Court File No. CV-16-11529-00CL

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**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**

B E T W E E N:

**ROMSPEN INVESTMENT CORPORATION**

Applicant

- and -

**206 BLOOR STREET WEST LIMITED**

Respondent

# FACTUM OF THE RECEIVER, ROSEN GOLDBERG INC.

November 21, 2016

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# FACTUM OF THE RECEIVER, ROSEN GOLDBERG INC.

## PART I - OVERVIEW

1. Rosen Goldberg Inc., the Court-appointed receiver (the "**Receiver**") of 206 Bloor Street West Limited (the "**Debtor**"), moves for directions regarding competing priority claims of Romspen Investment Corporation ("**Romspen**") and Linda Paris Rosenberg ("**Rosenberg**") to the sum of $350,000 (the "**Fund**"). The Fund is being held in the trust account of Dickinson Wright LLP, from the proceeds of sale of a condominium unit. Romspen is a mortgagee. Rosenberg is a judgment creditor. Based on its independent review of the facts, including the Debtor's books and records, and the applicable law, the Receiver submits that Romspen has priority over the Fund.

## PART II – THE FACTS

2. The Debtor was the developer of a 19 storey, 27 unit residential condominium project known as Museum House (the "**Project**"), at 206 Bloor Street West, in Toronto (the "**Property**").[1]

3. At present, the only remaining condominium unit in the Project which has not been sold is the penthouse. There are 3 unsold parking units and a storage locker appurtenant to the penthouse.[2] The unsold parking units, the storage locker and the penthouse are hereinafter referred to collectively as the "**Penthouse**".

4. In September of 2008, the Debtor obtained construction financing for the Project from Royal Bank of Canada ("**RBC**"). RBC's funding was secured by a $50 million first mortgage against the Property (the "**RBC Charge**").[3] Lombard General Insurance Company of Canada ("**Lombard**") provided the Debtor with a condominium deposit insurance facility, which was secured by a second-ranking mortgage in the principal amount of $30 million (the "**Lombard Charge**").[4]

5. In May of 2011, the Project encountered approximately $3 million in cost overruns and RBC was not prepared to make further advances unless the Debtor obtained additional funding.[5] As a consequence, the Debtor obtained a mezzanine loan from Romspen, a non-bank commercial lender. [6]

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[1] First Report of the Receiver ("**First Report**"), Tab 2 of the Receiver's Motion Record, p. 11, para. 5.

[2] Para 33-34 of First Report, pp. 17-18.

[3] RBC Charge, Appendix "B" to First Report, p. 36.

[4] Lombard Charge, Appendix "C" to First Report. Lombard is now Northbridge General Insurance Corporation.

[5] Excerpt of Report No. 30 prepared by Altus Group Consulting & Project Management, Appendix "D" to First Report and para 8 of First Report, p 12.

[6] Romspen Term Sheet, Appendix "E" to First Report, p. 45, and para 9 of First Report, p. 12.

6. As security for its mezzanine loan, Romspen received a third mortgage over the Property (the "**Romspen Charge**") from the Debtor. The Romspen Charge, although granted in 2011, was not registered until later for the reasons described below.[7]

7. Three directors and officers of the Debtor, namely, Sheldon Esbin, Arthur Resnick and Wesley Roitman, are also directors and officers of Romspen. Indirect shareholders of Romspen hold approximately 22% of the shares of the Debtor as a passive investment. The remaining shares of the Debtor are owned indirectly by other business people who have no direct or indirect relationship with Romspen.[8]

8. At RBC's request, the Debtor undertook in writing not to register the Romspen Charge without RBC's prior written consent.[9] RBC also required that Romspen enter into an Interlender Agreement, pursuant to which Romspen agreed to subordinate the Romspen Charge in favour of RBC.[10] Lombard also refused to consent to the registration of the Romspen Charge on terms that were acceptable to the Debtor.[11]

9. The Project was registered as Toronto Standard Condominium Corporation No. 2254 on August 14, 2012.[12]

10. On January 17, 2013, the Debtor's unsold inventory was refinanced with a $10 million mortgage from United Overseas Bank (the "**UOB Charge**") and the RBC Charge was

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[7] Unregistered Romspen Charge, Appendix "H" to First Report, p. 75.

[8] Supplementary Report to First Report ("**Supplementary Report**"), Appendix "A", Shareholders' Register of the Debtor, p. 7, para 2 of Supplementary Report, para 2, p. 3 and para 14 of First Report, p. 13.

[9] Undertaking, Appendix "I" to First Report, p. 97.

[10] Interlender Agreement, Appendix "J" to First Report, p. 99.

[11] Letter from Lombard to the Debtor, Appendix "K" to First Report, p. 109 and para 14 of First Report, p. 13.

[12] Parcel Register, Appendix "O" to First Report, p. 172.

discharged.[13] The UOB Charge prohibited the Debtor from further encumbering the Property. The UOB Charge was refinanced on February 28, 2014 with a mortgage from Home Trust Company in the principal amount of $4 million (the "**Home Trust Charge**").[14]

11. The Romspen Charge was not registered until May of 2014, after the Debtor had satisfied its obligations to UOB, and the Lombard Charge and the UOB Charge were discharged.[15]

12. From the Receiver's review of the Debtor's bank statements, cheque register, bank reconciliation and general ledger, it is clear that on the following dates, the following sums were advanced to 206 under the Romspen Charge:[16]

| **Dates of Advance** | **Amount Advanced** |
|---|---|
| June 2 to 6, 2011 | $1,489,719.74 |
| July 5 to 18, 2011 | $1,225,280.26 |
| August 9 to 14, 2012 | $550,000.00 |
| October 25 to November 1, 2013 | $1,000,000.00 |
| **Total Principal Advanced** | **$4,265,000.00** |

13. The Receiver has verified that all of the funds advanced under the Romspen Charge were applied on account of the Project and that no distributions were made to the Debtor's shareholders.[17]

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[13] UOB Charge, Appendix "L" to First Report, p. 109.

[14] Home Trust Charge, Appendix "M" to First Report, p. 139.

[15] Registered Romspen Charge, Appendix "N" to First Report, p. 147.

[16] Para 19 of First Report, pp. 14-15.

[17] Para 20 of First Report, p. 15.

14. Rosenberg, in paragraph 25 of her Affidavit sworn November 8, 2016 in response to the within Motion, notes that she has not seen evidence regarding the application of proceeds from the sale of units between June 2014 and July 2016. The Receiver has investigated Rosenberg's concern by reviewing trust ledger statements from the files of Miller Thomson LLP. Miller Thomson LLP acted for 206 on the sale of all units. The statements deal with the application of sale proceeds in relation to the four (4) units that were sold during the period of June 6, 2014 through June 30, 2016. [18] They reveal that, net of transaction related costs and HST (for which 206 was liable on the completion of the sale of the units), the proceeds from the sale of the first two (2) units (June 6, 2014 and July 31, 2014) were paid to Home Trust in reduction of 206's indebtedness under the Home Trust Charge On the closing of the sale of Unit 1401 (the third closing of the four (4) units, on March 23, 2015), the balance outstanding under the Home Trust Charge of $1,058,409.50 was satisfied in full, and 206 received $233,295.99. The funds which 206 received were subsequently used towards finishing the Penthouse. Upon the completion of the sale of the last of the four (4) units, namely, Unit 901, on June 30, 2016, the sale proceeds were applied in payment of 206's legal costs, the Fund (which is presently being held in trust by Dickinson Wright LLP), real estate commissions payable in connection with the sale of Unit 901, and the net proceeds of $1,106,606.88 (the "**Proceeds**") were paid to 206.[19]

15. Due to the Project's cost overruns and the unanticipated delays 206 encountered in selling the units, the Penthouse became (and remains) the ultimate source for Romspen's recovery under the Romspen Charge. Therefore, Romspen agreed to discharge the Romspen Charge over Unit 901 without payment, as the Proceeds were needed to pay 206's expenses toward finishing the Penthouse and rendering it saleable.[20]

16. As Romspen's loan matured on June 1, 2016 and was not repaid, on July 19, 2016, Romspen made formal demand on the Debtor for repayment and delivered a Notice of Intention

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[18] Statements of Miller Thomson LLP, Appendix "B" to Supplementary Report, p. 14.

[19] Statements of Miller Thomson LLP, Appendix "B" to Supplementary Report, pp. 9-12 and certified cheque in the amount of $12,265,138.34 payable to the Debtor, Appendix "C" to Supplementary Report, p. 14.

[20] Para 7 of Supplementary Report, p. 5.

to Enforce Security pursuant to section 244 of the *BIA*. As at July 1, 2006, the sum of $12,265,138.34 was due and owing to Romspen by the Debtor.[21]

17. The Receiver has obtained an opinion from its independent counsel, with respect to the validity and enforceability of the Romspen Charge. Subject to the customary qualifications and limitations contained therein, the Receiver's independent counsel has opined that the Romspen Charge is valid and enforceable security as against Unit 901 (hereinafter defined).[22]

18. Pursuant to a Judgment of Justice Myers dated June 29, 2016 made on a motion for summary judgment, the Debtor was ordered to pay Rosenberg the sum of $523,750, plus costs in the amount of $225,000 inclusive of disbursements and HST (the "**Judgment**").[23] The Judgment arose from a dispute regarding deposits (the "**Deposit**") paid under an agreement of purchase and sale in respect of Unit 901 in the Project ("**Unit 901**") between the Debtor, as vendor, and Rosenberg, as purchaser (the "**APS**").[24] The issue before Justice Myers was whether the Deposit had been forfeited to Rosenberg or the Debtor. His Honour held that the Debtor breached the APS in failing to provide Rosenberg with a comprehensive list of samples and pricing from which to make selections in the finishing of Unit 901 and ordered the Debtor to pay the Judgment amount to Rosenberg.[25]

19. With respect to the issue of priority over the Fund as between Romspen and Rosenberg, there are three (3) three relevant provisions in the APS.

20. Subsection 4(e) of Schedule A to the APS provides:

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[21] Demand and *BIA* Notice, Appendix "P" to First Report, p. 177.

[22] Opinion of Battiston & Associates, Appendix "Q" to First Report, p. 182.

[23] Judgment, Appendix "R" to First Report, p. 191.

[24] APS, Appendix "T" to First Report, p. 236.

[25] Reasons, Appendix "S" to First Report, p. 195.

> This Agreement shall be subordinated to and postponed to any mortgages on the Lands arranged by the Vendor and any advances made thereunder from time to time.[26]

(hereinafter, the "**Subordination Provision**").

21. Subsection 4(f) of Schedule A to the APS provides:

> This Agreement is personal to the Purchaser, and does not create an interest in, or a right to a lien against the Property, the Building and/or the Lands. The Purchaser shall not register, or cause to be registered on title, notice of this Agreement, nor any notice thereof, nor any caution with respect thereto, nor any certificate of pending litigation or other similar court process, nor shall the Purchaser give, register or permit to be registered any encumbrance against the Lands, or sell, encumber or make any other disposition of the Property, until after the Closing Date.[27]

(hereinafter, the "**No Right in Rem and Prohibition from Registration Provision**").

22. Section 26 of Schedule A the APS provides:

> 26. TERMINATION WITHOUT DEFAULT
>
> If this Agreement is terminated through no fault of the Purchaser, any and all deposit monies paid shall be returned to the Purchaser with interest, from the termination date, at the rate prescribed under the Act. The foregoing shall not oblige the Vendor to return any monies paid as an Occupancy Fee. In no event shall the Vendor be liable for any costs or damages whatsoever, including, without limitation, any loss of bargain, relocation costs, loss of use of deposit monies or for any fees, professional or otherwise, expended in relation to this transaction. The Purchaser acknowledges and agrees that the foregoing may be pleaded by the Vendor as an estoppel to any action brought by the Purchaser.[28]

23. The Judgment is partially but not wholly satisfied.[29] On April 13, 2016, Rosenberg received $494,750 from funds that were held by Miller Thomson LLP as cash collateral security

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[26] APS, Appendix "T" to First Report, p. 244.

[27] APS, Appendix "T" to First Report, p. 244.

[28] APS, Appendix "T" to First Report, p. 258.

[29] Paras 28-29 of First Report, pp. 16-17.

for excess condominium deposit insurance. A further $20,000 was paid to Rosenberg by Tarion Warranty Corporation in late June of 2016. Accordingly, the principal sum of $9,000 under the Judgment, and the costs award of $225,000, are outstanding.[30]

24. The issue of whether prejudgment and postjudgment interest are payable on the principal amount of the Judgment was also left open for determination at a later day.

25. On May 12, 2016, Rosenberg caused a Caution to be registered against title to Unit 901.[31] On June 29, 2016, on a motion by 206, Justice Myers directed the land registrar to delete and expunge the Caution and Dickinson Wright LLP was ordered to hold the Fund from the proceeds of sale of Unit 901, in trust, pending a determination of entitlement to the Fund.[32]

26. The Penthouse is unsaleable in its current, partially finished state. In order to fund the completion of the Penthouse and stay Rosenberg from executing on the Judgment, Romspen applied for the appointment of the Receiver, which Justice Newbould granted on September 27, 2016.[33] The Order appointing the Receiver provides that Rosen Goldberg Inc. is a non-possessory receiver. The Debtor remains in possession and control of, and can complete, the finishing of the Penthouse so that it can be sold.

27. On September 26, 2016, the day prior to the Receiver's appointment, Rosenberg commenced an action against the Debtor and Romspen claiming a declaration that the Romspen Charge was a fraudulent conveyance or contrary to the *Assignments and Preferences Act* and

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[30] The unpaid principal sum of $9,000 under the Judgment pertains to partial upgrades which Rosenberg paid to the Debtor. Upgrades are not insured by Tarion. Rosenberg's costs of litigating over the deposit are also not insured by Tarion or Lombard.

[31] Rather than taking out a judgment and filing an execution, Rosenberg registered a Caution.

[32] Endorsement, Appendix "U" to First Report, p. 264.

[33] Appointment Order, Appendix "A" to First Report, p. 19.

damages of $300,000.00.[34] That action has not proceeded by virtue of the stay of proceedings imposed under the Order appointing the Receiver.

28. If the Fund is adjudged payable to Romspen, it will be advanced to the Debtor to fund the costs of finishing the Penthouse. If the Fund is payable to Rosenberg, the Judgment will be satisfied in full.

## PART III – THE ISSUES

29. The issues for determination are:

(a) who as between Romspen and Rosenberg has priority to the Fund;

(b) who will have priority over the proceeds of sale of the Penthouse when it is ultimately sold;

(c) whether the Romspen Charge is void as a fraudulent conveyance and, if so, whether the Judgment has priority over Romspen;

(d) whether the Romspen Charge is void against Rosenberg by operation of the *Assignments and Preferences Act* and, if so, whether the Judgment has priority over Romspen;

(e) whether prejudgment and postjudgment interest are payable on the principal amount payable under the Judgment.

## PART IV – THE LAW

### The *Dictum* in *Jellett v. Wilkie*

30. In *Jellett v. Wilkie* (“***Jellet***”), the Chief Justice of the Supreme Court of Canada asserted that “no proposition of law can be more amply supported by authority than . . . that an execution

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[34] Statement of Claim, Tab “T”, Responding Motion and Record and Cross Motion of Lina Rosenberg,.

creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor."[35]

31. The *dictum* in *Jellett*, which is really a restatement of the principle of *nemo dat quod non habet*, has been applied repeatedly in priorities contests between prior secured creditors whose interests are unperfected and subsequent execution creditors. For example, in *McDonald v. The Royal Bank of Canada*, a creditor obtained judgment against McDonald and filed an execution with the sheriff. The sheriff thereupon seized a mortgage between McArthur, as mortgagor, and McDonald, as mortgagee. The mortgage had been assigned by McDonald to the Royal Bank seven (7) years earlier but the bank had failed to register the assignment in the registry office and the execution creditor had no notice or knowledge of the assignment at the time the sheriff seized the mortgage. The Court of Appeal for Ontario, relying on *Jellett*, held that the execution could not defeat the bank.[36]

32. Similarly, in *Kerr v. Ruttle and Cruickshank*, Brown borrowed money from Ruttle to buy land and promised to give Ruttle a mortgage on the land as security. The time of repayment and the rate of interest were agreed upon but no formal mortgage was executed. Subsequently, an execution was filed against the land. The Court held that Ruttle held an equitable mortgage. The Court further held that Ruttle had priority over the execution because the execution was not lodged with the sheriff until after the creation of the equitable mortgage. The rationale for this conclusion was that a writ of execution attaches only to the interest of the execution debtor in the lands and where an execution debtor is the registered owner of lands that are subject to an equitable mortgage at the time the execution is placed in the sheriff's hands, the execution will attach only to the equity in the land remaining after the claim of the equitable mortgagee.[37]

33. Applying the *dictum* in *Jellett*, and putting aside the failure of Rosenberg to file an execution, the Judgment, which was granted in June of 2016, can attach only to the interest of the

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[35] *Jellett v. Wilkie*, 26 SCR 282, 1896 CanLII 49 (SCC), pp. 288-289.

[36] *McDonald v. The Royal Bank of Canada*, [1933] OR 418; [1933] 2 DLR 680, 1933 CanLII 116 (CA), p. 8.

[37] *Kerr v. Ruttle and Cruickshank* [1952] OR 835; [1953] 1 DLR 266 1952 CanLII 81 (ON SC), p. 6.

Debtor in the Property. Insofar as the interest of the Debtor in the Property was subject to the unregistered Romspen Charge, signed by the Debtor in June of 2011, and fully advanced in the principal sum of $4,265,000 by November 2013, the Judgment must rank subordinate in priority because it is later in time.

**The Subordination Provision in the APS**

34. Rosenberg in her Notice of Motion claims to hold an equitable lien which gives her a prior right to the equity in Unit 901 and the other property of the Debtor. The Receiver submits that such claim is expressly precluded by the the No Right in Rem and Prohibition from Registration Provision pursuant to which Rosenberg agreed that the APS is personal to her, and does not create an interest in, or a right to a lien against the Property.

35. In *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.* Newbury J.A. of the British Columbia Court of Appeal confirmed that an equitable remedy such as a purchaser's lien may be excluded or modified by agreement of the parties.[38]

36. Justice Myers, in his reasons (the "**Reasons**"), characterized the Debtor and Rosenberg as "competent, adult parties, each of whom had independent legal advice" in connection with entering into the APS."[39] The Receiver submits that there is no principled basis to relieve Rosenberg from her agreement that she has no interest in or lien against the Property.

37. Putting aside the No Right in Rem and Prohibition from Registration Provision, the Receiver respectfully submits that the issue of whether Rosenberg holds an equitable lien as opposed to an unsecured claim is irrelevant because the Subordination Provision in the APS is a complete answer to any claim for priority she may have.

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[38] *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.*2014 BCCA 113 (CanLII), para 20.

[39] Reasons, Appendix "S" to First Report, p. 200, para 18.

38. In *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.*[40] (**"*Counsel*"**), Adams J. concluded that no issue of priority arose because the mortgagee had actual knowledge of a subordinated interest:

> While I accept that a purchaser's lien arose in the context of all of these purchase and sale agreements, the liens were not registered and do not take priority over the first registered charge against the lands and premises of Chanel in favour of Counsel. Although the priority of a registered mortgage may be affected by actual notice of a prior equitable lien, *the priority will not be affected where the lien, by its own terms, is expressed to be subordinate or subject to the registered mortgage*. That is the effect of paragraph 26 of all of the agreements of purchase and sale concerning these condominium units. Therefore, *the only actual notice that the initial purchase agreements gave to the plaintiff was notice of a subordinate interest of each purchaser to the rights of a mortgagee* under a mortgage arranged by the vendor.

39. The Receiver submits that Rosenberg is precluded from claiming an equitable lien which gives her a prior right to the equity in Unit 901 and the other property of the Debtor, because under the Subordination Provision in the APS, she expressly agreed that the APS shall be subordinated to and postponed to any mortgages arranged by the Debtor and any advances made thereunder from time to time.

**The No Right in Rem and Prohibition from Registration Provision in the APS**

40. In *Holborn Property Investments Inc. v. Romspen Investment Corp.* (**"*Holborn*"**), Wilton-Siegel J. applied *Chanel*, although the agreement of purchase and sale in that case did not contain a subordination provision.[41] Rather the agreement of purchase and sale in *Holborn* contained a covenant on the part of the purchaser not to register the agreement of purchase and sale, or notice thereof, on title to the property. His Honour stated (at para 45):

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[40] *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.* 1997 CanLII 12130 (ON SC) 33 O.R. (3d) 285, affirmed 1999 CanLII 1653 (ON CA).

[41] *Holborn Property Investments Inc. v. Romspen Investment Corp.* 2008 CarswellOnt 6914, [2008] O.J. No. 5722, 77 R.P.R. (4th) 262.

> In my opinion, however, a covenant not to register an agreement of purchase and sale does constitute a subordination of that agreement for purposes of actual notice. By precluding registration of the Agreement on title, clause 20(d) of the Agreement constitutes the Agreement an interest in the Property that is subordinated to Romspen's interest as chargee under the First Mortgage and the Second Mortgage. The only reasonable inference from a covenant not to register, in an agreement that does not contain a covenant [on the part of the vendor] against further encumbering the Property, is that the Agreement is intended to be subordinate to any encumbrance registered against the Property after the date of the Agreement.

41. Based on *Holborn*, the Receiver respectfully submits that the covenant in the No Right in Rem and Prohibition from Registration Provision, not register the APS or notice thereof on title to the Property, precludes Rosenberg from asserting priority over the Romspen Charge.

**Fraudulent Conveyance**

42. Section 2 of the *Fraudulent Conveyances Act*[42] provides:

> 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 other persons and their assigns.

43. Although Rosenberg in her Statement of Claim is seeking damages of $300,000, the law does not allow for a remedy in damages under the *Fraudulent Conveyances Act*. The statute provides for a declaration that transactions are void and that is all.[43]

44. There must be preponderance of evidence adduced to establish that a conveyance is fraudulent. As Penny J. stated in *Indcondo v. Sloan* ("***Indcondo***"):

> At the end of the day, however, the court must act on such a preponderance of evidence as to show whether the conclusion the plaintiff seeks to establish is substantially the most

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[42] *Fraudulent Conveyances Act*, R.S.O. 1990, c F.29.

[43] *Purcaru v Seliverstova et al.*, 2015 ONSC 6679 (CanLII) (Myers J,), para 108.

probable of the possible views of the facts; mere suspicion is not sufficient, Clarke v. The King (1921), 61 S.C.R. 608 at 616.[44]

45. In the absence of direct evidence of intent, surrounding circumstances are considered to establish *prima facie* the intent to defraud.[45]

46. The "badges of fraud," as listed in *Indcondo*, are considered below in light of the facts at bar.[46]

| **Badge of Fraud** | **Application to the Facts** |
|---|---|
| The donor continued in possession and continued to use the property as his own. | In giving Romspen a charge on the Property, the Debtor covenanted to give Romspen possession of the Property upon default. |
| The transaction was secret. | The Romspen Charge was disclosed to both RBC and Lombard. |
| The transfer was made in the face of threatened legal proceedings. | The Romspen Charge was signed in June of 2011. According to the Reasons, Rosenberg's real estate lawyers first wrote to the Debtor's lawyers on November 17, 2011 complaining that no one was getting back to her with the information as to her remaining options for finishing Unit 901.[47] Rosenberg did not threaten litigation until October 29, 2012.[48] She did not sue the Debtor until December 6, 2012.[49] |
| The transfer documents contained false statements as to consideration. | The principal face amount of the Romspen Charge was $5 million and $4.265 million was advanced. |

[44] *Indcondo v. Sloan*, 2014 ONSC 4018 (CanLII), 121 OR (3d) 160, para 57.

[45] *Indcondo*, para. 50.

[46] *Indcondo*, para. 52.

[47] Reasons, Appendix "S" to First Report, p. 208, para 59.

[48] Reasons, Appendix "S" to First Report, p. 219, para 114.

[49] Reasons, Appendix "S" to First Report, p. 220, para 117.

| | |
|---|---|
| The consideration is grossly inadequate. | At the time Romspen's mezzanine loan was committed and the Romspen Charge was signed ,the Debtor faced approximately $3 million in cost overruns.[50] The Receiver has verified that all of the funds advanced under the Romspen Charge were applied on account of the Project and that no distributions were made to the Debtor's shareholders.[51] |
| There is unusual haste in making the transfer. | The need for the mezzanine loan was driven by RBC's refusal to advance further funds under the RBC Charge while construction was underway.[52] There is nothing suspicious with the timing. |
| Some benefit is retained under the settlement by the settlor. | The benefit which the Debtor retained from entering into the mezzanine loan was the ability to continue building the Project, which was the foundation for the transaction. There is nothing suspicious about this. |
| Embarking on a hazardous venture. | Not applicable. |
| A close relationship exists between parties to the conveyance. | Romspen and the Debtor do not stand in a relationship of parent and subsidiary and are not sister companies. 78% of the shares of the Debtor are owned indirectly by business people who have no direct or indirect relationship with Romspen.[53] |

47. The Receiver, therefore, submits that the circumstances surrounding the Romspen Charge do not support Rosenberg's fraudulent conveyance claim.

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[50] Excerpt of Report No. 30 prepared by Altus Group Consulting & Project Management, Appendix "D" to First Report and para 8 of First Report, p 12.

[51] Para 20 of First Report, p. 15.

[52] Excerpt of Report No. 30 prepared by Altus Group Consulting & Project Management, Appendix "D" to First Report and para 8 of First Report, p 12.

[53] Supplementary Report to First Report ("**Supplementary Report**"), Appendix "A", Shareholders' Register of the Debtor, p. 7, para 2 of Supplementary Report, para 2, p. 3 and para 14 of First Report, p. 13.

***Assignments and Preferences Act***

48. The *Assignment and Preferences Act*[54] was considered by Sedgwick J. in *Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd.*[55] It applies to every "gift, conveyance, assignment or transfer..." of real or personal property which is made by a person when

(1) insolvent,

(2) unable to pay his debts in full, or

(3) he knows that he is on the eve of insolvency,

if the gift, conveyance, assignment or transfer is made "with intent to defeat, hinder, delay or prejudice" any one or more creditors of the person.

49. If made with this intent, the gift, conveyance, assignment or transfer is void as against the creditor(s) "injured, delayed or prejudiced" (sub-section 4(1)). If, however, the gift, conveyance, assignment or transfer is made "in good faith" and "in consideration of a present actual payment in money" or "by way of security for a present actual advance of money" where the "money paid" bears "a fair and reasonable relative value to the consideration therefor", the "gift, conveyance, assignment or transfer is not void as against the creditor(s) (sub-section 5(1)).

50. The statute further provides that nothing contained therein invalidates a security given to a creditor for a pre-existing debt, where because of the giving of the security, "an advance in money" is made to the debtor by the creditor in the belief that the advance will enable the debtor to continue its trade or business and to pay the debts of the debtor in full (subsection 5(5)(d)).

51. The Receiver submits that there is no evidence that the Romspen Charge was given in June of 2011 with intent to defeat, hinder, delay or prejudice any one or more creditors of the Debtor. On the contrary, it is clear that the Romspen Charge was given with the intent of filling the Debtor's funding shortfall in order to complete the Project.

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[54] Assignments and Preferences Act, R.S.O. 1990, c A.33.

[55] *Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd.*, 1996 CanLII 8253 (ON SC), paras 64-67

**Interest Under the Judgment**

52. Although the issue of whether prejudgment and postjudgment interest under the Judgment may in the fullness of time prove to be moot, as it is raised by Rosenberg in her Motion, it is addressed briefly below.

53. Section 26 of Schedule A to the APS provides that if the APS is terminated through no fault of the purchaser, any and all deposit monies paid shall be returned to the purchaser with interest, from the termination date, at the rate prescribed under the *Condominium Act*.[56]

54. Subsection 82 (7) the *Condominium Act* states:

> If an agreement of purchase and sale provides that a purchaser is entitled to a return of money paid under the agreement upon termination of the agreement and the agreement is terminated, the declarant shall pay interest at the prescribed rate to the purchaser on the money returned.

55. The prescribed rate of interest is found in Subsection 19(3) of O. Reg. 48/01 to the *Condominium Act*:

> The prescribed rate of interest for the purpose of subsections 73 (3), 74 (9) and 82 (1), (5) and (7) of the Act shall be,
>
> (a) for the period from April 1 to September 30 of each year, 2 per cent per annum below the bank rate at the end of March 31 of that year; and
>
> (b) for the period from October 1 of each year to March 31 in the following year, 2 per cent per annum below the bank rate at the end of September 30 immediately before that October.

56. Subsection 19(2) of the aforesaid regulation provides:

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[56] *Condominium Act*, S.O. 1998.

> In subsection (3), "bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to members of the Canadian Payments Association.

57. The "Bank Rate" as that term is used by the Bank of Canada, refers to the minimum rate at which the Bank of Canada makes short-term advances to members of the Canadian Payments Association.[57]

58. Although in the Reasons, Justice Myers did not expressly specify the date upon which the Debtor terminated the APS, it appears that His Honour considered January 11, 2013, the date of the Debtor's Statement of Defence and Counterclaim, to be the termination date.[58]

59. According to the Bank of Canada, Data and Statistics Office, since January of 2013, the Bank Rate has consistently stayed below 2 per cent per annum.[59] Therefore, Rosenberg is not entitled to any interest on the Deposit.

## PART V – ORDER SOUGHT

60. The Receiver seeks an Order:

(a) declaring that Romspen has priority to the Fund over Rosenberg and directing that the Fund be distributed to Romspen;

(c) declaring that Romspen has priority over the proceeds of sale of the penthouse unit owned by the Debtor and appurtenant parking units and storage locker, once sold;

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[57] "A Primer on the Implementation of Monetary Policy, in the LVTS Environment" Published by the Bank of Canada.

[58] Reasons, Appendix "S" to First Report, p. 220 para 120 and p. 222, p. 133.

[59] Table of Historical Bank Rates, Data and Statistics Office.

(d) declaring that no prejudgment or postjudgment interest is payable on the principal amount of the Judgment; and

(e) costs of this motion payable by Rosenberg.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 21st day of November, 2016.

Harold Rosenberg, Counsel for the Receiver

**SCHEDULE "A"**

**LIST OF AUTHORITIES**

1. *Jellett v. Wilkie*, 26 SCR 282, 1896 CanLII 49 (SCC)

2. *McDonald v. The Royal Bank of Canada*, [1933] OR 418; [1933] 2 DLR 680, 1933 CanLII 116 (CA)

3. *Kerr v. Ruttle and Cruickshank* [1952] OR 835; [1953] 1 DLR 266 1952 CanLII 81 (ON SC)

4. *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd.* 2014 BCCA 113 (CanLII)

5. *Counsel Holdings Canada Ltd. v. Chanel Club Ltd.*1997 CanLII 12130 (ON SC) 33 O.R. (3d) 285, affirmed 1999 CanLII 1653 (ON CA).

6. *Holborn Property Investments Inc. v. Romspen Investment Corp.* 2008 CarswellOnt 6914, [2008] O.J. No. 5722, 77 R.P.R. (4th) 262

7. *Purcaru v Seliverstova et al.*, 2015 ONSC 6679 (CanLII) (Myers J.)

8. *Indcondo v. Sloan*, 2014 ONSC 4018 (CanLII), 121 OR (3d) 160

9. *Dapper Apper Holdings Ltd. v. 895453 Ontario Ltd.*, 1996 CanLII 8253 (ON SC)

## SCHEDULE "B"

*Fraudulent Conveyances Act*, **RSO 1990, c F.29**

**Where conveyances void as against creditors**

2. 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. R.S.O. 1990, c. F.29, s. 2.

*Assignments and Preferences Act*, **RSO 1990, c A.33**

**Nullity of gifts, transfers, etc., made with intent to defeat or prejudice creditors**

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. R.S.O. 1990, c. A.33, s. 4 (1).

**Assignments for benefit of creditors and good faith sales, etc., protected**

5(1) Nothing in section 4 applies to an assignment made to the sheriff for the area in which the debtor resides or carries on business or, with the consent of a majority of the creditors having claims of $100 and upwards computed according to section 24, to another assignee resident in Ontario, for the purpose of paying rateably and proportionately and without preference or priority all the creditors of the debtor their just debts, nor to any sale or payment made in good faith in the ordinary course of trade or calling to an innocent purchaser or person, nor to any payment of money to a creditor, nor to any conveyance, assignment, transfer or delivery over of any goods or property of any kind, that is made in good faith in consideration of a present actual payment in money, or by way of security for a present actual advance of money, or that is made in consideration of a present actual sale or delivery of goods or other property where the money paid or the goods or other property sold or delivered bear a fair and reasonable relative value to the consideration therefor. R.S.O. 1990, c. A.33, s. 5 (1).

**Certain securities to be valid**

5(5)(d) invalidates a security given to a creditor for a pre-existing debt where, by reason or on account of the giving of the security, an advance in money is made to the debtor by the creditor in the belief that the advance will enable the debtor to continue the debtor's trade or business and to pay the debts in full. R.S.O. 1990, c. A.33, s. 5 (5).

*Condominium Act*, **1998, SO 1998, c 19**

**Terminated agreements**

82(7) If an agreement of purchase and sale provides that a purchaser is entitled to a return of money paid under the agreement upon termination of the agreement and the agreement is terminated, the declarant shall pay interest at the prescribed rate to the purchaser on the money returned. 1998, c. 19, s. 82 (7).

**General, O Reg 48/01**

**Sale of units**

19(2) In subsection (3),

"bank rate" means the bank rate established by the Bank of Canada as the minimum rate at which the Bank of Canada makes short-term advances to members of the Canadian Payments Association. O. Reg. 48/01, s. 19 (2).

19(3) The prescribed rate of interest for the purpose of subsections 73 (3), 74 (9) and 82 (1), (5) and (7) of the Act shall be,

(a) for the period from April 1 to September 30 of each year, 2 per cent per annum below the bank rate at the end of March 31 of that year; and

(b) for the period from October 1 of each year to March 31 in the following year, 2 per cent per annum below the bank rate at the end of September 30 immediately before that October. O. Reg. 48/01, s. 19 (3).

**ROMSPEN INVESTMENT CORPORATION**
Applicant

-and-

**206 BLOOR STREET WEST LIMITED**
Respondent

Court File No. CV-16-11529-00CL

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO
(COMMERCIAL LIST )

# FACTUM OF THE RECEIVER, ROSEN GOLDBERG INC.

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