal person is the beneficial owner, directly or indirectly, in any manner whatsoever (in particular through one or more trusts, corporations, or other entities that the person Controls), other than as a creditor, of a number of outstanding shares of that corporation’s share capital allowing that person to exercise, on that date, more than fifty per cent (50%) of the voting rights attaching to the outstanding shares of each class of that corporation, carrying on that date the right to vote in any circumstances or including the right to vote in particular circumstances or conditions that, on that given date, apply and make it possible to vote, and (ii) with respect to a trust, partnership, or entity other than a corporation, the fact that a person holds the power to administer and direct the affairs of that entity;

(1.1.3) Agreement

means this agreement including the preamble and its schedules, any supporting documentation, and any amendments that may be made from time to time by the Parties; the expressions “herein”, “in this agreement”, “under this agreement”, and “pursuant to this agreement”, or any other similar expression, when used in this contract, generally refer to the contract as a whole rather than a part of it, unless otherwise indicated in the text.

(1.1.4) Legal Representatives

means, as the case may be, the liquidators of the succession, heirs, legatees, successors, mandataries, officers, or directors of a party.

**1.2** **Precedence**

The Agreement constitutes the entire agreement between the parties on the subjects addressed herein, to the exclusion of any other document, contract, or any prior or contemporaneous verbal promise that may have been made in the context of negotiations leading up to the complete performance of the Agreement, that the parties declare inadmissible as evidence to amend or affect in any way whatsoever any of the provisions of this Agreement.

**1.3 Jurisdiction**

The Agreement, its interpretation, performance, application, validity, and effects are subject to the applicable laws in force in the province of Quebec. Any provision of the Agreement that does not comply with the applicable laws is presumed to be of no effect insofar as it is prohibited by one of the said laws. If one of the provisions contravenes an applicable law, it must be interpreted, as the case may be, in such a way as to render it compliant with the applicable law or, failing that, in the way most likely to respect the intention of the parties without derogating from the prescriptions of the applicable laws the parties do not wish to contravene.

**1.4 Cumulation**

All the rights stated in the Agreement are cumulative, not alternative. Renouncing the exercise of right granted by one of the Parties to the other Party to the Agreement must never be interpreted as a renunciation of the exercise of any other right, granted herein, unless the wording of a provision of the Agreement exceptionally indicates the need for such a choice.

**(2) COMPENSATION FOR RICHER**

2.1 Sirois undertakes to pay Richer compensation (the “**Compensation**”) according to the following terms:

(i) Initial compensation: Sirois (through Neon Buddha) undertakes to pay Richer, no later than June 30, 2016, initial compensation of $350,000, which will be used to buy back the Advances made by Richer to the Corporation, with the balance of $80,000 being paid into the trust account of Richer’s legal counsel, for Richer’s benefit. The Parties undertake to sign any document and perform any action to assign the debt recording the Advances to Neon Buddha, and Richer undertakes to ensure that the Corporation grants Neon Buddha a movable hypothec on the universality of its movable property to guarantee the payment of the Advances; and

(ii) Additional compensation: subject to the occurrence of the Planned Transaction, Sirois undertakes to pay Richer or any person designated by him (through Neon Buddha or any corporation he Controls), additional compensation of $1,000,000 no later than December 31, 2016. Sirois further undertakes to guarantee the payment of this additional compensation by ensuring that his spouse, Mayuree Sirois, grants Richer a second ranking hypothec (mortgage) on the condo unit located at PH100-3462 Ross Drive, Vancouver, British Columbia, V6S 0H6, and will ensure that any document giving effect to this undertaking is promptly signed.

2.2 Should Richer be compelled to disburse any amounts regarding the obligations of the Corporation secured by Richer or for which Richer is personally responsible or liable under the law, Sirois may, at his sole discretion and further to a request to this effect from Richer, pay such obligations for and on behalf of Richer and deduct the amounts thus paid from the Compensation payable to Richer under subsection 2.1.

2.3 In addition to the Compensation set out under subsection 2.1, but subject to the occurrence of the Planned Transaction, Sirois undertakes to hire Richer as CCO (Chief Creative Officer) in connection with the operation of the Richer Assets within SiroisCo or any other entity that is Controlled directly or indirectly by Sirois, at an annual salary of $200,000. The Parties undertake to sign an employment contract to this effect concurrent with the closing of the Planned Transaction (the “**Employment Contract**”).

2.4 Sirois hereby expressly renounces his right to directly or indirectly exercise any recourses against Richer that arise or could arise from a personal guarantee or security granted by Richer to creditors of the Corporation, and in respect of which Sirois (or any entity Controlled by him) could become the holder through assignment, subrogation, or otherwise.

**(3) EARNINGS AND PROFIT SHARING RESPECTING ASSET OPERATIONS**

3.1 Following the occurrence of the Planned Transaction, the Parties agree to share the earnings and profits arising strictly from the operation of the Richer Assets, according to the following terms:

(i) All of the positive liquidities arising from the operation of the Richer Assets will in priority and exclusively be paid to Sirois (or to a corporation he Controls) until the amounts loaned or advanced by him (or one of his corporations) to the Corporation and the amounts incurred or disbursed to carry out the Planned Transaction, if any, in capital, costs, and interest (collectively, the “**Investments**”) are fully paid. Failing a statement to this effect in the loan documents, the amount in capital and costs thus incurred will bear interest at an annual rate of twelve per cent (12%).

(ii) Once the Investments are entirely repaid, all the positive liquidities arising from the operation of the Richer Assets will in priority and exclusively be paid to Richer (or any other person he may appoint) up to a maximum of $3,650,000;

(iii) Once the amount of $3,650,000 has been paid in full to Richer, the profits arising from the operation of the Richer Assets will be divided equally between Sirois and Richer.

3.2 Sirois must ensure that separate accounting records are set up to make it possible to determine the earnings and profits arising directly from the operation of the Richer Assets. Sirois must send Richer a copy of the financial statements of SiroisCo or any other corporations operating the Richer Assets within ninety (90) days of the end of each of their fiscal years, and Richer will also have the right to access, during normal business hours, internal financial statements, operating results, and accounting data relating to the operation of the Richer Assets.

3.3 Should Sirois decide to sell the Richer Assets to a third party, in whole or in part (subject to the application of the provisions of section 4), the proceeds of the sale will have to be shared between Sirois and Richer in accordance with the terms set out in subsection 3.1.

**(4) RIGHT OF FIRST REFUSAL OVER THE RICHER ASSETS**

4.1 Insofar as Sirois (or SiroisCo or any other corporation Controlled by Sirois) receives a good faith offer for all or part of the Richer Assets, and he wants to accept it, he must, before accepting the offer received, offer to sell all, and not less than all, the Richer Assets included in such offer to Richer, at the same price and on the same terms and conditions as those appearing in the third party’s offer. In such case, Sirois must send Richer a written notice with a copy of the offer received from the third party, giving Richer thirty (30) days from the date on which the notice is sent to avail himself of his preferential right to acquire the Richer Assets included in this offer. Richer must inform Sirois within this thirty (30) day period, with copy to the third party concerned, whether he intends to purchase the Richer Assets included in the offer, failing which he will be deemed to have refused to exercise his preferential right to acquire.

4.2 If Richer does not exercise his preferential right to acquire, or is deemed to have refused to exercise it, the right of first refusal set out in section 4 may be set up against Richer, and Sirois may then sell the Richer Assets in question to the third party in accordance with the terms and conditions set out in the offer presented to Richer, subject to the provisions of subsection 3.3. This transfer must be completed within a maximum of ninety (90) days from the end of the applicable time period referred to in subsection 4.1.

4.3 Should Sirois wish to assign the Richer Assets in question at a price and on terms and conditions that are less onerous than those stipulated in the offer presented to Richer, or if the sale of the Richer Assets in question to a third party is not completed within the time period stipulated in subsection 4.2, Sirois will have to offer them again, every time, to Richer in accordance with the terms of section 4 before selling them to a third party, unless otherwise agreed by the Parties.

**(5) RESILIATION OF THE AGREEMENT**

5.1 This Agreement may be resiliated by either of the Parties, in the following circumstances and according to these terms:

(i) By Richer, between the date of this Agreement and the moment when the Compensation has been paid to him in full or December 31, 2016, whichever occurs first, in which case Richer will be obliged to purchase the Richer Assets from SiroisCo for an amount equal to the Investments plus a premium of ten per cent (10%) of that amount; or

(ii) By either of the Parties, at any time after the occurrence of the Planned Transaction, in which case the provisions of section 6 will apply.

5.2 As long as the Agreement is not resiliated in accordance with these terms, the Compensation set out in subsection 2.1 and the earnings and profits payable to Richer according to the terms and conditions of subsection 3.1 remain payable to him despite the resiliation of the Employment Contract.

**(6) HIGHEST BID CLAUSE**

Should one Party wish, for any reason whatsoever, to resiliate this Agreement in accordance with subsection 5.1(ii), that Party may notify the other Party in writing (the “Notice”), and the following provisions will then apply.

6.1 Each Party will, within ninety (90) days of the date of the Notice (the “**Preparation Period**”), prepare a formal and irrevocable offer addressed to the other Party to repurchase the other Party’s rights in the Agreement, at the price indicated in his offer. The Parties must, within the first thirty (30) days of the Preparation Period, agree in writing on (1) the scope and extent of the rights included in the repurchase procedure, and (ii) the identity of the person in charge of managing the process and opening the offers (the “**Agent**”), it being understood that the Agent must be a neutral and impartial person. The fees and expenses of the Agent will be assumed in equal parts by the Parties. The Parties may, as the case may be, mandate the Agent to assist them in determining the rights included in the repurchase procedure. Until the Parties reach an agreement in this regard, the Preparation Period will be extended to allow the Parties to each benefit from a minimum period of sixty (60) days following such agreement to prepare their offer. Failure by one Party to submit an offer prior to the end of the Preparation Period will be deemed to constitute a renunciation on their part to make such an offer to the other Party.

6.2 To be valid, each offer must meet the following criteria. It must:

6.2.1 Be addressed to the other Party, sealed, and given to the Agent no later than 5:00 p.m. (Montreal time), on the last day of the Preparation Period;

6.2.2 Include satisfactory proof (bank certification or other) that the Party has the necessary liquidity or financing to pay the price offered in his offer;

6.2.3 Include all the other Party’s rights in the Agreement, as first determined by mutual agreement between the Parties; and

6.2.4 Be made for a cash amount, excluding any other method of payment (property exchanges, etc.)

6.3 Once the Preparation Period has expired, the sealed offers will be opened by the Agent, in the Parties’ presence. Subject to the offer complying with the conditions set out in this Agreement, the Party offering the highest amount to repurchase the rights of the other Party in the Agreement will win the bidding process. That Party undertakes to then immediately repurchase those rights for the amount indicated in his offer. The transaction must take place within thirty (30) days of the date on which the offers were opened, and the amount must be paid in full on the day of the transaction.

6.4 If the Party repurchasing the other Party’s rights in the Agreement under the process set out in this section is Richer, the amount paid for the repurchase will be deemed to include the value of the Richer Assets, which will have to be transferred to Richer (or any other entity he Controls) in the context of the transaction, and the Parties undertake to sign any document and perform any act to give effect to such transfers.

**(7) GENERAL PROVISIONS**

7.1 Confidentiality

The Parties understand that this Agreement must remain strictly confidential. To this end, they undertake never to disclose its existence, unless disclosure becomes necessary to protect or assert a Party’s rights following the other Party’s failure to comply with this Agreement. Any violation of this section will result in the defaulting Party’s obligation to indemnify the other Party for any damage he has suffered as a result of this unauthorized disclosure.

7.2 Unassignability

Except as expressly provided herein, the Agreement is unassignable. No rights, duties, or obligations set out herein may be subleased, assigned, or otherwise alienated by either of the Parties without the prior written authorization of the other Party. Any attempt to sublease, assign, transfer, or alienate, without the above authorization, of any right, duty, or obligation under the Agreement is null and void.

7.3 Amendments

This Agreement may be amended in whole or in part, as the Parties wish. In such case, any amendment thus made will take effect only once it has been put in writing and duly signed by the Parties.

7.4 Scope

The Parties and their Legal Representatives are bound by this agreement, which is enforceable against them and concluded for their benefit.

7.5 Election

The Parties agree that for any claim or legal action, for any reason whatsoever relating to the Agreement, the judicial district of Montreal, Province of Quebec, Canada, is the appropriate forum for a hearing on these claims or legal actions, to the exclusion of any other jurisdiction or judicial district that may have jurisdiction over such dispute in accordance with the law.

IN WITNESS WHEREOF, THE PARTIES HAVE SIGNED IN MONTREAL ON JUNE , 2016.

[s] Kevin Richer [s] Sébastien Sirois

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**KEVIN RICHER SÉBASTIEN SIROIS**

**INTERVENTION**

The undersigned, represented for the purposes of this Agreement by its duly authorized president, and after having read the Agreement on this day, undertakes and covenants to comply with each and every obligation stipulated on its behalf within the said Agreement.

**SIGNED IN MONTREAL ON JUNE , 2016.**

**NEON BUDDHA LTD**

[s] Sébastien Sirois

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By: Sébastien Sirois

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| REASONS OF BACHAND |
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1. I have read the reasons of my colleague Schrager J.A., with which I unfortunately cannot concur. In my view, and with respect for the contrary opinion, there is no reason to set aside the impugned judgment.
2. I come to this conclusion, first and foremost, because I find that Mr. Richer’s arguments on the issue of the meaning to ascribe to the expression [translation] “’occurrence of the Planned Transaction”, to which agreement P-5 refers, are inadmissible because they are an invitation to retry the case. Furthermore, even assuming that these arguments are admissible, I find that the trial judge’s conclusion that this [translation] “Planned Transaction” never took place is sufficiently supported by the evidence adduced.
3. Finally, I find that the Court should not accept Mr. Richer’s arguments based on article 1503 *C.C.Q*.

\* \* \*

1. The issue at the heart of this appeal is whether the judge made a reviewable error in concluding that the vesting of the assets of Divertissement Wooky Inc. (“Wooky”) to a corporation controlled by Mr. Sirois in the context of Wooky’s liquidation is tantamount to the [translation] “occurrence of the Planned Transaction” within the meaning intended by Mr. Richer and Mr. Sirois when they entered into agreement P-5. The importance of this question rests on the fact – admitted by all parties – that based on that agreement, the payment of the amounts claimed by Mr. Richer is conditional to the occurrence of this [translation] “Planned Transaction”.
2. The meaning to give to this notion of the [translation] “occurrence of the Planned Transaction” is a question of contractual interpretation. It cannot be answered by relying solely on the language used in agreement P-5, even when endeavouring, during the first of the two steps in the analysis, to determine whether the terms at issue are clear or ambiguous. Indeed, in *Uniprix*, the Supreme Court could not have been clearer on the importance of considering, at each step of the analysis when interpreting a contract, the factual context of the conclusion and performance of the contract: [[23]](#footnote-23)

*(a) Principles of Contractual Interpretation*

[34] The first step in interpreting a contract is to determine whether its words are clear or ambiguous ... .

[35] Although this step is based first and foremost on a reading of the words themselves, it is not necessarily limited to that in every case, as there may be situations in which a contract’s language is not faithful to the parties’ common intention ... . Indeed, [translation] “[w]hen considered in the context of the agreement’s other clauses or of the circumstances in which it was concluded, the seemingly clear words of a clause may [sometimes] prove to be ambiguous and to be inconsistent with the scheme of the contract, the true intention of the parties” ... . Likewise, a clause that might be perceived to be ambiguous may be perfectly clear when considered in its context.

[36] If the words of the contract are clear, the court’s role is limited to applying them to the facts before it. If, on the other hand, the court identifies an ambiguity, it must resolve the ambiguity by proceeding to the second step of contractual interpretation ... . The distinction between these two steps can be difficult to see, but it is fundamental. At the first step, the judge might, for example, consider the context of the conclusion and performance of the contract in order to confirm that its language is clear ... . In principle, however, the judge should not have recourse to the principles of interpretation set out in arts. 1425 to 1432 of the *Code* ... . In this sense, the interpretation of the contract is more superficial at the first step than at the second ... .

[37] The cardinal principle that guides the second step of the interpretation exercise is that “[t]he common intention of the parties rather than adherence to the literal meaning of the words shall be sought” (art. 1425 *C.C.Q.*). In this exercise, it is necessary to consider intrinsic aspects of the contract, such as the words of the clause at issue and the other clauses, in order to ensure that each of them is given a meaningful effect and that each is interpreted in light of the others (arts. 1427 and 1428 *C.C.Q*.; ... ). The interpretation of a contract also requires consideration of the nature of the contract and of the context extrinsic to it, including the factual circumstances in which it was formed, how the parties have interpreted it, and usage (art. 1426 *C.C.Q.*; Baudouin and Jobin, at No. 418; Lluelles and Moore, at Nos. 1600, 1603 and 1607).

...

[41] Indeed, contractual interpretation involves the consideration of a multitude of facts. It is a question of mixed fact and law in respect of which courts of appeal may not intervene in the absence of a palpable and overriding error ... . The same is true for [translation] “[d]etermining whether a contract is clear or ambiguous”, which “is a discretionary process” in respect of which “a court of appeal must show restraint and deference” ... .

[Emphasis added.]

1. Mr. Richer has properly understood the teachings of *Uniprix*, since his arguments on appeal are not based exclusively on the language of agreement P-5. In fact, far from insisting on this language, he mostly criticizes the trial judge for being [translation] “gravely mistaken on the circumstances in which the Agreement [P-5] was entered into”,[[24]](#footnote-24) when she failed to consider – or drew erroneous conclusions from – certain excerpts of the testimonial and documentary evidence adduced during the hearing on the merits. Mr. Richer therefore impugns the observations made by the judge when analyzing the evidence on the circumstances in which agreement P-5 was concluded and performed.
2. Because these are conclusions of fact, the Court must show a “high degree of deference” [[25]](#footnote-25) in deciding whether they should be set aside. The reasons for this deference have been grouped into three “basic principles”[[26]](#footnote-26) that the Supreme Court summarized as follows in *Benhaim*: [[27]](#footnote-27)

Deference to factual findings limits the number, length and cost of appeals, which in turn promotes the autonomy and integrity of trial proceedings. Moreover, the law presumes that trial judges and appellate judges are equally capable of justly resolving disputes. Allowing appellate courts free rein to overturn trial courts’ factual findings would duplicate judicial proceedings at great expense, without any concomitant guarantee of more just results. Finally, according deference to a trial judge’s findings of fact reinforces the notion that they are in the best position to make those findings. Trial judges are immersed in the evidence, they hear viva voce testimony, and they are familiar with the case as a whole. Their expertise in weighing large quantities of evidence and making factual findings ought to be respected.

It is noteworthy that in *Benhaim*, the Supreme Court also highlighted that these considerations justifying the deference that must be shown by appellate courts take on added importance in matters like the one before us, where the evidence on file is both voluminous and complex.[[28]](#footnote-28)

1. The concrete consequence of this deference is that appellate courts can set aside a conclusion of fact drawn in first instance only if it is vitiated by an error that is both palpable and overriding. These two notions – palpable error, overriding error – were clarified by the Supreme Court in *Hydro Québec v. Matta*: [[29]](#footnote-29)

An error is *palpable* if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is *overriding* if it has affected the result: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at paras. 55‑56 and 69‑70; *Salomon v. Matte‑Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at para. 33. As Morissette J.A. so eloquently put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para.  77, [translation] “a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions”: quoted in *Benhaim*, at para.  39. The beam in the eye metaphor not only illustrates the obviousness of a reviewable error, but also connotes a misreading of the case whose impact on the decision is plain to see.

[Italics in original]

1. I must insist on the fact that, to be characterized as palpable, the error must be obvious. This is where the idea, oft repeated in the case law,[[30]](#footnote-30) that it is not up to the Court to retry the case by minutely re-examining all the evidence on which the conclusions of fact or of mixed fact and law impugned on appeal, becomes so important. As my colleague Morissette J.A. stated in *J.G.*, a palpable error is one that is [translation] “identifiable with great economy of means, without provoking a long semantic debate, and without having to review large parts of documentary or testimonial evidence that is divided and contradictory, as is generally the case in disputes of a certain level of difficulty that make it to trial”;[[31]](#footnote-31) it is an error that is plain to see.[[32]](#footnote-32) Some years earlier, Morissette J.A. had explained that it was possible to [translation] “put one’s finger on” a palpable error, adding that this meant [translation] “something other than inviting the Court to take a broad look at all the evidence: it means to direct its attention toward a determined point where an unequivocal evidentiary element is quite simply an obstacle to the impugned finding of fact”.[[33]](#footnote-33)
2. In light of paragraph [49] of my colleague’s reasons, I find it useful to add that this great deference is just as applicable to inferences of fact as it is to findings of mixed fact and law.[[34]](#footnote-34) The prohibition on retrying the case also means that appellate courts must refrain from setting aside the inferences of fact and mixed findings drawn in first instance unless they have first put their finger on an obvious error that is identifiable with great economy of means.
3. There is no doubt in my mind that Mr. Richer’s arguments on the issue of the meaning to ascribe to the expression [translation] “Planned Transaction” is an invitation to retry the case. Far from being able to put his finger on an obvious error that is identifiable with great economy of means, Mr. Richer invites the Court to re-examine large parts of the evidence in the hope that it will find that the judge could not reasonably interpret the notion of [translation] “Planned Transaction” as she did. The nature of his strategy was clear during the appeal hearing, when his counsel devoted most of the 90 minutes they had been allotted to draw the Court’s attention to countless excerpts from examinations and exhibits they claimed supported their client’s position.

\* \* \*

1. Moreover, even if Mr. Richer had better circumscribed his arguments on appeal, he would not have convinced me that the judge’s conclusion on the meaning to ascribe to the expression [translation] “Planned Transaction” is vitiated by a palpable error.
2. As the Court recalled in *Construction Blenda*, per my colleague Mainville J.A., the burden incumbent on an appellant is to show that the finding of fact or of mixed fact and law that it impugns is vitiated by an obvious error of such importance that this finding could not reasonably be supported by the evidence.[[35]](#footnote-35) To understand how strict this burden is, it is useful to recall the remarks of the Supreme Court in *H.L.* regarding the degree of conviction required for an appellate court to set aside a finding of fact or of mixed fact and law, which is nothing short of certainty: [[36]](#footnote-36)

[69] As I have already mentioned, there is no meaningful difference between a standard of “clearly wrong” and a standard of “palpable and overriding error”. As Iacobucci and Major JJ. noted in *Housen*, at para.  5, the *New Oxford Dictionary of English* (1998) defines “palpable” as “clear to the mind or plain to see” (p. 1337 (emphasis added)). Moreover, no error could lead to a reversal unless it was “overriding” in the sense that it discredits the result.

[70] The “palpable and overriding error” standard, apart from its resonance, nevertheless helps to emphasize that one must be able to “put one’s finger on” the crucial flaw, fallacy or mistake. In the words of Vancise J.A., “[t]he appellate court **must be certain** that the trial judge erred and must be able to identify **with certainty** the critical error” (*Tanel*, at p. 223, dissenting, though not on this issue).

[Underlining in original; bold added]

1. In short, the question is whether we can conclude with certainty that the evidence cannot reasonably support the judge’s finding on the meaning to ascribe to the expression [translation] “Planned Transaction”.
2. In my view, this question must be answered in the negative, because the judge’s conclusion is supported by the most relevant evidence of Mr. Richer and Mr. Sirois’s intentions when they entered into agreement P-5, that is, the testimony of Mtre Guillaume Beaupré.
3. This testimony is of particular importance for two reasons. The first is that Mtre Beaupré drafted agreement P-5. The second is that the language of agreement P-5 does not provide a clear answer to the issue dividing the parties, that is, whether the expression [translation] “occurrence of the Planned Transaction” includes *any* acquisition of Wooky’s assets by Mr. Sirois or one of his companies – *regardless of context* – or whether this notion is instead limited to an acquisition of assets in the context of a concerted transaction between Mr. Richer and Mr. Sirois.
4. During his examination, Mtre Beaupré addressed this issue directly and, in doing so, clearly explained that this [translation] “Planned Transaction”, which, when it occurred, would make the amounts claimed by Mr. Richer payable, was an acquisition of Wooky’s assets in a very specific context, that is, a second agreement that was to be entered into subsequently between Richer and Sirois, in which Wooky was to intervene. The following excerpt from the transcript is particularly enlightening:[[37]](#footnote-37)

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|  | [translation]  THE COURT: |
|  | What I understand from what you are telling me, and correct me if I misunderstood, when the parties signed the agreement, the idea was that they first had to clean up the secured creditors. If that worked, they would eventually sign a transaction, which is the planned transaction in which some of the assets would be transferred. And if that occurred, the agreement tells us how the money would be shared between them. But there would inevitably be the need to sign a transaction that is the planned transaction to which Wooky would intervene? |
| A | Yes, ultimately. Yes, Wooky would have to intervene in ... with respect to some documents, once they reached that point, yes. |
| Q | Therefore, there is ... it was necessary to clean up the creditors then the planned transaction would have to take place? |
| A | Yes. |
| Q | But we, future partners, if you will, here is how we are going to share ... without being ... that is a contract in itself, I do not want to say that it is a pre-contract, but it is ... how we are going to manage our affairs between us when we go ahead with the planned transaction. |
| A | The broad strokes of, yes, indeed. |
| Q | Okay. |
|  | By Mtre Roy |
| Q | But we will come back to it, but do you agree with me that the transaction ... first, had you already been mandated to start the documentation for the sale of the assets? |
| A | No. No, because we did not yet know how the asset transfer would take place. |
| Q | Okay. |
| A | So, it could just as easily be done as ... a transfer. But as I said earlier, it all depended on how the discussions went with the ... or how the strategy would be formulated with respect to the ordinary creditors, the ... In fact, it could also have taken place through a bankruptcy process, which is different ... which is a different path. |
| Q | But you agree with me that when we refer to the planned transaction in agreement P-5 that we saw ... |
| A | Yes. |
| Q | ... at no point is there any reference to the fact that it could happen through bankruptcy? |
| A | Well, at no point do we state how the transfer would be done. |
| Q | And you agree with me that the planned transaction, there was no date for it in your document? |
| A | There is no specific date to do it. |
| Q | There is no, we do not know whether it is the purchase of all of the shares, the assets? We don’t know, it isn’t defined there? |
| A | No. No. |
| Q | It was all up for negotiation? |
| A | Well, all of that ... it was all to be determined. |
| Q | Okay. |
| A | Of course, yes. But as I was saying, the focus was elsewhere at the time. |
|  | THE COURT |
|  | When you ... when the parties signed the agreement, you say that the manner in which the assets would be transferred had not yet been chosen. But do I understand that what the parties intended, is that they would… ... both be involved in the asset transfer? |
| A | Who would both be involved in the asset transfer? |
| Q | Yes. |
| A | Do you mean Mr. Richer and Mr. Sirois? |
| Q | Yes. |
| A | Well, ultimately, ultimately, yes  [Emphasis added.] |

1. The above excerpt is also important to a proper understanding of the circumstances in which the parties considered an asset transfer in the context of a bankruptcy when they entered into agreement P-5. My colleague is of the view that the evidence clearly shows that Mr. Richer and Mr. Sirois considered that any asset transfer in the context of bankruptcy would amount to the [translation] “occurrence of the Planned Transaction”. Yet it appears from Mtre Beaupré’s testimony that this was not the case, as he tends to demonstrate, as the respondents argue, that Mr. Richer and Mr. Sirois had merely considered an asset transfer through bankruptcy in the context of a concerted transaction between the two protagonists.
2. In short, it is my opinion that the explanations of Mtre Beaupré alone are sufficient to observe that the judge could reasonably find that the vesting of Wooky’s assets to a company controlled by Sirois in the context of Wooky’s liquidation did not amount to the [translation] “occurrence of the Planned Transaction”, since it is clear – and admitted by all – that this transaction did not take place in a concerted manner with Mr. Richer. Indeed, the evidence is clear that Mr. Richer and Mr. Sirois never entered into a second agreement and that their business relationship had broken down many months before the vesting of Wooky’s assets took place. Thus, while Mr. Sirois eventually acquired Wooky’s assets, he did so in circumstances entirely different from those that Mtre Beaupré affirms had been considered in agreement P-5. Mr. Sirois was exercising rights as a secured creditor at that point, rather than acting in the context of a concerted transaction with Mr. Richer’s agreement. The judge could therefore reasonably find that the condition to which the payment of the amounts claimed by Mr. Richer was subject was never fulfilled.
3. It should be added that, in a formal demand dated August 5, 2016, after Mr. Sirois indicated that he no longer wanted to continue a business partnership with Mr. Richer, the latter made remarks that tend to confirm those made by Mtre Beaupré that the [translation] “occurrence of the Planned Transaction” consisted of an acquisition of Wooky’s assets in the specific context of a second agreement concluded between Mr. Richer and Mr. Sirois:

[translation]

Sir,

We represent the interests of Mr. Kevin Richer, who has mandated us to address this letter to you following an email you sent to our client on July 22, 2016, (the “Email”) and various subsequent communications.

It is clear that you have an understanding of the contract titled [translation] “Agreement on earnings and profit sharing” signed in June 2016 (the “Contract”) and of the circumstances of its execution and performance that is particular, to say the least.

Our client completely disagrees with the interpretation and allegations in the Email. You seem to have made the unilateral decision to refuse to comply with certain terms of the Contract concerning its performance and resiliation.

Unlike you, our client considers that all parts of the Contract are interrelated and must be performed in good faith, in accordance with the provisions of article 1375 of the *Civil Code of Québec*. In this respect, even though this reminder may appear superfluous to any party who is in good faith, we insist on the fact that neither party may avoid it by voluntarily refraining or neglecting to fulfill any of their obligations. Similarly, neither party may act, publicly or privately, with the goal of causing the Planned Transaction in the Contract to fail.

Our client therefore requires your strict compliance with the Contract and all its provisions and is at your disposal to fix a date to sign the contract to purchase the Richer Assets concerned by the Planned Transaction, as set out in the Contract.

...

[Emphasis added.]

1. In closing, I note that Mtre Beaupré’s explanations on Richer and Sirois’s intentions and on the meaning to be given to the expression [translation] “Planned Transaction” are consistent with other elements in the record. In his testimony, which the judge characterized as honest and without artifice,[[38]](#footnote-38) Mr. Sirois repeatedly pointed out that he had little experience with corporate mergers and acquisitions and that he knew practically nothing about the industry in which Wooky operated. These elements suggest that it would be more consistent with good commercial sense to consider that, from Mr. Sirois’s point of view, the acquisition of Wooky’s assets was only of interest in the context of a close business partnership with Mr. Richer. In addition, I find the provision in agreement P-5 providing for Richer to be hired as chief creative officer[[39]](#footnote-39) very telling of the parties’ commitment to signing an employment contract [translation] “concurrent with the closing of the Planned Transaction”. This provision only makes sense, it seems to me, if the scope of the expression [translation] “Planned Transaction” is limited to an asset transfer occurring in a concerted manner between Mr. Richer and Mr. Sirois.
2. In short, in light of these aspects of the case, I do not see how one could find – much less *with certainty* – that the evidence cannot reasonably support the judge’s conclusion that an asset transfer occurring in the context of Mr. Sirois exercising his rights as a creditor, without Mr. Richer’s agreement, amounts to the [translation] “occurrence of the ‘Planned Transaction’”.

\* \* \*

1. In paragraph [54] of his reasons, my colleague asserts in the alternative that, in the hypothesis where the payment of the amounts claimed by Mr. Richer were conditional on the parties entering into a second agreement, that condition should be considered of no effect given that Mr. Sirois prevented it from being fulfilled within the meaning of article 1503 *C.C.Q.* More specifically, my colleague finds that Mr. Sirois acted wrongfully,[[40]](#footnote-40) insisting on three facts that took place in the summer of 2016: (i) Mr. Sirois confirmed to Mr. Richer on July 22, 2016, that he would not pursue agreement P-5; (ii) he did not respond to Mr. Richer’s formal demand dated August 5, 2016; and (iii) he excluded Mr. Richer from Wooky’s operations in mid-July 2016.
2. At the outset, I have serious doubts about whether the Court should analyze the case from this perspective, because the argument based on article 1503 *C.C.Q.* was addressed for the first time – and then only very summarily – in response to a question raised by the bench during the appeal hearing.[[41]](#footnote-41) I agree that a purely legal question may be raised for the first time on appeal. However, in my view, that is not what this is, because this argument based on article 1503 *C.C.Q.* raises mixed questions with substantial factual aspects. I also have reservations about whether the parties had sufficient opportunity to debate this issue within the meaning of the second paragraph of article 17 *C.C.P.*
3. In any event – even supposing that the obligations invoked in support of Mr. Richer’s claim for payment were characterized as conditional within the meaning of articles 1497 and ff. *C.C.Q.* – I find, with great respect, that the three facts on which my colleague relies are not a sufficient basis to allow the Court to conclude that Mr. Sirois’s conduct prevented, within the meaning of article 1503 *C.C.Q.*, the condition related to a second agreement from being fulfilled.
4. The issue, as I see it, is that my colleague’s analysis is not consistent with the fact that, after all the circumstances of the case have been examined – including the three facts on which he relies – the trial judge concluded that Mr. Sirois had not acted in bad faith or in an abusive manner in the summer of 2016. In fact, in her view, the fact that a second agreement was never entered into is not due to some sort of reprehensible conduct by Mr. Sirois, but instead to a series of events beyond his control that had a serious impact on Wooky’s financial situation and that justified Mr. Sirois’s decision not to pursue his business relationship with Mr. Richer. In addition, when the judge noted that Mr. Sirois had not acted in bad faith or in an abusive manner in the summer of 2016, she did so in the part of her judgment where she dismissed Mr. Richer’s claim for damages, which Mr. Richer chose not to challenge on appeal. In any event, her conclusion does not appear to be vitiated by any palpable and overriding error to me; it is therefore immune to any intervention by the Court.

\* \* \*

1. In conclusion, I find that Mr. Richer has failed to show the existence of an error allowing the Court to set aside the judge’s conclusion that the amounts he claimed from Mr. Sirois never became payable because the [translation] “Planned Transaction” referred to in agreement P-5 never occurred. This observation is sufficient to dismiss the appeal because his other grounds of appeal depend on the merits of this first ground.

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| FRÉDÉRIC BACHAND, J.A. |

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. [↑](#footnote-ref-1)
2. *Sirois & al. c. Richer & al.*, March 29, 2021, 500-17-096324-168, (Desfossés, J.S.C.), para. 162 [Judgment]. [↑](#footnote-ref-2)
3. Art. 1631 *C.C.Q.* [↑](#footnote-ref-3)
4. Sections 95 and ff. *BIA*. [↑](#footnote-ref-4)
5. Judgment, *supra*, note 2, para. 149. [↑](#footnote-ref-5)
6. Judgment, *supra*, note 2, paras. 132, 143-145. [↑](#footnote-ref-6)
7. *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, [2017] 2 S.C.R. 59, para. 41 [*Uniprix*]. [↑](#footnote-ref-7)
8. *Uniprix*, *supra*, note 7, paras. 34 and 36. [↑](#footnote-ref-8)
9. *Uniprix*, *supra*, note 7, para. 37. [↑](#footnote-ref-9)
10. *Uniprix*, *supra*, note 7, para. 36. [↑](#footnote-ref-10)
11. *Gestion immobilière Bégin inc. v. 9156-6901 Québec inc.*, 2018 QCCA 1935, para. 20; *Pépin v. Pépin*, 2012 QCCA 1661, paras. 86-91; *Gregory v. Château Drummond inc.*, 2012 QCCA 601, paras. 54-61. [↑](#footnote-ref-11)
12. *Uniprix*, *supra*, note 7, para. 41; *Larouche v. Néron*, 2016 QCCA 692, para. 5; *Lamco II s.e.c. v. Québec (Ville)*, 2016 QCCA 757, para. 2; see also *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633, paras. 47-50; *Société immobilière Duguay inc. v. 547264 Ontario Limited*, 2020 QCCA 571, para. 33; *Modern Cleaning Concept Inc. v. Comité paritaire de l’entretien d’édifices publics de la région de Québec*, 2019 SCC 28, [2019] 2 S.C.R. 406, para. 68; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46, [2018] 3 S.C.R. 101, paras. 49; *Broccolini v. Restaurant Loupy's inc.*, 2019 QCCA 297, para. 4; *Churchill Falls (Labrador) Corporation Ltd. v. Hydro-Québec*, 2019 QCCA 1072, para. 40; *Gercotech inc. v. Kruger inc. Master Trust (CIBC Mellon Trust Company)*, 2019 QCCA 1168, para. 26; *Distribution financière Sun Life (Canada) inc. v. Lamontagne*, 2019 QCCA 2162, paras. 4-6. [↑](#footnote-ref-12)
13. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, paras. 23 and ff.; *Uniprix*, *supra*, note 7, para. 41. [↑](#footnote-ref-13)
14. *Prud'homme v. Prud'homme*, 2002 SCC 85, [2002] 4 S.C.R. 663, para. 65. [↑](#footnote-ref-14)
15. *Salomon v. Matte‑Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, paras. 36-41. [↑](#footnote-ref-15)
16. *Francoeur v. 4417186 Canada inc.*, 2013 QCCA 191, paras. 11 and 64; see also *Ford du Canada ltée v. Automobiles Duclos inc.*, 2007 QCCA 1541, paras. 128-136. [↑](#footnote-ref-16)
17. *Softmedical inc. v. Daabous*, 2017 QCCA 1270, paras. 47-50 and 66. [↑](#footnote-ref-17)
18. *Druide Informatique inc. v. Éditions Québec Amérique inc.*, 2020 QCCA 1197, paras. 97-101. [↑](#footnote-ref-18)
19. *Construction Infrabec inc. v. Paul Savard, Entrepreneur électricien inc.*, 2012 QCCA 2304, para. 43; see also *V.L. v. Ville de Gatineau*, 2022 QCCA 1395, para. 43; *Guérin v. Lavoie*, 2021 QCCA 692, para. 13; *Nbogni-Ngouala v. Financière Castleton ltée*, 2019 QCCA 1001, para. 15; *Stoyanova v. Syndic de Disques Mile End inc.*, 2018 QCCA 1788, paras. 19-24. [↑](#footnote-ref-19)
20. And it should be remembered that Sirois subsequently sold Wooky’s intellectual property for $250,000. [↑](#footnote-ref-20)
21. *Bank of Montreal v. Kuet Leong Ng*, [1989] 2 S.C.R. 429, p. 441. [↑](#footnote-ref-21)
22. *Uni-Sélect Inc. v. Acktion Corp.*, 2002 CanLII 41226 (QC CA), paras. 53-57. [↑](#footnote-ref-22)
23. *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43. [↑](#footnote-ref-23)
24. Arguments of the appellant, para. 26. [↑](#footnote-ref-24)
25. *Housen v. Nikolaisen*, 2002 SCC 33, para. 10. [↑](#footnote-ref-25)
26. *Ibid.*, para. 15. [↑](#footnote-ref-26)
27. *Benhaim v. St‑Germain*, 2016 SCC 48, para. 37. [↑](#footnote-ref-27)
28. *Ibid.* See also *KPH 11 v. Richardson Wealth Limited (Richardson GMP Limited)*, 2022 QCCA 148 (leave to appeal to SCC refused, 40254 (21 February 2023), para. 8. [↑](#footnote-ref-28)
29. 2020 SCC 37, para. 33. See also *Gercotech inc. c. Kruger inc. Master Trust (CIBC) Mellon Trust Company*, 2019 QCCA 1168, para. 8. [↑](#footnote-ref-29)
30. See e.g.: *Barendregt v. Grebliunas*, 2022 SCC 22, para. 102 (“[a]n appellate court’s role, as noted, is instead generally one of error correction; it is not to retry a case.”); *Birdair inc. c. Danny’s Construction Company Inc.*, 2013 QCCA 580, para. 49; *Audet c. Payette*, 2018 QCCA 309, para. 11, and the case law cited therein; *Gercotech inc. c. Kruger inc. Master Trust (CIBC) Mellon Trust Company,* 2019 QCCA 1168, para. 9; *Construction Blenda inc. c. Office municipal d’habitation de Rosemère*, 2020 QCCA 149 (leave to appeal to SCC refused, 39142 (1 October 2020), para. 37; *Douglas Consultants inc. c. Unigertec inc.*, 2021 QCCA 384 (leave to appeal to SCC refused, 39679 (14 October 2021), para. 22; *Droit de la famille — 21354*, 2021 QCCA 431, para. 7; *Leroux c. Barriault*, 2022 QCCA 312, para. 4. [↑](#footnote-ref-30)
31. *J.G. c. Nadeau*, 2016 QCCA 167 (leave to appeal to SCC refused, 36924 (March 2, 2017), para. 76. [↑](#footnote-ref-31)
32. *Ibid.* para. 77. See also: *Cloutier c. Bussière*, 2019 QCCA 2014, para. 22; *Construction Blenda inc. c. Office municipal d’habitation de Rosemère*, 2020 QCCA 149 (leave to appeal to SCC refused, 39142 (1 October 2020), para. 39. [↑](#footnote-ref-32)
33. *P.L. c. Benchetrit*, 2010 QCCA 1505, para. 24. See also *Construction Blenda inc. c. Office municipal d’habitation de Rosemère*, 2020 QCCA 149 (leave to appeal to SCC refused, 39142 (1 October 2020), para. 37: [translation] “in a highly fact-based case, like the one before us, where the judge had to weigh material evidence and abundant testimony, it is not up to the Court to perform the exercise the appellant would have it do, that is, to reassess almost all the evidence to draw conclusions of fact that differ from those of the judge”. [↑](#footnote-ref-33)
34. See in particular: *Housen v. Nikolaisen*, 2002 SCC 33, paras. 19–37; *Benhaim v. St‑Germain*, 2016 SCC 48, para. 36; *Hydro-Québec v. Matta*, 2020 SCC 37, para. 33. It should also be recalled that the application of a legal standard to a set of facts raises a question of mixed fact and law and that, as a general rule, the applicable standard of appellate review is that of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, para. 26; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, paras. 49 and ff.; *Modern Cleaning Concept Inc. v. Comité paritaire de l’entretien d’édifices publics de la région de Québec*, 2019 SCC 28, paras. 68–69 (Côté, Brown & Rowe JJ.); *Ma.R. c. M.R.*, 2020 QCCA 1151, para. 18; *Dubé c. Lesage inc.*, 2020 QCCA 112, para. 4; *9251-4157 Québec inc. c. Procureur général du Québec*, 2022 QCCA 1343, para. 63; *Michael Bruni Transport inc. c. Aviva compagnie d’assurance du Canada*, 2021 QCCA 1979, para. 17. [↑](#footnote-ref-34)
35. *Construction Blenda inc. c. Office municipal d’habitation de Rosemère*, 2020 QCCA 149 (leave to appeal to SCC refused, 39142 (1 October 2020), para. 38. [↑](#footnote-ref-35)
36. *H.L. v. Canada (Attorney General)*, 2005 SCC 25*.*  [↑](#footnote-ref-36)
37. A.F., vol. 11, pp. 3630–3634. See also pp. 3579–3583 and 3679–3681. [↑](#footnote-ref-37)
38. Judgment *a quo*, para. 165. [↑](#footnote-ref-38)
39. It is clause 2.3 of the agreement. [↑](#footnote-ref-39)
40. It should be recalled that article 1503 *C.C.Q.* applies only if the debtor has prevented the condition from being fulfilled by conduct that warrants being characterized as wrongful: Didier Lluelles & Benoît Moore, *Droit des obligations*, 3rd ed. (Montreal: Themis, 2018) 1503 (no. 2495). [↑](#footnote-ref-40)
41. See in particular: *Jean-Paul Beaudry ltée c. 4013964 Canada inc.*, 2013 QCCA 792, para. 89; *Terjanian c. Lafleur*, 2019 QCCA 230, para. 30; *Beaumier c. XIT Télécom inc.*, 2019 QCCA 1000, para. 10. [↑](#footnote-ref-41)