

ONTARIO
**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

ROMSPEN INVESTMENT CORPORATION

Applicant

-and-

206 BLOOR STREET WEST LIMITED

Respondent

**FACTUM ON BEHALF OF LINDA ROSENBERG, INTERESTED PARTY
(Returnable November 23, 2016)**

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AND TO: THE HONOURABLE COURT

PART 1 – PARTIES AND MATTERS IN DISPUTE

1. This motion is brought by the Court appointed Receiver Rosen Goldberg Inc. (the “receiver”) of 206 Bloor West Limited (“206”) for a declaration of priority to certain funds being held in trust pursuant to the Order of Justice F Myers dated June 29, 2016, as between the receiver and Linda Rosenberg (“Rosenberg”), a judgment creditor of 206.
2. Rosenberg obtained judgment against 206 for \$514,750 plus costs of \$225,000, and interest in an amount to be determined by the Court. After a trial, Reasons for Decision dated January 4 and February 12, 2016 were issued by Myers J.
3. At the hearing of June 29, 2016, Justice Myers ordered that Dickinson Wright LLP, counsel for 206, hold the amount of \$350,000 in trust to the credit of this proceeding. The fund was determined to be sufficient to cover the claims asserted by Rosenberg, being the unpaid costs and pre and post-judgment interest.
4. The fund was derived from monies received by 206 from the sale of unit 901.
5. The moving party, Rosen Goldberg Inc., was appointed as the receiver of 206 on September 27, 2016 by Order of the Honourable Justice Newbould.
6. If she is successful in asserting priority, Rosenberg has a cross motion to have the court fix pre-judgment interest, post-judgment and costs.

PART 2 – SUMMARY OF FACTS

Linda Rosenberg and 206

7. On August 16, 2010, Rosenberg purchased unit 901 at 206.

**Reference: Affidavit of Linda Rosenberg, paragraph 1
Tab 2 of the Responding Party’s Motion Record**

8. 206 was not able to provide the unit as guaranteed by the agreement of purchase and sale and subsequent agreements. After trying for quite some time to resolve the

issue, the contract was ended on or about October/November 2012.

**Reference: Affidavit of Linda Rosenberg, paragraph 5 and Exhibit G
Tab 2 of the Responding Party's Motion Record
Reasons for Decision dated January 4 and February 12, 2016
Appendix S to the First Report of the Receiver**

9. Rosenberg issued an action on December 6, 2012 against 206, carrying on business as Museum House. The action went to a summary judgment trial, heard by Justice Myers, in the summer and fall of 2015. Rosenberg was awarded \$514,750 plus interest and summary judgment on January 4, 2016. She was subsequently awarded a further \$9,000 and costs in the amount of \$225,000 in a decision dated February 12, 2016.

**Reference: Affidavit of Linda Rosenberg, paragraph 6, 7
Tab 2 of the Responding Party's Motion Record**

10. The terms of the Judgment could not be agreed upon by Rosenberg and 206. As a result, the Judgment was not issued and Rosenberg placed a caution against unit 901 of 206 on May 12, 2016.

**Reference: Affidavit of Linda Rosenberg, paragraph 12
Tab 2 of the Responding Party's Motion Record**

11. On June 29, 2016, Justice Myers allowed the Registrar to remove the caution from title of unit 901 and ordered 206 to pay to Dickinson Wright LLP in trust the sum of \$350,000 to the credit of the action until the Court determines the amount of funds to be paid to Rosenberg and/or 206.

**Reference: Affidavit of Linda Rosenberg, paragraph 13, 14
Tab 2 of the Responding Party's Motion Record**

12. On June 30, 2016, unbeknownst to Rosenberg or her counsel, Judgment was issued. Counsel for Rosenberg was not provided with the Judgment until the Receiver's materials for this motion were received. Rosenberg had been attempting to work out the terms of the Judgment with 206 since January 2016.

**Reference: Affidavit of Linda Rosenberg, paragraph 16
Tab 2 of the Responding Party's Motion Record**

Mortgages Granted by 206

13. Timelines for the various mortgages on the property owned by 206 are listed below:

Mortgage Co.	Date Registered	Date Discharged	Amount	Interest Rate
RBC	September 10, 2008	January 22, 2013	\$50 million	Prime + 0.75%
Lombard/Northbridge	September 12, 2008	January 22, 2013	\$30 million	18%
United Overseas Bank	January 17, 2013	March 11, 2014	\$10 million	Prime + 1.25%
Home Trust	February 28, 2014	April 8, 2015	\$4 million	5.99%
Romspen	May 15, 2014	N/A	\$5 million	24%

**Reference: Affidavit of Linda Rosenberg, paragraph 19
Tab 2 of the Responding Party's Motion Record**

14. The average mortgage interest rate for all of the mortgages with the exception of the Romspen mortgage is approximately 8%. None of the mortgages were ever in default. All of the lenders, with the exception of Romspen, have been repaid in full

The Romspen Mortgage

15. On June 1, 2011, Romspen gave a Promissory Note to 206 for \$5 million, along with a General Security Agreement dated June 2011. A total of \$4,265,000 was advanced to the date of November 1, 2013. Part of the advance was made after the initial expiry of the Promissory Note, June 2013. Romspen was granted a mortgage but it was not registered on title. The terms of the mortgage indicate that 206 was to make monthly payments to repay the debt. For reasons set out in the First Report, lenders ahead of Romspen would not allow the Romspen mortgage to be registered against title.

**Reference: First Report of the Receiver, paragraph 10, 19
Tab 2 of the Moving Party's Motion Record**

16. Rosenberg issued her action against 206 in December 2012. When the Romspen Mortgage was registered on May 15, 2014, 206 had notice of Rosenberg's action.

**Reference: Affidavit of Linda Rosenberg, paragraph 20
Tab 2 of the Responding Party's Motion Record**

17. When the Romspen mortgage was registered, units 801, 901, 1201, 1301/1401 and PH01 remained unsold. The closing timelines and values are below:

Unit	Date Sold	Approximate Purchase Price
801	June 6, 2014	\$1,535,278
1201	July 31, 2014	\$1,297,225
1301/1401	March 23, 2015	\$1,314,039
901	July 4, 2016	\$1,579,526
PH01	N/A	N/A

**Reference: Affidavit of Linda Rosenberg, paragraph 25
Tab 2 of the Responding Party's Motion Record**

18. The receiver advises that the outstanding debt of 206 in favour of Romspen is stated to be \$12,265,138.34 as of June 30, 2016. It is not clear how the \$4.2 million advanced became a debt of greater than \$12 million, and no evidence has been offered to explain same.

**Reference: Affidavit of Linda Rosenberg, paragraph 20
Tab 2 of the Responding Party's Motion Record**

19. The interest rate for the Romspen mortgage, 24%, is unreasonable given the loan to value ratio. In the opinion of Peter Juretic, an expert in commercial mortgages, this interest rate is "high and above a commercially reasonable range".

**Reference: Affidavit of Linda Rosenberg, paragraph 27, 28, Exhibit "S"
Tab 2 of the Responding Party's Motion Record**

20. There is no evidence that 206 tried to borrow money at a reasonable rate from an unrelated lender.

21. The terms of the registered mortgage are different than the terms of the unregistered mortgage. The 2011 unregistered mortgage requires monthly payments to Romspen while the 2014 registered mortgage indicates that the money is to be paid on demand, even though no money was advanced by Romspen after November 2013.
22. There is no evidence of any funds being paid by 206 to Romspen at any time during the life of the mortgage to reduce the amount of debt owing on the Promissory Note. In the Second Report the receiver states that money received from the sale of 901 was used to pay the lawyer for 206 for services rendered in connection with Rosenberg's matter, and for other real estate related expenses. No money was applied to reduce the debt. All of the other debts, all with lower interest rates, were paid in full.

**Reference: Affidavit of Linda Rosenberg, paragraph 25
Tab 2 of the Responding Party's Motion Record**

Romspen and 206 Are Not at Arm's Length

23. It was only after Justice Myers rendered his decision on June 29, 2016 that Romspen made the decision to serve the Notice of Intention to Enforce Security on 206 on July 19, 2016.

**Reference: First Report of the Receiver, Exhibit "P"
Tab 2 of the Moving Party's Motion Record**

24. Romspen had never made any demand for payment from 206 for the outstanding Promissory Note and/or mortgage prior to July 19, 2016, even though the Promissory Note maturity date was extended June 1, 2013, June 1, 2014 and June 1, 2015. It was in default the month after it was made, and every month thereafter until a demand was made in 2016.
25. 206 and Romspen are related companies. 206 is partially owned or directed by Sheldon Esbin, Wesley Roitman and Arthur Resnick, persons who are also principals of Romspen. The address for both companies is the same, at 162 Cumberland St Toronto. Wesley Roitman, Sheldon Esbin and Arthur Resnick own 100% of the shares and are directors of Romspen. They are the directors of 206.

**Reference: Affidavit of Linda Rosenberg, paragraph 21, Exhibits M, N
Tab 2 of the Responding Party's Motion Record
First Report of the Receiver, paragraph 12
Second Report of the Receiver, paragraph 2**

26. Both Romspen and 206 have put themselves out into the marketplace as interchangeable.

**Reference: Affidavit of Linda Rosenberg, Exhibit O
Tab 2 of the Responding Party's Motion Record**

27. It is submitted that most if not all of the important dates are set out in the following chronology of key dates:

Event	Date
Purchase of Unit 901	August 16, 2010
206 gives Romspen Promissory Note and General Security Agreement	June 1, 2011
Mortgage/Charge given	Aug 22, 2011
Breach of Contract	October/November 2012
Statement of Claim	December 6, 2012
Romspen's Promissory Note extended	June 1, 2013
Registration of Romspen Mortgage	May 15, 2014
Romspen's Promissory Note extended	June 1, 2014
Romspen's Promissory Note extended	June 1, 2015
Reasons of Justice Myers	January 4, 2016 and February 12, 2016
Rosenberg receives \$494,750 from Northbridge/Tarrion	April 13, 2016
Caution on Unit 901	May 12, 2016
Romspen Mortgage Matured	June 1, 2016
Justice Myers ordered 206 to pay \$350,000 to Dickinson Wright LLP to be held in trust	June 29, 2016

Judgment	June 30, 2016
Rosenberg received \$20,000 from Northbridge/Tarrion	Late June 2016
Caution on Unit 901 Removed	July 4, 2016
Romspen's Formal Demand for Payment from 206	July 19, 2016
Receiver Appointed	September 27, 2016

Issues with the Receiver's Reports

28. The Receiver has chosen to file reports, as opposed to Affidavits, in support of the herein motion. It has received an opinion concerning the validity and enforceability of the mortgage from the same firm arguing that point.

Reference: First Report of the Receiver, Exhibit Q

29. It is submitted that some evidence proffered by the receiver's reports is hearsay, argumentative, or without foundation. For example, paragraph 7 of the Second Report. In that paragraph the receiver fails to identify 1) the basis for the statement that the project had cost overruns; 2) that there were delays in selling the units, or 3) that the penthouse "became the ultimate source for Romspen's recovery under the Romspen charge". In addition no evidence has been tendered for the proposition relating to Romspen's supposed agreement to discharge the charge against unit 901 without payment in order to pay "expenses toward finishing the penthouse and ultimately rendering saleable". The proceeds from the sale were in fact used to pay litigation and closing costs. None of the receiver's comments in paragraph 7 should be accorded any weight, if they are admissible at all.

30. In paragraph 4, the source of information available to the receiver is said to be, among other things, the "debtors management". Romspen is not identified as being a source of information. Whichever individual provided the information was a principal in both companies.

Reference: First Report of the Receiver, paragraph 4

Tab 2 of the Moving Party's Motion Record

31. In paragraph 34, statements as to the purpose for which the money is sought, is not attributed and therefore should not be accorded any weight, if it is even admissible.

**Reference: First Report of the Receiver, paragraph 34
Tab 2 of the Moving Party's Motion Record**

PART 3 – STATEMENT OF THE QUESTIONS IN ISSUE

The following issue(s) require determination by this Honourable Court:

- A. How much weight should be given to the Receiver's Reports filed in support of the herein motion?
- B. Does Linda Rosenberg's interest in the money held in trust take priority over the interest of the receiver acting on behalf of Romspen?
- C. If so, what amount of pre-judgment interest and post-judgment interest is she entitled to?

PART 4- LAW AND ARGUMENT

- A. How much weight should be given to the Receiver's Reports filed in support of the herein motion?**
32. Rosenberg respectfully submits that in law, while the reports themselves are admissible, the courts must consider the admissibility and weight of the evidence tendered in the report by the receiver, as any court does when considering the receipt of evidence. An example is that hearsay evidence contained in such reports is no less admissible than if it has been contained in an affidavit. Further, it is up to the Judge hearing the motion to determine the weight to be given to the report, or any part of it.

**Reference: *Farber v. Goldfinger*, 2011 ONSC 2044, para 35, 42
Tab 1 of the Responding Party's Book of Authorities**

B. Does Linda Rosenberg's interest in the money held in trust take priority over the interest of the receiver/206?

Fraudulent Conveyance

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.
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.
35. Section 2 of the *Fraudulent Conveyances Act* ("FCA"):

Where conveyances void as against creditors

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.

**Reference: *Fraudulent Conveyances Act, R.S.O. 1990, c. F.29, s. 2*
Tab 9 of the Responding Party's Book of Authorities**

36. The *FCA* was enacted to prevent fraud. It is remedial legislation and must be given as broad an interpretation as its language will reasonably bear.

**Reference: *Indcondo v. Sloan, 2014 ONSC 4018, para 49*
Tab 2 of the Responding Party's Book of Authorities**

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.
39. In order for a transfer to be voided under this section of the *FCA*, three elements must be proven on a balance of probabilities:
- 1) A “conveyance” of property;
 - 2) An “intent” to defeat; and
 - 3) A “creditor or other” towards whom that intent is directed.
- Creditors can be present or future creditors.

**Reference: *Indcondo v. Sloan*, 2014 ONSC 4018, para 44, 48
Tab 2 of the Responding Party’s Book of Authorities**

40. The first requirement is satisfied on the facts of this case. In law, conveyancing is the transfer of legal title of property from one person to another, or the granting of an encumbrance such as a mortgage or a lien. Here the legal authority over the undertaking of 206 is transferred by the receiver from 206 to the receiver.
41. The second requirement is met by the sudden decision, after the decision of Justice Myers on June 29, 2016, to transfer from Romspen to the receiver, who is asserting a superior right to the funds, a right Romspen does not have.

42. The third requirement of *Inconondo* is evident. Rosenberg is the target of the transaction. Pursuant to the Order of Justice Myers dated January 4, 2016 and February 12, 2016, Rosenberg is a judgment creditor of 206.
43. Evidence of actual intent is rarely available. The *Indcondo* case identifies several badges of fraud used to assess whether a transaction is fraudulent.
44. Below are several badges of fraud and their relevance to the case at hand.
- a) the transaction was secret;
 - No demand for payment had ever been made by Romspen to 206 for payment on the mortgage.
 - b) the transfer was made in the face of threatened legal proceedings;
 - Only after the June 29, 2016 decision of Justice Myers did Romspen attempt to enforce its right under the mortgage. Further, the Romspen mortgage was registered on May 15, 2014 and the Linda Rosenberg issued her claim on December 6, 2012.
 - c) the transfer documents contained false statements as to consideration;
 - While this badge is not literally satisfied, to say the mortgage is "in default" in July 2016 is artificial and, respectfully, not credible.
 - d) the donor continued in possession and continued to use the property as his own;
 - By the receiver's own statements, attribution for which could only have come from one of the principals of Romspen or 206, 206 remains in possession and will undoubtedly be attempting to build out, market, then sell, the penthouse. By this statement it is clear Romspen has never had any intention to realize on the security by forcing a default process.
 - d) there is unusual haste in making the transfer;
 - The notice and the Application were done with complete haste, once the funds were placed beyond the reach of Romspen.
 - e) some benefit is retained under the settlement by the settlor;
 - The settlor here is Romspen, who, along with 206, will realize the benefit of the fund.
 - f) a close relationship exists between parties to the conveyance.

- 206 and Romspen, with their overlapping owners, are clearly in a position to feed information to the receiver. This information is selective, and designed to give the appearance of bona fides.

**Reference: *Indcondo v. Sloan*, 2014 ONSC 4018, para 52
Tab 2 of the Responding Party's Book of Authorities**

45. The consideration for the mortgage was grossly inadequate. Romspen advanced \$5 million dollars at an interest rate of 24%. Such an interest rate is commercially unreasonable. There is no evidence that 206 attempted to obtain a mortgage with a reasonable interest rate.
46. The Supreme Court of Canada has described a “sham transaction” as 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.

**Reference: *Minister of National Revenue v. Cameron*, [1974] SCR 1062,
page 1068
Tab 3 of the Responding Party's Book of Authorities**

47. In law, “sham” has also been described as “one not intended to operate as it appears”. For example, “when a debtor transfers his property away, he may wish only to present the appearance of a transfer. His true intent may be to reserve some interest to himself, by way of a secret instrument, oral agreement, or understanding with the transferee. In such a case, the conveyance is not made in good faith, since it is a sham...”

**Reference: *Chan v. Stanwood*, 2002 BCCA 474, para 23, 25
Tab 4 of the Responding Party's Book of Authorities**

48. An intent to put in place a transaction to put the money beyond the reach of the creditor can be inferred from the evidence. For example, no money has ever been paid by 206, even though there were sufficient funds from the sale of units to reduce the debt. The inference can be drawn that Romspen's ability to have the debt repaid really did not matter to either Romspen or 206 during the project.

**Reference: *Indcondo v. Sloan*, 2014 ONSC 4018, para 51
Tab 2 of the Responding Party's Book of Authorities**

49. A close relationship exists between 206 and Romspen. The companies share three directors, namely Sheldon Esbin, Wesley Roitman and Arthur Resnick. While these individuals own 22% of the shares of 206, they may still, and presumably do, retain voting rights that control 206. The companies also share the same address. Romspen and 206 project their companies to the public as being interchangeable.
50. The Court has held that another factor to consider in determining whether a conveyance is fraudulent is that unless the transaction is set aside, it will have the practical consequence of placing a substantial asset beyond the reach of judgment creditors. In the case at hand, unless the Romspen mortgage is determined to be fraudulent, the \$350,000 being held in trust paid by 206, will be out of reach of Rosenberg, a judgment creditor. This would not be equitable as the Romspen mortgage was not known to third parties including creditors until registration in 2014. The mortgage registration was not done in good faith to protect Romspen's interest. It was registered to have the practical effect of defeating creditors. The same can be said for the receivership application, as it attempts to assert a priority that otherwise would not exist, and one which would have the effect of putting the fund out of the reach of the creditor.

**Reference: *DiSano v. DiFlorio*, 2014 ONSC 1161, para 34
Tab 5 of the Responding Party's Book of Authorities**

206 and Romspen are not dealing at Arm's Length

51. 206 and Romspen are not at arm's length from one another. In fact and law they are related to each other.
52. Paragraph 251(1)(b) of the *Income Tax Act* reads as follows:

"It is a question of fact whether persons not related to each other were at a particular time dealing with each other at arm's length."

Reference: *Income Tax Act, RSC 1985, c 1 (5th Supp), s. 251*
Tab 10 of the Responding Party's Book of Authorities

53. Although the *Income Tax Act* specifies that it is a question of fact whether persons were at a particular time dealing with each other at arm's length, that factual question must be decided within the cradle of the law and in reality it is a mixed question of fact and law.

Reference: *Campbell v. M.N.R.*, 1998 CanLII 330 (TCC), para 8
Tab 6 of the Responding Party's Book of Authorities

54. If a person moves money from one of his pockets to the other, even if he does so consistently with a regular commercial transaction, he is still dealing with himself, and the nature of the transaction remains "non arm's length".

Reference: *Campbell v. M.N.R.*, 1998 CanLII 330 (TCC), para 11
Tab 6 of the Responding Party's Book of Authorities

55. Three criteria or tests are commonly used to determine whether the parties to a transaction are dealing at arm's length. They are:

- (a) the existence of a common mind which directs the bargaining for both parties to the transaction,
- (b) parties to a transaction acting in concert without separate interests, and
- (c) "de facto" control.

Reference: *Campbell v. M.N.R.*, 1998 CanLII 330 (TCC), para 13
Tab 6 of the Responding Party's Book of Authorities

56. The common mind test reveals that where corporations are controlled directly or indirectly by the same person, whether that person be an individual or a corporation, they are not by virtue of that section deemed to be dealing with each other at arm's length. Here Sheldon Esbin, Arthur Resnick and Wesley Roitman own 100% of the shares of Romspen. All three are directors of 206. The three hold 22% of the shares of 206. No evidence has been offered to describe the class of shares owned by Esbin, Resnick and Roitman. While they may only comprise 22%, the class of shares they hold may result in them retaining voting rights. It is submitted the two companies do not operate at arm's length.

**Reference: Campbell v. M.N.R., 1998 CanLII 330 (TCC), para 13
Tab 6 of the Responding Party's Book of Authorities**

57. The source of information for the receiver should have been Romspen, who hired the receiver. Instead it is presumably individuals who are also the management of 206. The reasonable inference is that it did not matter to the receiver where the information came from because the same people would be giving it if the questions were posed to Romspen.

**Reference: First Report of the Receiver, paragraph 4
Tab 2 of the Moving Party's Motion Record**

58. Rosenberg's interest to the fund is not defeated by the interest of the receiver/206.

Oppression Remedy

59. It is submitted that there was oppressive conduct or conduct that unfairly disregarded the interests of Rosenberg as a creditor, pursuant to section 248 of the *Business Corporations Act* ("OBCA").

Oppression remedy

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section.

Idem

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(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

(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.

Reference: *Business Corporations Act, R.S.O. 1990, c. F.29, s. 248*
Tab 11 of the Responding Party's Book of Authorities

60. Section 245(c) of the *OBCA* defines a "complainant" to include "any other person who, in the discretion of the court, is a proper person to make an application under this Part". Linda Rosenberg, as a creditor of 206, has status to bring a complaint pursuant to s. 245(c).

Reference: *Business Corporations Act, R.S.O. 1990, c. F.29, s. 245*
Tab 12 of the Responding Party's Book of Authorities

Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc., 1995
CanLII 7519 (ONSC), para 11, 12
Tab 7 of the Responding Party's Book of Authorities

61. The oppression remedy has been said to protect the reasonable expectations of a creditor. The determination of unfair prejudice or unfair disregard should encompass the protection of the underlying expectation of a creditor in its arrangement with the corporation, the extent to which the acts complained of were unforeseeable or the creditor could reasonably have protected itself from such acts, and the detriment to the interests of the creditor.

Reference: *Adecco Canada Inc. v. J. Ward Broome Ltd., 2001 CanLII 28360 (ONSC), para 23*
Tab 8 of the Responding Party's Book of Authorities

62. It has been held that "in Ontario, the interests of creditors are considered to be unfairly prejudiced in cases where there is a closely-held corporation in which the director gains a personal advantage or a reduction in liability from keeping funds or assets out of a creditor's reach."

Reference: *Adecco Canada Inc. v. J. Ward Broome Ltd.*, 2001 CanLII 28360 (ONSC), para 23
Tab 8 of the Responding Party's Book of Authorities

63. In the case at hand, there is a significant amount of overlap in both ownership and in terms of the directors. Therefore, it was beneficial for Romspen to place a commercially unreasonable mortgage on the unsold units of 206, then trigger an artificial default in order to appoint a receiver. Both of these steps have the effect attempting to prevent 206 from paying an unsecured creditor, Linda Rosenberg.
64. This arrangement was a mechanism for 206 and Romspen to continue their collaboration without having to satisfy the creditors of 206. The actions of Romspen caused unfair prejudice to and unfairly disregarded the interests of the unsecured creditor, Rosenberg, contrary to s. 248(2) of the *OBCA*.

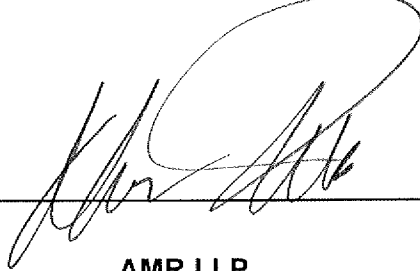
Entitlement to the Fund

65. It is respectfully submitted that the receiver's argument at paragraph 26 and 27 of the First Report cannot succeed because Rosenberg's rights to the fund come from the order of costs and pre and post-judgment interest granted by the judgment, and not by any right emerging from the APS.

PART IV- ORDER SOUGHT

66. The Responding Party respectfully requests:
- a) A declaration of this Court that Linda Rosenberg's interest in the fund currently held in trust by Dickinson Wright LLP ranks in priority to the interest of the receiver/ applicant.
 - b) That Linda Rosenberg be paid out of the fund \$225,000, \$9,000 plus pre-judgment interest and post-judgment interest, and costs of this proceeding.
 - c) That this court order the balance of the fund be paid out to 206 or as this court directs.
 - d) Such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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SCHEDULE 'A'- LIST OF AUTHORITIES

- 1) *Farber v. Goldfinger*, 2011 ONSC 2044
- 2) *Indcondo v. Sloan*, 2014 ONSC 4018
- 3) *Minister of National Revenue v. Cameron*, [1974] SCR 1062
- 4) *Chan v. Stanwood*, 2002 BCCA 474
- 5) *DiSano v. DiFlorio*, 2014 ONSC 1161
- 6) *Campbell v. M.N.R.*, 1998 CanLII 330 (TCC)
- 7) *Sidaplex-Plastic Suppliers Inc. v. Elta Group Inc.*, 1995 CanLII 7519 (ONSC)
- 8) *Adecco Canada Inc. v. J. Ward Broome Ltd.*, 2001 CanLII 28360 (ONSC)

SCHEDULE 'B' – RELEVANT STATUTES

Fraudulent Conveyances Act, R.S.O. 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.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp)

This section is the statutory provision for determining arm's length relationships.

251(1) For the purposes of this Act,

- a. related persons shall be deemed not to deal with each other at arm's length;
- b. a taxpayer and a personal trust (other than a trust described in any of paragraphs (a) to (e.1) of the definition "trust" in subsection 108(1)) are deemed not to deal with each other at arm's length if the taxpayer, or any person not dealing at arm's length with the taxpayer, would be beneficially interested in the trust if subsection 248(25) were read without reference to sub clauses 248(25)(b)(iii)(A)(II) to (IV); and
- c. where paragraph (b) does not apply, it is a question of fact whether persons not related to each other are at a particular time dealing with each other at arm's length.

Definition of "related persons"

2. For the purpose of this Act, "related persons", or persons related to each other, are
 - a. individuals connected by blood relationship, marriage or common-law partnership or adoption;
 - b. a corporation and
 - i. a person who controls the corporation, if it is controlled by one person,
 - ii. a person who is a member of a related group that controls the corporation, or
 - iii. any person related to a person described in subparagraph 251(2)(b)(i) or 251(2)(b)(ii); and
 - c. any two corporations

- i. if they are controlled by the same person or group of persons,
- ii. if each of the corporations is controlled by one person and the person who controls one of the corporations is related to the person who controls the other corporation,
- iii. if one of the corporations is controlled by one person and that person is related to any member of a related group that controls the other corporation,
- iv. if one of the corporations is controlled by one person and that person is related to each member of an unrelated group that controls the other corporation,
- v. if any member of a related group that controls one of the corporations is related to each member of an unrelated group that controls the other corporation, or
- vi. if each member of an unrelated group that controls one of the corporations is related to at least one member of an unrelated group that controls the other corporation.

Corporations related through a third corporation

3. Where two corporations are related to the same corporation within the meaning of subsection 251(2), they shall, for the purposes of subsections 251(1) and 251(2), be deemed to be related to each other.

Relation where amalgamation or merger

1. 3.1 Where there has been an amalgamation or merger of two or more corporations and the new corporation formed as a result of the amalgamation or merger and any predecessor corporation would have been related immediately before the amalgamation or merger if the new corporation were in existence at that time, and if the persons who were the shareholders of the new corporation immediately after the amalgamation or merger were the shareholders of the new corporation at that time, the new corporation and any such predecessor corporation shall be deemed to have been related persons.

Amalgamation of related corporations

1. 3.2 Where there has been an amalgamation or merger of two or more corporations each of which was related (otherwise than because of a right referred to in paragraph 251(5)(b)) to each other immediately before the amalgamation or merger, the new corporation formed as a result of the amalgamation or merger and each of the predecessor corporations is deemed to have been related to each other.

Definitions concerning groups

4. In this Act,

- "related group" « groupe lié »
- "related group" means a group of persons each member of which is related to every other member of the group;
- "unrelated group" « groupe non lié »
- "unrelated group" means a group of persons that is not a related group.

Control by related groups, options, etc.

5. For the purposes of subsection 251(2) and the definition "Canadian-controlled private corporation" in subsection 125(7),
 - a. where a related group is in a position to control a corporation, it shall be deemed to be a related group that controls the corporation whether or not it is part of a larger group by which the corporation is in fact controlled;
 - b. where at any time a person has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently,
 - i. to, or to acquire, shares of the capital stock of a corporation or to control the voting rights of such shares, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the person owned the shares at that time,
 - ii. to cause a corporation to redeem, acquire or cancel any shares of its capital stock owned by other shareholders of the corporation, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the shares were so redeemed, acquired or cancelled by the corporation at that time;
 - iii. to, or to acquire or control, voting rights in respect of shares of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the person could exercise the voting rights at that time, or
 - iv. to cause the reduction of voting rights in respect of shares, owned by other shareholders, of the capital stock of a corporation, the person is, except where the right is not exercisable at that time because its exercise is contingent on the death, bankruptcy or

permanent disability of an individual, deemed to have the same position in relation to the control of the corporation as if the voting rights were so reduced at that time; and

- c. where a person owns shares in two or more corporations, the person shall, as shareholder of one of the corporations, be deemed to be related to himself, herself or itself as shareholder of each of the other corporations.

Blood relationship, etc.

- 6. For the purposes of this Act, persons are connected by
 - a. blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;
 - b. marriage if one is married to the other or to a person who is so connected by blood relationship to the other;
 - 1. common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship to the other; and
 - c. adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is so connected by blood relationship (otherwise than as a brother or sister) to the other.

***Business Corporations Act*, R.S.O. 1990, c. B.16**

Oppression remedy

248. (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).

Idem

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(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

(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. R.S.O. 1990, c. B.16, s. 248 (2).

Court order

- (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
- (a) an order restraining the conduct complained of;
 - (b) an order appointing a receiver or receiver-manager;
 - (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
 - (d) an order directing an issue or exchange of securities;
 - (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
 - (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
 - (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;
 - (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
 - (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;
 - (j) an order compensating an aggrieved person;
 - (k) an order directing rectification of the registers or other records of a corporation under section 250;
 - (l) an order winding up the corporation under section 207;
 - (m) an order directing an investigation under Part XIII be made; and
 - (n) an order requiring the trial of any issue. R.S.O. 1990, c. B.16, s. 248 (3).

Idem

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

- (a) the directors shall forthwith comply with subsection 186 (4); and
- (b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders. R.S.O. 1990, c. B.16, s. 248 (4).

Shareholder may not dissent

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section. R.S.O. 1990, c. B.16, s. 248 (5).

Where corporation prohibited from paying shareholder

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

- (a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or
- (b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities. R.S.O. 1990, c. B.16, s. 248 (6).

245. In this Part,

“action” means an action under this Act; (“action”)

“complainant” means,

- (a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,
- (b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
- (c) any other person who, in the discretion of the court, is a proper person to make an application under this Part. (“plaignant”) R.S.O. 1990, c. B.16, s. 245.

ROMSPEN INVESTMENT CORPORATION
Plaintiff

-and- **206 BLOOR STREET WEST LIMITED**
Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO

**FACTUM ON BEHALF OF LINDA ROSENBERG,
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