

CITATION: Romspen Investment Corporation v. 6711162 Canada Inc., 2014 ONSC 2781
COURT FILES NOS.: CV-14-10470-00CL and CV-14-10529-00CL
DATE: 20140505

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

COURT FILE NO. CV-14-10470-00CL

RE: Romspen Investment Corporation, Applicant

AND:

6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd., Altaf Soorty and Zoran Cocov, Respondents

AND:

COURT FILE NO. CV-14-10529-00CL

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF 6711162 CANADA INC., AND THOSE OTHER
COMPANIES LISTED IN SCHEDULE "A" HERETO

BEFORE: D. M. Brown J.

COUNSEL: S. Jackson, for the Romspen Investment Corporation

D. Magisano and S. Puddister, for 6711162 Canada Inc., 1794247 Ontario Inc.,
1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts
Ltd. and Casino R.V. Resorts Inc., respondents/CCAA Applicants

A. Bouchelev, for Altaf Soorty and Zoran Cocov

E. Tingley, for Pezzack Financial Services Inc.

HEARD: May 2, 2014

REASONS FOR DECISION

I. Competing applications for the appointment of a receiver and the making of an initial order under the *Companies' Creditors Arrangement Act*

[1] Romspen Investment Corporation ("Romspen") lent money to 6711162 Canada Inc. ("671") and certain related companies. That loan has matured and has not been repaid. Romspen applies for the appointment of a receiver under section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, together with the appointment of a construction lien trustee pursuant to section 68 of the *Construction Lien Act*, R.S.O. 1990, c. C.30.

[2] 6711162 Canada Inc. and certain related companies opposed the appointment of a receiver and, instead, they have applied for an initial order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Romspen opposed the making of a CCAA initial order.

[3] The key business issue at stake in these competing applications is who gets to control the development and/or realization of a partially-completed residential condominium project in Midland, Ontario – a court-appointed receiver or the current owners and management of one of the CCAA Applicants, Hugel Lofts Limited?

[4] For the reasons set out below, I grant the application for the appointment of a receiver and construction lien trustee, and I dismiss the application for an initial order under the CCAA.

II. Evidence about the debt and secured assets

[5] Romspen is a commercial mortgage lender. The respondents, Altaf Soorty and Zoran Cocov, are the principals of a group of property holding and development companies which own parcels of land in Midland, Cambridge and Ramara, Ontario and to which Romspen lent money.

A. The Loan and the demands

[6] By Commitment Letter dated July 18, 2011, Romspen agreed to provide 6711162 Canada Inc. ("671") and 1794247 Ontario Inc. ("179") with a \$16 million loan facility for a two year term expiring August 1, 2013. The Commitment Letter stated:

The Loan shall be funded by way of advances, the amount(s) and timing of such advances(s) to be in the absolute discretion of Lender.

[7] The funds were to be used "for general corporate purposes...to retire existing mortgage indebtedness [on two properties]...to pay fees and transaction costs, to set up an interest reserve, and up to \$10,000,000 for the acquisition of additional real property, to be secured by mortgage(s) and other security satisfactory to Lender in its sole discretion."

[8] The Loan was secured by first mortgages on three properties in Ramara, as well as by a second mortgage on a fourth. Three of the properties were owned by 671 and 179; the fourth was owned by Soorty and Cocov. The Commitment Letter stated that the Borrower had represented that the cumulative value of the four properties was \$28.1 million. The Loan was also secured by general security agreements.

[9] A year later, on June 12, 2012, the parties amended the Commitment Letter in several respects (the "First Supplement"). First, another company controlled by Soorty and Cocov, Casino R.V. Resorts Inc., was added as a "Borrower". Second, an additional advance of \$470,000 was made, secured by two other properties. The parties agreed that this advance was transitional in nature and ultimately was taken out by replacement financing.

[10] However, the principals of the CCAA Applicants made some very serious allegations about the validity of the First Supplement. Soorty, in his April 17, 2014 affidavit, deposed:

I did not sign the said document and verily believe that it is a forgery. Unlike all other documents signed between Romspen Investment Corporation and myself, the pages of the First Supplement are not initialed and the signatures not witnessed, even though space for witnesses' signatures is provided.

Soorty so deposed evidently to support his contention that he had never agreed to make Casino R.V. a "Borrower" under the Loan, which on its face was one of the effects of the First Supplement. In his April 17 affidavit Cocov also alleged that his signature on the First Supplement was a forgery.

[11] Romspen adduced evidence which showed that slightly over 15 other documents were signed as part of the additional \$470,000 loan put in place by the First Supplement. Soorty signed many of those on behalf of Casino R.V. One of the documents was an opinion by corporate counsel for Casino R.V. dated June 14, 2012 which stated that the "Loan and Security Documents have been duly and validly executed and delivered by the Company and create valid and legally binding obligations of the Company enforceable against the Company in accordance with the term thereof".

[12] After Romspen filed that evidence Soorty swore a further affidavit (April 23) in which he backpedaled from his forgery allegation, now contending that:

I have no recollection of ever signing [the First Supplement]. If I ever did sign it, it was without understanding and appreciation of the nature and legal consequences of the document that was put in front of me.

Then, in his affidavit in support of the CCAA application, Soorty deposed that "even a cursory review of the First Amendment shows that it was put together in a rather hap-hazard fashion". Finally, in his second affidavit in support of the CCAA application, Soorty simply stated that the First Supplement "was placed in front of me with little time to obtain meaningful legal advice".

[13] Yet, as will be discussed in detail shortly, on June 7, 2013, one year after the First Supplement, both Soorty and Cocov signed a forbearance letter with Romspen, including Soorty signing the letter on behalf of Casino R.V. Resorts Inc. Why, one might ask, if the First Supplement which added Casino R.V. as a Borrower was a "forgery" or was based on a lack of "understanding and appreciation", would Soorty proceed to sign, one year later, the forbearance letter on behalf of Casino? In my view the answer is clear – there is absolutely no basis to support the allegations of Soorty and Cocov that the First Supplement was a forgery or that they did not understand it. Their allegations of forgery can only be described as falsehoods, and such

falsehoods severely undermine the credibility of the CCAA application given that Soorty and Cocov are the principals of the CCAA Applicants.

[14] To continue with the technical narrative, a further amendment was made to the Commitment Letter on August 15, 2012 (the "Second Supplement"). Four entities were added as "Borrowers": Hugel Lofts Limited, 20333387 Ontario Inc., 1564168 Ontario Inc., and 1387267 Ontario Inc. The use of the loaned funds provision was amended so that the next advances under the Loan could be used by the Borrowers to refinance a condominium project in Midland and "to provide funds to assist in completion of construction on [the Midland Condo Project] on a cost to complete basis in accordance with a project budget to be approved by Lender (including contingency allowance satisfactory to Lender)(approximately \$7,000,000) and to pay further fee and transaction costs."

[15] Also, the Second Supplement increased the security provided by the Borrowers to include three Midland properties, including the lands upon which the Midland Condo Project was being built, as well as three properties in Cambridge. Romspen took first and second mortgages on the Midland lands, a first mortgage on one Cambridge property, and second mortgages on two other Cambridge properties which were behind mortgages held by Pezzack Financial Services Inc.

[16] The mortgage security taken by Romspen contained a standard provision enabling it to appoint a receiver upon an event of default, and the chargor also agreed to consent to a court order appointing a receiver.

[17] The Second Supplement also amended the Commitment Letter by adding, as a schedule, Romspen's Standard Construction Conditions. Section 4 of those Conditions stated:

4. Cost to Complete

The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

[18] According to Wesley Roitman, a Managing General Partner of Romspen, in the months following the execution of the Second Supplement Romspen became concerned that the costs to complete the Midland Condo Project would exceed the budgeted \$7 million and that a funding gap of about \$3.1 million would arise. On June 7, 2013, the parties entered into a forbearance agreement. After reciting the language of the Commitment Letter's Section 4 "Cost to Complete", the forbearance letter went on to state:

At this time, the amount required to be invested by you to comply with Section 4 above, is \$3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith.* (emphasis added)

[19] Notwithstanding putting the Borrowers on notice that they had committed an act of default, in the forbearance letter Romspen stated that it agreed to forbear from exercising its

available rights and remedies with respect to the act of default and would make the current advance requested by the Borrowers under the Loan “to fund continuing construction with respect to the condominium development at 151 Marina Park Avenue, Midland, Ontario”.

[20] The Borrowers did not invest the \$3,180,994.00 stipulated in the forbearance agreement. The record showed that at most they invested a further \$270,000 on June 20, 2013 and paid a supplier’s \$89,383 invoice on June 14, 2013.

[21] Rompsen stopped making any further advances under the Loan in October, 2013.

[22] In December, 2013, suppliers to the Midland Condo Project registered liens totaling about \$2.248 million.

[23] On January 3, 2014, Rompsen sent to all of the Borrowers, except Casino, a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security. The demand stated that as of January 3, 2014, the sum of \$11.996 million was owed under the Loan. Payment was demanded by January 17, 2014. None was made.

[24] On March 28, 2014, Rompsen sent to Casino R.V. Resorts a demand letter and *BIA* s. 244(1) Notice of Intention to Enforce Security which stated that as of March 28, 2014 the amount due under the Loan was \$12.284 million.

[25] On March 4, 2014 Rompsen commenced its application to appoint a receiver, subsequently amending its notice of application on April 3. A schedule for the hearing of Rompsen’s receivership application was set by the Court on April 11, 2014.

[26] Then, on April 28, 2014, 671, 179, 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc. and Hugel Lofts Ltd. (the “CCAA Applicants”), issued their notice of application seeking an initial order under the *CCAA*.

B. The businesses of the CCAA Applicants

[27] Five of the CCAA Applicants own vacant land: 671 and 179 own the properties in Ramara, and 138, 156 and 203 own the Cambridge properties. At the present point of time, those CCAA Applicants operate simply as land holding companies; they have no employees.

[28] The other CCAA Applicant, Hugel Lofts, owns the land on which the Midland Condo Project is located, together with two undeveloped parcels of land in Midland.

C. The Midland Condo Project and other Midland properties

[29] The Midland Condo Project involves a partially constructed 4-storey residential building with 53 units. Construction is either about 50% or two-thirds completed, depending on which evidence one consults. The project has had a difficult development history, with Hugel Lofts acquiring the already-started project in power of sale proceedings in June, 2012 for \$4 million, with a mortgage back for \$3.1 million.

[30] Between December 11 and December 20, 2013, trades registered six construction liens against the Midland Condo Project, with certificates of action registered this past January and February. In early April Hugel Lofts filed notices of intent to defend those lien actions. Construction has ceased on the Project.

[31] There was a dispute in the evidence about the fair market value of the three properties in Midland. The CCAA Applicants pointed to an October 3, 2013 “short narrative appraisal” prepared by Real Estate Appraisers and Consulting Limited which appraised the properties at \$18 million (the “RE Appraisal”). That appraisal consisted of an “as is” appraisal of the one parcel on which the Midland Condo Project is located (151 Marina Park Ave.), which the appraiser arrived at by deducting the costs to complete from an appraised “as if complete” sellout value for the 53 condo units. The RE Appraisal also contained “as if” appraisals of the other two Midland parcels assuming “all approvals for the proposed development are in place and the subdivisions registered” (Vindon and Victoria Streets).

[32] The RE Appraisal recounted the following history of the Midland Condo Project as obtained from the current property owner – i.e. Hugel Lofts:

Based on the information available, the structure was erected a few years ago by the previous owner. Due to finance and other difficulties, the construction work was (sic) for several years. This property in conjunction with the remaining undeveloped lands was sold under power of sale in 2012. Our client (the new owner) reported that the construction work was resumed in summer 2013.

...

The building as of the date of appraisal is described as about 50% completed.

It is also reported that all units were completely presold by the previous owner for about \$275 per sq ft. These sales were however void after liquidation of the previous owner.

Per our client, that marketing of the new project will be launched in Spring 2014 and the new price range will be between \$300 and \$325 per sq ft. *Our client reported that many of the previous buyers show strong interest of coming back.* (emphasis added)

Photographs of the Midland Condo Project taken by the appraiser in October, 2013 showed significant completion of the exterior work on the building, but the need for extensive interior work.

[33] The RE Appraisal used a “cost to complete” for the Midland Condo Project of \$6.591 million based upon a payment schedule dated September 15, 2013 provided by the general contractor, Sierra Construction. Sierra’s schedule recorded a total value for its construction contract of \$7.452 million, with the value of work done to that date of \$1.145 million.

[34] Hugel Lofts proposes to build on the two undeveloped parcels (Vindon and Victoria Streets) 68 condo apartment units, 39 senior apartment units, 66 bungalows, 62 townhouse units and 80,000 sq. ft. of commercial space. The RE Appraisal assigned an “as is” value to 151

Marina Park of \$10.6 million, and a “hypothetical” “as if” value of \$7.4 million to the other two parcels.

[35] Romspen’s internal valuations placed the worth of the Midland properties at far less than \$18 million.

D. The Ramara properties

[36] The CCAA Applicants contended that the four Ramara Properties – 5781 Rama Road, 5819 Rama Road, 4243 Hopkins Bay Road and 4285 Hopkins Bay Road – were worth about \$27 million on a built-out basis. An August 11, 2010 narrative appraisal of the vacant, unserviced development land prepared by Schaufler Realty Advisors for 671 provided a “hypothetical value of the subject site as fully serviced sites approved for the contemplated commercial and residential development” as of October 6, 2012 of \$27.1 million.

[37] The Schaufler Appraisal noted that the four properties had been acquired for \$4.4 million.

[38] A November 21, 2013 “draft” appraisal prepared by Schaufler also used a \$27.1 million hypothetical value.

[39] Romspen’s internal valuations placed the “as is” worth of the Ramara properties at far, far less than \$27.1 million.

E. The Cambridge Properties

[40] 138, 156 and 203 own six parcels of vacant land in Cambridge, some of which are “brown-field” lands which will require remediation for environmental reasons. Romspen holds first mortgages over the Cambridge properties owned by 138, and second mortgages over those owned by 156 and 203, with Pezzack Financial Services and TD Canada Trust holding \$300,000 in first mortgages on those properties.

III. Evidence about the owners’ approach should the Court grant a CCAA initial order

[41] Soorty deposed that the CCAA Applicants intend to complete the Midland Condo Project without any further financial support from Romspen and he believed that the proceeds from condo units sales would be “sufficient to repay Romspen, resolve any lien claims and make a proposal to creditors using the remaining properties as the basis for that proposal”:

The Applicants simply want to complete the Condo Project with funds that will likely be supplied by Zoran and I (from our own resources) and repay Romspen the funds they did advance once the Condo Project is complete.

Soorty deposed elsewhere:

... I believe that Zoran and I should have the opportunity to restructure the Applicants’ affairs, repay Romspen on its loan, pay remaining creditors and keep control of our real estate development projects. As shown above, there is more than enough value in the Applicants’ assets to repay Romspen in full.

A. Proposed sources of funds

A.1 Principals of CCAA Applicants mortgage other assets under their control

Harbour Mortgage

[42] As to the sources of those funds, Soorty deposed that a related company, 1026517 Ontario Limited, owned lands in Mississauga which secured a collateral mortgage in favour of Harbour Mortgage Corp. in the amount of \$8 million. He deposed that Harbour Mortgage had “agreed to increase the loan amount to \$11,250,000, thereby providing 1026517 Ontario Limited with an additional \$3,250,000. I intend to use these funds to finish the construction at the Midland Property”.

[43] The April 2, 2014 term sheet signed by Harbour Mortgage had not been signed and accepted by Soorty on behalf of 1026517 Ontario. The “loan amount” of \$11.25 million was “not to exceed 65% of the appraised value and/or value as determined by the Lender” of the Mississauga properties. No evidence of their value was placed in evidence. The term sheet offered a loan with a 12-month term, and described the “use of funds” as follows:

The proceeds of the Loan shall be used to refinance existing debt and to repatriate Borrower equity for planned future development.

The term sheet made no reference to a permitted use of funds for the Midland Condo Project.

National Bank

[44] Cocov deposed that he was the President of Harmony Homes Oshawa Ltd., a recently completed townhome condominium project in Oshawa, and that the National Bank had agreed to provide Harmony Homes with a mortgage for \$4.8 million: “I intend to use these funds to complete construction at 151 Marina Park Avenue, Midland, Ontario.”

[45] Cocov attached to his affidavit an April 11, 2014 “Discussion Paper” from National Bank which stated: “This Discussion Paper is an outline of proposed terms for purpose of considering your application only and is not: (i) a commitment letter; nor (ii) an agreement to provide financing”. The Discussion Paper only referenced the Oshawa property, and it described the “purpose of proposed loan” as “refinancing”, with the “type of facility” as “first rank conventional mortgage financing”. The Discussion Paper made no reference to the Midland Condo Project, and I infer from its terms that the bank simply envisaged that its loan would replace the existing financing for the Oshawa property.

[46] Harmony Home signed the Discussion Paper on April 17, 2014. This motion was heard on May 2. No detailed evidence was provided concerning what discussions, if any, had ensued between Harmony Home and National Bank between April 17 and May 2.

[47] The Projected Statement of Cash Flows for the period May 2 through to June 6, 2014 filed by the CCAA Applicants did not make any reference to cash receipts from financings from either Harbour Mortgage or National Bank.

A.2 Proposed DIP Financing

[48] Soorty deposed that the CCAA Applicants would require \$250,000 to complete four model suites, together with \$50,000 in soft costs to begin pre-sales. Soorty and Cocov would finance those costs using their personal funds to make available up to \$300,000 in “drip” financing, provided their financing was given a DIP Priority Charge.

[49] The filed CCAA Cash Flow statement contemplated using \$150,000 of the DIP financing during the initial 30-day period.

A.3 HST Refund

[50] Soorty deposed that in early April, 2014, Cocov had contacted the CRA which had advised that it had approved an HST refund to Hugel Lofts of about \$254,000. The filed CCAA Cash Flow statement contemplated receipt of the HST Tax refund during the week of May 23, 2014. The CCAA Applicants did not adduce any written communications from CRA which confirmed the entitlement to the HST Refund or the expected date of refund issuance.

B. Costs to complete the Midland Condo Project

[51] As to the costs to complete the Midland Condo Project, Soorty initially deposed that the Project’s general contractor, Sierra Construction (Woodstock) Limited:

[I]s prepared to complete the Condo Project for \$5.5 million plus H.S.T. (the “Project Completion Costs”). In fact, they have guaranteed to complete the Condo Project for no more than then Project Completion Costs.

The April 23, 2014 Sierra Construction letter which Soorty filed in support of that evidence did not support Soorty’s assertion. Sierra Construction did write that “the all in number to complete should be \$5,500,000.00 (HST is not included)”. However, it continued:

Sierra, the project trades and their respective suppliers have suffer and continue to suffer damages as a result of non-funding. Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. Our summary would indicate the costs spent to date and the costs to complete weighted against the projected revenues, support the request for the project to continue to completion. We look forward in assisting you in completing this project.

Sierra’s letter contained no “guarantee” that it would complete construction for \$5.5 million.

[52] In a subsequent affidavit Soorty attached a further, April 28, 2014 letter from Sierra which stated, in part:

The outstanding Construction Liens cumulative balance is \$1,378,605.02 per our understanding you intend to vacate the liens. Some contractor Liens are in dispute, the true Lien value is \$957,949.00. The remaining cost to complete the construction portion of the project plus consulting fees, Tarion Warranty inspections, Models suite upgrades,

the all in number to complete should be \$5,500,000.00 (HST is not included). Based on earlier submission/correspondence Sierra is prepared to enter into a fix price contract for the remainder of the project work.

Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. We look forward in assisting you in completing this project.

[53] The CCAA Applicants did not file a detailed statement from Sierra which identified the work needed to complete the Midland Condo Project, similar to the one attached as Appendix "E" to the October, 2013 RE Appraisers report, nor did they file any explanation about why Sierra, which in that October, 2013 statement valued the work remaining to be done at \$6.3 million, would be prepared to commit to complete the work for the significantly lesser amount of \$5.5 million.

[54] Also, Sierra's April 28 letter suggested that it would not be prepared to resume work unless its lien was vacated. The CCAA Applicants did not address where the funds would come from to either pay off or bond off Sierra's lien, let alone those of other lien claimants, apart from their evidence about dealings with Harbour Mortgage and National Bank.

[55] Romspen filed its own internal calculations which placed all of the costs to complete – both "hard" and "soft" – several million dollars higher than the \$5.5 million referred to by Sierra.

C. Summary

[56] In sum, the evidence filed by the CCAA Applicants disclosed that, if granted CCAA protection, they would look to the future sale of the units from the Midland Condo Project to "repay the Romspen Indebtedness in full and provide funds for resolving lien claims". The evidence of projected unit sales revenue of \$17.579 million filed by the CCAA Applicants consisted of a short email (which contained no date) from Mr. Jonathan Weizel, who described himself as a sales representative at Royal LePage Terrequity Realty in Thornhill. Soorty deposed that Weizel had been responsible for selling out the Midland Condo Project before the previous owners were placed into a receivership.

[57] Soorty also deposed that the CCAA Applicants proposed "...leaving the balance of the Applicants' assets as a basis for a proposal to the Applicants' remaining creditors". In terms of the amounts due to those "remaining creditors", Crowe Soberman Inc., in its April 30, 2014 Pre-Filing Report in its capacity as the proposed Monitor, estimated the amounts owed by Hugel Lofts at \$15.98 million, consisting of \$12 million due to Romspen, \$958,000 due to lien claimants, and \$3 million due to unsecured creditors, including related parties. Soorty deposed:

The most significant unsecured creditors are Zoran and I with respect to shareholder loans we have made to facilitate completion of the Condo Project.

[58] Soorty, in his CCAA affidavit, deposed that save for Hugel Lofts, the other CCAA Applicants have "nominal financial obligations", and Crowe Soberman made no mention of any other liabilities concerning the CCAA Applicants, from which I infer that such liabilities are

limited to the amounts contained in the charges registered against the Ramara and Cambridge properties owned by the CCAA Applicants.

IV. Analysis

A. A summary of the applicable legal principles

[59] Romspen seeks the appointment of SF Partners Inc. as receiver and construction lien trustee over the respondents under *BIA* s. 243(1), section 101 of the *Courts of Justice Act* and section 68 of the *Construction Lien Act*. In *Bank of Nova Scotia v. Freure Village on Clair Creek*, the court reviewed the factors to be taken into account in considering a request to appoint a receiver:

The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed....

While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.¹

[60] The CCAA Applicants seek the making of an initial order under *CCAA* s. 11.02. In broad terms, the purpose of the *CCAA* is to permit a debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. As pointed out by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*:

¹ (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div.), paras. 10 and 12.

There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership.²

[61] Both an order appointing a receiver and an initial order under the *CCAA* are highly discretionary in nature, requiring a court to consider and balance the competing interests of the various economic stakeholders. As a result, the specific factors taken into account by a court are very circumstance-oriented. In the case of land development companies, some courts have identified several of the factors which might influence a decision about whether to grant an initial order under the *CCAA*. For example, in *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, the British Columbia Court of Appeal stated:

Although the *CCAA* can apply to companies whose sole business is a single land development as long as the requirements set out in the *CCAA* are met, it may be that, in view of the nature of its business and financing arrangements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exercising their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.³

[62] More recently, C. Campbell J., in *Re Dondeb Inc.*, after quoting the above passage from *Cliffs over Maple Bay*, stated:

Similarly, in *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), paragraph 17, Kent, J. made the following comments:

This is not a case where it is appropriate to grant relief under the *CCAA*. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the

² [2010] 3 S.C.R. 379, para. 14.

³ 2008 BCCA 327, para. 36.

current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

A similar result occurred in *Shire International Real Estate Investments Ltd.*, [2010] A.J. No. 143, 2010 CarswellAlta 234, even after an initial order had been granted.

In *Edgeworth*, dealing with the specifics of that case I noted:

Were it not for the numerous individual investors (UDIs, MICs) and others who claim to have any interest in various of the lands as opposed to being general creditors of the Edgeworth companies, I doubt I could have been persuaded to grant the Initial CCAA Order.

...

[In the present case] the request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

In his last affidavit filed Mr. Dandy explained why certain properties were transferred into individual corporations to allow additional financing that would permit the new creditors access to those properties in the event of default. To a certain extent this was perceived by creditors as "robbing Peter to pay Paul" and led to the distrust and lack of confidence the vast majority of creditors exhibit. Had there been full and timely communication both the creditors and the court may have concluded that a *CCAA* plan could be developed.

...

Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most

of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.⁴

B. Applying the legal principles to the evidence

[63] The evidence adduced by Romspen established the indebtedness of the Borrowers under the Loan, the maturing of the Loan facility in September, 2013, the demands for payment, the failure of the Borrowers to repay the amount demanded and the validity of the security held by Romspen on the Ramara, Midland and Cambridge properties. The Borrowers did not dispute the amount owed, and the security documents contained a clear contractual right of Romspen to appoint a receiver upon an act of default and required the Borrowers, in such circumstances, to consent to an order appointing a receiver. An active development was underway on only one of the properties securing the Loan – the Midland Condo Project – the other lands being vacant and undeveloped. The other creditors who hold security against the Cambridge lands did not oppose the appointment of a receiver. Pezzack Financial simply submitted that in the event a receiver were appointed, the receiver should not enjoy priority over Pezzack Financial for its fees and expenses on those properties where Pezzack Financial held the first mortgages. The lien claimants against the Midland Condo Project did not appear on the return of the application, although served with the court materials. Sierra Construction provided the Borrowers with a letter of support, but did not formally appear in the proceeding.

[64] In the usual course of affairs those circumstances would point towards the appropriateness of granting the requested order appointing a receiver, as well as a construction lien trustee. However, the Borrowers opposed the making of such an order on two main grounds. First, they argued that by its conduct Romspen had caused the Borrowers to default under the Loan and Romspen should not be allowed to take advantage of such conduct. Second, they contended that the plan advanced by the CCAA Applicants offered a fairer way to balance the competing economic interests at play and any consideration of the appointment of a receiver should be deferred until the CCAA Applicants had been afforded an opportunity to complete the Midland Condo Project. Let me deal with each argument in turn.

[65] First, Soorty, in his affidavit in support of the CCAA application, and the CCAA Applicants in their written submissions to the Court, contended that their default on the Loan was caused by Romspen's wrongful failure to advance the full amount of the Loan as it was contractually required to do, leading to the trades to lien the Midland Condo Project. The CCAA Applicants argued that a lender was not entitled to take advantage of, or seek relief in respect of, a default which its own wrongful conduct had created.

[66] While the authorities certainly contemplate that a court may refuse to appoint a receiver where the lender's conduct has placed the debtor in default of its borrowing obligations,⁵ that is not this case. When the Loan facility was amended to permit the use of funds for the continued construction of the Midland Condo Project, the Second Supplement, by incorporating Section 4

⁴ 2012 ONSC 6087, paras. 19-21, 25, 26 and 31.

⁵ *Royal Bank of Canada v. Chongsim Investments Ltd.* (1997), 456 C.B.R. (3d) 267 (Ont. Gen. Div.)

of Romspen's Standard Construction Conditions, made quite express the circumstances under which Rompsen was required to advance further funds for that project:

The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

[67] The June, 2013 Forbearance Letter contained an acknowledgement by the Borrowers of their failure to have advanced their own funds towards the Midland Condo Project:

At this time, the amount required to be invested by you to comply with Section 4 above, is \$3,180,994.00. You have advised that you have been and are currently unable to fund this amount. *Your failure to fund this amount constitutes an act of default under the loan and the security granted in connection therewith.*

[68] In sum, the evidence established that it was the failure of the Borrowers to abide by the terms of the Commitment Letter, as amended by the Second Supplement and the Forbearance Letter, which led to them to commit acts of default.

[69] The CCAA Applicants also strongly intimated in their evidence that throughout the earlier part of this year Romspen had misled them into thinking that the difficulties with the Loan could be worked out. In support of that submission they pointed to language in an April 4, 2014 email from Roitman to them which talked about the completion of the Midland Condo Project as "clearly...the best outcome for all of us". That was not an accurate characterization of the email by the CCAA Applicants, as can be seen when one reads the email in full:

Al, these emails are not really very useful. As we have discussed at length, Romspen's lawyers need to push our case forward as forcefully as they can. This does not prevent us from changing course later on. When you and Zoran have your affairs arranged to the point where you can move the project forward again, we will be glad to discuss terms for reinstating the loan and completing the project. Clearly this would be the best outcome for all of us, *but we have waited about one year already for you guys to work things out between each other and to find the funding to cover the cost, and we just can't wait forever.* (emphasis added)

[70] The last phrase in Roitman's email most likely suggests the real reason for the default of the CCAA Applicants under the Loan – internal disagreements between Soorty and Cocov about how much each of them should contribute to the continued construction of the Midland Condo Project. The June 7, 2013 forbearance agreement signed by both hinted at this problem, with its reference to Soorty and Cocov having advised "that you have been and are currently unable to fund this amount" (i.e. \$3.18 million). Soorty expressly referred to the internal problems in paragraph 55 of his CCAA initial affidavit when he deposed: "As a sign of our good faith, I was prepared to put \$2 million towards the Condo Project immediately, however, Zoran required additional time to finalize similar financing".

[71] Turning to the second argument advanced by the Borrowers/CCAA Applicants, does their proposed approach to complete the construction of the Midland Condo Project offer a better, more practical alternative to Romspen's proposed appointment of a receiver?

[72] At a high level, a certain unfairness characterizes the plan of the CCAA Applicants. Under their plan, they would see the development of the Midland Condo Project to its end and use the unit sales proceeds to pay off Romspen in full and, evidently, to pay most of the amounts sought by the lien claimants. They would then develop out the other secured properties to propose a plan to the other unsecured creditors, but according to Soorty most of the unsecured debt consists of shareholders loans from Cocov and himself. Reduced to its essence, the plan seems to be no more than asking the court to impose on Romspen an extension of the term of the Loan beyond its 2-year term and to allow management to continue operating as they have in the past. In other words, the CCAA Applicants do not propose the compromise of debt or the liquidation of part of their businesses – they want to carry on just as they have in the past.

[73] I accept the evidence of Romspen about the unfairness of such an approach. Romspen stated that it had “absolutely no confidence” in the ability of Soorty and Cocov to manage the affairs of the CCAA Applicants during any stay period, pointing to them letting the first general contractor on the Midland Condo Project, Dineen, place liens on it, and allowing subsequent contractors to do so as well. Roitman also deposed about Soorty and Cocov:

They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.

There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

[74] Two other questions arise as part of this higher level analysis. First, the RE Appraisal recited that management had told the appraiser that “all units were completely presold by the previous owner” and “many of the previous buyers show strong interest in coming back”. If that in fact was the case, why have Soorty and Cocov been unable to attract replacement financing for the Midland Condo Project? Second, the CCAA Applicants emphasized the significant equity available in the other Midland properties, as well as the Ramara and Cambridge properties, arguing that Romspen should hang in for the duration of the Midland Condo Project because it was fully secured. Perhaps the more appropriate question to pose is why the CCAA Applicants are not prepared to realize on some of the equity in those other properties to pay out Romspen now, given that the Loan matured well over half a year ago? The answer appears to be that they want the CCAA initial order to secure for them a compelled extension of the term of the Romspen Loan at minimal cost. I do not regard that as a proper use of the CCAA process in the circumstances.

[75] Other questions arise when one turns to the specifics of the general plan proposed by the CCAA Applicants. It is apparent that the proposed DIP financing would be wholly inadequate to complete the construction of the Midland Condo Project. Where will the other funds come from? The suggestion by the CCAA Applicants that National Bank and Harbour Mortgage may serve as sources for such financing simply is not borne out by the specifics contained in the respective Discussion Paper and Term Sheet. Put another way, I see no credible evidence before the Court to suggest that the CCAA Applicants are anywhere close to finding sources to fund the costs to complete the construction of the Midland Condo Project, let alone to resolve the existing lien claims which one would expect would be one of the necessary first steps to get this project back up and running.

[76] Further, the 30-day Cash Flow statement filed in support of the short-term plan to build model suites rested heavily on the receipt of the HST Refund, yet the CCAA Applicants placed no evidence before the Court from CRA which would indicate that such a refund would be received within the next 30 days.

[77] Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a “guaranteed” cost to complete.

[78] For these reasons, I dismiss the application by the CCAA Applicants for an initial order under the *CCAA*, and I grant the application of Romspen for the appointment of SF Partners Inc. as receiver and construction lien trustee.

C. The scope of the appointment

[79] Romspen holds security, by way of mortgages and general security agreements, over the companies which own the Ramara Properties – 6711162 Canada Inc. and 1794247 Ontario Inc. – the companies which own the Cambridge Properties – 1387267 Ontario Inc., 1564168 Ontario Inc. and 2033387 Ontario Inc. – and the company which owns the Midland Properties – Hugel Lofts Ltd. A receiver is appointed over those companies and those properties.

[80] One of the Ramara Properties – 4271-4275 Hopkins Bay Road, Rama – is owned by Altaf Soorty and Zoran Cocov. At the hearing I had questioned Romspen’s counsel about why his client was seeking the appointment of a receiver over Soorty and Cocov. He responded by pointing to GSAs given by both individuals to Romspen. After further discussion counsel advised that he had received instructions to withdraw the request for a receiver over Soorty and Cocov. I had not been able to read most of the application records prior to the hearing. I now see that Romspen obtained a charge from Soorty and Cocov over the Hopkins Bay Road properties owned by them. My queries about the need to appoint a receiver over the individual respondents were not focused on that property, but on whatever other assets the two individuals possessed. Consequently, I consider it most appropriate to appoint a receiver over the property owned by Soorty and Cocov at 4271-4275 Hopkins Bay Road, Rama.

[81] Much ink was spilt by both sides over the appointment of a receiver over Casino R.V. Resorts Inc. That issue can be dealt with quickly. Romspen loaned money to Casino and received a package of security in return, part of which included the addition of Casino as a "Borrower" under the Commitment Letter pursuant to the First Supplement. All parties agreed that that loan was repaid in full. On July 16, 2012, Romspen wrote that upon receipt of the amount to pay out the loan to Casino, it would provide its signed authorization to register its assignment of its PPSA registrations in respect of the loan, as well as a release of its interest. The loan was repaid, but apparently Romspen did not provide those documents. It contended it was never asked to do so.

[82] Be that as it may, while I am prepared to grant Romspen's request to add Casino R.V. Resorts Inc. as a party to the receivership application, I am not prepared to appoint a receiver over Casino or any properties it previously provided as security. The appointment of a receiver is an equitable remedy. Casino repaid the loan and Romspen agreed to release its interest. Under those circumstances, it is neither fair nor reasonable for Romspen to seek the appointment of a receiver over Casino.

[83] Counsel for Romspen circulated a draft appointment order at the hearing. On behalf of Pezzack Financial Services Inc., Mr. Tingley submitted that the receiver's charge should not enjoy priority over his client's first mortgages on Cambridge Properties because the receivership really concerned a dispute involving the Midland Condo Project. That was a reasonable request in the circumstances, and I order that in respect of the Cambridge Properties the charge granted to the receiver shall stand subordinate to any first charges registered against those properties by any person other than Romspen.

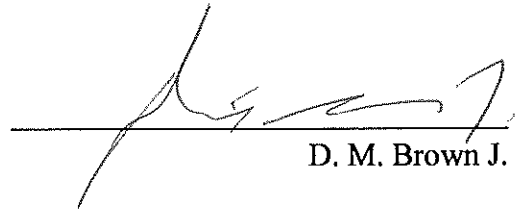
[84] A sealing order shall issue in respect of the Confidential Exhibits to the Affidavit of Wesley Roitman in order to preserve the integrity of any sales and marketing process undertaken by the Receiver. Counsel can submit a revised draft appointment order to my attention through the Commercial List Office for issuance.

V. Costs

[85] I would encourage the parties to try to settle the costs of these applications. If they cannot, Romspen may serve and file with my office written cost submissions, together with a Bill of Costs, by May 16, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by May 29, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

[86] Any responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile*

Insurance Co., an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party “is no more than an attack in the air”.⁶



D. M. Brown J.

Date: May 5, 2014

⁶ (2003), 64 O.R. (3d) 135 (S.C.J.), para. 10, quoted with approval by the Divisional Court in *United States of America v. Yemec*, [2007] O.J. No. 2066 (Div. Ct.), para. 54.