CITATION: Romspen Investment Corporation v. 206 Bloor Street West Limited, 2016 ONSC 7314
COURT FILE NO.: CV-16-11529-00CL
DATE: 20170201

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

RE: Romspen Investment Corporation, Applicant

AND:

206 Bloor Street West Limited, Respondent

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *Harold Rosenberg*, for the Applicant, Rosen Goldberg Inc.

David Preger, for Romspen Investment Corporation

R. Donald Rollo, for Linda Rosenberg

HEARD: November 23, 2016

ENDORSEMENT

[1] On this motion, the court-appointed receiver of 206 Bloor Street West Limited ("206"), Rosen Goldberg Inc. (the "Receiver"), seeks a declaration of the Court regarding the competing priority claims of Romspen Investment Corporation ("Romspen") and Linda Rosenberg ("Rosenberg") to certain funds currently held in trust pursuant to the order of Myers J. dated June 29, 2016 (the "Myers Order"). By cross-motion, Rosenberg seeks, among other things, a declaration that she has a priority interest in such funds and an order requiring payment by 206 of such funds to her.

Factual Background

[2] 206 was the developer of a 19 storey, 27 unit residential condominium project known as "Museum House" (the "Project").

[3] The Project was initially financed by a construction loan from the Royal Bank of Canada ("RBC"), which had a first mortgage. Lombard General Insurance Company of Canada ("Lombard") had a second mortgage to secure condominium deposits.

The Romspen Loan and the Romspen Mortgage

[4] In 2011, as a result of cost overruns that increased the budget for the Project by $3 million, 206 obtained further financing from Romspen. In this regard, 206 issued Romspen a promissory note dated June 1, 2011 in the principal amount of $5 million (the "Promissory Note") together with a general security agreement and a third mortgage (the "Romspen Mortgage"), which secured amounts outstanding under the Promissory Note. The Romspen financing is herein referred to as the "Romspen Loan".

[5] The Romspen Loan was extended on several occasions. The Romspen Mortgage was not registered, however, until May 15, 2014, after the RBC construction loan and the Lombard condominium deposit insurance arrangements had been fully satisfied. The Romspen Mortgage matured on June 1, 2016, in accordance with the terms of the most recent extension agreement dated June 1, 2015, and was not repaid.

[6] In the Receiver's First Report dated October 31, 2016 (the "First Report"), the Receiver states that based on its review, a total of $4,265,000 was advanced by Romspen between June 2, 2011 and November 1, 2013 pursuant to the Romspen Loan. The Receiver also states that it has determined that all of the funds advanced by Romspen under the Romspen Loan were applied on account of the Project and no distributions were made to the shareholders of 206.

[7] As of July 1, 2016, the amount owing under the Romspen Loan was $12,265,138.34.

Rosenberg's Judgment against 206

[8] Rosenberg entered into an agreement with 206 to purchase unit 901 in the Project. In that connection, she paid a deposit of $514,750. A dispute arose regarding work to be done by 206 with respect to unit 901. Ultimately, the dispute was addressed in litigation. Rosenberg commenced an action against 206 in December 2012. Rosenberg was successful after a trial conducted by Myers J. He held that 206 had terminated the agreement with Rosenberg and therefore was required to return her deposit to her. Rosenberg obtained a judgment against 206 in the amount of $523,750 plus costs of $225,000 (the "Judgment").

[9] On April 13, 2016, Rosenberg received $494,750 pursuant to the Lombard deposit insurance arrangements in partial satisfaction of the Judgment. In addition, in June 2016, Rosenberg received a further $20,000 from Tarion Warranty Corporation ("Tarion"). As a result of these payments, only the principal sum of $9,000 and the full amount of the costs award of $225,000 remain outstanding. The amount of $9,000 represents a payment made by Rosenberg to 206 in respect of certain work to be performed by 206 that was not insured by the Lombard or Tarion arrangements.

[10] Immediately after the release of the decision of Myers J. holding that 206 was required to return Rosenberg's deposit to her, 206 listed unit 901 for sale and subsequently entered into an agreement of purchase and sale with a third party. Rosenberg registered a caution against unit 901, which came to the attention of 206 at the time of the closing of the sale of unit 901. Pursuant to the Myers Order, made on an emergency motion brought by 206, the sale was authorized free of the caution subject to payment of $350,000 into the trust account of the solicitors of 206 pending "resolution of the entitlement of [Rosenberg] to priority payment".

These words refer to the fact that, as expressed in the endorsement of Myers J., "[Rosenberg] has claims for an equitable lien, a fraudulent conveyance, and an oppression remedy, among other things, to establish priority or a right *against others*" (italics added).

[11] The sale of unit 901 closed and the solicitors for 206 currently hold the amount of $350,000 in trust pursuant to the Myers Order.

The Receivership

[12] On July 19, 2016, Romspen made a formal demand for repayment of the amount outstanding under the Romspen Loan. 206 did not repay the amount of the Romspen Loan. The Receiver was appointed by order of Newbould J. dated September 27, 2016 (the "Receivership Order") upon the application of Romspen (the "Receivership Application"). Under the Receivership Order, 206 remains in possession and control of the Project and is proceeding to finish the remaining unsold unit in the Project, being the penthouse, for sale.

Preliminary Issue

[13] The motion record of the Receiver includes the First Report and the Receiver's Supplementary Report dated November 11, 2016 (the "Second Report") (collectively, the "Receiver's Report").

[14] Rosenberg argues that, while the Receiver's Report is admissible, some of the evidence therein is hearsay, argumentative or without foundation. In particular, Rosenberg submits that the Court should not give any weight to paragraphs 4 and 34 of the First Report or to paragraph 7 of the Second Report. I have the following comments regarding these paragraphs.

[15] Paragraph 4 of the First Report indicates that the Receiver received information from 206 management. Rosenberg says that whoever provided that information would have been a "principal" in both Romspen and 206. The relationship between 206 and Romspen is addressed below. I think the submission is that, given this relationship, the information obtained by the Receiver from management of 206 should not be relied upon. However, this relationship is not, by itself, sufficient to render any particular information unreliable. Moreover, as noted below, Rosenberg actually relies on much of this information. More generally, a general allegation of this nature is not, by itself, sufficient to support exclusion of any particular statement in the Receiver's Report.

[16] Paragraph 34 of the First Report states that Romspen applied for the Receivership Order to prevent Rosenberg from executing on the Judgment. Rosenberg says this statement is not attributed and should not be given any weight. It is, however, self-evident, although it may not be a complete statement of Romspen's intentions in applying for the Receivership Order. Moreover, Rosenberg also relies upon this statement in her own argument. I am therefore not prepared to exclude this statement.

[17] Paragraph 7 of the Second Report states that the penthouse unit in the Project became the ultimate source of Romspen's recovery under the Romspen Mortgage as a result of the Project's cost overruns and delays in selling the units. It states that Romspen agreed to discharge the

Romspen Mortgage in respect of unit 901 without payment as 206 required the proceeds to pay expenses toward finishing the penthouse and rendering it saleable.

[18] Rosenberg says there is no foundation for these statements, that they are hearsay, and that they are incorrect insofar as the proceeds of the sale of unit 901 were used to pay litigation and closing costs. The complete use of the sales proceeds of unit 901 is set out in paragraph 5 of the Second Report based on the records of the legal counsel for 206 on the sale. It indicates that $203,535.93 was paid to legal counsel for 206 in the litigation with Rosenberg, $15,000 was paid to such counsel for legal fees in connection with the motion before Myers J. respecting the sales proceeds of unit 901, the $350,000 was paid into trust as described above, approximately 85,700 was held back for costs associated with the sale, and the balance of the proceeds, representing approximately $1,457,000, was paid to 206.

[19] More generally, the evidence is entirely consistent with Romspen having decided to refrain from enforcing the Romspen Mortgage in order that 206 could use the proceeds of sale of the remaining units to fund the completion of the penthouse. As the penthouse is the only remaining asset of 206, it is in Romspen's interest to maximize the sale price of the penthouse in order to recover as much as possible of the amount advanced under the Romspen Loan. In fact, rather than disputing these facts, Rosenberg accepts them and relies on them in support of her own position. I have therefore accepted these statements in paragraph 7 as accurate.

Overview and Observations Regarding Rosenberg's Position

[20] It is instructive to set out Rosenberg's argument at the outset. Rather than paraphrase that argument with the risk of some lack of precision, I have set out the following paragraphs from her Factum, which describe her position:

> 33. Romspen's interest runs afoul of fraudulent conveyance law when it retained the receiver to convey 206's equity to the receiver. After the decision of Justice Myers on June 29, 2016, Romspen could not have asserted its interest over the funds because 206 was the party that received the funds from the sale of 901 and decided not to pay down the debt owed.
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> 34. Why Romspen did not demand repayment of the money advanced to the project is unknown, but by conveying the equitable interest of 206 in the project, they are attempting to place funds beyond the reach of the judgment creditor. In law, the transaction is a sham transaction.
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> ...
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> 37. It is respectfully submitted that Romspen, by placing the mortgage in default and giving notice under the *Bankruptcy Act*, is doing indirectly what cannot be done directly by either 206 or Romspen. Romspen cannot secure the funds for itself because Rosenberg is a judgment creditor and the money is in law for the creditor an exigible asset. Romspen cannot secure the money for itself directly because it had no right to the money. 206 received the money from the sale of unit 901, and once those funds were placed in trust by Court Order they were beyond the reach of the mortgagee, Romspen.

> 38. Once Romspen realized it had no right to the funds and its claim, along with the claim of 206, would be defeated, Romspen and 206 then triggered the receivership artificially by design claiming the mortgage was in default, issuing the Notice under section 244 of the *Bankruptcy and Insolvency Act*, then using enhanced rights accorded to a receiver under the Statute to claim priority.

[21] There are seven problems with this analysis that are relevant to the Court's determination herein.

[22] First, while Romspen discharged unit 901 from the Romspen Mortgage when unit 901 was sold, it did not discharge the sales proceeds from the charge under the Romspen Mortgage. Similarly, the fact that Romspen allowed 206 to use the sales proceeds received on the sale of units of the Project, including the sales proceeds of unit 901, to fund the costs of finishing the penthouse and readying it for sale does not mean that Romspen released such sales proceeds, or the asset to which the proceeds were applied, being the penthouse. All monies in the hands of 206 remain subject to the charge under the Romspen Mortgage.

[23] Second, as a related matter, the fact that, out of the sales proceeds, $350,000 was placed in trust pursuant to the Myers Order does not mean that the funds are "beyond the reach" of Romspen as a mortgagee. The funds remain subject to any charge or other security interest granted over the assets of 206, including the Romspen Mortgage, for the reasons addressed above. Romspen could have realized on the assets of 206, including its interest in the funds in trust, at any time, notwithstanding the Myers Order, to the extent that the Romspen Mortgage is otherwise valid and ranks prior to unsecured claims. Moreover, Romspen did not need to be a party to the litigation between 206 and Rosenberg to have an interest in the trust monies or, more accurately, to have the right to assert that its security under the Romspen Mortgage extended to such monies.

[24] Third, the fact that Romspen did not enforce the Romspen Mortgage at any earlier time did not prevent it from making demand and, if it so chose, enforcing the Romspen Mortgage at any time after the Judgment. It is perfectly reasonable for a secured creditor having confidence in its debtor to allow the debtor to complete construction of a building project rather than to enforce its security and take over responsibility for the remaining construction or to sell the uncompleted project to another builder.

[25] Fourth, the appointment of the Receiver did not constitute a conveyance of 206's equity to the Receiver. Under receivership law, the debtor remains the owner of its property. The effect of a receivership order is to give a receiver the authority to deal with the debtor's property to the extent provided for in the order. In addition, in this case, the Receivership Order limited the Receiver's authority to the power to sell the assets of 206. Accordingly, Rosenberg's ability to execute the Judgment against the funds in trust depends upon the relative priorities of the Judgment and the Romspen Mortgage as they existed immediately prior to the appointment of the Receiver. These priorities are not affected by the Receivership Order.

[26] Fifth, it appears that Rosenberg considers the appointment of the Receiver to be a sham transaction because she considers that 206 and Romspen are effectively the same corporation. I accept for this purpose the definition of sham transaction proposed by Rosenberg in her factum,

based on the decision of the Supreme Court in *Minister of National Revenue v. Cameron*, [1974] S.C.R. 1062, 28 D.L.R. (3d) 477, at p. 1068:

> The appellant's submission really rests upon the contention that the agreement between Campbell Limited and Independent was nothing but a sham. Both counsel cited the definition of that word by Diplock L.J. in *Snook v. London & West Riding Investments, Ltd.* [[1967] 1 All E.R. 518, p. 528.]:
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> > As regards the contention of the plaintiff that the transactions between himself, Auto-Finance, Ltd. and the defendants were a "sham", it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.

[27] The present circumstances do not qualify as a sham transaction by this definition. In this case, the appointment of the Receiver was authorized by the court and had real consequences for 206's ability to deal with its assets.

[28] As a legal matter, the evidence indicates that Romspen and 206 are separate corporations with different shareholders, although there are common directors and shareholders. In the Receiver's Report, the Receiver states that 22 percent of the issued and outstanding shares of 206 are owned by a holding corporation of Sheldon Esbin ("Esbin") or his family, a holding corporation of Wesley Roitman ("Roitman") or his family, and a corporation, Romspen Holdings Inc., owned as to 74 percent by companies controlled by Roitman and Esbin and as to 26 percent by Arthur Resnick ("Resnick"). It is understood that Esbin and Roitman control Romspen. Esbin, Roitman and Resnick are also three of the four directors of 206 as well as officers of 206. Neither this shareholding arrangement nor the common directors of 206 and Romspen constitute Romspen an "affiliate" of 206 for the purposes of the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA") and, in particular, for the purposes of Rosenberg's claim of oppression under the OBCA. As a related matter, the issue of whether 206 and Romspen are at arm's length for the purposes of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) is irrelevant for present purposes.

[29] On the other hand, Rosenberg is correct, in a sense, to say that 206 and Romspen have a common economic interest. It is, however, more accurate to say that Romspen effectively owns all of the remaining equity in 206, if it is assumed that the interest rate under the Promissory Note is enforceable and that the realizable value of the penthouse is approximately $10.5 million as Rosenberg suggests and, therefore, less than the amount owing to Romspen. In these circumstances, to the extent that the directors of 206, including Esbin, Roitman and Resnick, cause 206 to take actions that maximize the value of the remaining asset of 206, they also further the interests of the creditors, including in particular Romspen. I will return to the significance of the Romspen Mortgage later in this Endorsement.

[30] Sixth, given the foregoing, it is incorrect to say that, by placing the Romspen Mortgage in default and giving notice under s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, Romspen is doing indirectly what cannot be done directly by either 206 or Romspen. In particular, the appointment of the Receiver did not change the priorities of Rosenberg and Romspen in the funds in trust.

[31] Lastly, Rosenberg's claim in respect of the trust funds turns on the validity of, and the amount outstanding under, the Romspen Mortgage, not on the appointment of the Receiver. However, Rosenberg does not challenge the fact that the Romspen Mortgage was validly given for good consideration in the form of advances totaling $4,265,000. In addition, while she suggests that the 24 percent interest rate payable under the Promissory Note is a "badge of fraud" or of a sham transaction as discussed below, she does not suggest that it is unenforceable such that the amount secured by the Romspen Mortgage is less than the amount asserted by Romspen.

Analysis and Conclusions

[32] I will address in turn three submissions addressed at hearing of this motion after first addressing three general matters.

[33] First, the appointment of the Receiver has removed the need for a hearing before Myers J. regarding the entitlement of Rosenberg to the trust monies insofar as this motion for directions of the Receiver is directed toward a determination of the same issue that would have been before Myers J. I do not agree, however, with Rosenberg's argument that the hearing contemplated by Myers J. would have been limited to a consideration of the relative entitlements of 206 and Rosenberg to the trust monies. The italicized words in the endorsement of Myers J. set out above clearly contemplated the assertion of claims to the trust monies by parties other than the parties to the litigation, including Romspen. Moreover, there would have been no dispute to be determined by Myers J. if the only two parties under consideration were Rosenberg, as a judgment creditor, and 206, as the debtor.

[34] Second, Rosenberg's position is essentially that the Receiver must pay her if it has the funds rather than apply the trust monies toward the completion of the penthouse unit. That is not, however, in accordance with the law. The effect of the Receivership Order is to stay any enforcement proceedings by Rosenberg in respect of the Judgment. The Receiver's obligation is to maximize the value of the assets of 206 for distribution to the creditors in accordance with the priority of their claims against 206. The Receiver believes that the assets of 206 will be maximized by completion and sale of the penthouse unit. There is no evidence in the record to the contrary and no motion before the Court challenging the Receiver's actions. Accordingly, given the appointment of the Receiver, the issue of priority to the trust monies originally contemplated by the endorsement of Myers J. becomes an issue of the relative priorities of the Judgment and the Romspen Mortgage to any future distribution by the Receiver.

[35] Third, I have some difficulty in identifying the intended legal significance of Rosenberg's arguments given the context described above. I have indicated my understanding of the legal significance to be attached to each argument below. I also note that, while Rosenberg's notice of cross-motion also asserts a claim for an equitable lien against the Project, she did not make this claim in her factum or in the oral submissions on the hearing of the motion.

Fraudulent Conveyances Act

[36] Rosenberg's principal submission is that the actions of Romspen in causing the appointment of the Receiver constituted a fraudulent conveyance for the purposes of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "FCA"). Although Rosenberg does not expressly state this, I think the argument is directed to setting aside the Receivership Order.

[37] The relevant provision in the FCA is section 2, which reads as follows:

> Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

[38] Rosenberg's submission based on the *FCA* cannot succeed for four principal reasons.

[39] First, as mentioned, there was no conveyance of property upon the appointment of the Receiver. It is not correct to say, as Rosenberg argues, that "the legal authority over the undertaking of 206 [was] transferred ... from 206 to the receiver", for the reasons addressed above. Moreover, as mentioned, in this case the Receivership Order essentially limited the powers of the Receiver to selling the remaining unsold units of the Project, which sales were effected on behalf of 206.

[40] Second, there was no "intent to defeat creditors" involved in the appointment of the Receiver. The fact that, in the receivership proceeding, Romspen intended to assert the priority of the Romspen Mortgage over Rosenberg's interest as a judgment creditor is not evidence of an intent to defeat creditors. The concept of intention to defeat creditors involves the attempt to establish, or improve, a priority position to the detriment of another creditor. In this case, the appointment of the Receiver did not alter the priorities as between Romspen and Rosenberg. Moreover, it is incorrect to say that the Receiver is asserting a superior right to the funds in trust. While the Receiver initially took a position on this motion, the Receiver is merely seeking a determination of the relative priorities of the Judgment and the Romspen Mortgage within the receivership proceeding. As mentioned, in the absence of a receivership, such a determination would have been made in the context of litigation directly between Rosenberg and Romspen.

[41] Third, the "badges of fraud" upon which Rosenberg relies to establish an intention of fraud are not evidence of any intent to defeat 206's creditors in the circumstances of this proceeding. In particular, as discussed above, it is not correct to say that, because no demand had been made by Romspen prior to July 19, 2016, there was an element of secrecy that evidences a fraudulent transaction. Nor is the relationship between 206 and Romspen, as described above, or the common economic interest of these companies given 206's current financial circumstances, evidence of any intent to defraud creditors for the reasons discussed above.

[42] Fourth, for the reasons set out above, it is incorrect to say that the effect of the receivership was to place the trust funds beyond the reach of judgment creditors. Whether or not the trust funds are available to judgment creditors is entirely dependent on the validity and

priority of the Romspen Mortgage as it existed prior to the receivership. As mentioned, Rosenberg does not challenge the amount secured by the Romspen Mortgage.

[43] I would observe, as well, that, for the reasons set out above, even if the Court were to set aside the Receivership Order as a fraudulent conveyance, this would not result in the relief in favour of Rosenberg that she seeks on this motion. The question of the relative priorities of the Judgment and the Romspen Mortgage to the monies held in trust pursuant to the Myers Order would remain.

Assignments and Preferences Act

[44] An alternative argument, that was addressed in oral submissions although it was not set out in Rosenberg's factum, is that the actions of Romspen in causing the appointment of the Receiver constituted a fraudulent conveyance for the purposes of the *Assignments and Preferences Act,* R.S.O. 1990, c. A.33 (the "APPA"). This submission is also directed to setting aside the Receivership Order.

[45] The applicable provision of the APPA is section 4, the relevant portions of which read as follows:

> 4. (1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.
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> (2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.
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> (3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

[46] This submission cannot succeed for the four reasons that were discussed above in rejecting the application of the FCA to the appointment of the Receiver. In addition, even if

successful, this request to set aside the Receivership Order would not result in the relief requested by Rosenberg for the reasons addressed above in respect of the claim based on the FCA.

Business Corporations Act

[47] Rosenberg's third submission is that the actions of 206 and Romspen constituted oppressive conduct for the purposes of section 248 of the OBCA. The relevant provision of the OBCA is subsection 248(2), which provides as follows:

> 248. (2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,
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> (a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;
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> (b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or
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> (c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of.

[48] Rosenberg submits that, because of the "significant amount of overlap in both ownership and in terms of the directors", it was beneficial for Romspen to place a "commercially unreasonable mortgage" on the unsold units of 206 and then trigger an artificial default in order to appoint the Receiver. She suggests that these steps have the effect of attempting to prevent 206 from paying an unsecured creditor. She says that the actions of Romspen caused unfair prejudice to, and unfairly disregarded, her interests as an unsecured creditor of 206. I understand this submission to be that the actions of 206 and Romspen disregarded Rosenberg's reasonable expectations as a judgment creditor.

[49] Before addressing this claim, I wish to make the following four observations.

[50] First, it is important to clarify the relief that could result if Rosenberg were successful on this submission. In such an event, I do not think that Rosenberg would be entitled to an order setting aside the Receivership Order for the reason that the oppression action is limited to actions of 206 and Romspen that are alleged to have disregarded unfairly the interests of Rosenberg only and the alleged oppressive conduct could be addressed without setting aside the Order. Rather, the appropriate relief would be an order subordinating the Romspen Mortgage to Rosenberg's claim in respect of the Judgment on the basis that the conduct of 206 and Romspen was oppressive for the purposes of section 248.

[51] Second, Rosenberg's claim for relief in the form of such subordination is asserted in the context of the oppression remedy in section 248 of the OBCA. For clarity, I do not address

herein whether Rosenberg would be entitled to a remedy if a claim of equitable subordination were known at law outside the oppression remedy in section 248 of the OBCA for the reason that Rosenberg does not assert a claim of this nature in the present proceeding.

[52] Third, as a related matter, while the Romspen Loan, including the issuance of the Romspen Mortgage, would appear to have been a transaction to which section 132 of the OBCA applied, Rosenberg does not assert a claim under that provision. Nor is there any evidence before the Court that any directors of 206 who were also directors and shareholders of Romspen in 2011 failed to comply with the requirements of section 132 at the time of the transaction. In any event, the matter of compliance with section 132, and any consequences of non-compliance, are not before the Court in this proceeding. In addition, even if there had been non-compliance, it is not clear that Rosenberg would be entitled to any remedy under that provision as a creditor of 206.

[53] Fourth, there is no dispute regarding Rosenberg's status as a "complainant" in respect of 206 for the purposes of her oppression claim. However, section 248 requires a demonstration that actions of the corporation or its affiliates, or that the conduct of the business or affairs of the corporation or its affiliates, unfairly disregarded the interests of the complainant. Romspen is not an affiliate of 206 for this purpose. Accordingly, actions of Romspen, for example its actions in applying for the Receivership Order, cannot constitute oppressive conduct in respect of the business and affairs of 206 for the purposes of section 248. This is not a mere technicality. The OBCA draws a very clear limit on the class of corporations whose conduct can fall within section 248. In respect of any claim of oppression pertaining to 206, the only parties whose actions would be relevant would therefore be 206 and its affiliates. It is therefore necessary to analyse whether the actions of 206 constitute oppressive conduct on their own without regard to the actions of Romspen, rather than on the basis that 206 and Romspen are effectively the same entity.

[54] Similarly, it is necessary to consider the actions of Romspen on their own without regard to the actions of 206.

[55] As described above, Rosenberg's claim is asserted in a very general manner. I have considered below a number of possible claims based on the facts upon which Rosenberg relies.

[56] First, and most important, I understand Rosenberg's principal submission to be that Romspen's actions in applying for the Receivership Order constituted oppressive conduct on the part of each of 206 and Romspen under section 248. This claim is based primarily on the alleged artificial nature of the default relied upon by Romspen to support its application for the Receivership Order. There are a number of difficulties with this submission.

[57] With respect to 206, that corporation essentially took no action in respect of the Receivership Application and is taking no action in respect of the contest between Rosenberg and Romspen. There is no basis on which 206's response to the application of Romspen can constitute oppressive behaviour.

[58] Insofar as Rosenberg's oppression claim pertains to Romspen's conduct in declaring a default under the Romspen Loan and applying for the Receivership Order, there are three principal problems with this submission.

[59] First, the oppression remedy is grounded in the concept of an action of a corporation that results in a breach of a party's reasonable expectations. In the present circumstances, it was reasonable for Rosenberg to expect that she would have a claim against the assets of 206 as a judgment creditor. It was not reasonable, however, for her to expect that the claim would rank ahead of all amounts secured under a valid mortgage, including the Romspen Mortgage. In this regard, it is also relevant that, although Rosenberg says that Romspen had notice of her action when it registered the Romspen Mortgage on May 15, 2014, she does not assert any priority of the Judgment over the Romspen Mortgage on the basis of such notice. In any event, the law is well established that an equitable mortgage in land takes priority over an execution creditor: see *Jellett v. Wilkie* (1896), 26 S.C.R. 282, 16 C.L.T. 260 and *Kerr v. Ruttle and Cruickshank*, [1952] O.R. 835, [1953] 1 D.L.R. 266 (H.C.J.). It was also unreasonable for her to expect that Romspen would not assert its priority, when she attempted to enforce the Judgment against the sales proceeds of unit 901, notwithstanding that Romspen was otherwise prepared to allow 206 to use those proceeds to complete the Project. Accordingly, any alleged breach of such expectations would not trigger a remedy under section 248.

[60] Second, Rosenberg has not established that Romspen's actions in applying for the Receivership Order were commercially unreasonable or that the default under the Romspen Mortgage was "artificial" in the sense of non-existent. Romspen's actions were directed to obtaining recovery under the Romspen Mortgage. There is no suggestion of any illegality involved on the part of Romspen. In furthering its own interest, Romspen may be said to be disregarding Rosenberg's interests in the colloquial sense of preferring Romspen's interests to Rosenberg's. However, in enforcing its security, Romspen is not "unfairly" disregarding Rosenberg's interests as a judgment creditor for the purposes of section 248 of the OBCA.

[61] Third, in the absence of any relationship between Romspen and Rosenberg, I do not think that Rosenberg would qualify as a "complainant" under section 245 of the OBCA in respect of an oppression claim against Romspen under section 248. It is difficult to envisage a situation in which one creditor could be a complainant in respect of the actions of another creditor. While there is an element of circularity, it is possible that such status could be established by demonstration that actions of a secured creditor were specifically directed toward establishing a priority over an unsecured claim that would not otherwise exist. However, in any event, such evidence is lacking in this case.

[62] Accordingly, I conclude that Rosenberg's oppression claim based on the argument that Romspen's demand under the Romspen Loan and application for the Receivership Order constituted, or resulted in, oppressive conduct by Romspen or 206 must fail.

[63] However, when viewing the circumstances in the larger context without regard to the receivership, I have sympathy for Rosenberg's position. She has had to pursue litigation against 206 to obtain a return of her deposit at considerable financial cost which cannot be recovered given the amount secured under the Romspen Mortgage, which effectively renders 206 insolvent.

Further, there was nothing that Rosenberg could have done to protect herself against this situation.

[64] Moreover, the reason why Rosenberg cannot expect any such recovery is easily identified. It is not the appointment of the Receiver in 2016 but the terms of the Romspen Mortgage as it was agreed to by 206 in 2011, specifically the 24 percent interest rate. Given that interest rate, the amount secured under the Romspen Mortgage has increased substantially from the amount secured originally. The equity remaining in the Project – only approximately $10.5 million on Rosenberg's estimation – is insufficient to satisfy the Judgment if the Romspen Mortgage is enforceable. This engages the relevance for any oppression claim of Rosenberg's assertion that the Romspen Mortgage was "commercially unreasonable" on a standalone basis.

[65] A complication in respect of Rosenberg's submission is that, while she has asserted that the Romspen Mortgage was "commercially unreasonable", she has not, however, asserted any specific legal claim based on this assertion, apart from the claim discussed above that the terms of the Romspen Mortgage were an element of the oppressive conduct of 206 and/or Romspen in respect of the appointment of the Receiver. In particular, as mentioned above, Rosenberg does not suggest that the interest rate provided for in the Romspen Mortgage renders the Mortgage unenforceable on some basis. I have, however, given consideration to whether the actions of 206 in agreeing to the terms of the Romspen Mortgage, or of Romspen in requiring a 24 percent interest rate as a condition of granting the Romspen Mortgage, constituted conduct that is oppressive for the purpose of section 248. For this purpose, it is necessary to consider the actions of 206 and Romspen in 2011 at the time of the issuance of the Romspen Mortgage.

[66] With respect to 206, I conclude that the record is not sufficient to establish oppressive conduct on the part of 206 in agreeing to the Romspen Mortgage in 2011, even assuming there is no issue of a limitation period. In order to find that such actions of 206 constituted actions that unfairly disregarded Rosenberg's interests under subsections 248(2)(a) or (b) of the OBCA, it would be necessary to establish that comparable financing was available to 206 in 2011 at a rate of interest materially less than 24 percent such that there would have remained sufficient equity in the Project to repay such financing and the Judgment upon completion of the Project. There is, however, no basis in the record for such a conclusion.

[67] While Rosenberg included in her motion materials an opinion letter from MCAP Financial Corporation to the effect that the 24 percent interest rate was "above a commercially reasonable range", the opinion letter is deficient in two respects. First, it speaks to May 15, 2014, being the date of registration of the Romspen Mortgage, rather than the date of issuance of the Mortgage. In addition, it is not in any way informed by the actual circumstances of the Project in 2011, relying instead upon an assumed property value in 2014 for which there is no evidentiary support and reasoning entirely on the basis of the resulting loan-to-value ratio in respect of the Project.

[68] With respect to the claim against Romspen there are two difficulties.

[69] First, for the same reasons, I also do not think that the record is sufficient to establish that Romspen's participation in the transaction in 2011 giving rise to the Romspen Mortgage constituted oppressive conduct. The reason for the interest rate is not in evidence. Ultimately,

that is an issue between 206 and Romspen. There is, however, no evidence that the non-Romspen-related investors in 206 raised any objection to the terms of the Romspen Loan. In addition, there is no evidence that, at the time the Romspen Mortgage was issued in 2011, Romspen or 206 agreed to the 24 percent interest rate with the intention of defeating claims by unsecured creditors. Moreover, Rosenberg's claim was not asserted until well after the Romspen Mortgage was executed by 206.

[70] Second, I do not think that Rosenberg would qualify as a "complainant" under section 245 of the OBCA in respect of an oppression claim against Romspen under section 248, for the reasons discussed above.

[71] Accordingly, I find that Rosenberg has not established a basis for a finding that any actions of 206 or of Romspen constituted oppressive conduct for the purposes of section 248 of the OBCA based on Rosenberg's assertion that the Romspen Mortgage was "commercially unreasonable".

Conclusion

[72] Based on the foregoing, I find that the Romspen Mortgage has priority over the claim of Rosenberg constituted by the Judgment in respect of the monies held in trust pursuant to the Myers Order. Accordingly, Rosenberg's motion for an order that such monies be paid to her is dismissed.

Wilton-Siegel J.

Date: February 1, 2017