Court File No. CV15-10843-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *CONSTRUCTION LIEN ACT,*
R.S.O. 1990, c. C.30, AS AMENDED

AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD.
FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE
CONSTRUCTION LIEN ACT, R.S.O. 1990, c. C.30, AS AMENDED

BRIEF OF AUTHORITIES

Re: Parking Motion
Originally Returnable: October 5, 2015
Adjourned To: October 16, 2015

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TAB A

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *700 King Street (1997) Ltd. (Trustee in Bankruptcy) v. Acro Capital Inc.*, [2004] O.J. No. 1038 (S.C.J.)

2. *Romspen Investment Corp. v. Woods Property Development Inc.*, [2009] O.J. No. 1163 (S.C.J.)

3. *Atlas-Gest Inc. v. Brownstones Building Corp.*, 1992 CarswellOnt 608 (Ont. Gen. Div.)

4. *Technicore Underground Inc. v. Toronto (City)*, [2012] O.J. No. 4235, 2012 ONCA 597

5. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, [2012] O.J. No. 4095, 2012 ONSC 4816 (S.C.J.)

6. *WestlLB AG, Toronto Branch v. The Rosseau Resort Developments Inc. (22 May 2009), Toronto CV-09-8201-00 CL (S.C.J.)*

7. *Royal Bank of Canada v. Penex Metropolis Ltd.*, [2009] O.J. No. 3645, 180 A.C.W.S. (3d) 258

TAB 1

Case Name:

700 King Street (1997) Ltd. v. Acro Capital Inc.

Between
Deloitte & Touche Inc. in its capacity as Receiver and Manager (sec. 68 Construction Lien Act) and as Trustee in Bankruptcy of 700 King Street (1997) Ltd., plaintiffs, and Acro Capital Inc., Vincent Chan, Howard Sloan, and Goldman, Sloan, Nash & Haber, LLP, defendants

[2004] O.J. No. 1038

70 O.R. (3d) 191

49 C.B.R. (4th) 309

35 C.L.R. (3d) 47

129 A.C.W.S. (3d) 649

2004 CarswellOnt 986

Court File No. 02-CL-4631

Ontario Superior Court of Justice
Commercial List

Lane J.

Heard: March 2, 2004.
Judgment: March 15, 2004.

(39 paras.)

Machanics' liens -- Trust fund -- Administration of fund -- Duties of trustee -- Practice -- Parties -- Proper parties, assignees -- Pleadings -- Striking out pleadings -- Grounds, failure to disclose a cause of action or defence -- Trusts -- Administration -- Actions by trustee.

Motion by the defendants to strike out the Statement of Claim as showing no reasonable cause of action. The plaintiff Deloitte was both the trustee under the Construction Lien Act for a fund associated with construction at 700 King and the bankruptcy trustee of 700 King Street (1997) Ltd. In 2000 700 King's solicitors received proceeds of sales of condominiums and paid those proceeds to Acro Capital. Deloitte alleged that the payment to Acro was a breach of trust under the CLA for which the solicitors were liable. The defendant

solicitors brought this motion arguing that Deloitte was not the beneficiary of the trust and therefore did not have the capacity to bring the action.

HELD: Motion dismissed. The statutory trustee had the primary right to sue Acro and the solicitors for the return of the funds. Deloitte had been constituted trustee by a previous order. While the contractor remained the beneficiary of the trust, Deloitte as trustee had the legal title to the corpus of the trust fund and therefore the right to sue in respect of the fund. It was not plain and obvious that Deloitte did not have the capacity and authority to bring the action. The claim may have been novel but that was no reason to strike it out.

Statutes, Regulations and Rules Cited:

Construction Lien Act, ss. 7, 9, 13, 68.

Ontario Rules of Civil Procedure, Rule 21.

Counsel:

Malcolm Mercer, for the defendants, Goldman, Sloan, Nash & Haber LLP and Howard Sloan, moving.
Timothy J. Hill, for the plaintiffs, responding.

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1 **LANE J.** (endorsement):-- This is a motion by the defendants Goldman, Sloan, Nash & Haber LLP (GSNH) and Howard Sloan under Rule 21 to strike out the Statement of Claim against them and dismiss the action as showing no reasonable cause of action. There is a cross-motion by the plaintiff to amend. It was agreed to deal with the defendants' motion as if the amendments had been made, as Mr. Mercer contended that even so, there would be no reasonable cause of action. He did not concede that the amendments ought to be made, but this may be an issue for a later day.

2 The principal objection to the claim as framed is that the plaintiff, Deloitte, is attempting to assert claims that could not be asserted by the bankrupt itself in claiming under the trust provisions of the Construction Lien Act (CLA). The heart of the matter is whether the plaintiff, as trustee appointed under the CLA, has the authority to claim against the moving parties for alleged breaches of those trust provisions when it is not the bankrupt, but the contractor, who is the beneficiary of those trusts.

3 The claims which are being attacked by GSNH on this motion, are claims brought by Deloitte as Construction Lien Trustee. Deloitte has pleaded that in its capacity as Construction Lien Trustee, it has been appointed to represent the interests of the beneficiaries of the trust provisions of the CLA, and that it is entitled to seek recovery from the Defendants in respect of their liability for their participation in the breach of the trust provisions of that Act.

4 The moving parties say that the essential point of this motion is that the beneficiary of any Vendor's Trust and any Owner's Trust under the CLA would be the contractor, namely Toddglen Construction Limited (Toddglen) and not 700 King, nor the Construction Lien Trustee nor the Bankruptcy Trustee, nor the other creditors of 700 King.

5 The motion falls to be decided by examining the authority of the plaintiff under the CLA, the Order appointing it and relevant case law. No additional evidence is admissible under Rule 21. Factual references are therefore drawn from the pleadings, which are taken to be true for the purposes of this motion.

Background:

6 Howard Sloan ("Sloan") is a partner in the law firm Goldman Sloan Nash & Haber LLP ("GSNH")[1].

7 700 King Street (1997) Ltd. ("700 King") owned and developed certain property at 700 King Street West in Toronto. Prior to February 9, 2001, 700 King was converting an existing office building located on this property into a 216 unit residential and an 8 unit commercial condominium project (the "Project" and the "Condominiums")[2].

8 GSNH, and in particular Sloan, acted as solicitors for 700 King[3].

9 On February 9, 2001, the Plaintiff was appointed[4] by Order of Farley J. to be trustee (the "Construction Lien Trustee") under section 68 of the Construction Lien Act to act as receiver and manager of the assets, property and undertaking of 700 King.

10 On February 19, 2001, the Plaintiff also became the trustee in bankruptcy (the "Bankruptcy Trustee") of the estate of 700 King.[5]

11 Toddglen had been retained by 700 King as the general contractor for the Project[6]. GSNH submits that 700 King was the "owner" of and Toddglen was the "contractor" for this Project[7].

The Claim

12 In December 2000, the sales of certain of the Condominiums were completed and the proceeds ("Proceeds") were received by GSNH as solicitors for 700 King. GSNH thereafter paid the sum of $1,392,010.23 (the "Payment") to the Defendant Acro Capital Inc. ("Acro") out of the Proceeds.

13 The Plaintiffs claim[8], as against the moving parties, is that the payment to Acro out of the Proceeds was a breach of trust for which Sloan and GSNH are liable such that the Plaintiffs are entitled to:

> "a declaration that Howard Sloan ("Sloan") and Goldman, Sloan, Nash & Haber LLP ("GSNH") received and held the sum of $1,392,010.23 in trust, and that the payment of the said funds to Acro constituted a breach of trust"; and
>
> "damages against Sloan and GSNH, jointly and severally, in the amount of $1,392,010.23 for breach of trust.

14 The Plaintiffs allege that the Proceeds were impressed with a trust pursuant to the Construction Lien Act. Sections 7, 9 and 13 of that Act are relied upon[9].

15 Section 7 of the Construction Lien Act constitutes a trust fund (the "Owners's Trust") as follows. The "owner" is the trustee of this trust fund. The "contractor" is the beneficiary:

> 7.(1) All amounts received by an owner, other than the Crown or a municipality, that are to be used in the financing of the improvement, including any amount that is to be used in the payment of the purchase price of the land and the payment of prior encumbrances, constitute, subject to the payment of the purchase price of the land and prior encumbrances, a trust fund for the benefit of the contractor.
>
> (2) Where amounts become payable under a contract to a contractor by the owner on a certificate of a payment certifier, an amount that is equal to an amount so certified that is in the owner's hands or received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.
>
> (3) Where the substantial performance of a contract has been certified, or has been declared by the court, an amount that is equal to the unpaid price of the substantially performed portion of the contract that is in the owner's hands or is received by the owner at any time thereafter constitutes a trust fund for the benefit of the contractor.
>
> (4) The owner is the trustee of the trust fund created by subsection (1), (2) or (3), and the owner shall not appropriate or convert any part of a fund to the owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts related to the improvement owed to the contractor by the owner. (Emphasis Added)

16 Section 9 of the Construction Lien Act constitutes a trust fund (the "Vendor's Trust") as follows. The vendor, "former owner" is the trustee of this trust fund. The "contractor" is the beneficiary:

> 9.(1) Where the owner's interest in a premises is sold by the owner, an amount equal to,
>
> (a) the value of the consideration received by the owner as a result of the sale, less,
>
> (b) the reasonable expenses arising from the sale and the amount, if any, paid by the vendor to discharge any existing mortgage indebtedness on the premises,

constitutes a trust fund for the benefit of the contractor.

(2) The former owner is the trustee of the trust created by subsection (1), and shall not appropriate or convert any part of the trust property to the former owner's own use or to any use inconsistent with the trust until the contractor is paid all amounts owed to the contractor that relate to the improvement. (Emphasis added)

17 Section 13 of the Construction Lien Act provides for the liability, in the case of a corporate trustee, of individuals who have effective control of the corporate trustee or its relevant activities, and who assent to, or acquiesce in, conduct that they know or reasonably ought to know amounts to breach of trust by the corporate trustee.

18 The Plaintiffs also allege a non-statutory trust in the nature of a constructive trust that is essentially to the same effect as the trust established by sections 7 and 9 of the Construction Lien Act.

19 The moving parties submit that, in respect of any Vendor's Trust or any Owner's Trust, 700 King would be the trustee rather than the beneficiary; and Toddglen is the beneficiary. They further submit that there is no non-statutory constructive trust on these facts, and if there was, the beneficiary would be the contractor and not the plaintiff in either of its trust capacities. The plaintiff therefore has no capacity to bring this action to enforce rights it does not possess.

20 Deloitte submits that it brings this action in two capacities, that of the Construction Lien Trustee, and that of Trustee in Bankruptcy of 700 King. The claims which are being attacked by GSNH on this motion, are claims brought by Deloitte as Construction Lien Trustee. It is Deloitte's position, and Deloitte has pleaded in both the Amended Statement of Claim and the proposed Further Amended Statement of Claim[10], that in its capacity as Construction Lien Trustee, it has been appointed to represent the interests of the beneficiaries of the trust provisions of the Construction Lien Act, and that it is entitled to seek recovery from the Defendants in respect of their liability for their participation in the breach of the trust provisions of that Act.

21 Deloitte submits that GSNH is attempting to shield itself from liability for its breach of trust of the Construction Lien Act provisions by urging a narrow and restrictive interpretation of the role of the Construction Lien Trustee, which is not supported by the relevant jurisprudence, and which is at odds with the purposes of the Act.

22 In the Statement of Claim, the plaintiff sets out in detail allegations of conflict of interest, participation in a sham' transaction, advances from the GSNH trust account without proper reason and knowing the funds were being diverted from the beneficiaries of the trust. For present purposes, it is not necessary to go farther than to say that if these allegations are true, they would constitute a breach of trust.

23 In paragraph 11 of its Factum, the plaintiff summarizes the causes of action which it asserts as follows:

(1) Deloitte (as Trustee for 700 King) may assert against GSNH, in connection with its role as solicitor for 700 King, claims for breach of contract, breach of fiduciary duty, negligence and breach of trust.

(2) In connection with breach of the trust provisions of the Construction Lien Act:

  (a) Deloitte, as Construction Lien Trustee, for the benefit of the beneficiaries of those provisions (contractors and subcontractors) may assert claims against GSNH for its liability under Section 13(1)(b) and (2) of the Act; and for breach of trust and knowing assistance with a breach of trust at common law;

  (b) Deloitte, as Trustee for 700 King, may make a claim against GSNH for contribution pursuant to Section 13(4) of the Act, which provides that a person "who has admitted liability, for a particular breach of a trust ... is entitled to recover contribution from any other person also liable for the breach ...".

Rule 21 Motions:

24 Such motions are normally brought at the pleadings stage of an action, when the full factual record has not been developed, and the facts alleged in the Statement of Claim are assumed to be true. At this early stage litigants must not be deprived of their action unless it is plain and obvious that the plaintiff cannot succeed.[11] The Statement of Claim is to read as generously as possible to accommodate drafting deficiencies in the form in which the allegations are expressed.[12] The court should be cautious in dealing with matters of law not fully settled[13], or based on statutory language, which is unclear and leaves doubt as to the correct interpretation.[14]

25 The central issue is who has the right to claim against the recipient of trust funds wrongfully paid to that recipient, Acro, by the agent of the owner/trustee, GSNH, and against that agent for knowing breach of duty.

26 Under ordinary trust law, the trustee is the legal owner of the corpus of the trust and has the right to sue any one who deprives the trust of its property or who damages the trust property in any way. The trustee can sell the corpus and give good title to it to a bona fide purchaser for value without notice, even though he lacks an actual power to sell. The trustee is, to the world, the owner and the world can rely upon his power to act as the owner. Equity takes the view that one with title, who contracts in his own name, has full capacity to act.[15] The right of the beneficiary is generally a personal one, to compel the Trustee to properly discharge his duties as trustee. In addition he may also bring an action on behalf of the trust to recover the trust property, except as against a bona fide purchaser for value. This may be regarded as a beneficiary's remedy, or as a trustee's remedy, which the beneficiary is permitted to bring on behalf of the trust in particular circumstances. But the evolution of this remedy has not deprived the trustee of the rights of ownership:

> The trustees "own" the trust property, and the beneficiary through his equitable interest can compel the trustees to discharge their fiduciary role in relation to the powers and duties which they possess.[16]

27 The CLA contains no definition of trust' or trustee' and one therefore assumes that these terms are to be read in their normal meaning in law, that is, as carrying the rights and obligations discussed above. Part II of the CLA, which contains the Trust Provisions, declares how the trusts come into effect and are discharged by payment and declares who are the beneficiaries, but does nothing to alter the law as to the general nature of the trust and the normal right and duties of the trustee.

28 It therefore appears to me that the person having the primary right to sue Acro for the return of funds improperly received by it, and to sue the solicitors for being complicit in the wrongful payment, would be 700 King as a statutory trustee. Any right of Toddglen to do so would be purely secondary and its suit would be brought on behalf of the trust as outlined by Waters in the passages referred to above.

29 Deloitte was constituted Trustee under section 68 of the CLA by order of Farley J. The Act gives the Trustee broad powers (to be exercised under the supervision and direction of the Court), which go beyond acting as a mere Receiver and Manager of the premises. These powers include the power to complete the improvement, the power to take appropriate steps for the preservation of the premises, and, subject to the approval of the court, the power to "take such other steps as are appropriate in the circumstances". Nothing in the Act suggests that the Trustee is not also clothed with the normal attributes of a trustee, such as the legal title to the corpus of the trust, indeed the Fourth Report of the Trustee reports that it will sell certain assets, including the rooftop condominium belonging to 700 King to the condominium corporation. That same report of the Trustee reported on the institution of this present action, so that if the approval of the court is an issue, it has been obtained.

30 The order of Farley J. appointing the Trustee grants to it even broader powers, including the power to "... take any steps ... necessary or reasonably incidental to the exercise of the powers granted to the Trustee pursuant to this order whether in the name of the company or otherwise ...".

31 While it is clear that the beneficiary of the trust funds remains the contractor, the appointment of the plaintiff as Receiver, Manager and section 68 Trustee of "... all the present and future undertaking, property and assets of whatsoever nature and kind ..." are words that are apt to include the legal title to the corpus of

the trust fund subject to the trust provisions. If the Trustee holds the legal title to the fund, it necessarily also holds the right to sue in respect of the fund.

32 My attention was directed to a passage in Bennett[17] at page 415 where the learned author discusses the provisions of section 70, now 68 of the CLA. He points out that the section appoints a "trustee" and gives the trustee power to act as a Receiver and Manager. As a trustee, the appointee; "... becomes a court officer for the benefit of all interested persons in the premises and has all the duties, powers and obligations of a "trustee" at common law and under the Trustee Act." A few lines later, he states:

> At common law and under the Trustee Act, a trustee has a fiduciary duty and the title to property under the trust usually vests in the trustee.

33 In my view, this is an accurate statement of the situation.

34 However, Mr. Bennett goes on to say that court appointed receivers and managers also have fiduciary duties but title does not vest in them. From this he concludes that the Legislature has used trustee' rather than receiver and manager' in section 68 without any apparent reason. With great respect, I disagree. This case illustrates clearly the usefulness of the term actually used in the legislation. The Act appoints a trustee and also allows that appointee to function as receiver and manager. This added function does not derogate from the appointment as a "trustee".

35 In these circumstances, it is not plain and obvious that the plaintiff does not have the capacity and authority to bring this action to recover the trust property, which allegedly has been wrongfully removed from its control, or to seek damages to recompense the trust fund for the losses caused to it by the alleged malfeasance of the defendants.

36 It follows from the foregoing that the assignment by Toddglen of its rights to the fund does not affect the right of the Trustee to pursue this claim.

37 It is not necessary, in view of the conclusion to which I have come as to the statutory trusts, to determine the issue of whether a constructive trust could co-exist with the statutory trust, since the action will proceed in any event. I express the view, however, that the issue is not foreclosed by any case law to which I was directed, and I would have declined to dismiss the action, so far as it is based on constructive trust, because unsettled questions of law are not appropriately addressed on such motions as this.

38 The plaintiffs' claim under section 13 of the CLA may be novel, as submitted by the moving parties, but that is no reason to strike it out. If there are necessary parties to be added to enable the matter to be fully adjudicated, that can be done.

39 For these reasons, the motion is dismissed. Costs to the respondents payable forthwith. If the amounts cannot be settled, written submissions may be made by the respondents within 15 days, and by the moving parties within a further ten.

LANE J.

cp/e/nc/qw/qlhcc

1 Amended Statement of Claim, paragraph 5.

2 Amended Statement of Claim, paragraph 8.

3 Amended Statement of Claim, paragraph 5.

4 Amended Statement of Claim, paragraph 2 and paragraph 2 of the Order of Farley J. dated February 9, 2001.

5 Amended Statement of Claim, paragraph 2 and paragraph 2 of the Order of Farley J. dated February 9, 2001.

6 Fifth Report of the Construction Lien Trustee.

7 As these terms are used in the Construction Lien Act: Factum of GSNH, para 12.

8 Amended Statement of Claim, paragraphs 1(e) and (f).

9 Amended Statement of Claim, paragraphs 21, 22, 26(g), 28 and 40.

10 Paragraph 46 of the Amended Statement of Claim, Cross-Motion Record, Tab 2A; Paragraphs 34 and 44 of the Proposed Claim, Cross-Motion Record, Tab 2B.

11 per Wilson J. for the Court: Hunt v. Carey (1990), 43 C.P.C. (2d) 105, (S.C.C.) at page 125.

12 Doe v. Metropolitan Toronto Commissioners of Police (1990), 74 O.R. (2d) 225 (Div. Ct.), 229; Operation Dismantle Inc v. The Queen, [1985] 1 S.C.R. 441.

13 Nash v. Ontario (1995), 27 O.R. (3d) 1 (C.A.).

14 Moriarity v. Slater (1989), 67 O.R. (2d) 758 at 763 (H.C.J.).

15 See the discussion of this point in Waters: Law of Trusts in Canada (2nd ed.) 1984, chapter 24.

16 Waters, op. cit. page 985.

17 Bennett: Receiverships; Carswell Company, 1985.

TAB 2

Case Name:

Romspen Investment Corp. v. Woods Property Development Inc.

IN THE MATTER OF Section 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended
RE: Romspen Investment Corporation, Applicant, and Woods Property Development Inc. and TDCI Holdings Inc., Respondents

[2011] O.J. No. 1163

2011 ONSC 3648

4 R.P.R. (5th) 53

75 C.B.R. (5th) 109

2011 CarswellOnt 2380

200 A.C.W.S. (3d) 118

Court File No. CV-08-00007543-00CL

Ontario Superior Court of Justice
Commercial List

H.J. Wilton-Siegel J.

Heard: October 25, November 8 and December 2, 2010.
Judgment: March 17, 2011.

(202 paras.)

Creditors and debtors law -- Receivers -- Court appointed receivers -- Sales by receiver -- Application by a receiver of an insolvent company for approval of a sale agreement of a 43-acre property to an affiliate of the company's secured lender allowed in part -- Lender's property interest took priority over interest of retailer that operated store on the property -- Retailer was not entitled to a statutory lien -- Retailer was entitled to equitable lien that did not take priority over lender's interest -- Property would be sold free of retailer's interest -- Sale agreement was not approved due to economic improvements that occurred since it was made -- Sale process had to be repeated.

Real property law -- Mortgages -- Priorities -- Registration -- Application by a receiver of an insolvent company for approval of a sale agreement of a 43-acre property to an affiliate of the company's secured lender allowed in part -- Lender's property interest took priority over interest of retailer that operated store on the Property --Retailer was not entitled to a statutory lien -- It was entitled to equitable lien that did not take priority over Lender's interest -- Property would be sold free of Retailer's interest -- Sale Agreement was not approved due to economic improvements that occurred since it was made-- Sale process had to be repeated.

Real property law -- Registration of documents -- Torrens Land Titles system -- Land Titles Act -- Overriding interests -- Application by a receiver of an insolvent company for approval of a sale agreement of a 43-acre property to an affiliate of the company's secured lender allowed in part -- Lender's property interest took priority over interest of retailer that operated store on the Property --Retailer was not entitled to a statutory lien -- It was entitled to equitable lien that did not take priority over Lender's interest -- Property would be sold free of Retailer's interest -- Sale Agreement was not approved due to economic improvements that occurred since it was made-- Sale process had to be repeated.

Application by SF Partners Inc. for approval of a sale agreement dated October 13, 2009 between it, as Receiver of Woods Property Development Inc., and 2204604 Ontario Inc. The Sale Agreement pertained to a 43-acre property owned by Woods. The Receiver also sought an order that the sale would be free of any claims by Home Depot of Canada Inc. Romspen Investment Corporation was a secured lender to Woods. It owned and controlled the Purchaser. Woods was put into receivership by court order in November 2008. Home operated a store on a portion of the Property. In May 2005 it agreed to purchase eight acres of the Property where its store was located. The sale was conditional upon the Home Land being severed from the Property. The November 2005 Home Depot Agreement with Woods was the version that Home relied upon to assert its property interest. Home would occupy the land pursuant to a ground lease until the severance was granted. Home was aware, before it signed the Lease in April 2006, that the Property was subject to three mortgages in favour of Romspen that totaled $11.1 million. The mortgages were registered in August 2004, in January 2005 and in September 2005. In January 2006 Romspen refinanced the second and third mortgages and replaced them with one new second mortgage. Home did not register the Home Agreement and the Ground Lease on title. Romspen refused to sign anything that would have subordinated its rights as mortgagee. Home did not obtain the severance. In July 2006 Woods obtained refinancing from Romspen. The two existing mortgages were discharged and were replaced by a mortgage for $17 million. Romspen claimed that it had a claim against the Property by way of subrogation under its previous mortgages. Romspen argued that its latter mortgage ranked prior to the Home Agreement by virtue of s. 93(3) of the Land Titles Act, even though it had actual notice of the Agreement when its registered its mortgage. s. 93(3) provided that a registered charge was free from any unregistered interest in the land.

HELD: Application allowed in part. Romspen never consented to either the Home Agreement, the Ground Lease or to Home having any interest in the Property. It also did not consent to the construction of the Home store. The priority of Romspen's subrogated claim was to be considered regarding funds outstanding as of November 2005. Romspen's subrogated interest in the Property in respect of amounts outstanding under its earlier mortgages had priority over Home's property interest. Even though Romspen had actual knowledge of the Home Agreement the Romspen mortgage ranked prior to the Agreement based on the operation of s. 93(3). s. 93(3) ousted the doctrine of actual notice regarding a registered charge even though the chargee had actual notice of unregistered documents. It provided a mortgagee with an absolute defence to a claim based on actual notice. Home was not entitled to a lien against the Property that ranked in priority to Romspen's interest by virtue of its construction of its store. The lien was based on s. 37(1) of the Conveyancing and Law of Property Act. Even though Home made lasting improvements to the Property, it did not have sufficient ownership interest to be entitled to this lien. Home was entitled to an equitable lien on the Property by the amount that the value of the Property was enhanced by the construction of its store. However, Romspen's interest still had priority. The Receiver was therefore granted an order permitting the sale of the Property free of Home's interest. The Sale Agreement was not approved because economic conditions improved significantly since the time it was signed. It was possible that the Sale Agreement did not represent the current fair market value of the Property. Also, since the Property was no longer subject to the Home Agreement it could be more marketable. The Receiver would have to repeat the sales process.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47(1)

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 37, s. 37(1)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101

Land Titles Act, R.S.O. 1990, c. L.5, s. 71(1.1), s. 93(3), s. 111(1), s. 155

Planning Act, R.S.O. 1990, c. P.13,

Counsel:

Harvin Pitch, for the Receiver, SF Partners Inc.

David P. Preger, for Romspen Investment Corporation and 2204604 Ontario Inc.

Craig A. Mills, for Home Depot Canada Inc.

ENDORSEMENT

1 **H.J. WILTON-SIEGEL J.**:-- On this motion SF Partners Inc. (the "Receiver") seeks approval of an agreement of purchase and sale dated October 13, 2009 between the Receiver and 2204604 Ontario Inc. (the "Purchaser") (the "Sale Agreement") regarding the sale of a property known municipally as 50 High Street, in the Town of Collingwood, (the "Property") and an order in connection with the completion of such sale vesting in the Purchaser all of the assets of Woods Property Development Inc. ("Woods"), the owner of the Property, free of any claims of Home Depot of Canada Inc. ("Home Depot").

2 By a cross-motion, Home Depot seeks an order that it is entitled to purchase a portion of the Property defined below as the "Home Depot Lands" pursuant to the Home Depot Agreement (as defined below) or to a lease defined below as the "Ground Lease" or, alternatively, that it is entitled to a lien pursuant to section 37 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34 (the "CLPA") or in equity that ranks prior to the Romspen Mortgage (as defined below) and, accordingly, should not be affected by any court approval of the transaction contemplated by the Sale Agreement.

Background

The Parties

3 Woods is an Ontario corporation that is the owner of the Property.

4 Romspen Investment Corporation ("Romspen") is a secured lender to Woods and a sister corporation, TDCI Holdings Inc. ("TDCI"), which is the owner of another property in the Town of Collingwood (the "Raglan Property"). The lending arrangements between Romspen and Woods/TDCI are described below. Wesley Roitman ("Roitman") is the chief financial officer of Romspen and the person at Romspen principally responsible for the Woods/TDCI loan arrangements.

5 Holborn Property Investments Inc. ("Holborn") was a proposed purchaser of the Property under the Holborn Sale Agreement (as defined below). Holborn no longer claims an interest in the Property and is no longer a party to these proceedings. The priority of its interest under the Holborn Sale Agreement was the subject of earlier litigation. The judgment of the Court in that litigation was reported as *Holborn Property Investments Inc.* v. *Romspen Investment Corp.*, [2008] O.J. No. 5722 (Sup. Ct. J.) (the "Holborn Judgment").

6 The Receiver was appointed the interim receiver of all assets, undertakings and properties of Woods and TDCI by order of this Court dated November 25, 2008 (the "Receivership Order").

7 The Purchaser is an Ontario corporation that is owned and controlled by Romspen.

8 Landex Holdings Inc. ("Landex") is an Ontario corporation that owns property immediately to the south of the Property. Landex has entered into a joint venture with the Purchaser to develop the Property should the Purchaser acquire the Property pursuant to the Sale Agreement.

The Property

9 The Property consists of approximately 43 acres. An industrial building on the Property is leased to two tenants with whom the Receiver has reached an agreement and who, therefore, do not oppose the motion.

10 A portion of the industrial building was demolished in 2006. Home Depot constructed a store of approximately 85,000 square feet on a part of the Property that includes the demolished portion of the industrial building (defined below as the Home Depot Lands) at a total cost of approximately $14.5 million. Construction was completed in January 2007, and a Home Depot store has been operated on that part of the Property since then.

Home Depot's Interest in the Property

11 On or about May 19, 2005, Home Depot entered into an agreement of purchase and sale with Woods whereby Woods agreed to sell Home Depot 8.67 acres of the Property, which included the acreage on which the new Home Depot store was to be located, (the "Home Depot Lands") for $3,250,000. Among other terms, the sale is conditional upon receipt of a severance of the Home Depot Lands from the Property under the *Planning Act*, R.S.O. 1990, c. P-13.

12 On October 17, 2005, Woods entered into a further agreement for the sale of the rest of the Property to Holborn (the "Holborn Sale Agreement"). The Holborn Sale Agreement provided that Home Depot could purchase the Home Depot Lands from Holborn under the Home Depot Agreement for $3,250,000 when a severance was obtained under the *Planning Act*. It was Woods' expectation that the proceeds of sale of the two transactions with Holborn and Home Depot would repay the indebtedness of Woods and TDCI to Romspen described below and leave a profit for Woods.

The Home Depot Agreement

13 The agreement between Woods and Home Depot was amended on November 30, 2005 (as so amended, the "Home Depot Agreement"). It is this agreement upon which Home Depot relies in asserting that it has an interest in the Property. As mentioned, in order to complete the sale transaction, a severance of the Home Depot Lands is required. The severance is, in turn, conditional on among other things, demolition of the industrial building on the Property in its entirety and, as described below, a plan of subdivision for the Property.

14 The Home Depot Agreement contains the following material provisions:

* First, the portion of the industrial building referred to above was to be demolished to permit construction of a Home Depot store.
* Second, Home Depot was obligated to apply for a consent under the *Planning Act* to sever the Property.
* Third, section 4.5 of the Home Depot Agreement states that it shall be effective to create an interest in land only if the provisions of the *Planning Act* have been complied with.
* Fourth, Home Depot shall be entitled to apply to the Town of Collingwood for approval and a building permit to construct a Home Depot store on the Home Depot Lands.
* Fifth, if within 270 days of the date of execution, Home Depot fulfilled all zoning conditions and obtained all necessary approvals for its proposed store including a building permit, Home Depot would take possession of an area slightly larger than the Home Depot Lands pursuant to a ground lease (the "Ground Lease"). As there does not appear to be any significance to this slight difference, in this En-

dorsement the lands subject to the Ground Lease are also referred to as the "Home Depot Lands" to avoid unnecessary complexity.

15 The Home Depot Agreement set out the following terms for the Ground Lease:

* The Ground Lease was to run for a term of 50 years at a rental of $300,000 per year for the first seven years and thereafter at $100 per year.
* The Ground Lease would terminate upon receipt of the severance of the Property under the *Planning Act*, at which point the Home Depot Agreement would be completed by Home Depot's purchase of the Home Depot Lands, and the rental payments already made would be credited against the purchase price.

16 It was a condition of Home Depot's obligation to enter into the Ground Lease that Woods would deliver to Home Depot an acknowledgement of Romspen's agreement to:

(1) permit the demolition of the existing industrial building to occur without acceleration of the Romspen mortgages described below; and
(2) provide a partial discharge of the Romspen mortgages upon payment of the purchase price of $3,250,000 under the Home Depot Agreement, without any restriction that such mortgages shall be in good standing at the time.

17 Section 7.11 of the Home Depot Agreement permitted Home Depot to register a caution in respect of its rights under the Home Depot Agreement pursuant to section 71(1.1) of the *Land Titles Act,* R.S.O., c. L5, as amended (the "Act"). However, Home Depot chose not register the Agreement. It is understood that Home Depot made this decision in order to avoid the payment of land transfer tax. For the purposes of this proceeding, however, the significant fact is that Home Depot bargained for, but did not exercise, a right of registration and not the particular reason it decided to forgo that registration.

The Ground Lease

18 With the exception of delivery of the acknowledgement, which is described below, Home Depot satisfied the conditions entitling it to take a Ground Lease of the Property on the terms set out above within the time period required under the Home Depot Agreement. The Ground Lease was signed by Woods and Home Depot on May 4, 2006.

19 Prior to doing so, on April 19, 2006, solicitors for Home Depot conducted a title search against the Property. Accordingly, Home Depot would have been aware at the time it executed the Ground Lease that the Romspen mortgages on the Property at such time had an aggregate face amount of $11.1 million.

20 On May 2, 2006, two days before the Ground Lease was signed, Woods had its mortgage broker Lee Mondrow ("Mondrow") contact Romspen to obtain the acknowledgment from Romspen contemplated by the Home Depot Agreement. However, Romspen was only willing to provide an acknowledgement that demolition of the industrial building would not accelerate the Romspen mortgages (because such demolition would increase the value of the Property). An acknowledgment to this effect was executed by Romspen on May 5, 2006, one day after the Ground Lease was executed.

21 Roitman says that Mondrow and Clive Figuera, on behalf of Woods, had been pressing him to provide a broader acknowledgment to Home Depot in respect of Home Depot's rights under the Home Depot Agreement and that he was unwilling to do so because he did not wish to compromise the priority or other rights of the two Romspen mortgages on the Property at the time. He says further that he would have refused to sign the acknowledgement if it had expressly or impliedly purported to be a postponement or a subordination of Romspen's rights as mortgagee. Home Depot did not contradict this evidence, which I have therefore taken to be an undisputed fact.

22 The Ground Lease contains a representation of Woods that the Home Depot Lands are subject to mortgages in favour of Romspen dated August 22, 2004 (for $8.6 million) and January 26, 2006 (for $2.5 million). In the absence of a Romspen acknowledgment in the form contemplated by the Home Depot Agreement, the Ground Lease contains a further representation of Woods to the effect that Romspen had agreed:

(1) to permit the demolition of the portion of the industrial building located on the Home Depot Lands without accelerating the Romspen mortgages on the Property at the time; and

(2) to give partial discharges of the Property from the Romspen mortgages "with the aggregate consideration for all such partial discharges being an amount not in excess of the balance of the purchase price payable by [Home Depot] under the [Home Depot Agreement] upon the completion of the purchase of the [Home Depot Lands] by [Home Depot] pursuant to the [Home Depot Agreement]."

It is unclear on what basis Woods gave the representation in (2), above, as the Romspen mortgages did not contain partial discharge provisions.

23 Section 19.6 of the Ground Lease addressed registration of the Ground Lease. It provides that Home Depot shall not register the Ground Lease but that either party may register a notice of the Ground Lease pursuant to section 111(1) of the *Land Titles Act* by way of a short form of notice providing certain stipulated information. Home Depot also decided not to register a notice of the Ground Lease, again apparently to avoid the payment of land transfer tax.

24 I think it is obvious from all of the circumstances, including the testimony of Sylvain Rivet, a senior real estate manager of Home Depot, the fact that Home Depot was advised by experienced solicitors, Home Depot's experience in real estate law given its extensive real estate operations, and the title subsearch of its solicitors in April 2006, that Home Depot made a conscious decision to execute the Ground Lease without obtaining the form of acknowledgment of Romspen contemplated by the Home Depot Agreement, and to forego registration of the Ground Lease, with full knowledge of the potential risks that such actions could entail.

Construction of the Home Depot Store

25 As mentioned, during 2006, Home Depot commenced construction of a store upon the Home Depot Lands.

26 In connection with such construction, on or about July 25, 2006, Romspen signed a site plan control agreement dated July 20, 2006 to which Woods, Home Depot and the Town of Collingwood were also parties (the "Site Plan Agreement'). The Site Plan Agreement specifically recites the existence of the Home Depot Agreement, although not the Ground Lease. It also recites the proposed demolition of the portion of the existing industrial building and the proposed construction of the Home Depot store.

27 Paragraph 32 of the Site Plan Agreement refers to the existence of Romspen charges on the Property in the respective amounts of $8.6 million and $2.5 million (being the earlier Romspen mortgages, which, by this time, however, had been replaced by the Romspen Mortgage) and contains an express postponement and subordination by Romspen of its interest in the Property to that of the Town of Collingwood under the Site Plan Agreement (but not to that of Home Depot). This is the only express covenant of Romspen in the Site Plan Agreement, which otherwise contains covenants of Woods and Home Depot regarding the construction of the Home Depot store on the Property.

28 Home Depot has applied for severance of the Home Depot Lands. However, it is understood that the Town of Collingwood will not consent to a severance until a comprehensive plan of subdivision is filed and approved for the entire Property. No plan of subdivision has been filed by Woods or any other party having a present or future interest in the Property. The Receiver is not proposing to file a plan of subdivision on its own.

Romspen's Interest in the Property

Mortgages Prior to July 6, 2006

29 At the time of the first agreement between Woods and Home Depot dated May 19, 2005, there were two mortgages registered against the Property in favour of Romspen. The first mortgage dated August 27, 2004 secured a loan in the principal amount of $8.6 million. The second mortgage dated January 26, 2005

secured a loan in the principal amount of $1,550,000 made to TDCI that was guaranteed by Woods. This second mortgage was also secured against the Raglan Property.

30 In September 2005, Romspen loaned an additional $500,000 to Woods that was secured by a further mortgage on the Property, bringing the total amount secured against the Property to $10,650,000. None of these mortgages contained a right of partial discharge in favour of Woods to allow it to sell the Home Depot Lands, although the mortgage dated January 26, 2005 provided for a discharge of the Property upon repayment of an amount to be determined by Romspen in its discretion up to the full outstanding amount.

31 Accordingly, at the time of the Home Depot Agreement dated November 30, 2005, there were three mortgages registered against the Property in favour of Romspen, securing loans totalling $10.65 million in principal amount.

32 On January 26, 2006, Romspen refinanced the second and third mortgages on the Property and made a further secured advance. This was effected through the issue of a new second mortgage loan dated January 17, 2006 in the principal amount of $2.5 million made to TDCI of which Woods was the guarantor. This new second mortgage was also registered against both the Property and the Raglan Property. The new second mortgage did not contain a partial discharge provision.

33 Accordingly, at the time of execution of the Ground Lease on or about May 4, 2006, there were two mortgages registered against the Property in favour of Romspen securing loans totalling $11.1 million - the mortgage dated August 27, 2004 and the mortgage dated January 17, 2006. Neither mortgage contained a partial discharge provision.

The $17 Million Romspen Mortgage

34 On June 1, 2006, Romspen provided Woods with a commitment letter (the "Commitment Letter") regarding an advance of further funds to discharge the existing Romspen mortgages against the Property, as well as a further mortgage in the principal amount of $3.6 million secured against the Raglan Property only, and to finance improvements on the Raglan Property. All such advances were to be secured against both the Property and the Raglan Property.

35 This transaction was completed on or about July 6, 2006, at which time Romspen advanced a total of approximately $17 million, of which $11,338,090.84 was advanced to discharge the three existing Romspen mortgages secured against the Property and to pay realty taxes on High Street. The total financing was secured against the Property and the Raglan Property by a joint mortgage of Woods and TDCI in the principal amount of $17 million (the "Romspen Mortgage"), which was registered on title on July 6, 2006. Subsequently, the earlier Romspen mortgages were discharged after an appropriate "seasoning period".

36 The Romspen Mortgage contained a provision allowing Woods a partial discharge of the Home Depot Lands upon payment of the purchase price under the Home Depot Agreement, provided that the Romspen Mortgage was not in default and that a loan-to-value covenant was satisfied in Romspen's sole determination after giving effect to the partial discharge.

37 The Romspen Mortgage also incorporated the following provision from the Commitment Letter, which contemplated land lease payments under the Home Depot Agreement without specifically referring to the Ground Lease:

> Monthly principal payments of $130,000 shall be due and payable on the same day each month. In addition, any land lease payments made by Home Depot pursuant to the Home Depot Agreement (both as defined below) which in aggregate exceed $250,000 shall be due and payable on account of principal, upon receipt and the Borrower shall direct Home Depot to make such payments directly to Lender.

Romspen's Knowledge of the Home Depot Agreement and the Ground Lease

Knowledge of the Home Depot Agreement

38 Roitman acknowledges that Romspen received a copy of the Home Depot Agreement in or about November 2005. Accordingly, it had knowledge from that time of the arrangements contemplated in that

Agreement in respect of both the sale of the Home Depot Lands and a possible ground lease of the Home Depot Lands.

Knowledge of the Ground Lease

39 Home Depot submits that the Court should infer that Romspen had actual knowledge of the existence of the Ground Lease, if not its actual contents, as of the date of execution and delivery of the Romspen Mortgage or, alternatively, as of the date of execution of the Site Plan Agreement. It relies upon the covenant in the Romspen Mortgage (by incorporation of the terms of the Commitment Letter) requiring payment to Romspen of land lease payments in excess of $250,000 as evidence of such actual knowledge at the time of the Romspen Mortgage. In the alternative, it says that, given the structure of the Home Depot Agreement, Roitman must have known that Woods and Home Depot had executed the Ground Lease when he was presented with the Site Plan Agreement for Romspen's execution.

40 As this is a motion, the Court cannot make findings of fact by way of inference. The Court must make its determinations on the basis of undisputed facts.

41 In this case, there is no evidence that Romspen had actual knowledge of the existence of the Ground Lease prior to receiving a copy of the Ground Lease in 2008, much less that such knowledge is an undisputed fact. At best, and as Home Depot states in its factum, "Romspen was aware that an interim land lease might be entered into at a later date". This falls short of actual knowledge of the existence of the Ground Lease prior to 2008.

42 Even if the Court were able to draw inferences of fact, I do not think that such knowledge could be inferred as of the date of execution of the Romspen Mortgage, even on a balance of probabilities standard, from the facts before the Court. The language of the Romspen Mortgage is hardly unequivocal evidence of knowledge. Moreover, the fact that the Commitment Letter did not refer specifically to the Ground Lease but rather to "any land lease payments made by Home Depot", and the fact that Romspen did not pursue repayment of the Romspen Mortgage due as a result of rental payments under the Ground Lease, are both consistent with an absence of actual knowledge on Romspen's part.

43 Similarly, I do not think that the Court could infer knowledge of the Ground Lease from Romspen's execution of the Site Plan Agreement. While Romspen may have had suspicions that Home Depot had received a Ground Lease when it received the Site Plan Agreement for execution, Home Depot has not established actual knowledge as of that time. As Romspen also points out, execution of the Ground Lease was inconsistent with several conditions of the Home Depot Agreement as Romspen understood them.

Romspen's Alleged Consent to the Home Depot Agreement and the Ground Lease and to the Construction of the Home Depot Store

44 Home Depot also argues that Romspen consented to the Home Depot Agreement and the Ground Lease as well as to the construction of the Home Depot store. I will address each of these issues in turn. Again, as this is a motion, Home Depot must establish any alleged consent as an undisputed fact. In my view, it has failed to satisfy this onus.

Alleged Romspen Consent to the Home Depot Agreement and the Ground Lease

45 Romspen had actual knowledge of the Home Depot Agreement from November 2005. However, such knowledge does not automatically imply or constitute consent to the subordination of Romspen's earlier mortgages to the Home Depot Agreement. After learning of the Home Depot Agreement, Romspen had no obligation to contact Home Depot to inquire as to whether it sought, or assumed that it had received, Romspen's consent to the Agreement. It was entitled to assume that Home Depot would do what it considered necessary to protect itself as a party having a subordinate interest in the Property. That legal position remained unchanged at the time of execution of the Romspen Mortgage notwithstanding that the Romspen Mortgage was executed after the Home Depot Agreement.

46 Home Depot acknowledges that it never sought any form of consent, subordination and postponement of rights, or non-disturbance agreement from Romspen with respect to the Home Depot Agreement. Nor did Romspen ever agree in favour of Woods or Home Depot to a partial discharge of the Property to

permit the sale of the Home Depot Lands. There is, therefore, no evidence that Romspen ever consented, orally or in writing, to the sale of the Home Depot Lands pursuant to the Home Depot Agreement or to the subordination of its interest in the Property, whether under the earlier Romspen mortgages or under the Romspen Mortgage, to the interest of Home Depot under the Home Depot Agreement.

47 I have concluded above that Romspen did not have actual knowledge of the Ground Lease prior to 2008. Home Depot never sought the consent of Romspen to the Ground Lease. Nor did it ever seek any form of subordination or non-disturbance agreement from Romspen in respect of the Ground Lease. Collectively, these facts exclude any determination that Romspen consented to the Ground Lease or to the subordination of its interest in the Property to the interest of Home Depot under the Ground Lease.

48 Insofar as it may be argued that Romspen's knowledge of the Home Depot Agreement constituted an implied consent to a lease as described in the Home Depot Agreement, even without actual knowledge of the execution of the Ground Lease, I think the argument must fail for the same reasons as I concluded that knowledge of the Home Depot Agreement did not imply Romspen's consent to that document.

49 Generally, Home Depot relies on the affidavit of Sylvain Rivet, a senior real estate manager of Home Depot, in which he deposed that it was Home Depot's understanding at all times that Romspen had consented to the Home Depot Agreement and the Ground Lease, as well as to Home Depot's interest in the Home Depot Lands. There is, however, no basis in the evidence for this understanding. To the extent that Home Depot says that it relied on Woods' representation in the Ground Lease that Romspen had consented to the Home Depot Agreement and the Ground Lease, such reliance was clearly unreasonable. Neither Woods nor Home Depot has provided any evidence of Romspen's advice or other comfort to Woods or Home Depot that supports this representation.

50 Accordingly, I have proceeded on the basis that Romspen did not consent at any time to either the Home Depot Agreement, the Ground Lease, or to any interest in the Home Depot Lands that Home Depot may have acquired thereunder.

Alleged Romspen Consent to the Construction of the Home Depot Store

51 There is a separate question regarding whether Romspen consented at some point in time to the construction of the Home Depot store. This issue is relevant to the priority of any lien against the Property in Home Depot's favour in respect of an improvement to the Property as opposed to the priority of the Home Depot Agreement and the Ground Lease in the Property *per se*.

52 There is no evidence of any such consent, and it cannot be inferred from the existence of the Home Depot Agreement. Nor can it be inferred from the existence of the Ground Lease of which, in any event, I have found Romspen had no knowledge prior to 2008. The remaining possibility is that, in some manner, Romspen's execution of the Site Plan Agreement constitutes its consent, or constitutes evidence of its consent given elsewhere, to the construction of the Home Depot store in a manner that is meaningful for this proceeding.

53 Home Depot cannot, however, establish as an undisputed fact that Romspen's execution of the Site Plan Agreement either constituted, or evidenced, its consent to such construction. The reasons for this conclusion are set out below in addressing the priority of any lien of Home Depot against the Property in respect of such improvement.

The Proposed Sale of the Property

54 Woods first defaulted on the Romspen Mortgage in 2007, and payments ceased on the Romspen Mortgage in January 2008, leading to the Receiver's appointment on November 25, 2008. The Receivership Order authorized the Receiver to market the Property.

55 The Receiver listed the Property for sale with Parallel Realty Inc. ("Parallel") for a listing price of $450,000 per acre. In an offering fact sheet prepared by Parallel for distribution to prospective purchasers, the Home Depot Agreement was disclosed in the following terms:

> The developer has agreed to sell 8.67 acres of the property to Home Depot, which has constructed and opened its 85,500 square foot store. Home Depot is currently leasing its portion of the property until a severance can be applied for ...

56 The Receiver's report lists the efforts of Parallel to market the Property. They include listing the property on MLS and a further listing service, advertising in two editions of the Report on Business, and responding to inquiries of numerous interested parties. Parallel has followed up on expressions of interest from more than 25 prospective purchasers. Despite such efforts, no offers have been received.

57 On October 13, 2009, the Receiver and the Purchaser entered into the Sale Agreement. The material terms of the Sale Agreement are:

(1) a purchase price of $14.1 million satisfied by a partial reduction of the current indebtedness to Romspen under the Romspen Mortgage (apart from certain cash expenses to be paid, including outstanding realty taxes and the Receiver's fees and borrowings, if any); and
(2) vacant possession of the Property or arrangements with any remaining tenants on terms satisfactory to the Purchaser in its sole discretion.

58 As no arrangements have been made with Home Depot, as the lessee under the Ground Lease, the Receiver seeks an order vesting the Property free and clear of the Home Depot Sale Agreement, the Ground Lease and any other lien in favour of Home Depot arising in respect of the construction of the Home Depot store.

Applicable Law

59 The factors that a Court should consider in determining whether to approve a sale by a Court-appointed receiver were set out by Galligan J.A. in *Royal Bank* v. *Soundair Corp.* (1991), 4 O.R. (3d) 1 at para. 16 (C.A.) as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

60 In the present proceeding, there are two specific issues to be considered:

1. whether the Court should vest the Property in the Purchaser free and clear of the interest of Home Depot in the Property, which is a condition of the completion of the transaction contemplated by the Sale Agreement; and
2. whether the Property has been marketed to prospective purchasers on the same basis as is contemplated in the Sale Agreement.

61 The first issue relates to the consideration of the interests of the parties. The second relates to the efficiency and integrity of the sales process. I will deal with each in turn.

Should the Court Order a Vesting of the Property Free and Clear of any Claims of Home Depot?

62 This motion raises four general issues that are addressed below:

1. Does the Court have the authority to grant an order "vesting out" Home Depot's interest in the Property?
2. Does Romspen have an interest in the Property ranking prior to Home Depot's interest?
3. Is Romspen's interest in the Property subordinated to Home Depot's interest by virtue of a consent?

4. Is Home Depot entitled to a lien against the Property ranking in priority to Romspen's interest by virtue of the construction of the Home Depot store?

I propose to address each issue in turn. I will then address the Receiver's request for an order vesting out Home Depot's interest in the Property setting out my assessment of the equities between the parties.

Does the Court Have the Authority to Grant the Requested Relief?

63 The first issue is whether the Court has the authority to issue an order granting the requested relief. Home Depot makes two arguments that it does not. It says that a court-appointed receiver is not entitled to evict a tenant merely because it would be advantageous to do so. It also submits that that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot's interest. I will address each issue in turn.

Authority of the Court to Issue A "Vesting Out" Order in Respect of a Leasehold Interest

64 Home Depot relies on the following cases in support of its position that the Court cannot order the Receiver to sell the Property free and clear of the interest of Home Depot in the Home Depot Lands and, in particular, free and clear of the Ground Lease: *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.*, [2004] B.C.J. No. 46 at paras. 12-14 (S.C.); *Capital Funds (I.A.C.) Ltd. v. Park Marine Apartments Ltd. et al.*, [1967] B.C.J. No. 132 at paras. 9-10 (S.C.); and *Winick v. 1305067 Ontario Ltd.* [2008] O.J. No. 695 at para. 15 (Sup. Ct. J.).

65 These decisions do not articulate an absolute and unqualified rule that the Court lacks the authority to vest out a leasehold interest. Instead, they mandate that a receiver take into consideration the equities of the positions of the various parties involved. The principle is well summarized by Ground J. in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.* [2006] O.J. No. 3169 at para. 19 (Sup. Ct. J.) as follows:

> I think the law is clear that, if Meridian had proceeded by way of power of sale, it could have sold the Property to a purchaser free and clear of the leasehold interest of BW Health and Integrated on the basis that the subordination provision contained in the leases clearly subordinate the rights of the tenants to the rights of Meridian under the Meridian Charge and on the basis that none of the leases was registered on title to the property. This sale is, however, being conducted by a court-appointed receiver and, when seeking to convey title to assets free and clear of the interest of other parties, a receiver must apply to the court for a vesting order. In *New Skeena Products Inc.* v. *Kitwanga Lumber Co.*, [2005] B.C.J. No. 546, 251 D.L.R. (4th) 328, the British Columbia Court of Appeal clearly states that, in determining whether to issue a vesting order terminating in the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties.

The same conclusion was expressed by Gill J. in *Capital Funds, supra* in his reference to the fiduciary obligation of a court-appointed receiver to all the parties involved in a contest.

66 Accordingly, I have proceeded on the basis that the Court has the authority to grant the relief requested provided it is appropriate to do so after reviewing the equitable considerations supporting the respective positions of the parties.

67 I would note, as well, that the cases relied upon by Home Depot do not provide much assistance with respect to the equitable considerations to be taken into account in the present proceeding inasmuch as the circumstances in those decisions were very different.

68 *Coast Capital Savings, supra* involved residential tenancies which were not registrable and for which the tenants had prepaid the rental for the year. It is also unclear from the incomplete recitation of the facts whether the mortgagee seeking the relief was likely to be repaid or not; the references of the trial judge to the obligation of a court-appointed receiver to protect the goodwill of a business suggests that there may have been other subsequent encumbrancers with an interest in the preservation of the existing tenancies.

69 In *Capital Funds*, it was established that the tenant had paid considerable amounts for rent and for renovations to the property in respect of a commercial tenancy.

70 In *Winick, supra,* Pepall J. considered the issue in the context of the requirement in *Soundair, supra* that the Court address whether there has been unfairness in the working out of the sale process. In that case, the purchaser had agreed to acquire the property subject to the relevant lease. There was therefore no suggestion that the sale price would have been affected by the continuation of the lease. In such circumstances, it would have been unconscionable to order a vesting out of the lease.

71 As mentioned above, I propose to consider the equitable considerations between the parties after discussion of the remaining issues outlined above, which will themselves involve a consideration of certain equitable considerations.

The Home Depot Lands Were Previously Conveyed

72 Home Depot also submits that that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot's interest. In making this submission, it relies on the decisions in *2022177 Ontario Inc.* v. *Toronto Hanna Properties Ltd.* (2005), 203 O.A.C. 220 (C.A.); *Re Terastar Realty Corp.* (2005), 16 C.B.R. (5th) 111 (Ont. Sup. Ct. J.); and *Re 1565397 Ontario Inc.*, [2009] O.J. No. 2596 (Sup. Ct. J.).

73 The Home Depot argument on this issue is based on the legal consequences of the Home Depot Agreement and the Ground Lease. It submits that the Home Depot Agreement created an equitable interest in the Property in favour of Home Depot that was therefore excluded from the assets subject to the Receivership Order. Similarly, Home Depot has a leasehold interest in the Home Depot Lands under the Ground Lease. Home Depot submits that these interests were excluded from the assets subject to the Receivership Order and cannot be extinguished by a transfer of the Property by the Receiver.

74 I accept the starting point of Home Depot's analysis. Because the Receiver has been appointed as the receiver of Woods' assets, the effect of the Receivership Order is to transfer possession of the Property to the Receiver, subject to Home Depot's interest in the Property under the Home Depot Agreement and the Ground Lease. Nevertheless, I conclude that Home Depot's submission must fail for two reasons.

75 First, in respect of the Home Depot Agreement, section 4.5 provides that it is effective to create an interest in land only if the provisions of the *Planning Act* have been complied with. This has not yet occurred. It would therefore appear that Home Depot does not presently have an enforceable equitable interest in the land under the Home Depot Agreement and may never have such an interest.

76 Second, and in any event, the issue in the present proceedings is not whether Woods granted Home Depot a lease pursuant to the Ground Lease and an equitable interest pursuant to the Home Depot Agreement to the extent it has such an interest notwithstanding section 4.5. That is conceded by Romspen. At issue are the priorities and the equities between Home Depot and Romspen.

77 In this context, while Home Depot is correct that the Receivership Order did not give the Receiver such authority, its submission ignores the nature of the Court's authority in the present circumstances. The Receiver does not rely on its authority under the Receivership Order in seeking a "vesting out" order. Instead, it relies upon the Court's inherent jurisdiction to order a vesting out of interests in property after a consideration of the equities between the parties.

78 Accordingly, I do not accept Home Depot's argument that the Receiver lacks the power to convey the Property free of Home Depot's interest because it did not receive the equity in the Home Depot Lands upon its appointment. The Court has the authority to authorize the Receiver to sell the Property free and clear of the interest of Home Depot after a consideration of the equities between the parties. Put another way, the Court may refuse to exercise its equitable jurisdiction to enforce Home Depot's equitable interests if it determines that it is appropriate to refrain from doing so after considering the equities between the parties.

Conclusion Regarding Authority of the Court

79 Based on the foregoing, I conclude that the Court has the authority to grant the requested relief if, in the circumstances, after reviewing the applicable equitable considerations relating to the respective positions of the parties, it is appropriate to do so.

Does Romspen Have an Interest in the Property Ranking Prior to Home Depot's Interest?

80 Romspen asserts that its interest in the Romspen Mortgage ranks prior to Home Depot's interest in the Home Depot Lands on two general grounds. First, it submits that the Romspen Mortgage is entitled to priority by virtue of its registration under the *Land Titles Act*, notwithstanding actual notice of the Home Depot Agreement and the Ground Lease, which were executed earlier but never registered under the Act. Second, it argues that it has a subrogated claim under the Romspen Mortgage to the extent of the monies secured under the earlier Romspen mortgages and refinanced by the Romspen Mortgage plus interest thereon at the rates provided under such mortgages.

81 I propose to consider the two submissions of Romspen in reverse order.

Romspen's Assertion of Priority Based on Subrogation

Romspen's Position

82 Romspen submits that it has a claim against the Property under the Romspen Mortgage by way of subrogation in respect of the amounts outstanding under the Romspen mortgages as of either November 30, 2005 (the date of the Home Depot Agreement) or April 26, 2006 (the date Romspen uses as the date of execution of the Ground Lease).

83 On either calculation, the total of the monies outstanding under these mortgages, as of February 1, 2010, appears to substantially exceed the value of the Property. According to Romspen's calculation, as of February 1, 2010, the amount outstanding under the two Romspen mortgages secured against the Property as of the date of the Home Depot Agreement (November 30, 2005) - being the mortgages in the principal amounts of $8.6 million and $1.550 million, respectively - was $17,844,975.38. In addition, as of February 1, 2010, the amount outstanding under the two Romspen mortgages secured against the Property as of the date of the Ground Lease (the date used by Romspen is April 26, 2005) - being the mortgages in the principal amounts of $8.6 million and $2.5 million, respectively - was $18,102,971.09.

84 Romspen acknowledges that the priority of its claim by way of subrogation is limited to the monies paid at the time of the refinancing of the relevant Romspen mortgages to discharge such mortgages plus interest thereon at the rates applicable under such mortgages. It is my understanding that the calculations set out above have been prepared on this basis and are not challenged by Home Depot.

85 Romspen's argument is based on the line of cases that establishes that a mortgagee who pays off prior encumbrances is entitled to be subrogated to the payee's priority position relative to other clients: see, for example, *Re Elias Markets Ltd.*, (2005) 34 R.P.R. (4th) 127 at para. 43 (Ont. Sup. Ct. J.) per Rady J., aff'd (2006) 47 R.P.R. (4th) 32 (Ont. C.A.). The principle was applied to a first mortgagee who "renews, replaces, refinances, amends or increases his mortgage": see *Midland Mortgage Corp. v. 784401 Ontario Ltd.* (1994), 34 O.R. (3d) 594 at para. 14 (C.A.) per Austin J.A. The doctrine also applies to the extent a mortgagee pays taxes on behalf of a mortgagor: see *Elias Markets, supra,* at para. 50 per Rady J.

86 Romspen argues that it is entitled to rank prior to Home Depot's interest in the Home Depot Lands to the extent of this subrogated claim based on the equities between the parties. In particular, it relies on the fact that Home Depot had knowledge of the Romspen mortgages on the Property at the time it executed the Home Depot Agreement and the Ground Lease based on their registration against title to the Property. It also relies on the fact that Home Depot did not seek either a non-disturbance or priority agreement from Romspen notwithstanding the priority of the Romspen mortgages at the time. Nor did Home Depot receive any consent or other protection from Romspen. Instead, it relied on incorrect representations from Woods in the Ground Lease when it was executed, without seeking confirmation of the validity of these representations. Romspen notes that Home Depot took these decisions without any representation on the part of Romspen. In addition, Romspen relies on its right to control partial discharges of the Property from its security, of which Home Depot had knowledge by virtue of the registration of Romspen's earlier mortgages.

Home Depot's Position

87 Home Depot notes that subrogation is a discretionary remedy for which the foundation is fairness. In reliance on J. McGhee, ed. *Snell's Equity* 31st ed. (Toronto: Thomson, 2005) at p. 869, it argues there are three conditions that must be satisfied before the doctrine can operate: (1) the subsequent encumbrancer is unjustly enriched at the lender's expense; (2) such enrichment is unjust; and (3) there are no policy reasons for denying the prior encumbrancer a remedy. It makes four submissions for denying the remedy of subrogation in the present circumstances, which I will address below.

Analysis and Conclusions

Preliminary Issue

88 Before addressing this issue, it is necessary to consider whether Romspen's subrogated claim should be considered in respect of monies outstanding under the earlier Romspen mortgages at the date of execution of the Home Depot Agreement, the date of execution of the Ground Lease, or both. The Home Depot Agreement and Ground Lease were both granted after the earlier Romspen mortgages described above but before the Romspen Mortgage. Although the parties have distinguished the rights and interests of Home Depot under the Home Depot Agreement and the Ground Lease, I do not think this distinction is meaningful for the purposes of determining against which mortgages Home Depot's priority based on subrogation is to be considered.

89 The Ground Lease was an interim measure to bridge the period until a severance was obtained and the transaction contemplated by the Home Depot Agreement could be completed. The possibility of a ground lease having terms substantially similar to the terms of the Ground Lease was contemplated in the Home Depot Agreement. The rental payments under the Ground Lease were a credit against the purchase price under the Home Depot Agreement. In these circumstances, I think that the priority of Romspen's subrogated claim under the Romspen Mortgage should be considered in respect of the monies outstanding under the earlier Romspen mortgages outstanding as of the date of the Home Depot Agreement.

Validity of Romspen's Claim for Priority By Way of Subrogation

90 On the facts of this case, I do not think that there is any doubt that Romspen has a subrogated claim in the amount of the monies outstanding under the earlier Romspen mortgages at the time of their refinancing by means of the Romspen Mortgage, plus interest at the rates provided under the earlier Romspen mortgages. The principle in *Midland Mortgage, supra* is well established law. There are no facts that exclude the operation of this principle in the present proceeding. The issue for the Court is whether the test for entitlement to the remedy of subrogation is met.

Assessment of the Equitable Considerations

91 In making their submissions on this issue, Home Depot relies on the test for subrogation set out in *Snell,* described above. Romspen relies on the analysis of unjust enrichment. I am not convinced that there is any significant difference between the two approaches, subject to one consideration discussed in the next paragraph. I will, however, consider each of these approaches in turn.

92 It should be noted that, in respect of Romspen's claim of priority for its interest in the Property based on subrogation, the interest of Home Depot at issue is its interest under the Home Depot Agreement and the Ground Lease, not the Home Depot store. In the absence of any evidence that Romspen consented to the construction of the Home Depot store in a manner that was intended to affect its legal rights in the Property, the issue of the Home Depot store must be considered in the context of an improvement on the Property. That is addressed later. In this section, the issue is limited to the right of Home Depot to acquire the Home Depot Lands under the Home Depot Agreement and, possibly, to hold a leasehold interest in the Home Depot Lands under the Ground Lease.

93 The starting point for the analysis of unjust enrichment is whether Home Depot would be enriched if the remedy of subrogation were unavailable to Romspen. I think it is clear that it would be. The Home Depot Agreement and the Ground Lease were executed after the earlier Romspen mortgages. Therefore, they

ranked after such mortgages. If subrogation were not granted, Home Depot's interest in the Property would rank in priority to the interest of Romspen in the Property. Accordingly, in the present circumstances, there would be an enrichment of Home Depot and a corresponding deprivation of Romspen if subrogation were not ordered.

94 I am also satisfied that there is an absence of a juristic reason for Home Depot's enrichment. In respect of this issue, the following considerations are relevant.

95 First, insofar as Home Depot seeks to enforce the Home Depot Agreement, it is effectively seeking an order compelling Romspen to discharge the security contained in the earlier Romspen mortgages which has been continued in the Romspen Mortgage. The Court should not relieve Home Depot of the risk that it knowingly assumed by its own actions.

96 As mentioned, the Romspen mortgage loans were secured against the entire Property and provided Romspen with an absolute control over partial discharges. Even if a severance had been obtained, Home Depot could only have completed the purchase if Romspen had been willing to deliver a partial discharge. Home Depot had full knowledge of that risk. By entering into the Home Depot Agreement without obtaining a non-disturbance or priority agreement with Romspen, Home Depot took the risk that the Home Depot Lands would not be deliverable to it. Home Depot could not have obtained an order of the Court compelling delivery to it of the Home Depot Lands free of the earlier Romspen mortgages. There is no reason why the refinancing of those mortgages should increase its rights in this respect.

97 Second, the evidence before the Court suggests that the present circumstances were not anticipated by either party. However, at the time of execution of the Home Depot Agreement and the Ground Lease, the priority of the Romspen mortgages registered on title to the Property was absolutely clear. Both parties were sophisticated business entities with access to experienced and knowledgeable legal counsel. Romspen did everything that it could to protect itself against unanticipated circumstances. Home Depot did not.

98 To protect itself, Home Depot needed to obtain a consent, a priorities agreement, or a non-disturbance agreement directly from Romspen in respect of the Home Depot Agreement, the Ground Lease, or both. It made a business decision not to require Woods to obtain the form of comfort contemplated by the Home Depot Agreement and to rely instead upon representations from Woods - which proved to be incorrect - without seeking any indication from Romspen regarding the validity of those representations.

99 On the other hand, Romspen chose to protect its security position by retaining absolute control over any partial discharges of the Property under the earlier Romspen mortgages. It was under no obligation to anticipate the situation that subsequently developed. Nor did it have an obligation to advise Home Depot of the risks associated with failure to seek a consent or other comfort from Romspen.

100 Third, Home Depot argues that there is no evidence that it has derived any value or enrichment from Romspen's refinancing of the earlier Romspen mortgages by means of the Romspen Mortgage and that, on the other hand, Romspen has derived real value from Home Depot's construction and operation of its store on the Home Depot Lands. For the same reason, Home Depot says that, if its interest is vested out, Romspen will be unjustly enriched by virtue of the construction of the Home Depot store on the Property.

101 These two amount to a single argument. More importantly, I do not think this argument has any force to the extent that it relates to Home Depot's interest in the Home Depot Lands as opposed to the improvement on those Lands. As mentioned above, the present issue of priorities is a contest between Home Depot's interest in the Home Depot Lands, as a prospective purchaser under the Home Depot Agreement and as a tenant under the Ground Lease, and Romspen's interest in the Property under the Romspen Mortgage by way of subrogation. While there is no evidence that Home Depot derived any value from the refinancing of the earlier Romspen mortgages, there is equally no evidence that Romspen has derived any value from either the Home Depot Agreement or the Ground Lease between Woods and Home Depot.

102 In particular, there is no suggestion that the Ground Lease provided for a market rental. In the absence of any severance of the Home Depot Lands, the Ground Lease reverts to a 21-year term with a nominal annual rent. Further, if the Home Depot Agreement were enforceable against Romspen, the purchase price payable on closing of the sale of the Home Depot Lands would be significantly reduced by the prior rental payments made to Woods, of which it has not been established that Romspen had knowledge.

103 Fourth, as a related matter, while it may be implied in Home Depot's submission that most, if not all, of the value of the Property is attributable in the present economic circumstances to the Home Depot Lands, I do not think that this is determinative of the equitable considerations. The fact that the remainder of the Property, apart from the Home Depot Lands, if sold separately may have a value significantly less than that at the time of the Romspen mortgage loans to Woods ignores the reality that at all relevant times both Home Depot and Romspen were dealing with a single property. It also ignores the fact that Romspen did address this risk to the extent it could do so by means of the loan-to-value covenant in the Romspen Mortgage.

104 Fifth, I do not accept the Home Depot argument that the issue of fairness does not come into play in the present circumstances because Romspen discharged the earlier mortgages with full knowledge of the Home Depot Agreement rather than as a result of a mistake or inadvertence. This argument may have been made on an erroneous assumption that the earlier Romspen mortgages were discharged prior to the execution and delivery of the Romspen Mortgages. If it is not, this argument is objectionable for two reasons. It casts the fairness consideration in the context of subrogation far too narrowly. It also flies in the face of common sense and well established practice, which reflects the practical reality that there should be no reason to maintain on title mortgages that have been refinanced by a later mortgage from the same lender.

105 Sixth, the present circumstances are not analogous to those in *Armatage Motors Ltd.* v. *Royal Trust Corporation of Canada Ltd.* (1997), 34 O.R. (3d) 599 (C.A.) in which injury to the party against whom subrogation was sought was a relevant consideration. *Armatage Motors* is a curious case in which the Court of Appeal appears to have denied subrogation on the basis that the first mortgagee had other assets against which it could recover the monies owed to it that were not also secured in favour of the second mortgagee, as well as the second mortgagee's reliance on the abstract of title. In the present proceedings, there is no evidence before the Court that Romspen will recover the outstanding loan amount from the remainder of the security under the Romspen Mortgage should subrogation not be granted. Insofar as there is any issue of reliance on the title to the Property, the present facts also favour Romspen.

106 Lastly, I do not accept Home Depot's submission that the doctrine of subrogation has no application in the context of a vesting order motion brought by a court-appointed receiver. Home Depot has offered no reason in principle why subrogation should not operate. I do not see any reason for excluding the operation of subrogation as an equitable consideration in determining whether to vest out a subsequent encumbrancer's interest.

107 On the basis of the foregoing, I conclude that Romspen is entitled to assert a subrogated claim against the Property in priority to that of Home Depot based on the principles of unjust enrichment. If it were necessary to consider the application of the principles in *Snell's Equity* upon which Home Depot relies, I would reach the same conclusion for the following reasons.

108 Turning to the test set out in *Snell's Equity*, satisfaction of the first requirement has already been addressed above. Absent subrogation, Home Depot will be enriched at Romspen's expense.

109 Similarly, for the reasons set out above pertaining to the absence of a juristic reason for such enrichment, I also conclude that such enrichment is unjust.

110 Lastly, I think that the third prong of the test in *Snell*, if in fact it is separate from the issue of a juristic reason for such enrichment, is also satisfied for the following reason. Provided that the issue of the Home Depot store is excluded from this analysis and dealt with below, as I believe is appropriate, there is no remaining policy reason for denying Romspen the remedy of subrogation. Romspen retained control over the discharge of all or any part of the Property from its security. Romspen did not benefit in any respect from the execution or performance of the Home Depot Agreement or the Ground Lease. The loss suffered by Home Depot - being the loss of the rental payments under the Ground Lease totaling $3,210,000 - was directly attributable to Home Depot's own actions in assuming a foreseeable risk.

Conclusion

111 Based on the foregoing, I conclude that Romspen's subrogated interest in the Property in respect of amounts outstanding under the earlier Romspen mortgages at the time of the execution of the Home Depot Agreement ranks prior to Home Depot's interest in the Home Depot Lands under the Home Depot Agreement and the Ground Lease.

Romspen's Assertion of Priority Based on the Romspen Mortgage

112 Romspen's alternative claim is that the Romspen Mortgage has priority over both the Home Depot Agreement and the Ground Lease by virtue of the absence of registration of these documents.

Preliminary Comments

113 Before addressing this submission, I wish to make two observations.

114 First, given the determination above in respect of Romspen's subrogation claim, it is likely that, as a practical matter, it is unnecessary to address this issue. It would appear that the amount of Romspen's subrogated claim is, by itself, substantially in excess of the current value of the Property. I have addressed this issue, however, in case this assumption proves to be incorrect in marketing the Property.

115 Second, the focus of this claim differs in one important respect from that of Romspen's subrogated claim. The subrogated claim is based on the priority of the earlier Romspen mortgages by virtue of their registration at the time of execution of the Home Depot Agreement and the absence of any subsequent consent or other agreement in favour of Home Depot affecting such priority. The claim in respect of the Romspen Mortgage is based principally on the ouster of the doctrine of actual notice in respect of the Home Depot Agreement and the Ground Lease by operation of the registration provisions under the *Land Titles Act* relating to charges.

Positions of the Parties

116 Romspen argues that the Romspen Mortgage, as a registered charge against title to the Property, ranks prior to the Home Depot Agreement and the Ground Lease by virtue of section 93(3) of the *Land Titles Act* notwithstanding actual notice of the Home Depot Agreement at the time of registration of the Romspen Mortgage. Section 93(3) reads as follows:

> The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but *free from any unregistered interest in the land.* [Emphasis added]

117 Home Depot argues that section 93(3) of the *Land Titles Act* does not displace the operation of the doctrine of actual notice in Ontario and that, by virtue of Romspen's actual knowledge of the Home Depot Agreement at the time of execution of the Romspen Mortgage, the Romspen Mortgage is subordinated to this instrument.

118 Home Depot submits that it is entitled to rely on the doctrine of actual notice by virtue of the principle articulated by the Supreme Court in *United Trust Co.* v. *Dominion Stores Ltd.*, [1977] 2 S.C.R. 915. It argues that wording comparable to that in the Alberta legislation referred to by Spence J. in *United Trust* is required in order to exclude the operation of actual notice in Ontario. It says that the wording of section 93(3) is insufficient for this purpose.

119 In making this submission, Home Depot also relies on the more recent decisions of Mesbur J. in *1420111 Ontario Inc. v. Paramount Pictures (Canada) Inc.*, [2001] O.J. No. 4461 (Sup. Ct. J.), as well as the Court of Appeal in *Manias v. Norwich Financial Inc.*, [2008] O.J. No. 2612 (C.A.) and *Romspen Investment Corp. v. 2126921 Ontario Inc.*, [2010] O.J. No. 5405 (C.A.).

Analysis and Conclusions

120 I propose to consider the following two issues in respect of the issue of the priority of the Romspen Mortgage relative to the Home Depot Agreement and the Ground Lease:

(1) does section 93(3) of the *Land Titles Act* oust the operation of the doctrine of actual notice in the present circumstances? and
(2) if not, is the Romspen Mortgage subordinated to the Home Depot Agreement and the Ground Lease by operation of the doctrine of actual notice?

Does Section 93(3) Oust the Doctrine of Actual Notice?

121 There is no dispute that Romspen had actual notice of the Home Depot Agreement at the time of execution and registration of the Romspen Mortgage. Accordingly, the issue in this section is whether the doctrine of actual notice could operate to subordinate the Romspen Mortgage to the interest of Home Depot under the Home Depot Agreement in accordance with the principle in *United Trust, supra.* The issue does not arise in respect of the Ground Lease given the determination above that Romspen did not have actual notice of the Ground Lease at the time of execution of the Romspen Mortgage.

122 The operation of section 93(3) of the *Land Titles Act* was previously addressed in the Holborn Judgment in the context of a contest between a registered mortgage and another unregistered agreement of purchase and sale. For the reasons set out therein, I concluded that section 93(3) operates to oust the doctrine of actual notice in Ontario in respect of a registered charge notwithstanding the chargee's actual notice of an unregistered agreement of purchase and sale.

123 Subsection 93(3) specifically addresses the operation of actual notice in the phrase "free from any unregistered interest in the land". In my view, this wording is sufficiently explicit to satisfy the test in *United Trust.* There is nothing in that decision that requires language substantially similar to the wording in the Alberta legislation to exclude the operation of the doctrine of actual notice. I am not persuaded that the conclusion reached in the Holborn Judgment was in error.

124 I do not think it is necessary to restate the reasons for my conclusion on this issue in this Endorsement. For present purposes, I adopt the reasons in the Holborn Judgment on the operation of section 93(3), with the exception of the alternative reasons of effective subordination, given the absence of any covenant against registration in the present proceedings. Subject to the qualification that section 93(3) has been read subject to section 155, which deals with the invalidity of the registration of fraudulent instruments and is not at issue in this proceeding, I conclude that section 93(3) provides a mortgagee with an absolute defence to a claim based on actual notice.

125 I wish, however, to set out several additional observations regarding this issue in response to Home Depot's submissions.

126 First, in reaching this conclusion, I have also considered the absence of any alternative interpretation of the language of section 93(3). Home Depot's position is that section 93(3) does not operate where a receiver seeks to vest out an equitable interest. It seeks to avoid the priority issue by identifying a different fact situation. It did not, however, provide a meaningful alternative interpretation of section 93(3) that demonstrates a purpose for that provision that does not address the doctrine of actual notice. In the absence of an alternative interpretation of section 93(3), the Court must conclude that the provisions of section 93(3) are directed to the present situation.

127 In addition, I have the following observations regarding the extent to which the additional decisions cited by Home Depot on this motion can be taken as authority for the proposition that the wording of section 93(3) does not exclude the operation of the doctrine of actual notice.

128 First, section 93(3) was not cited in the decisions of either the Court of Appeal in *Manias, supra* or Mesbur J. in *Paramount Pictures, supra.* Second, *Manias* addresses an altogether different situation of a contest of priorities among registered charges, where a mistake was made in the order of registration. That issue did not invoke section 93(3). Third, *Paramount Pictures* addresses a contest between a mortgagee and a tenant in which the tenant wished to resile from its lease, rather than a situation in which a mortgagee sought to vest out a tenant's interest. This dispute therefore also does not involve section 93(3).

129 Fourth, in *Romspen Investment Corporation* v. *2126912 Ontario Inc.*, [2010] O.J. No. 639 (Sup. Ct. J.), Tucker J. held that section 93(3) did not apply where a party sought to rely on that provision to take advantage of a registration error in respect of a prior mortgage in order to obtain a better position than had been bargained for. Subsequent to the hearing in the present proceeding, the Court of Appeal upheld this decision in *Romspen Investment Corporation* v. *2126912 Ontario Inc.,* [2010] O.J. No. 5405 (C.A.) by way of an appeal book endorsement.

130 The relevant portion of the appeal book endorsement on the substantive issue reads as follows:

> We are satisfied that the application judge's finding that the appellants had actual notice of the intended priority of the Romspen mortgage necessarily included a finding that the Romspen mortgage was an equitable mortgage in respect of the parking lot. That being so, contrary to the analysis in *Holborne* [*sic*] *Property* v. *Romspen* (2008), 77 R.P.R. (4th) 262, the application judge was correct in holding that section 93(3) of the *Land Titles Act* did not preclude Romspen's equitable mortgage from having priority over the appellants' registered mortgage. (See *United Trust* v. *Dominion Stores et al.*, [1977] 2 S.C.R. 915 at pp. 956 and 957). To that extent, the appeal must fail.

131 I do not think the decision in *Romspen Investment Corporation* v. *Orvitz* applies to the present circumstances for the following reasons.

132 First, I do not think that the Court of Appeal intended to state, as a general principle, that the doctrine of actual notice continued to operate in all circumstances in Ontario notwithstanding the enactment of section 93(3). The issue of the ambit of section 93(3) was not addressed by Tucker J. The Court of Appeal was also silent on the issue.

133 Second, as Tucker J. expressly noted at para. 25 of her judgment, the facts in this decision are profoundly different from those in the Holborn Judgment. She noted "[t]his is not a case where priorities are in issue; the second mortgagee always knew it was to be a second". I see nothing in the decisions of Tucker J. or of the Court of Appeal that addresses, let alone excludes, the operation of section 93(3) in substantive priority contests.

134 Third, as a related matter, it is not necessary to exclude the operation of section 93(3) in order to reach the result ordered in *Orvitz*. It appears that the solicitor's error in *Orvitz* was a failure to include a legal description - that was included in the second mortgage - of a second parcel of land intended to be charged. As Tucker J. recognized in her judgment, *Orvitz* is essentially an unjust enrichment case based on an implied contractual subordination agreement among the parties, rather than a case of actual notice. It would be unconscionable to allow the second mortgage to retain its priority even if, in the first instance, section 93(3) operated. Moreover, the implication from *Manias* is that section 93(3) does not operate in a priority dispute between charges. Essentially, that is the situation in *Orvitz* - a contest between two mortgagees where one mortgagee seeks rectification of his instrument to reflect the intended security as between the mortgagor and mortgagee in circumstances in which rectification would be ordered notwithstanding its impact on the second mortgagee because of the intended priorities as between the two mortgages.

135 In summary, while I accept that the wording of the endorsement of the Court of Appeal may be read in different ways, I think the intention is clear and the circumstance are entirely different from those in the present case or in the Holborn Judgment.

136 Based on the foregoing, I conclude that, while Romspen had actual knowledge of the Home Depot Agreement, the Romspen Mortgage ranks prior to the Home Depot Agreement based on the operation of section 93(3) of the *Land Titles Act*.

The Operation of the Doctrine of Actual Notice

137 In the event that the doctrine of actual notice is held to operate in the present circumstances, however, I also do not think that it would be applied to subordinate the Romspen Mortgage to either the Ground Lease or the Home Depot Agreement.

138 The Court has previously concluded that Romspen did not have actual knowledge of the Ground Lease at the time that it executed the Romspen Mortgage. This excludes the operation of the doctrine of actual notice in respect of the Ground Lease.

139 With respect to the Home Depot Agreement, the doctrine of actual notice is an equitable doctrine. Its application is not automatic. If it were held that the doctrine of actual knowledge operated with respect to the Home Depot Agreement, the Court must still consider the equities between the parties.

140 In this case, in my opinion, the considerations discussed above in the context of Romspen's claim for priority by way of subrogation are equally applicable to the issue of the operation of the doctrine of actual

knowledge. On this basis, I would conclude that the equities between the parties did not favour the application of the doctrine of actual notice to subordinate the Romspen Mortgage to the Home Depot Agreement.

Conclusion Regarding Priority of Romspen's Interest in the Property

141 Based on the foregoing, I conclude that Romspen's interest in the Property under the Romspen Mortgage ranks prior to Home Depot's interests in the Home Depot Lands under the Home Depot Agreement and the Ground Lease.

Is Romspen's Interest in the Property Subordinated to Home Depot's Interest By Virtue of a Consent?

142 As a matter of law, if a lease is executed by a mortgagor after the mortgage has been granted, the mortgagee will be bound by the terms of the lease if it is made with his express or implied consent: see *Goodyear Canada Inc.* v. *Burnhamthorpe Square Inc.* (1998), 41 O.R. (3d) 321 at paras. 54-57 (C.A.). The same principle can operate in respect of an agreement to purchase land.

143 Romspen's claim for subrogation is based on the prior registration of the earlier Romspen mortgages at the time of execution of the Home Depot Agreement. This claim could, however, be defeated by evidence that it consented to the Home Depot Agreement or the Ground Lease at some point thereafter.

144 Similarly, Romspen's claim of priority in respect of its interest under the Romspen Mortgage could also be defeated by evidence of such consent at some point after execution and registration of the Romspen Mortgage notwithstanding an initial priority position for the reasons set forth above.

145 The issue in this section is purely factual - did Romspen consent to the Home Depot Agreement or the Ground Lease? This matter has been addressed above, where I concluded that Home Depot has failed to establish as an undisputed fact that Romspen consented to either the Home Depot Agreement or the Ground Lease such that the Romspen Mortgage is subordinated to either or both of these instruments.

146 I would add only the observation that the issue of actual notice arises in circumstances such as the present precisely because knowledge does not automatically constitute consent. Accordingly, the significance, if any, of Romspen's knowledge of the existence of the Home Depot Agreement at the time of the Romspen Mortgage is properly addressed, not as a matter of consent, but as a matter of actual notice.

Is Home Depot Entitled to a Lien Against the Property Ranking in Priority to Romspen's Interest by Virtue of the Construction of the Home Depot Store?

147 Based on the foregoing, Romspen has an interest in the Property that ranks prior to Home Depot's interest under the Home Depot Agreement and the Ground Lease on two grounds: (1) by way of subrogation to the extent of the monies refinanced under the Romspen Mortgage plus interest; and (2) by operation of section 93(3) of the *Land Titles Act* to the extent of all monies secured under the Romspen Mortgage.

148 In these circumstances, Home Depot claims a lien against the Property under section 37(1) of the CLPA or, alternatively, in equity, in either case in the amount by which the value of the Property has been increased by the construction of the Home Depot store. It should be noted that the claim for lien is asserted against the owner of the Property. To the extent a lien claimant is successful, there is a further issue regarding the priority of any such lien relative to Romspen's interest in the Property. I will first address the validity of Home Depot's lien claims before considering the issue of priority.

The Conveyancing and Law of Property Act

149 Section 37(1) of the CLPA provides as follows:

> Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

Home Depot seeks a lien under this provision in the amount of the value by which the Property has been improved as a result of the construction of the Home Depot store on the Home Depot Lands.

150 As set out in *McGuire v. Warren* (2006), 46 R.P.R. (4th) 113 at para. 7 (Ont. Sup. Ct. J.) per Wood J., before granting relief under section 37(1) of the CLPA, the Court must apply a three-part test:

> ... First, it must be satisfied that the person making the improvements genuinely believed that he or she owned the land. Secondly, it must be satisfied that the improvements made are of a "lasting" nature. Finally, if the first two parts are met, the court must weigh the equities between the owner of the encroached upon lands and the person who has made the improvements, to determine whether it is appropriate to either grant a lien on the lands for the value of the improvements or to transfer the lands to the person who made the improvements for appropriate compensation.

151 There is no question that Home Depot has made improvements of a lasting value to the Property. The issue is whether Home Depot has satisfied the requirement that it have a sufficient ownership interest in the Property.

152 The Receiver and Romspen make three submissions with respect to the first part of the test.

153 Firstly, they refer to para. 12 of *McGuire*, in which Wood J. observed that section 37(1) was enacted at a time when serious inadequacies or deficiencies in conveyancing practice resulted in disputed property boundaries. They argue the present case does not result from such factors, suggesting that the provision is therefore unavailable. However, I do not think that the purpose of section 37(1) is limited to addressing issues arising from historical conveyancing practice.

154 Second, Romspen argues that demonstration of a genuine belief that the claimant owns the relevant land requires demonstration of not only an honest belief but also a reasonable basis for that belief: *Derro v. Dube,* [1948] O.W.N. 287 at paras. 3-4 (H.C.J.) per McRuer C.J.H.C.; and *Halton Hills (Town) v. Row Estate,* [1993] O.J. No. 1222 (O.C.J. (Gen. Div.)) per MacKenzie J. It argues that Home Depot did not have such a belief at the time it erected its store on the Property.

155 I do not think it can reasonably be suggested that, as between Home Depot and Woods, Home Depot did not believe that it had an interest in the Property that was sufficient for the purposes of claiming relief under section 37(1). It had spent $14.5 million in improvements on the Property. The only reasonable inference is that it did so in the belief that, at a minimum, it had a right to remain on the Property for the remainder of the term of the Ground Lease.

156 Third, Romspen argues that, irrespective of that belief, Home Depot does not have a sufficient ownership interest in the Home Depot Lands to obtain relief under section 37(1). It argues that a purchaser under an unexecuted agreement of purchase and sale, while an equitable owner of the property, does not have a sufficient ownership interest to obtain relief under section 37(1). It relies on *Geldhof v. Bakai* (1982), 139 D.L.R. (3d) 527 at para. 8 (Ont. H.C.J.) per Callaghan J. Insofar as it is suggested that this is a general principle of law, I think it is incorrect notwithstanding that this was the result in *Geldhof v. Bakai.* It is clear that Callaghan J. based his decision on a finding of fact in the particular circumstances of that case, including specific advice that neither plaintiff believed that they would own the land in question until the date of the closing of the agreement of purchase and sale entered into with the defendants.

157 However, on the facts of the present case, I conclude that Home Depot does not have a sufficient ownership interest under the Home Depot Agreement or the Ground Lease to seek relief under section 37(1) for the following reasons.

158 As mentioned, at best, Home Depot has an unregistered equitable agreement to purchase the Home Depot Lands. Moreover, that is subject to an important qualification. Section 4.5 of the Home Depot Agreement provides that the Agreement shall only be effective to create an interest in land if the provisions of the *Planning Act* have been complied with. That cannot occur until severance of the Home Depot Lands has occurred. Given the combination of these two factors, I think the Court must conclude that Home Depot does not have a sufficient interest in land under the Home Depot Agreement to assert a claim under section 37(1).

159 I have some sympathy for the argument that Home Depot's leasehold interest under the Ground Lease, which is effective currently, is a sufficient ownership interest in the Home Depot Lands to obtain relief under section 37. Section 3.3(a) of the Ground Lease contains a covenant for quiet possession from Woods. The Ground Lease has a fixed term of 50 years and rental payments fixed for the entire period. In short, Home Depot has security of tenure as between itself and Woods. Such a long-term lease is often a substitute for ownership of the freehold interest. However, the language of section 37(1) appears to require a belief that the lien claimant is an owner of the relevant property. The Court has not been provided with any case law that supports the proposition that a leasehold interest in a property is a sufficient interest to obtain relief under section 37(1). Moreover, there is some authority to the contrary in *Metzger Estate v. Gardner*, [2000] O.J. No. 2280 (Sup. Ct. J.).

160 On the basis of the foregoing, I therefore conclude that Home Depot is not entitled to a lien against the Property under section 37(1) of the CLPA.

Claim for Equitable Lien

161 As mentioned, in the alternative, Home Depot claims an equitable lien in the Property equal to the amount by which the value of the Property has been enhanced by the construction of the Home Depot store. It relies on a line of cases in which equitable relief has been granted to parties who make improvements to a property at a time when they mistakenly believe they will be able to acquire the property: see, for example, *Montreuil* v. *Ontario Asphalt Co. and Caldwell Sand and Gravel Co.* (1922), 63 S.C.R. 401 at p. 429 per Anglin J.; *Isabelle* v. *Lahaie*, [2007] O.J. No. 4981 (Sup. Ct. J.); and *Hatoum* v. *Hatoum*, [1988] O.J. No. 1216 at p. 6-8 (H.C.J.) per Southey J., aff'd [1990] O.J. No. 1669 (C.A.).

162 I do not think that this principle is limited in operation to circumstances in which a claimant has an honest belief in his or her right to acquire the subject property. It is framed more broadly in *Chalmers v. Pardoe*, [1963] All E.R. 552 (P.C.) as follows:

> There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended.

163 On this issue, the equities clearly favour Home Depot over Woods. There is no apparent equitable consideration in favour of Woods. Home Depot had a right to purchase the Home Depot Lands as well as a leasehold interest under the Ground Lease having a term of at least 21 years. It appears that, at the time that it constructed the Home Depot store, there was no indication of the onset of Woods' financial difficulties, which later prevented completion of the sale transaction. In addition, the Home Depot store was constructed in accordance with arrangements that were specifically agreed to by Woods. Further, Woods did not appear on this motion and does not oppose a lien in favour of Home Depot. The Receiver effectively does not oppose this relief either as it is more concerned with the issue of the priority of such lien relative to the Romspen mortgages.

164 Based on the breadth of this principle, as well as the equitable considerations set out above, I think Home Depot would satisfy the test for an equitable lien based on its honest belief that, pursuant to the Ground Lease, it had a valid leasehold interest in the Property having a term of at least 21 years.

165 Accordingly, to the extent that Home Depot is not entitled to a lien against the Property under section 37(1) of the CLPA, I am of the opinion that it has satisfied the requirements of an equitable lien in the Property against the interest of Woods in the amount by which the value of the Property has been enhanced by the construction of the Home Depot store.

The Priority Issue

166 The real issue in this proceeding is not, however, whether Home Depot is entitled to a lien against the Property but whether such lien should rank in priority to Romspen's interest under the Romspen Mortgage. This issue appears to be a matter of first impression.

167 The Receiver and Romspen argue that equity cannot permit the priority of Romspen's interest in the Property to be reversed by equitable lien rights on the principle that, where the equities are equal between competing claims in a property, legal title prevails: see *Toronto-Dominion Bank v. Faulkner* (1990), 74 O.R. (2d) 92 at para. 18 (C.A.). However, this submission begs the question of whether the equities between Home Depot and Romspen are equal.

168 Home Depot points to a number of factors that it says should be taken into consideration by the Court. Home Depot's principal argument is that, in its view, Romspen allowed the construction of the Home Depot store on the Home Depot Lands and now seeks to take advantage of that improvement without compensation, which it characterizes as a windfall gain. It also argues that the Court should infer Romspen's consent to the construction of the Home Depot store from its execution of the Site Plan Agreement. Lastly, it says that if Romspen is successful, the Home Depot employees will lose their employment.

169 I have considerable sympathy for Home Depot's position notwithstanding the fact that they have contributed in a significant way to the present situation by deciding not to register the Home Depot Agreement or the Ground Lease. The reality is that, if the order is granted, Romspen will obtain the benefit of an improvement that it did not originally anticipate insofar as the parties did not expect, at the time the Home Depot store was constructed, that Woods would go into default on the Romspen Mortgage prior to completion of the sale of the Home Depot Lands.

170 However, I have concluded that Romspen's interest in the Property should have priority over Home Depot's equitable lien for the following reasons.

171 First, the mere fact that Romspen will obtain the value of the Home Depot store is not, by itself, sufficient to determine the issue of the priority of Home Depot's lien. To succeed in this claim, Home Depot must do more than demonstrate that it has improved the Property and that Romspen, as the mortgagee, will benefit if it is denied a prior equitable lien in respect of the improvement. It must establish either a consent of Romspen to the construction of the Home Depot store in circumstances indicating that the issue of priority was understood to be involved or another equitable consideration that justifies imposition of a prior lien in the absence of such consent.

172 In my opinion, Home Depot has failed to identify any other equitable consideration that justifies imposition of a prior lien in the absence of Romspen's consent to the construction of the store. Home Depot suggests that the Court should consider the possibility that its employees will lose their jobs. This is always an important consideration for courts in a receivership context. However, there is simply no basis in the evidence before me that would support such a conclusion. There are a number of possible outcomes to the present situation depending upon the business decisions of the parties after the release of this Endorsement.

173 Accordingly, the issue turns on whether Romspen consented to the construction of the Home Depot store on the Home Depot Lands in circumstances that it understood, or should reasonably have understood, that Home Depot would have a prior lien over such Lands to the extent of the value of the improvement. I conclude that Home Depot has failed to demonstrate any such consent of Romspen for the following reasons.

174 First, there is no evidence that Romspen ever consented directly to the construction of the Home Depot store. There is no evidence that Home Depot ever approached Romspen for such a consent. Nor is there any evidence of any communication between the parties that Romspen should reasonably have considered constituted a request for such a consent or required a response to protect its security position. Accordingly, there is no evidence that supports Home Depot's suggestion that Romspen "allowed" the construction of the Home Depot store in some manner.

175 Second, it is not suggested that the existence of the Home Depot Agreement implied a consent to the construction of the Home Depot store. Insofar as Home Depot suggests that the execution of the Ground Lease implies such a consent, I reject the submission for two reasons. Home Depot was not a party to the Ground Lease and gave no assurances in respect of Woods' representations therein. In addition, I have concluded that Home Depot did not have actual knowledge of, and did not consent to, the Ground Lease. There

is also no basis for implying consent to the construction of the Home Depot store from Romspen's execution of the Romspen Mortgage.

176 The issue therefore turns principally on whether Romspen's execution of the Site Plan Agreement somehow changes this result - that is, whether it constitutes consent to the construction of the Home Depot store or evidence of Romspen's consent given elsewhere to such construction. I do not think it does for four reasons.

177 First, there is nothing in the Site Plan Agreement that constitutes the express or implicit consent of Romspen to the construction of the Home Depot store. There is also nothing in the Site Plan Agreement that expressly contemplated that Home Depot would require or seek Romspen's consent to the construction of the Home Depot store. Romspen was entitled to assume from the absence of any contractual relationship between it and Woods, as well as the limited scope of the Site Plan Agreement, that Home Depot would approach it separately if it required a consent or other protection from Romspen in respect of the construction of the store on the Property.

178 Moreover, the Site Plan Agreement specifically referred to the earlier Romspen mortgages, which were registered against the Property and which maintained Romspen's control over the Property by the mechanism of Romspen's control over partial discharges of its security. The express subordination set out in the Site Plan Agreement related only to the rights of the Town of Collingwood. While rights of subordination of an interest in the Property are not the same as consent to the construction of the Home Depot store, the absence of any provision in the Site Plan Agreement dealing with Home Depot's rights in respect of the Property in the event of construction of the store is significant. If the Site Plan Agreement had been intended to grant Home Depot rights in respect of Romspen, it had to do so explicitly.

179 Second, more generally, there is no sense in which it can be said that Home Depot "allowed" the construction of the Home Depot store by executing the Site Plan Agreement. As mentioned, the only purpose of its execution of the Site Plan Agreement was to subordinate its interest in the Property to the interest of the Town of Collingwood. The Site Plan Agreement did not set out a timetable for the construction of the Home Depot store. Romspen could not know of Home Depot's intentions in this regard unless Home Depot chose to advise it. There is no evidence that Home Depot ever communicated its intention to construct the Home Depot store to Romspen.

180 Third, the circumstances in July 2006 were not such that Romspen's execution of the Site Plan Agreement can be taken as necessarily implying that Romspen turned its mind to the issue of the priority of any lien in favour of Home Depot in the Property that might arise after construction of the store and, by implication, agreed to subordinate Romspen' interest to any such lien. As mentioned above, the Romspen Mortgage was in good standing in July 2006. There was no reason to expect that Woods would be unable to obtain a partial discharge of the Home Depot Lands, in which case the priority issue would not arise.

181 Fourth, Home Depot has failed to identify any circumstances at the time of execution of the Site Plan Agreement that would have imposed an obligation on Romspen to take positive action to protect its position even if it suspected from the request to sign the Site Plan Agreement that Home Depot intended to construct the Home Depot store on the Home Depot Lands.

182 At all times, Home Depot's contractual relationships were restricted to Woods. The only exception was the Romspen acknowledgement, which addressed only the demolition of a portion of the industrial building on the Property. Home Depot was not required to notify Romspen of the commencement of construction of the Home Depot store or to seek its consent to such construction. Conversely, Romspen was not obligated to inquire as to Home Depot's intentions and to advise Home Depot that it did not consent to the construction of the Home Depot store insofar as it would give rise to a lien in priority to the Romspen Mortgage.

183 Ultimately, Home Depot's position is that Romspen ought to have known from the fact of the demolition of the portion of the industrial building and from the Site Control Agreement that it was proposing to build the Home Depot store on the Home Depot Lands and that Romspen had an obligation to advise Home Depot that it did not consent to such construction. There is no evidence that Romspen actually knew of Home Depot's intentions prior to commencement of construction beyond knowing that it was possible that Home Depot might construct a store on the Property. I do not think that Romspen could reasonably have known of

Home Depot's intention to commence construction immediately from the demolition and the Site Control Agreement alone. It certainly could not have known that Home Depot intended to commence construction without obtaining any consent or assurance from Romspen to protect its position in the event of realization proceedings by Romspen. In any event, however, neither actual nor constructive knowledge imposed any obligation on Romspen to approach Home Depot to protect its security position in the circumstances of unilateral action by Home Depot. There was no contractual relationship between the parties. There was no prior representation from Romspen to Home Depot. I know of no legal principle that would impose such an obligation in the circumstances of this case in the absence of any express communication from Home Depot to Romspen that could ground a claim based on reliance.

184 Accordingly, I conclude that the Romspen Mortgage has priority over any equitable lien in favour of Home Depot arising as a result of the construction of the Home Depot store on the Property.

185 In addition to the equitable considerations addressed above, I would add, if it were necessary to address this issue, that I see no basis for excluding the operation of section 93(3) of the *Land Titles Act* in respect of an equitable lien. There is nothing in the language of section 93(3) that provides that the principles of equity are intended to override the operation of this provision of the *Land Titles Act*. Indeed, an unregistered inequitable lien would appear to be the very type of interest to which section 93(3) is directed.

Conclusion Regarding the Equities Between the Parties Relative to the Receiver's Request for an Order Vesting Out the Interest of Home Depot in the Property

186 The foregoing issues, while they involve a consideration of the equities between the parties in relation to specific issues, are not determinative of the question of whether the Receiver should be granted an order approving the sale of the Property on a basis that vests out the interest of Home Depot. That requires a consideration of the equities between the parties based on the determinations made above and any other applicable considerations.

187 Based on the foregoing, the Court must consider the equities between the parties in the context of findings that

(1) Romspen's interest in the Property ranks ahead of that of Home Depot to the extent of the monies secured under the Romspen Mortgage or, alternatively, to the extent of the monies secured under the earlier Romspen mortgages in existence at the date of the Home Depot Agreement, plus interest at the rates provided for under those mortgages;
(2) Home Depot's equitable lien against the Property arising as a result of the construction of the Home Depot store does not rank prior to the interest of Romspen in the Property; and
(3) Home Depot is unable to establish as an undisputed fact that Romspen consented to the Home Depot Agreement, the Ground Lease or the construction of the Home Depot store in a manner that was intended to affect its rights in the Property.

188 I conclude that the Receiver should be granted an order permitting the sale of the Property free of the interest of Home Depot for the following reasons.

189 The equitable considerations addressed in the context of the determinations of the priorities of the respective interests of Romspen and of Home Depot in the Property are also applicable for the present assessment. In particular, Romspen bargained with Woods for the right to control the discharge of any portion of the Property from its security. Registration of the earlier Romspen mortgages, and of the Romspen Mortgage, was notice to Home Depot of the existence of such right. In addition, Romspen did not in any way provide assurance or comfort to Home Depot with respect to the priority of its interest in the Property or the protection of its interest in the event of realization proceedings.

190 The only other consideration to be addressed by the Court is, therefore, the value of the Property. As suggested in *1565397 Ontario Inc. (Re)*, [2009] O.J. No. 2596 (Sup. Ct. J.), while a court can sell property free of a contract entered into between a debtor and a third party, the Court cannot do so in circumstances where the effect is to extinguish an interest in property except in limited circumstances. Those circumstances

appear to be limited to those in which the third party has no equity in the subject property given the value of the property and prior encumbrances.

191 While the circumstances in the present proceedings are more complex than other decisions in which this principle has been applied, I think that the facts before the Court establish that there is no equity in Home Depot's interest in the Property.

192 The Sale Agreement contemplates a sale price of $14.1 million. This is substantially below the amount secured under the Romspen Mortgage, which is at least $17,844,975.38 plus interest since February 1, 2010. On this basis, there is no equity value in Home Depot's subordinate interests in the Property. Given the existing priorities, Home Depot's interest would only have value if the Receiver received an offer for the Property that fully satisfied the monies owing to Romspen.

193 Based on the foregoing analysis of the applicable equitable considerations as between Romspen and Home Depot, I conclude that the equities favour Romspen and, accordingly, that the Receiver is entitled to an order permitting the sale of the Property on a basis that vests out the Home Depot interests in the Property under the Home Depot Agreement and the Ground Lease.

Should the Court Approve the Sale Agreement?

194 The remaining issue is whether the Court should also approve the Sale Agreement at this time.

195 As mentioned, the Receiver's report sets out in detail the exposure of the Property to the market. In the usual circumstance, the nature and extent of such activities would be sufficient to satisfy the Court that the proposed sale price for the Property represented the fair market value of the Property.

196 There are, however, two unusual features of the present circumstances.

197 First, the Receiver's effort to market the Property took place principally in the first six months of 2009. While there are legitimate reasons for the delay in bringing on this motion, the stock market and residential real estate market have nevertheless improved significantly since then. There is, therefore, a possibility that the real estate market in Collingwood has improved in a like manner since then. The Court must be concerned that the sale price under the Sale Agreement may not represent the current fair market value of the Property.

198 Second, and more importantly, the Receiver marketed the Property on the basis that a purchaser was bound to sell the Home Depot Lands to Home Depot in accordance with the Home Depot Agreement. It is possible that the Property would be attractive to other potential purchasers as a result of the determination in this Endorsement that the Receiver has the authority to sell the Property free of any claim by Home Depot. This consideration is relevant to the question as to whether the sale price under the Sale Agreement represents the current fair market value of the Property.

199 Further, the Receiver itself suggests that Home Depot is financially able to acquire the Romspen Mortgage and develop the Property itself if this motion is decided against it and it wishes to avoid the loss of its investment in the Home Depot store. I do not suggest that any such action is probable. However, it does raise the possibility that, as a result of the determination in this proceeding, Home Depot may itself wish to participate in the sales process in some manner.

200 Given these circumstances, the Court is of the view that it cannot consider approval of the Sale Agreement until the Receiver has conducted a further sales process in respect of the Property on the basis that a purchaser would be entitled to acquire the Property free and clear of any lien or claim of Home Depot. Rather than address the nature of and length of any such sales process, the Court is of the view that it should leave such details to the Receiver subject, of course, to the Receiver's right to seek the advice and directions of the Court at any time.

Further Order

201 At the request of the Receiver, an appraisal of the Property obtained by the Receiver from High Point Danbury Realty Advisors Corporation is hereby sealed pending completion of the sale of the Property or further order of this Court.

Costs

202 If the parties are unable to agree on costs of this motion, they shall have thirty days to make written submissions to the Court through the Commercial List Office, not to exceed seven pages in length.

H.J. WILTON-SIEGEL J.

TAB 3

1992 CarswellOnt 608
Ontario Court of Justice (General Division)

Atlas-Gest Inc. v. Brownstones Building Corp.

1992 CarswellOnt 608, [1992] O.J. No. 1674, 26 R.P.R. (2d) 233, 2 C.L.R. (2d) 275, 35 A.C.W.S. (3d) 158

Re Contruction Lien Act, 1983

ATLAS-GEST INC. v. THE BROWNSTONES BUILDING CORPORATION, THE BREAKERS EAST INC., MONTREAL TRUST COMPANY, MONTREAL TRUST COMPANY OF CANADA and URSUS CAPITAL CORPORATION

MONTREAL TRUST COMPANY OF CANADA v. JOHN J. RYAN, KATHLEEN TIMMINS, 713905 ONTARIO LIMITED and THE BREAKERS EAST INC.

Stach J.

Heard: July 15-17, 1992
Oral reasons: July 17, 1992
Written reasons: August 11, 1992
Docket: Docs. 92-CQ-21862 and 38494/91

Counsel: *T. Kerzner, Q.C.*, for defendants Montreal Trust Company and Montreal Trust Company of Canada (Doc. 38494/91), and for plaintiff Montreal Trust Company of Canada (Doc. 92-CQ-21862).
John A.M. Judge and *Jim Doris*, for plaintiff Atlas-Gest Inc.
W.G. Dingwall, Q.C., and *Ian C. Marshall*, for defendants Brownstones Building Corporation, The Breakers East Inc. and Ursus Capital Corporation.
Max Shafir, Q.C., for lien claimant Forum Electrical.
Bruce Bos, for lien claimant Quality Rugs of Canada.

Subject: Property; Contracts; Civil Practice and Procedure; Corporate and Commercial

Table of Authorities

Cases considered:

Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp. (April 19, 1975), Grange J. (Ont. H.C.) [unreported] — *applied*

Macon Drywall Systems Ltd. v. H.P. Hyatt Construction Ltd., [1972] 3 O.R. 189, 17 C.B.R. (N.S.) 6, 27 D.L.R. (3d) 641 (H.C.) — *applied*

Royaledge Industries Inc. v. Perma-Roof Ontario Ltd. (1991), 44 C.L.R. 160, 2 O.R. (3d) 488 (Gen. Div.) — *applied*

Statutes considered:

Construction Lien Act, R.S.O. 1990, c. C.30 —

s. 68

Rules considered:

Ontario, Rules of Civil Procedure —

R. 41

Ontario, Rules of Practice.

Motion by mortgagee for appointment of trustee-receiver-manager over uncompleted condominium project.

Editor's Note

The developer applied for a stay of this order pending appeal. On August 13, 1992, Mr. Justice Montgomery (Doc. Whitby 38494/91, Ont. Gen. Div.) refused the application on the basis of balance of convenience. Montgomery J. determined that a stay would cause delay which would harm unit purchasers and lien claimants, and would certainly jeopardize the mortgagee's security interests.

***Stach J.*:**

1 In this proceeding, the Montreal Trust Company of Canada and the Montreal Trust Company ("Montreal Trust") ask the court to appoint Coopers & Lybrand Limited as trustee of a parcel of land on which a 68-unit luxury building is situate, and as receiver-manager of The Breakers East Inc. ("Breakers"), the registered owner of the land in question.

2 The building is up, and although substantially complete, requires approximately $200,000 to render it into a state of completion that will permit the many remaining condominium units

to be offered for sale. Several of the 68 condominium units have already been "sold," and have undergone the first phase of closing, known as "occupancy closing." The general contractor on this project has long since left the site as a result of a dispute with Breakers; that dispute is multi-faceted, and is now the subject of litigation.

3 The first mortgage on this development is held by the Montreal Trust Company of Canada, and although the mortgage matured on December 1, 1990, it remains unpaid. Approximately $13.6 million remains outstanding on the principal of that mortgage and, as at May 21, 1992, another $1.276 million has accrued in unpaid interest charges; and the interest continues to accrue.

4 The documentation necessary to effect registration of the project as a condominium is at hand, but has not been tendered for registration, owing in large measure to a dispute involving Breakers and a related corporation on the one hand and Montreal Trust on the other. The resulting stalemate has already endured for a considerable period. Numerous construction lien claims in excess of $2.7 million have been registered against the land.

5 Unit purchasers who have already occupancy closed are unable to secure title to their holdings, because title closing cannot take place until condominium registration is completed. The impasse between Breakers and Montreal Trust appears on the surface to stem from an obdurate position being taken by Breakers and a related corporation; the impasse shows no hint of ending or even abating. This continuing stand-off operates to the financial disadvantage of those persons who have completed occupancy closings but are unable and helpless to secure final closing. Debts for hydro and other services to the building are substantial, and are in considerable arrears.

6 The current real estate market is uncertain. If the impasse is allowed to carry on, interest charges will continue to accrue, and will continue to erode the pool of funds ultimately available to construction lien claimants. The security interest of Montreal Trust is likely to come increasingly in jeopardy.

7 Such is the background confronting the court in this proceeding.

8 Breakers takes the preliminary position that this motion is fatally flawed and that, in the result, it is a nullity. In short, counsel for Breakers advance the position that this proceeding ought to have been commenced by way of "application" rather than by "motion," and that the failure to do so is fatal to the position of Montreal Trust.

9 I hold a different view. Counsel have kindly provided me not only with the 1990 revision of the *Construction Lien Act*, R.S.O. 1990, c. C.30, but also the predecessors of that statute. I have carefully examined s. 68 of the current *Construction Lien Act* against the relevant statutory provisions in the predecessor legislation. Counsel have also provided me with the relevant *Rules of Practice* which obtained at the time the predecessor legislation was in effect, and also drew to my

attention the current *Rules of Civil Procedure* which apply in respect of the current *Construction Lien Act.*

10 After hearing the submissions of counsel, I have come to the view that the "form" of the proceeding is not what governs, and that the proceedings as presently constituted in the form of a motion are in fact properly constituted. In coming to that view, I also place reliance on *Macon Drywall Systems Ltd. v. H.P. Hyatt Construction Ltd.*, [1972] 3 O.R. 189, 17 C.B.R. (N.S.) 6, 27 D.L.R. (3d) 641 (H.C.), in which Mr. Justice Lerner carefully analyzed a considerable body of case authority in coming to the conclusion that the request to appoint a trustee (under the predecessor legislation) was an interlocutory proceeding, i.e., and can be brought on a motion. The "old" *Rules of Practice* also contemplate such an interpretation. Although the 1990 revision of the *Construction Lien Act* and the "new" *Rules of Civil Procedure* have minor changes of wording, they do not dictate the result contended for by counsel for Breakers which, in my opinion, would be manifestly undesirable as a throwback to the old forms of action. Accordingly, any technical objection based upon the form of the proceeeding now before this court must, in my view, fail.

11 In the argument before me, it was vigorously urged by counsel for Montreal Trust that some of the documentation prepared by Breakers, by a closely related corporation and by Mr. Ryan, was either fraudulent or had a dishonest intent. I do not discern from the im pugned documentation, nor from the cross-examination of Mr. Reinards, any fraud, dishonesty or deceit. Rather, I regard the documentary steps taken by "the Breakers group" as an attempt to protect its additional investment vis-à-vis Montreal Trust, and as continuing evidence of the stalemate that exists between this group and Montreal Trust. The "Breakers group" may well have deliberately created this impasse to protect their interest vis-à-vis Montreal Trust on grounds that are not contemplated in the Montreal Trust security agreements. But there is no fraud.

12 The power of the court to appoint a trustee and a receiver-manager has its origin in the law of equity. Although the notice of motion does not clearly allege fraud or dishonest intent, the thrust of many parts of Mr. Reinards's affidavit in support of the application makes such allegations, and they were expanded upon in the submissions before me by counsel for Montreal Trust. Having regard for my finding that Montreal Trust has failed to established these very serious allegations, that alone may have been sufficient for me to dismiss this motion. I do not do so, however.

13 There are other factors which the court considers of such sufficient significance that, in the final analysis, an order appointing a trustee and a receiver-manager must issue. In making such an order on the basis that it is just and convenient in all of the circumstances to do so, this court is nevertheless mindful of the proposition that the appointment of a trustee, receiver-manager, is an extraordinary remedy, and must therefore be a remedy that is granted rarely.

14 One is similarly mindful of the series of cases (outlined in G.D. Watson and M. McGowan, *Ontario Civil Practice* (Toronto: Carswell, annual) under R. 41 of the *Rules of Civil Procedure*) which tend to indicate that the remedy is one that is not given without great care.

15 In applying what I consider to be the appropriate considerations, I found it most useful to review the decision of Mr. Justice Lane in *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.* (1991), 44 C.L.R. 160, 2 O.R. (3d) 488 (Gen. Div.). In addition, I drew assistance from the full test of an earlier unreported decision of Mr. Justice Grange (as he then was) in *Durcard Mechanical Contractors Ltd. v. I.C.R. Development Corp.* (April 19, 1975), (Ont. H.C.) [unreported]. Although their precise make-up may vary greatly, the factors that seem to emerge in these kinds of cases appear to have considerable commonality. Yet it is the particular mix of factors present, their precise make-up and their relative importance in the particular circumstances that must in the end govern the discretion which the court exercises.

16 In *Royalege*, for example, Mr. Justice Lane refused to appoint a trustee for reasons he summarized, in part, as follows (at p. 497 [O.R.]):

> There is no vacuum in the management of these premises; the owner has not abandoned them, is not insolvent and is not acting in an irresponsible way. There is no income flow to be taken in hand for the benefit of the lien claimants to avoid a sale of the premises. There is no danger of deterioration of the services that have been installed. The security of the lien claimants has not been shown to be at risk.

17 In *Durcard*, the situation before the court invoved an apartment building that was up and, although not fully rented, was apparently being managed properly. On the contested allegations before him, Mr. Justice Grange could not determine whether the lien claimants were truly at risk.

18 In the case before me, the luxury condominium building is "up," but unfinished, and not in a state that permits the sale of several additional units to go ahead. Nor, in this artificial stalemate, can those units which are already "sold" proceed to final closings. If existing unit sales were allowed to complete and prospective sales permitted to go ahead, two separate streams of substantial income flow could be tapped.

19 I am satisfied that the impasse is even now operating to the financial detriment of lien claimants and to the financial detriment of unit purchasers who are otherwise innocent. The impasse, if allowed to continue, will result in a proportionately greater erosion of their respective positions. Accordingly, I am satisfied that the impasse has resulted in the neglect of essential management functions.

20 To be sure, Breakers also has a direct interest in the overall completion of the enterprise and, to the extent that the Breakers "group" has a legitimate dispute with Montreal Trust or other

interested persons as to the priority that can or should attach to its "additional investment," my reasons should not be taken as an attempt to eliminate that perceived right.

21 Although it cannot be said, particularly with the mortgagee having gone into possession of the unfinished premises, that there is any *physical* deterioration of the asset here in question, yet it is plain that the value of the assets is deteriorating in an economic sense.

22 In coming to this result, I am reluctant to characterize Breakers as insolvent. It is not entirely clear from the evidence whether Breakers's failure to pay many of the outstanding accounts resulted from insolvency, or whether the failure was just symptomatic of the impasse that developed between Breakers and Montreal Trust. To be sure, the mortgage indebtedness of Breakers to Montreal Trust is very substantial, and has remained outstanding for a period in excess of 18 months. There are serious implications to a finding of insolvency, however, and I believe that aspect of the matter is better left to the appropriate forum to deal with on greater evidence than was before me on this issue. Suffice it to say that a very significant debt has remained outstanding for a considerable period, and it is my view that the security interest of Montreal Trust also stands to be imperilled further,and proportionately more, as the situation in its present state is allowed to continue.

23 In conclusion, I find that there are sufficient indicia to meet the test most recently set out in the *Royaledge* case by Mr. Justice Lane.

24 In the order that I make appointing a trustee and receiver-manager, I do not wish to be over-broad. To the contrary, I choose explicitly to narrow the authority of Coopers & Lybrand Limited by making it plain that the trustee-receiver-manager may not intrude on the ability of the directors or officers of Breakers to continue with any current litigation or to commence any additional litigation, if advised, provided that such litigation does not have the effect of imperilling the assets which are the subject of the charge to the trustee. I am hopeful that counsel can draft an order which incorporates that intent. If there is no agreement, I may be of some assistance in setting the terms of the order.

25 Accordingly, I make an order appointing Coopers & Lybrand Limited as trustee of the lands in question and as receiver and manager of The Breakers East Inc., subject to the limitations that I have already expressed. By way of direction to the trustee and receiver-manager, there will be an order directing Coopers & Lybrand, in addition to its other duties, to take such steps as are necessary to register the property as a condominium corporation, to complete and close the existing agreements of purchase and sale and to sell unsold units. In addition, there will be an order requiring The Breakers East Inc. and Ursus Capital Corporation, its officers, directors, agents (including solicitors), to turn over all documents, writings, records and things relating to the registration of the condominium corporation, and that each of them co-operate with the trustee and receiver and manager for these purposes.

26 I adverted earlier in my reasons to the fact that I did not discern any dishonest or fraudulent purpose in the documentation of the Breakers group. Because of that finding, I make no order for costs.

Addendum

27 Appended as Schedule "A" to these reasons is the form of order settled with the assistance of counsel on July 30, 1992.

Motion granted.

Appendix — Order

This motion made by Montreal Trust Company of Canada for an order appointing Coopers & Lybrand Limited as receiver and manager of The Breakers East Inc. and as trustee of the lands and premises referred to in this order, without security, was heard the 15th, 16th and 17th days of July, 1992, at Toronto, Ontario.

On reading the evidence and proceedings herein and upon hearing counsel for the parties:

1. This court orders that Coopers & Lybrand Limited be and it is hereby appointed receiver and manager without security of all of the assets, property and undertaking of The Breakers East Inc., save the causes of action being or to be advanced by The Breakers East Inc. against the plaintiff and its bonding company, with authority to manage and operate the business and undertaking of The Breakers East Inc. in respect of which it has been herein appointed and to act at once until further order of this court.

2. This court orders that Coopers & Lybrand Limited be and it is hereby appointed trustee under the *Construction Lien Act* of the lands and premises set out below:

> Parcel J-2, Section M-977, part of Block J, according to Plan M-977, designated as parts 2, 9 and 10, Plan 40R-11755, Town of Ajax, Regional Municipality of Durham, Land Titles Division of Durham (No. 40)

3. This court orders that the said trustee, and receiver and manager (hereinafter "Coopers"), shall have the powers set out in this order.

4. This court orders that The Breakers East Inc., its officers, directors, agents, servants, solicitors and shareholders, do forthwith deliver to Coopers all of the assets, property and undertaking of every kind and nature of The Breakers East Inc., save those excluded from Coopers' appointment, and all books, documents, contracts, papers and records of every kind relating thereto, and to co-operate with Coopers in so doing and without restricting the generality of the foregoing, all documents, plans, writings, records or things, necessary for

the due and prompt registration of the subject lands and premises as a condominium, and the closing of the existing agreements of purchase and sale with purchasers, including those who have taken interim occupancy under their agreements of purchase and sale, subject to any further order of the court in respect of documents required solely for The Breakers East Inc.'s prosecution or defence of claims left to its control herein by paras. 1 and 7 hereof.

5. This court orders that Coopers be and it is hereby empowered to complete any construction or repairs that it feels are necessary, in order to permit sales of units to close or to be entered into and to comply with or otherwise perform agreements of purchase and sale with purchasers existing or future.

6. This court orders that Coopers be and it is hereby authorized to take appropriate steps for the preservation of the subject lands and premises.

7. This court orders that Coopers be and it is hereby fully authorized and empowered to institute and prosecute all actions, applications or proceedings as may in its judgment be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed and likewise to defend all actions, applications or proceedings as may in its judgment be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed and likewise to defend all actions, applications or proceedings instituted against The Breakers East Inc. or Coopers and to appear in and conduct the prosecution or defence of any such action, proceeding or application now or hereafter instituted in any court by or against The Breakers East Inc., the prosecution or defence of which will in the judgment of Coopers be necessary to take possession of, receive, protect, preserve or realize upon the assets, property and undertaking of The Breakers East Inc. in respect of which Coopers has been appointed, and the authority hereby conferred shall extend to such appeals as Coopers shall deem proper and advisable in respect of any order or judgment pronounced in any such action, application or proceeding. For greater clarity, the authority hereby given to Coopers shall not include the prosecution of causes of action in respect of which Coopers has not been appointed nor the defence of this or any other *Construction Lien Act* claim (including breach of trust claims even if commenced by proceedings under the *Courts of Justice Act*) against The Breakers East Inc. or the defence of Action 92-CQ-21862.

8. This court orders that Coopers shall be at liberty to retain agents or such assistance including solicitors from time to time as it may consider necessary for the purposes of preserving the said assets, property and undertaking of The Breakers East Inc. and carrying on its business in respect of which Coopers has been appointed, and generally performing its duties and powers hereunder.

9. This court orders that Coopers shall be at liberty to carry on the business of The Breakers East Inc. including:

(a) To carry on the business of The Breakers East Inc., including the power to sell those of its assets in respect to which it has been appointed in the ordinary course of business;

(b) To sell, lease or mortgage the assets, property, and undertaking of The Breakers East Inc. or any part or parts thereof in respect to which it has been appointed out of the ordinary course of business with the approval of this court, without waiting for the determination of any inquiries or accounts which may be directed herein or in the future, provided that the purchase money, rent or proceeds of any such realization shall be paid to Coopers;

(c) To manage, rent or lease and collect the rents, interim occupancy fees and other revenues from the lands and premises;

(d) To sell, lease, mortgage, or otherwise dispose of all or a part of the lands and premises in the ordinary course;

(e) To take such steps for the preservation and protection of the assets, property and undertaking of The Breakers East Inc. in respect of which it has been appointed as Coopers deems necessary;

(f) To purchase or lease such machinery and equipment as may be necessary for the improvement or enhancement of the business assets or undertaking of The Breakers East Inc. in respect of which it has been appointed;

(g) To settle, extend or compromise any indebtedness or claim by or to The Breakers East Inc. in respect of which it has been appointed or for which it has authority to defend;

(h) To enter into any agreements or incur any obligations necessary or reasonably incidental to the exercise of the powers granted in this order to Coopers.

10. This court orders that Coopers is authorized to join in and execute all necessary bills of sale, conveyances, deeds and documents of whatsoever nature in the name of and on behalf of The Breakers East Inc., in respect of the business, assets and undertaking in respect of which it has been appointed.

11. This court orders that any expenditure which shall be properly made or incurred by Coopers shall be allowed to it in passing its accounts and together with its remuneration shall form a charge on the assets, property and undertaking of The Breakers East Inc. in priority to all prior and subsequent encumbrances.

12. This court orders that Coopers may from time to time move this court for advice and direction in the discharge of its powers and duties hereunder.

13. This court orders that liberty be reserved to any interested person to bring a motion to this court for such further order as such person may be advised.

14. This court orders that there be no order as to the costs of this motion.

15. This court orders that Coopers make a first report to this court as to its administration within 60 days of the date of this order.

16. This court orders that Coopers shall pass its accounts from time to time and shall pay the balance in its hands into court to the credit of this action or as the court may otherwise direct. Coopers shall be at liberty from time to time to apply reasonable amounts from the moneys in its hands against its fees and disbursements and such amounts shall constitute advances against its remuneration when assessed.

17. This court orders that Coopers be and it is hereby empowered to borrow moneys without personal liability from time to time as it may consider necessary, not exceeding the principal sum of $200,000 in the aggregate at such rate or rates of interest as it deems advisable and for such period or periods as it may be able to arrange for the purpose of taking possession of, receiving, protecting, preserving or realizing upon the assets, property and undertaking of The Breakers East Inc. in respect of which it has been appointed and that as security for such borrowings and every part thereof, Coopers is authorized to pledge, assign or give security or securities on any such assets, property or undertaking but subject to the right of Coopers to be indemnified out of such assets, property and undertaking with respect to its liabilities, amounts and its own remuneration properly incurred and all of such amounts shall be a first charge on such assets, property and undertaking.

18. This court orders that the moneys authorized to be borrowed by this order shall be in the nature of a revolving credit and that Coopers may pay off or reborrow within the limits of the authority hereby conferred so long as the maximum principal amount owing in respect of such borrowings at any one time does not exceed the amount hereby authorized.

19. This court orders that for purposes of its borrowings, Coopers be authorized to give or issue receipts or receivers' certificates for any such moneys borrowed by it pursuant to this order, which receipts or certificates shall substantially be in the form of the Schedule "A" annexed hereto.

20. This court orders that any security granted by Coopers in connection with its borrowings shall not be enforced without leave of this court.

21. This court orders that no action, application or other proceedings shall be taken or continued against The Breakers East Inc. or Coopers without leave of this court first being obtained, except that the following shall be allowed to proceed as to The Breakers East Inc.:

(a) Those which have been excluded from Cooper's authority to defend by para. 7 of this order and from prosecuting by para. 1 of this order;

(b) Such other proceedings as the court may by order hereafter determine.

22. This court orders that the tenants of any property of The Breakers East Inc. do attorn to and pay their rents in arrears and accruing rents to Coopers and that any persons who are liable to pay interim occupancy fees to The Breakers East Inc. shall hereby attorn to and pay such occupancy fees in arrears and accruing occupancy fees to Coopers.

23. And this court orders that without limiting the generality of any preceding paragraph of this order, all persons, firms, and corporations be and they are hereby enjoined from disturbing and interfering with utility services including but not limited to the furnishing of gas, heat, electricity, water, telephone or any other utilities of like kind furnished up to the present date to The Breakers East Inc., and they are hereby enjoined from cutting off or discontinuing or altering any such utilities or services to Coopers, except upon further order of this court.

24. And this court orders that the liability of Coopers which it may incur as a result of its appointment or as a result of the performance of its duties hereunder, save and except for negligence or wilful misconduct, shall be limited to the net proceeds realized upon the lands and premises. The net proceeds of the lands and premises shall be the cash proceeds realized by Coopers from the disposition of the lands and premises or any part thereof after deducting the remuneration and disbursements of Coopers and after any moneys borrowed by Coopers pursuant to this order are repaid.

25. And this court orders that the provisions of para. 4 hereof shall apply mutatis mutandis to Ursus Capital Corporation, its officers, directors, solicitors, servants or agents to turn over all documents, writings, records and things relating to The Breakers East Inc., the lands and premises which are the subject-matter of this order, including but not limited to those necessary or required by Coopers in order to effect prompt registration of the subject property as a condominium, including but not limited to all plans, surveys and approvals required for condominium registration, and to co-operate with Coopers in so doing.

26. And this court orders that for greater clarity in its duties and powers hereunder, without in any way restricting the generality of those, Coopers shall take such steps as are necessary to register the subject property as a condominium, complete and close existing agreements

of purchase and sale, complete necessary construction or repairs where required in order to close or effect sales of units, and sell all unsold units in the subject property.

SCHEDULE "A"

Amount
$_____

Receiver's Certificate
No.

1. This is to certify that Coopers & Lybrand Limited, trustee and receiver and manager of the assets, property and undertaking of The Breakers East Inc. (the "company") acknowledges receipt of $_____ as trustee and receiver and manager, and that the trustee and receiver and manager is indebted to the holder of this certificate in the sum of $_____ in the aggregate.

2. The principal sum of $_____ represented by the certificate is payable on the _____ day of _____ 199_, [or, on demand] with interest thereon at the rate of _____ % per annum payable monthly on the _____ day of _____, 199_, and thereafter in each and every month.

3. The said principal sum of $_____ together with interest thereon is issued pursuant to the order and is secured by the assets, property and undertaking of the company, but subject to any higher ranking security in the nature of a mortgage, lien or encumbrance and to the right of the trustee and receiver and manager to be indemnified out of such property for its liabilities, its expenses and its own remuneration properly incurred.

4. All sums payable in respect of principal and interest under this certificateare payable at the office of _____ at _____ in the City of Toronto, in the Municipality of Metropolitan Toronto.

5. In case default shall be made in payment of interest on this certificate and such default shall continue for a period of _____ days, the principal of this certificate may be declared immediately due and payable by the holder hereof. This certificate and any security granted pursuant to it shall not be enforced without leave of this court.

6. All liability in respect of the whole or any part of the principal sum for which this certificate is issued and for interest thereon shall at any time and from time to time be terminated on tender to the holder hereof of the whole or such part of such principal sum then outstanding with interest accrued thereon to the date of such tender.

7. The trustee and receiver and manager does not undertake and is not under any personal liability to pay any sum in respect of which it may issue certificates under the terms of the said order.

Dated at _____ this _____ day of _____, 199_.

The Breakers East Inc.

Per:_____

End of Document

TAB 4

Case Name:

Technicore Underground Inc. v. Toronto (City)

Between
Technicore Underground Inc., Plaintiff, and
City of Toronto, Defendant (Respondent), and
Clearway Construction Inc., Third Party (Appellant)

[2012] O.J. No. 4235

2012 ONCA 597

296 O.A.C. 218

14 C.L.R. (4th) 169

2 M.P.L.R. (5th) 1

220 A.C.W.S. (3d) 333

354 D.L.R. (4th) 516

2012 CarswellOnt 11173

Docket: C54801

Ontario Court of Appeal
Toronto, Ontario

E.E. Gillese, R.G. Juriansz and G.J. Epstein JJ.A.

Heard: June 20, 2012.
Judgment: September 12, 2012.

(71 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- To dismiss action -- Appeal by contractor from summary dismissal of bulk of its claims against City dismissed -- Parties' contract, pursuant to which contractor was to build water main for City, contained notice provision specifying time frame for bringing claims for additional payment, relative to completion of work giving rise to claim -- Contractor's claim in subsequent court proceedings was limited to claim it previously brought within mandated time frame in contract.

Construction law -- Contracts -- Miscellaneous issues -- Appeal by contractor from summary dismissal of bulk of its claims against City dismissed -- Parties' contract, pursuant to which contractor was to build water main for City, contained notice provision specifying time frame for bringing claims for additional payment, relative to completion of work giving rise to claim -- Contractor's claim in subsequent court proceedings was limited to claim it previously brought within mandated time frame in contract.

Appeal by Clearway from the summary dismissal of the bulk of its multimillion dollar construction claim against the City of Toronto. Clearway contracted to construct a water main six kilometres long under a number of City roads. The contract provided that claims for additional payment needed to be provided within seven days of commencing that part of the work forming the claim. Clearway subcontracted Technicore to do the underground tunneling, using a tunnel boring machine. Technicore excavated a tunnel under Leslie Street. A flood resulted on August 2, 2006. Technicore's boring machine was trapped under Leslie Street by the flood. After rescuing the machine, Technicore completed the work by December 22, 2006. Technicore claimed $800,000 against Clearway for damages arising from the flood. In March 2007, Clearway submitted a claim to the City for an additional payment under the contract of $1,270,000 to cover costs incurred as a result of the flood. The City denied Clearway's claim. Technicore commenced the main action in these proceedings, against the City, in July 2008. The City defended and third partied Clearway. Clearway defended and counterclaimed against the City in March 2010. Clearway amended its counterclaim to increase its damages to $3,400,000 in June 2011. The City was successful on its summary judgment application to dismiss those parts of Clearway's claim in excess of its March 2007 claim directly to the City.

HELD: Appeal dismissed. The City was entitled to rely on the notice provision in the parties' contract. The City was under no obligation to lead evidence of prejudice. Prejudice could be presumed where Clearway was attempting to make a multimillion dollar claim years after the contract permitted. There was no course of conduct between the City and Clearway indicating that they did not intend to be bound by the notice provision in their contract.

Appeal From:

On appeal from the judgment of Justice Beth Allen of the Superior Court of Justice, dated December 5, 2011.

Counsel:

Christos Papadopoulos, for the appellant.

Darrel A. Smith, for the respondent.

The judgment of the Court was delivered by

1 **E.E. GILLESE J.A.**:-- The City of Toronto (the "City") successfully disposed of the bulk of a multimillion dollar construction claim against it, by means of a partial summary judgment motion. The claimant says that the matter requires a trial and should not have been decided by way of summary judgment.

2 Is the claimant correct? In my view, it is not. As I will explain, this appeal should be dismissed.

OVERVIEW

3 Clearway Construction Inc. ("Clearway") entered into a construction contract with the City in which it agreed to construct a water main 5.88 kilometres in length (the "Contract"). The water main ran under a number of roads in Toronto, including Leslie Street (the "Leslie Street Project").

4 Clearway subcontracted with Technicore Underground Inc. ("Technicore") to do the underground tunnelling, which it did through a tunnel boring machine.

5 Technicore excavated the tunnel under Leslie Street. During the evening of August 2 - 3, 2006, there was a flood in that tunnel. It is the flood that led to these legal proceedings.

6 As a result of the flood, Technicore's tunnel boring machine was trapped under Leslie Street. After rescuing and refurbishing the boring machine, Technicore completed the tunnelling by December 22, 2006.

7 The Contract work affected by the flood was completed at the end of December 2006.

8 By letter dated February 9, 2007, Technicore made a claim against Clearway for approximately $800,000 plus G.S.T. for damages arising from the flood (the "Technicore claim").

9 On March 6, 2007, Clearway submitted a claim to the City for additional payment under the Contract to cover costs incurred as a result of the flood (the "March 2007 Claim"). In the March 2007 Claim, Clearway sought approximately $1,270,000, comprised of indemnity for the Technicore claim plus a claim for approximately $400,000 of its own costs incurred as a result of the flood. In the March 2007 Claim, Clearway noted the possibility that "some costs have not yet been identified" and "reserve[d] the right to claim payment for work(s) not specifically mentioned herein".

10 By letter dated April 4, 2007, the City denied the March 2007 Claim.

11 Technicore started the main action in these proceedings on July 30, 2008. It claimed solely against the City for damages suffered as a result of the flood.

12 The City defended and started a third party claim against Clearway for contribution and indemnity, and additional damages.

13 Clearway defended the City's third party claim and counterclaimed against the City. In its initial defence and counterclaim, served on the City in March 2010, Clearway sought indemnity for the Technicore claim, plus damages of $1,000,000.

14 In August of 2010, Clearway sent the City a claim in which it repeated the amounts sought in the March 2007 Claim and added new claims in excess of $3,000,000 (the "August 2010 Claim").

15 In an amended defence and counterclaim dated June 23, 2011 (the "Counterclaim"), Clearway continued to seek indemnity for the Technicore claim but increased its damages claim to just over $3,400,000.

16 In a companion construction lien action, Technicore sues Clearway for damages arising out of the Leslie Street flood and for certain other claims. The lien action has been ordered to be tried together with this proceeding.

17 The City brought a motion for partial summary judgment, seeking a dismissal of those parts of the Counterclaim that were in excess of the March 2007 Claim. The focus of the motion was paragraph GC 3.14.03.03 of the General Conditions that were included as part of the Contract (the "Notice Provision"). The Notice Provision sets out specific requirements for the filing of claims under the Contract. It reads as follows:

> The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than 30 Days after completion of the work affected by the situation. The detailed claim shall:
>
> a) identify the item or items in respect of which the claim arises;
> b) state the grounds, contractual or otherwise, upon which the claim is made; and
> c) include the Records maintained by the Contractor supporting such claim.

18 The full text of GC 3.14 can be found as appendix A to these reasons.

19 The motion judge concluded that Clearway was limited to the March 2007 Claim. By judgment dated December 5, 2011, she granted partial summary judgment (the "Judgment").

20 Clearway appeals. It contends that the portions of its Counterclaim that the Judgment has the effect of dismissing raise genuine issues requiring a trial. It asks that the Judgment be set aside.

21 In my view, the motion judge correctly decided this matter. I would dismiss the appeal.

A PRELIMINARY MATTER

22 The focus of the motion below was on the timing of the August 2010 Claim, as it had been made years after the time required by the Notice Provision. However, the motion judge struck two other parts of the August 2010 Claim for reasons other than the timing of its delivery.

23 First, she struck those parts of the August 2010 Claim that pre-dated, and were unrelated to, the Leslie Street Project, noting that they failed to raise a genuine issue requiring a trial in respect of the City's liability.

24 Second, she struck the parts in which Clearway sought reimbursement for the claims that Technicore made against it (Clearway) in the related lien action that had not been made against the City. These other Technicore claims against Clearway were unrelated to the flood or the work under Leslie Street ("the non-Leslie Street Claims").

25 Before the motion judge, the parties agreed that the non-Leslie Street Claims were not properly asserted against the City and should be dismissed, but they disagreed on the procedure that should be followed for their dismissal. The motion judge was satisfied that partial summary judgment was an appropriate method by which to dispose of the non-Leslie Street claims.

26 I do not understand Clearway's appeal to extend to these two other parts of the August 2010 Claim, even though Clearway purports to seek to have the entire Judgment set aside. However, even if Clearway did intend to appeal the dismissal of these parts of the Counterclaim, it is readily apparent that the appeal fails in respect of these items. For the reasons given by the motion judge, they raise no genuine issue requiring a trial in respect of the City.

THE ISSUES

27 Clearway submits that the motion judge erred in:

1. her interpretation of the Notice Provision;
2. granting the motion despite the absence of evidence of prejudice to the City;
3. allowing the City to rely on the Notice Provision when it had failed to comply with GC 3.14.04;
4. failing to recognize and find that items 7 and 8 in Part 1 of the August 2010 Claim are the same as items 3 and 6 of the March 2007 Claim; and
5. allowing the City to rely on the Notice Provision when it has raised no complaint in respect of the date of delivery of the March 2007 Claim.

ANALYSIS

Issue 1: *Interpreting the Notice Provision*

28 Based on the jurisprudence, the motion judge concluded that the Notice Provision operated as a condition precedent that served to bar the August 2010 Claim because Clearway failed to deliver it (the August 2010 Claim) before the expiry of the time limit. Clearway submits that the motion judge erred in her interpretation of the Notice Provision. It argues that had the motion judge reviewed GC 3.14 in its entirety, she would have seen that the Notice Provision in GC 3.14.03 simply sets out a procedure to identify, and provide details of, any claims that are to be subsequently negotiated and possibly mediated pursuant to GC 3.14.04 and 3.14.05. As none of these provisions contains a "failing which" clause, Clearway submits that the Contract does not contain the clear language necessary to deprive it of the right to proceed with its full counterclaim against the City.

29 I do not accept this submission. The Notice Provision sets out a mandatory procedure for the filing of claims under the Contract, including the requirement that detailed claims are to be submitted no later than 30 days after completion of the work affected by the situation.[1] The Notice Provision need not include a "failing which" clause in order for it to bar the August 2010 Claim. This conclusion flows inexorably from the decision of the Supreme Court of Canada in *Corpex (1977) Inc. v. Canada*, [1982] 2 S.C.R. 643.

30 In *Corpex*, the plaintiff contractor had a contract with the federal government to build a dam across a river. The first stage of the contract required the river to be dewatered. The contractor based his estimate of the pumping costs on incorrect information about the nature of the soil contained in the plans and specifica-

tions. After a fortnight of pumping, it became obvious that the pumping equipment was not equal to the task. Additional pumps had to be installed. The contractor did not give written notice to the government that it would claim for the additional costs occasioned by the mistake as to the soil conditions.

31 Notice of the claim was required by clause 12 of the General Conditions to the contract. Clause 12 provided:

> 12. (1) **No payment shall be made** by Her Majesty to the Contractor **in addition to the payment expressly promised by the contract on account of any extra expense, loss or damage incurred or sustained by the contractor for any reason**, including a misunderstanding on the part of the Contractor as to any fact, whether or not such misunderstanding is attributable directly or indirectly to Her Majesty or any of Her Majesty's agents or servants (whether or not any negligence or fraud on the part of Her Majesty's agents or servants is involved) unless, in the opinion of the Engineer, the extra expense, loss or damage is directly attributable to
>
> (a) a substantial difference between information relating to soil conditions at the work site, or a reasonable assumption of fact based thereon, in the plans and specifications or other documents or material communicated by Her Majesty to the Contractor for his use in preparing his bid and the actual soil conditions encountered at the work site by the Contractor when performing the work, ...
>
> ...
>
> in which case, **if the Contractor has given the Engineer written notice of his claim before the expiry of thirty days after encountering the soil conditions giving rise to the claim [...] Her Majesty shall pay** to the Contractor in respect of the additional expense, loss or damage incurred or sustained by reason of that difference [...] an amount equal to the cost, calculated in accordance with clauses 44 to 47 of the General Conditions, of the additional plant, labour and materials necessarily involved. [Emphasis added.]

32 Corpex sued the government for, among other things, the additional costs arising from the mistake as to the soil conditions. The trial judge allowed this part of Corpex's claim based on considerations of equity rather than on a "technical application of certain clauses in the General Conditions".[2]

33 The Federal Court of Appeal overturned the trial decision on this point because Corpex had failed to give notice as required by clause 12 of the General Conditions.

34 The Supreme Court upheld the decision of the Federal Court of Appeal. In paras. 59 and 60 of *Corpex*, Beetz J., writing for the court, explains that a clause such as clause 12 of the General Conditions is of benefit to both the contractor and the owner.

> The contractor is practically certain of being compensated for additional costs either during the work or later, if he complies with the provisions of clause 12, and in particular, if he gives the notice provided for in that clause. ...
>
> An owner who is thus informed of a mistake as to the nature of the soil knows that the contractor will probably not drop his claim, and he is enabled to reconsider his position. He can in practice be assured that the work will go forward if he wishes ... . He may conclude another agreement with the same contractor or some other. If he prefers for the work to continue under the new circumstances, he may make arrangements to monitor quantities and costs of additional work so that the payments due the contractor ... can be made.

35 In para. 62, Beetz J. explains why compliance with a notice provision is a condition precedent to legal proceedings:

> However, once the work is complete, a contractor cannot claim in a court of law benefits similar to those which clause 12 would have guaranteed if he has not himself observed that clause and given the notice for which the clause provides. Otherwise, he would be depriving the owner of the benefits which he is guaranteed by clause 12.

36 There was no "failing which" provision in *Corpex*. Nonetheless, the contractor was barred from asserting this part of its claim because it had failed to give notice as required by clause 12.

37 Nor was there a "failing which" provision in *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.* (1988), 27 B.C.L.R. (2d) 89 (C.A.). In *Doyle*, the plaintiff contractor was engaged to construct an expansion of the defendant's brewery. The tender documents did not contain a clear statement that certain items of equipment would be installed by the defendant during the construction. The contractor contracted on the assumption that the equipment would not be installed until after the construction was complete. When the mistake was discovered a new construction schedule had to be drawn up. After the work was completed, the contractor submitted a claim for the extra costs incurred because of delay.

38 The trial judge, [1987] B.C.J. No. 65, held that the defendant had not breached the contract but, in any event, the contractor's claim could not proceed because the contractor had failed to give notice as required by the contract. He noted that had the contractor given proper notice, the defendant could have addressed cost reduction measures, insisted on the institution of a cost control system and taken steps to see that all records were preserved. The contractor's failure to comply with the notice provisions deprived the defendant of these rights.

39 The British Columbia Court of Appeal dismissed the contractor's appeal, holding that compliance with the notice provision in the contract was a condition precedent to the contractor's claim.

40 In *Bemar Construction (Ontario) Inc. v. Mississauga (City of)* (2004), 30 C.L.R. (3d) 169 (On. S.C.), Fragomeni J. considered *Doyle* at length and applied the principles set out in it. At para. 194, Fragomeni J. concluded that the contractor could not advance its claims as it had failed to properly comply with the notice provisions in the contract. On appeal, this court approved the trial decision: see *Bemar Construction (Ontario) Inc. v. Mississauga (City of)* 2007 ONCA 685, 63 C.L.R. (3d) 161.

41 Again, there was no "failing which" provision in *Bemar*.

42 I acknowledge that at para. 6 of *First City Development Corp. Ltd. v. Stevenson Construction Co. Ltd.* (1985), 14 C.L.R. 250, the British Columbia Court of Appeal stated:

> I approach the construction of art. 36 with the proposition established by the decided cases in mind: if a party to a building contract is to be deprived of a cause of action, this is only to be done by clear words.

43 However, as the motion judge explained, there are significant factual distinctions between *First City* and this case. In *First City*, there was no express time requirement. Article 36 of the construction contract provided that a claim was to be made in writing "within a reasonable time after the first observance of such damage and not later than the time of final certificate". The plaintiff commenced an action one year after completion. As no final certificate of completion had ever been issued, the claim was permitted to proceed.

44 Two additional points must be made in respect of the decision in *First City*. First, the court makes no mention of *Corpex* in its judgment. Second, *Doyle* was decided after *First City*. The British Columbia Court of Appeal was fully aware of its decision in *First City* when it rendered its decision in *Doyle*.[3] Nonetheless, and in the absence of a "failing which" clause, the court clearly and emphatically concluded that compliance with a notice provision is a condition precedent to maintaining a claim in the courts.

45 Accordingly, I see no error in the motion judge's interpretation of the Notice Provision. This ground of appeal fails.

Issue 2: *The Absence of Evidence of Prejudice to the City*

46 Clearway submits that when dealing with notice provisions, the court's central concern is to protect parties from any prejudice resulting from non-compliance with them. It contends that *Doyle* and *Bemar* are authority for the proposition that notice provisions serve to bar claims only where there is evidence of preju-

dice resulting from non-compliance. Clearway says that the City provided no evidence that it suffered prejudice as a result of the timing and delivery of the August 2010 Claim and, therefore, the motion judge erred in granting partial summary judgment.

47 I begin by considering *Corpex*. Does it stipulate that prejudice must be proven in order for an owner to rely on a notice provision? No, it does not. As para. 60 of *Corpex* makes clear, one purpose of a notice provision is to enable the owner to consider its position and the financial consequences of the contractor providing additional work. Notice gives the owner the opportunity to decide whether to conclude another agreement with the contractor or have the work done by some other. It also enables the owner to make arrangements to monitor the costs of the additional work. The contractor must give notice in accordance with the notice provision, otherwise it deprives the owner of the benefits guaranteed by the notice provision.

48 What then of *Doyle* and *Bemar*? Do either of these cases stand for the proposition that the owner must show prejudice in order to rely on a notice provision? In my view, they do not.

49 At para. 21 of *Doyle*, the trial judge is quoted as stating that had the contractor given proper notice, the defendant "could have addressed cost reduction measures, could have insisted upon the institution of a cost control system, and could have taken steps to see that all records, including site diaries, were preserved". Similarly, had Clearway given proper notice in this case, the City could have chosen whether to permit Clearway to continue with the work occasioned by the flood and, if so, it could have instituted cost control mechanisms. The fact that the trial judge in *Doyle* made those findings does not make it a requirement in law.

50 *Bemar* does not elevate this aspect of *Doyle* to a requirement of law. It is true that *Doyle* is quoted at length and relied on by the trial judge in *Bemar*, and that the findings of prejudice in *Doyle* set out in the preceding paragraph are quoted. But, Fragomeni J. does not suggest that prejudice must be established before non-compliance with notice provisions will bar a claim. At para. 194 of the *Bemar* trial decision, Fragomeni J. concludes that the contractor did not properly comply with the notice provisions in the contract and, therefore, it could not advance its claims. He made no finding of prejudice on the part of the city in reaching that conclusion.

51 Accordingly, there was no onus on the City to lead evidence of prejudice. As owner, the City is assumed to have been prejudiced by a multimillion dollar claim being made years after the Contract permitted and long after the City could consider its position and take steps to protect its financial interests.

Issue 3: *Reliance on the Notice Provision despite Failing to Comply with GC 3.14.04*

52 GC 3.14.04 of the Contract requires the parties to "make all reasonable efforts to resolve their dispute by amicable negotiations" and to provide "open and timely disclosure of relevant facts, information, and documents to facilitate these negotiations".

53 Clearway says that instead of attempting to negotiate after receiving the March 2007 Claim, the City simply issued the denial letter of April 4, 2007. Clearway also complains about the City's delay in disclosing the report prepared by its geotechnical engineer on the causes of the flood. Clearway submits that because the City failed to comply with the negotiation and disclosure requirements in GC 3.14.04, it should be barred from relying on the Notice Provision.

54 In my view, this submission completely misses the mark. GC 3.14.04 **follows** the Notice Provision in GC 3.14.03. Therefore, the negotiation and disclosure requirements in GC 3.14.04 arise **after** a claim has been made pursuant to GC 3.14.03. Accordingly, the complaints that Clearway levies against the City about negotiation and disclosure can only relate to the March 2007 Claim, with which the City took no issue in the motion below. An alleged failure on the part of the City to negotiate in the spring of 2007 is not, and cannot be, relevant to the August 2010 Claim, as the negotiation requirement did not arise until the August 2010 Claim had been delivered to the City. Similarly, the disclosure requirement could not have arisen in 2007 in respect of the August 2010 Claim.

55 Finally, while I need not decide the point, it may be that GC 3.14.04 is not engaged at all where, as in this case, the August 2010 Claim was not properly advanced in accordance with the Notice Provision.

Issue 4: *Items 7 and 8 of the August 2010 Claim*

56 Items 3 and 6 of the March 2007 Claim were for the extended maintenance of excavations or pits, and the associated shoring required for the pits. The cost of these two items in the March 2007 Claim was slightly in excess of $455,000. Clearway says that items 7 and 8 of the August 2010 Claim are for the same items, but for the increased amount of approximately $1,700,000.

57 Clearway submits that the motion judge erred in failing to recognize that items 7 and 8 of the August 2010 Claim are of the same type as those in items 3 and 6 of the March 2007 Claim and, instead, treated them as new claims. It asks that even if the appeal is otherwise dismissed, it be allowed to continue to pursue the amounts set out as items 7 and 8 of the August 2010 Claim.

58 The City disputes the factual assertion that underpins this ground of appeal. It says that items 3 and 6 of the March 2007 Claim are for extended maintenance of excavations under Leslie Street and under a CN Rail tunnel but that items 7 and 8 are for pit delay costs at numerous locations, including Leslie Street and the CN Rail tunnel.

59 *Corpex* dictates that this ground of appeal must fail. It will be recalled that in para. 62 of *Corpex*, the Supreme Court stated:

> [O]nce work is complete, a contractor cannot claim in a Court of law benefits similar to those which [the notice provision] would have guaranteed if he has not himself observed that clause and given the notice for which the clause provides.

60 Thus, even if Clearway's factual assertion is correct, Clearway cannot rely on items 3 and 6 of the March 2007 Claim to save items 7 and 8 of the August 2010 Claim. The Notice Provision requires detailed claims in which the items being claimed are identified and supported by records. Items 3 and 6 do not contain the information necessary to meet those requirements in respect of items 7 and 8 of the August 2010 Claim. Accordingly, items 3 and 6 of the March 2007 Claim did not give the notice required by the Notice Provision such that Clearway can rely on them to proceed with its claims in items 7 and 8 of the August 2010 Claim.

Issue 5: *No Complaint by the City in respect of the Date of Delivery of the March 2007 Claim*

61 This ground of appeal rests on the timing of the March 2007 Claim, which Clearway delivered to the City more than 30 days after completion of the work affected by the flood.

62 Clearway contends that as the City did not raise any issue with respect to the timing of the March 2007 Claim, it waived compliance with the Notice Provision or, alternatively, it varied the terms of the Contract by this conduct. On the basis of either waiver or variation of contract, Clearway submits, the City cannot rely on the timing component of the Notice Provision to bar the August 2010 Claim.

63 The Supreme Court of Canada provides guidance on the doctrine of waiver in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490. In paragraphs 19, 20 and 24, it lays down the following. Waiver occurs when one party to a contract (or proceeding) takes steps that amount to foregoing reliance on some known right or defect in the performance of the other party. It will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of the deficiency that might be relied on and (2) an unequivocal and conscious intention to abandon the right to rely on it. The intention to relinquish the right must be communicated. Communication can be formal or informal and it may be inferred from conduct. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.

64 There is nothing in Clearway's affidavit material that meets the requirement that the City communicated an "unequivocal and conscious intention to abandon" its right to rely on the Notice Provision or to otherwise waive strict compliance with its terms. Indeed, Clearway did not assert that it had any such belief. Accordingly, there is no factual basis to support this submission. On that basis alone, this ground of appeal must fail.

65 Two other arguments advanced on this ground of appeal warrant comment. The first is Clearway's argument, based on the decision of this court in *Colautti Construction Ltd. v. Ottawa (City of)* (1984), 46 O.R. (2d) 236, that the City varied the terms of the Contract by its conduct such that it cannot rely on the timing component of the Notice Provision.

66 *Colautti Construction* is a very different case from the present one. In *Colautti Construction*, the plaintiff contractor entered into a contract with the defendant city for the construction of a sanitary sewer. The contract stipulated that written authorization was required for additional charges. Nonetheless, at various different times over the course of the project, the contractor billed the city for significant extra charges and the city paid them, despite the absence of written authorization. This court held that the parties had varied the terms of the contract by their conduct and the city could not rely on the strict provisions of the contract to escape liability for further additional costs.

67 In the present case, there is no pattern of conduct by the parties over the course of the Contract demonstrating that they did not intend to be bound by the Notice Provision. Far from ignoring the relevant provisions in the Contract, the parties acted in compliance with its terms. GC 3.14.03.01 required Clearway to give notice of any situation that might lead to a claim for additional payment. The affidavit evidence shows that Clearway did this. Further, as we have seen, the Notice Provision required Clearway to give a detailed claim after completion of the work affected by the situation. Clearway did that, by delivering its March 2007 Claim. As for the City, GC 3.14.03.05 required that it advise Clearway, in writing, within 90 days of receiving the detailed claim, of its opinion of the validity of the claim. This the City did by means of its letter dated April 4, 2007, which denied the March 2007 Claim. There is no pattern of conduct by the parties that had the effect of varying the terms of the Contract.

68 The second matter warranting comment is the City's contention that waiver and promissory estoppel are one and the same. Based on this view, the City submitted that Clearway had to meet the test for promissory estoppel enunciated by the Supreme Court of Canada in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, at para. 13:

> The principles of promissory estoppel are well settled. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. Furthermore, the representee must establish that, in reliance on the representation, he acted on it or in some way changed his position.

69 The Supreme Court decided *Saskatchewan River Bungalows* a mere three years after *Maracle*. It did not conflate or equate the requirements for waiver and promissory estoppel in those two cases. Rather, as has been seen, it articulated different requirements for each doctrine. Indeed, at para. 18 of *Saskatchewan River Bungalows*, after acknowledging that waiver and promissory estoppel are "closely related", the Supreme Court expressly declined to determine how and whether the two doctrines should be distinguished. Instead, it decided the appeal based on waiver, because that is how "the parties [had] chosen to frame their submissions".

70 There has been much speculation, both judicial and academic, on whether waiver and promissory estoppel are essentially the same thing, with the sole or primary difference being that waiver developed as a common law doctrine whereas promissory estoppel arose in equity.[4] That determination awaits the proper case, one in which it is squarely raised and fully argued. Following the lead of the Supreme Court, I would decide this ground of appeal based on waiver and variation, as that is how Clearway framed the issue. I would add, however, that if the doctrine of promissory estoppel is in play, my conclusion that Clearway has failed to establish the necessary evidentiary basis is reinforced because there is no evidence of detrimental reliance.

DISPOSITION

71 Accordingly, I would dismiss the appeal, with costs to the City in the agreed-on amount of $5,000, inclusive of disbursements and applicable taxes.

E.E. GILLESE J.A.
R.G. JURIANSZ J.A.:-- I agree.
G.J. EPSTEIN J.A.:-- I agree.

* * * * *

Appendix A

GC 3.14 Claims, Negotiations, Mediation

GC 3.14.01 Continuance of the Work

.01 Unless the Contract has been terminated or completed, the Contractor shall in every case, after serving or receiving any notification of a claim or dispute, verbal or written, continue to proceed with the Work with due diligence and expedition. It is understood by the parties that such action will not jeopardize any claim it may have.

GC 3.14.02 Record Keeping

.01 Immediately upon commencing work which may result in a claim, the Contractor shall keep Daily Work Records during the course of the Work, sufficient to substantiate the Contractor's claim, and the Contract Administrator will keep Daily Work Records to be used in assessing the Contractor's claim, all in accordance with clause GC 8.02.07, Records.

.02 The Contractor and the Contract Administrator shall reconcile their respective Daily Work Records on a daily basis, to simplify review of the claim, when submitted.

.03 The keeping of Daily Work Records by the Contract Administrator or the reconciling of such Daily Work Records with those of the Contractor shall not be construed to be acceptance of the claim.

GC 3.14.03 Claims Procedure

.01 The Contractor shall give oral notice to the Contract Administrator of any situation which may lead to a claim for additional payment immediately upon becoming aware of the situation and shall provide written notice to the Contract Administrator of such situation or of any express intent to claim such payment, within seven days of the commencement of any part of the work which may be affected by the situation or will form part of the claim.

.02 Not used.

.03 The Contractor shall submit detailed claims as soon as reasonably possible and in any event no later than 30 Days after completion of the work affected by the situation. The detailed claim shall:

a) identify the item or items in respect of which the claim arises;
b) state the grounds, contractual or otherwise, upon which the claim is made; and
c) include the Records maintained by the Contractor supporting such claim.

In exceptional cases the 30 Days may be increased to a maximum of 90 Days with approval in writing from the Contract Administrator.

.04 Within 30 Days of the receipt of the Contractor's detailed claim, the Contract Administrator may request the Contractor to submit any further and other particulars as the Contract Administrator considers necessary to assess the claim. The Contractor shall submit the requested information within 30 Days of receipt of such request.

.05 Within 90 Days of receipt of the detailed claim, the Contract Administrator shall advise the Contractor, in writing, of the Contract Administrator's opinion with regard to the validity of the claim.

GC 3.14.04 Negotiations

.01 The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, open and timely disclosure of relevant facts, information, and documents to facilitate these negotiations.

.02 Should the Contractor disagree with the opinion given in paragraph GC 3.14.03.05, with respect to any part of the claim, the Contract Administrator shall enter into negotiations with the Contractor to resolve the matters in dispute. Where a negotiated settlement cannot be reached and it is agreed that payment cannot be made on a Time and Material basis in accordance with clause GC 8.02.04, Payment on a Time and Material Basis, the parties shall proceed in accordance with clause GC 3.14.05, Mediation.

GC 3.14.05 Mediation

.01 If a claim is not resolved satisfactorily through the negotiation stage noted in clause GC 3.14.04, Negotiations, within a period of 30 Days following the opinion given in paragraph GC 3.14.03.05, and the Contractor wishes to pursue the issue further, the parties may, upon mutual agreement, utilize the services of an independent third party mediator.

.02 The mediator shall be mutually agreed upon by the Owner and Contractor.

.03 The mediator shall be knowledgeable regarding the area of the disputed issue. The mediator shall meet with the parties together and separately, as necessary, to review all aspects of the issue. In a final attempt to assist the parties in resolving the issue themselves prior to proceeding to arbitration the mediator shall provide, without prejudice, a non-binding recommendation for settlement.

.04 The review by the mediator shall be completed within 90 Days following the opinion given in paragraph GC 3.14.03.05.

.05 Each party is responsible for its own costs related to the use of the third party mediator process. The costs of the third party mediator shall be equally shared by the Owner and Contractor.

GC 3.14.06 Payment

.01 Payment of the claim will be made no later than 30 Days after the date of resolution of the claim or dispute. Such payment will be made according to the terms of Section GC 8.0, Measurement and Payment.

GC 3.14.07 Rights of Both Parties

.01 It is agreed that no action taken under this subsection GC 3.14, Claims, Negotiations, Mediation, by either party shall be construed as a renunciation or waiver of any of the rights or recourse available to the parties, provided that the requirements set out in this subsection are fulfilled.

1 The Notice Provision allows for time extensions of up to 90 days in "exceptional cases", with approval in writing from the Contract Administrator. As the August 2010 Claim greatly exceeds either time limit, for ease of reference I refer only to the 30-day limit.

2 *Corpex,* at para. 31.

3 See pp. 101-103.

4 See, for example, *Re Med-Chem Health Care Inc.*, [2000] O.J. No. 4009 (S.C.); *HREIT Holdings 45 Corp. v. R.A.S. Food Services (Kenora) Inc.* (2009), 80 R.P.R. (4th) 64, at paras. 57-61 (Ont. S.C.); *Re Tudale Explorations Ltd. and Bruce et al.* (1978), 20 O.R. (2d) 593, at pp. 595-99 (H. Ct. J.); *Petridis v. Shabinsky* (1982), 35 O.R. (2d) 215 (H. Ct. J.); *Laurie v. Jones*, 2004 NSSC 87, at para. 14, 223 N.S.R. (2d) 129. For academic consideration of this matter see, for example, S.M. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at paras. 195-206; Angela Swan, *Canadian Contract Law*, 2d ed. (Markham, Ont.: LexisNexis, 2009), at paras. 2.198-255; John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005), at pp. 275ff.

TAB 5

Case Name:

Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.

RE: Firm Capital Mortgage Fund Inc., Applicant, and 2012241 Ontario Limited, Respondent

[2012] O.J. No. 4095

2012 ONSC 4816

222 A.C.W.S. (3d) 938

99 C.B.R. (5th) 120

2012 CarswellOnt 10743

Court File No. CV-11-9456-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: July 23, 26, 2012.
Judgment: August 30, 2012.

(39 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Sale of property -- Motion by Receiver for order approving Receiver's proposed marketing and sales process of respondent's commercial property and authorizing Receiver to terminate unit purchase agreements and leases if vacant possession was required allowed -- Some unitholders had paid full purchase price and had invested in improvements of their units -- Receiver not required to borrow funds to close project nor was first mortgagee required to advance such funds -- Unitholders either had remedy to recover deposits or were responsible for any losses over and above that amount.

Motion by the Receiver for an order approving the Receiver's proposed marketing and sales process in respect of the respondent's commercial property and authorizing the Receiver to terminate and obtain an order vesting out certain unit purchase agreements and leases in the event that the Receiver received an acceptable offer to purchase the property which required vacant possession. The Receiver argued that the only practical approach to maximizing recovery for the stakeholders was to market and sell the property as a whole to the widest of possible market which would include potential purchasers prepared to complete the project as a registered condominium and sell the units, as well as potential purchasers who might wish to purchase the property and lease out the units without registering the project as a condominium. A group of purchasers had entered into agreements with the respondent and had made significant investments in the project, in some

cases having paid the entire purchase price for their units or having invested many thousands of dollars for the leasehold improvements for businesses which were currently operating out of the premises. The purchasers argued that the Receiver should recognize their purchase agreements and proceed to complete the condominium project and bring it to registration at which point the existing purchase agreements could be closed and the balance of the units sold. All of the agreements of purchase and sale contained clauses expressly subordinating the purchasers' interests thereunder to the first mortgagee. The first mortgagee was in default and the mortgagee had appointed the Receiver.

HELD: Motion allowed. Specific performance, specifically in the context of an unregistered condominium project, should not be ordered where it would amount to a mandatory order that required the incurring of borrowing obligations against the property and completion of construction ordered to bring the property into existence. The Receiver was not required to borrow the required funds to close the project nor was the first secured creditor required to advance funds for such borrowing. The recommendation by the Receiver that it be authorized to market the property was reasonable in the circumstances. There were no equities in favour of the purchasers and lessees that would justify overriding first mortgagee's legal priority rights. These Unitholders either had a remedy to receive back their original deposits or, alternatively, they were responsible for any losses over and above that amount.

Statutes, Regulations and Rules Cited:

Condominium Act, 1998, S.O. 1998, c. 19, s. 78, s. 79

Land Titles Act, R.S.O. 1990, c. L.5, s. 44(1)(4)

Counsel:

J.D. Marshall, for Deloitte & Touche Inc., Receiver.

J. Finnigan and A. McEwan, for Firm Capital Mortgage Fund Inc.

R.D. Howell and D. Schatzkev for G. Gill et al.
("Unitholders").

S. Dewart, for LawPro.

ENDORSEMENT

1 **G.B. MORAWETZ J.**:-- The Receiver brings this motion for an order (i) approving the Receiver's proposed marketing and sales process in respect of the Respondent's commercial property in Brampton, Ontario (the "Property"); and (ii) authorizing the Receiver to terminate and obtain an order vesting out certain unit purchase agreements and leases with respect to certain units in the Property, such vesting order to be issued in the event that the Receiver receives an acceptable offer to purchase the Property which requires vacant possession.

2 The Receiver takes the position that the only practical approach to maximizing recovery for the stakeholders is to market and sell the Property as a whole (in accordance with the process outlined in the First Report) to the widest of possible market which would include (i) potential purchasers prepared to complete the project as a registered condominium and sell the units, as well as (ii) potential purchasers who may wish to purchase the Property and lease out the units without registering the project as a condominium. In order to reach both potential markets it is the Receiver's opinion that it is necessary for it to be able to deliver the Property free and clear of the purchase agreements and leases. The Receiver therefore seeks approval of the proposed marketing proposal with the express condition that it can offer the Property free and clear of the purchase agreements and leases. In effect, the Receiver is seeking an order that those agreements and leases can be "vested out" upon the approval of any agreement to sell the Property, recommended by the Receiver at the completion of the marketing process, if vacant possession is required by the terms of any recommended purchase agreement.

3 Further, the Receiver recognizes that there is a possibility that a potential purchaser may wish to complete the project as a condominium and may therefore wish to adopt one or more of the agreements or leases or renegotiate such agreements or leases. The Receiver therefore seeks an order that it be authorized, but not bound, to terminate the agreements and leases to allow for the possibility that termination may not be necessary.

4 On the other hand, a group of purchasers (the "Unitholders") have entered into agreements with 2012241 Ontario Limited ("the Debtor") and have made significant investments in the project, in some cases having paid the entire purchase price for their units or having invested many thousands of dollars for the leasehold improvements for businesses which are currently operating out of the premises. Some of the Unitholders made payments of the entire purchase price at the time of occupancy closings. Others made partial payments and began to make occupancy payments for taxes, maintenance and insurance and have made those payments to the Debtor and later the Receiver.

5 At the time of occupancy, the Debtor advised that registration and the final closing would take place in approximately three months. However, registration did not take place as anticipated and in 2011, TD Bank, the first mortgagee, appointed a receiver of the Property. TD subsequently assigned its position to Firm Capital Mortgage Fund Inc ("Firm Capital").

6 Subsequent to the registration of the TD/Firm Capital mortgage, the debtor entered into a number of "pre-sale" agreements, referenced above, pursuant to which several persons agreed to purchase units in the proposed condominium, to close when the Property was registered as such.

7 The Unitholders take the position that the Receiver's proposed course of action would favour Firm Capital and would disregard the interests of the Unitholders. The Unitholders take the position that the Receiver should recognize their purchase agreements and proceed to complete the condominium project and bring it to registration at which point the existing purchase agreements could be closed and the balance of the units sold.

8 The Debtor also entered into a number of leases of units after the registration of the TD/Firm Capital mortgage. Although the records are not clear, the Receiver reports that it appears that the Debtor entered into agreements of purchase and sale with respect to 29 units and leases with respect to 5 units. The balance of 30 units appear to be unsold and not leased.

9 None of the agreements and leases are registered against the title to the Property.

10 All of the agreements of purchase and sale contain clauses expressly subordinating the purchasers' interests thereunder to the Firm Capital mortgage security. The provisions read as follows:

> 26. Subordination of Agreement
>
> The Purchaser agrees that this Agreement shall be subordinate to and postponed to any mortgages arranged by the Vendor and any advances thereunder from time to time, and to any easement, service agreement and other similar agreements made by the Vendor concerning the property or lands and also to the registration of all condominium documents. The Purchaser agrees to do all acts necessary and execute and deliver all necessary documents as may be reasonably required by the Vendor from time to time to give effect to this undertaking and in this regard the Purchaser hereby irrevocably nominates, constitutes and appoints the Vendor or any of its authorized signing officers to be and act as his lawful attorney in the Purchaser's name, place and stead for the purpose of signing all documents and doing all things necessary to implement this provision.

11 Three of the five leases also contain similar subordination clauses. The other two leases contain subordination clauses that only refer to mortgages or charges created after the date of the leases. However, the Receiver has been informed that the tenant of one of the units recently terminated its lease and the other unit is vacant and the former Receiver has advised that it believes the lease was terminated or abandoned.

12 It appears from the Debtor's records that most of the Unitholders who entered into agreements to purchase units paid deposits to the Debtor which are held in trust pursuant to the provisions of the *Condominium Act*, 1998. The Receiver advises that while those records contain numerous inconsistencies which

made it impossible for the Receiver to determine with certainty whose deposit remains in trust, it appears that most of the initial purchase deposits remain in trust.

13 However, five purchasers apparently paid to the Debtor or its solicitors the balance of the purchase price, notwithstanding that the project had not been registered and further authorized the law firm in question to release the funds from trust and pay them to the holder of the second mortgage registered against title. Those payments total more than $1.2 million.

14 The Receiver advises that it does not have the financial resources to complete the Property to the point of registration as a condominium or to market the unsold units. The Receiver is of the view that the revenue currently generated by the Property is not sufficient to cover ongoing operational expenses, let alone the costs of completing construction, marketing and other related costs. Further, Firm Capital is not prepared to advance funds for this purpose, nor is Firm Capital prepared to subordinate its mortgage security to any new lender.

15 In addition, the Receiver has advised that it will not be in a position to close at least five of the pre-sold units due to the fact that the purchasers of those units paid to the Debtor the full balance of purchase price under their agreements and authorized the Debtor to pay those funds to the second mortgagee instead of being held in trust.

16 From the standpoint of the Unitholders the main issue on this motion is whether the Receiver should be permitted to terminate the agreements of purchase and sale and effectively vest out the interests of the Unitholders.

17 Counsel to the Unitholders points out that at the time of the commencement of the receivership, all stakeholders had the expectation that the project would proceed to registration and that the existing agreements of purchase and sale and lease agreements would be honoured.

18 Counsel to the Unitholders argued that in moving to the appointment of the Receiver, TD had indicated that its goal was to expedite registration and that this was a reasonable goal given that the project was virtually complete and that owners and tenants were operating businesses from their units.

19 Counsel further submits that developers and their successors have a statutory obligation to expedite registration of the condominium so that title to the individual units can be conveyed. Counsel referenced s. 79 of the *Condominium Act, 1998* (the "Act") with respect to the duty to register declaration and description and that the existence of these duties, although not binding on the Receiver, are relevant considerations in determining the actions which the Receiver should be approved to take.

20 The position put forth by the Unitholders was adopted by counsel to LawPro as insurer for Paltu Kumar Sikder.

21 In my view, this secondary argument can be disposed of on the basis that neither Firm Capital nor the Receiver is a "declarant" or "owner" of the Property. In my view the activities of Firm Capital and the Receiver are not governed by the provisions of ss. 78 and 79 of the Act. Neither Firm Capital nor the Receiver have statutory obligations to the Unitholders.

22 With respect to the main issue, counsel to the Receiver submits that as a matter of law the first mortgage takes legal priority over the interests, if any, of the purchasers and the lessees. (See: Subsection 93 (3) of the *Land Titles Act*.)

23 In this case, the first mortgage was registered on October 20, 2008. The mortgage is in default. The unit purchase agreements and leases are all dated after that date and are not registered.

24 Counsel to the Receiver also points out that with respect to the leases, ss. 44 (1)(4) of the *Land Titles Act* provides that any lease "for a period yet to run that does not exceeds three years" is deemed not to be an encumbrance. All of the leases in question are unregistered and run for periods exceeding three months. Accordingly, counsel submits that they are subordinate to the registered first mortgage.

25 In addition, the purchase agreements and leases contain expressed clauses subordinating the interests thereunder to the first mortgagee. The Court of Appeal has held that the existence of such express sub-

ordination provisions negate any argument that the mortgagee is bound by actual notice of a prior interest. (See: *Counsel Holdings Canada Limited v. Chanel Club Ltd.* (1997), 33 O.R. (3d) 285 (C.A.).)

26 Further, counsel submits that in any event, it is doubtful that the purchase agreements create an interest in land, referencing paragraph 19 of the Purchase Agreements which provide in part as follows:

> 19. Agreement not to be Registered
>
> The purchaser acknowledges this Agreement confers a personal right only and not any interest in the Unit or property ...

27 I agree that the position of Firm Capital takes legal priority over the interests of the purchasers and lessees.

28 Counsel to the Receiver submits that the position taken by the Unitholders is essentially that they wish specific performance of their purchase agreements. Counsel to the Receiver submits that this court has previously held that specific performance (specifically in the context of an unregistered condominium project) should not be ordered where it would amount to "a mandatory order that requires the incurring of borrowing obligations against the subject property and completion of construction ordered to bring the property into existence". (See: *Re 1565397 Ontario Inc.* (2009), 54 C.B.R. (5th) 262.) I accept this submission.

29 In my view, the law is clear that the Receiver is not required to borrow the required funds to close the project nor is the first secured creditor required to advance funds for such borrowing.

30 Having reviewed the evidence and hearing submissions, I am satisfied that the recommendation of the Receiver that it be authorized to market the property in accordance with the process recommended in the First Report is reasonable in the circumstances.

31 With respect to the second issue, namely, whether the Receiver should be authorized to terminate purchase agreements and leases and be entitled to a vesting order that terminates the interest of parties to purchase agreements and leases, it is necessary for the Receiver to take into account equitable considerations of all stakeholders.

32 The remaining question is whether there are any "equities" in favour of the purchasers and lessees that would justify overriding first mortgagee's legal priority rights.

33 Counsel to Firm Capital submits that the equitable considerations with respect to the Unitholders are limited. The interests of the Unitholders fall into four categories:

i. Those who paid deposits that are still held in trust;
ii. Those who purport to have purchased units and paid deposits but which are apparently not held in trust;
iii. Those who paid the balance due on closing under their agreement and authorized release of those funds to the second mortgagee;
iv. Those who claim to have incurred expenses in renovating or improving their units.

34 With respect to the first category, it seems to me that these purchasers would be entitled to the return of their deposits held in trust if the Sale Agreements are terminated and they will not incur any significant financial losses.

35 The second category of purchasers, whose deposits are not held in trust for whatever reason, may have some remedy against the Debtor, or perhaps its advisers.

36 The third category of purchasers paid the balance of their purchase price and expressly authorized the release of those funds from trust to be paid to the second mortgagee, notwithstanding the subordination clauses of their Sale Agreements and the fact that they would not be receiving title to their unit at that time. It seems to me that these purchasers ran the risk of losing those payments, but they may have recourse against other parties.

37 The fourth category of purchasers claim that they have spent significant sums of money on renovations and improvements to their proposed units, and on equipment. As counsel for Firm Capital points out

these purchasers spent this money at their own risk and are subject to the subordination clause in their Sale Agreement.

38 In considering the equities of the situation, it seems to me that a review of the above categories establishes that the equities do not favour the Unitholders. These Unitholders either have a remedy to receive back their original deposits or, alternatively, they are responsible for any losses over and above that amount. In the result, I have not been persuaded that the positions of the Unitholders/opposing purchasers, as supported by LawPro have merit.

39 The Receiver's motion is granted and an order shall issue approving its proposed process of marketing and sale, with related relief, as set forth substantially in the form of a draft order attached as Schedule "A" to the notice of motion with revisions to reflect the Receiver's intent as expressed in paragraphs 20 and 21 of the factum submitted by counsel to the Receiver.

G.B. MORAWETZ J.

TAB 6

Court File No. CV-09-8201-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT* , R.S.O. 1990, C. C. 30, AS AMENDED

BETWEEN:

WESTLB AG, TORONTO BRANCH

Applicant

- and -

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

Reasons of the Honourable Madam Justice Pepall

Application heard: May 20 and 21, 2009
Reasons given orally: May 22, 2009

Counsel:

Pamela L.J. Huff and Michael McGraw for WestLB AG, Toronto Branch
Shayne Kukulowicz for Alvarez & Marsal Canada ULC and McIntosh & Morawetz Inc., Proposed Receiver and Trustee
Maria Konyukhova and Kathy Mah for The Rosseau Resort Developments Inc.
Fred Myers for Fortress Credit Corp.

The Applicant, West LB AG, Toronto Branch, seeks the appointment of an interim receiver and manager and a receiver, manager and trustee of Rosseau Resort Developments Inc. ("RRDI"). It relies on s. 47 of the BIA, s. 101 of the CJA and s. 68 of the Construction Lien Act.

RRDI is an Ontario corporation that owns property on the shore of Lake Rosseau in Muskoka. It has been developing and constructing a first class resort hotel and condominium complex on that property. RRDI is wholly-owned by Red Leaves Resort ("RLR"), a partnership of 5 corporate partners. The majority partner is Ken Fowler Enterprises Limited ("KFE"). RLR has assembled

a number of adjacent properties for the purposes of the development of a large planned resort and community known as Red Leaves. That development is projected to be completed in 2030. RRDI is one of a number of subsidiaries of RLR, each of which owns or operates a different aspect of the Red Leaves development.

RRDI's property consists of about 40 acres plus the land on which the hotel is situate. It leases adjacent property on which it operates a sewage treatment plant that provides services to the hotel.

The hotel's construction is incomplete. Upon completion it will consist of 221 fully furnished suites in 2 buildings plus various other facilities. The hotel has been constructed as a condominium/hotel whereby the residential units of the hotel would be marketed and sold to purchasers who would have defined access to use of the purchased unit. When not in use by the owner, the unit would be included in a rental pool and function as a hotel suite.

Of the 221 units, 72 units have been sold and closed; 65 units have been sold and are expected to close shortly or upon completion of construction and obtaining of occupancy permits; and 84 units remain to be sold.

The hotel has been open since December 2008 and is currently operating under the banner of "JW Marriott Resort and Spa" pursuant to a Management Agreement between Marriott Hotels of Canada Ltd. and RRDI. That agreement requires RRDI to fund any net operating losses of the hotel and any working capital requirements. Since its opening, the hotel has operated at a loss. Marriott may terminate its obligations as a result of unfunded net operating losses or if the hotel was not completed by May 1, 2009. In light of this, RRDI agreed with Marriott that Marriott would not declare an event of default prior to May 31, 2009 provided RRDI complied with terms of a funding letter wherein it agreed to fund about $1.95 million of net operating losses and working capital requirements through May 31, 2009. The applicant provided RRDI with these funds to make this payment. Marriott has requested that an additional $850,000 payment be made as of June 2, 2009 to fund operating losses.

The applicant is the agent for a syndicate of lenders that provided a first priority senior secured credit facility to RRDI pursuant to a February 1, 2007 credit agreement in the amount of $113.5 million. It was divided into 3 tranches:

1. $83.8 million senior secured construction facility to fund the construction of the hotel;

2. $12.8 million to develop 31 condominium units on other lands; and

3. $16.9 million to develop a further 51 residential units.

The first tranche has been fully advanced and the second and third have been cancelled.

RRDI is in default of its obligations to the senior lenders. On May 19, 2009, the applicant delivered a s.244 BIA notice and a demand for payment in the amount of $68,965,845.63. The senior lenders' financing is secured by mortgages, PPSA security and guarantees.

RRDI is also indebted to Fortress Credit Corp. in the amount of approximately $30 million. It is secured by a mortgage. All amounts under the Fortress Loan Agreement have been fully advanced and RRDI is in default.

Fortress and the senior lenders are parties to a subordination agreement dated June 6, 2007 in which they agreed that the security provided by RRDI to Fortress would be subordinated to the security provided by RRDI to the applicant subject to certain limits on certain other advances. Fortress takes the position that the relief requested by the applicant is an attempt to enhance its security rights in breach of the subordination agreement.

The applicant, Fortress, RRDI and KFE have engaged in discussions to consider solutions to the problems. In December 2008, the applicant agreed to temporarily waive certain defaults for 45 days and agreed to advance $13.1 million under the credit agreement. On January 26, 2009, the applicant agreed to continue to waive the defaults to February 17, 2009 and to advance an additional $1.4 million. On February 24, 2009, the applicant agreed to continue to waive defaults to March 3, 2009 and advanced $440,000.

By a forbearance agreement dated April 9, 2009, RRDI acknowledged certain existing and continuing events of default under the credit agreement and the applicant agreed to forbear from exercising any remedies under the credit agreement until May 15, 2009 and agreed to advance a further $2,493,637. Further amounts were advanced by the applicant on April 14, 2009 ($1,164,882), April 21, 2009 ($1,966,370.37) and May 12, 2009 ($24,739).

Neither the applicant nor Fortress is prepared to advance any further funds. Although efforts have been made, RRDI has failed to obtain financing from any other source. KFE has advised the applicant that it has no ability to invest any additional amounts to finance RRDI given the demands of its other facilities. Furthermore, KFE is not in a position to consent or acquiesce to the filing of an application under the BIA or CCAA as such conduct could trigger recourse under a guarantee provided by KFE to Fortress.

RRDI has no further access to funds and is in a cash crisis. It is unable to fund essential expenses and unable to fund its payroll after May 15, 2009. The hotel is operating at a loss and no funds are available to RRDI to support continued operations and finance construction costs. Net proceeds of condominium sales are required to pay down amounts owing to the applicant and are not available for operational expenses. Construction of the hotel is projected to be completed in June 2009 if work continues without interruption. Obligations due to construction trades amount to $4.3 million of which $3.4 million represents a holdback deficiency. Construction progress has slowed and certain construction trades have refused to perform services. Altus Group Limited, a cost consultant with expertise in construction projects, has recommended that an additional $5 million be added to the budget to complete the project and market the unsold units.

RRDI employs 10 people. On March 1, 2009, the Director of Finance and Administration of Red Leaves resigned and on April 17, 2009 and April 25, 2009, the CFO of Red Leaves and RRDI's controller resigned, respectively. As mentioned, 84 units remain unsold. According to the applicant, the sales and marketing of these units have discontinued although Mr. Fowler states that on April 10, 2009, RRDI retained Sothebys International Realty who is actively promoting the hotel. The hotel is operating at a loss and since opening, has operated at approximately 13% capacity. Construction cost overruns amount to $34.4 million or 25%.

McIntosh & Morawetz Inc., a company related to A&M, has consented to act as interim receiver under the BIA. Alvarez & Marsal Canada ULC ("A&M"), who has consented to act as receiver under the CJA and trustee under the CLA, prepared two reports dated May 19 and 20, 2009 at the request of the applicant. All counsel agreed that the facts contained therein were admissible with the exception of paragraphs 3.12 and 3.13 of the May 20, 2009 report. It was also agreed that I would give no weight to the recommendations made by A&M in the reports.

In those reports, A&M noted that:

- with respect to the non-RRDI Red Leaves entities, each is facing liquidity challenges. In this regard, the Rock golf course has not opened this season and Marriott, which manages the Rock, has issued a default notice to it and to KFE as guarantor;
- in the absence of immediate funding, it is expected that construction trade creditors will assert their lien rights and discontinue efforts to complete construction;
- in some cases, suppliers have refused to deliver goods or render services;
- Rock Ridge Contractors Inc. is the general contractor/construction manager of the hotel. Historically the applicant has advanced funds to RRDI and RRDI would then make disbursements to RRCI to allow RRCI to meet its obligations to the subcontractors. RRCI subcontract employees are owed amounts for fees and are expected to withdraw their services;
- the RRCI subcontract employees are critical to completing construction of the hotel;
- Fortress has been unwilling to provide consent to the release of its security over certain hotel units;
- there are no funds to meet payroll on May 29 and certain employees have not been reimbursed for out-of-pocket expenses amounting to $30,000;
- construction relating to outdoor bathroom facilities and guest change rooms has not proceeded due to lack of funding. This is required for the lower swimming pools to be operational and to permit the service of alcohol in the hotel's outdoor areas. This could take 6 weeks and 28 weddings are booked at the hotel for the summer season;

- Clevelands House is substantially fully booked for upcoming summer weekends and is forecast to operate on a cash flow neutral basis throughout 2009; and

- there is evidence of impairment of the applicant's security position.

The applicant brings this application on an urgent basis to stabilize the operations of RRDI, complete the construction project and maximize realizations. It is proposed that the senior lenders will provide the Receiver/Trustee with a $15 million senior secured loan facility which would rank in priority to all other obligations of RRDI except for obligations to the Receiver/Trustee secured by a Receiver's charge. The funds would be used for a variety of purposes including completing construction. It is also proposed that a claims administration process for construction trade creditors pursuant to the CLA be established.

As the summer approaches, RRDI is entering its peak unit sales season and maximum value should be achieved if the project is completed.

The applicant relies on s. 47 of the BIA, s. 101 of the CJA and s. 68 of the CLA.

RRDI objects to the relief requested as does Fortress. RRDI submits that 10 days' notice under s.244 of the BIA has not been given thereby precluding s.101 CJA and s.68 CLA relief and in any event, the requisite tests have not been met. As to s.47 of the BIA, that relief should be adjourned and in any event, the test is not satisfied.

Fortress submits that the relief requested is premature and RRDI is entitled to 10 days to respond. Furthermore, there is no urgency. The lien claimants are not at risk and it is inappropriate to prime Fortress, particularly in circumstances where the applicant and Fortress have agreed to funding priorities by contract. Fortress states that this application is an attempt by the applicant to enhance its security rights in breach of its agreements with Fortress. The relief requested is not in Fortress' interest nor to the benefit of RRDI. Fortress further submits that a receivership is destructive of the market and will negatively impact the other properties. Fortress has other complaints with respect to the applicant's conduct including the security it took from KFE and the assertion of priority with respect to approximately $5.6 million in alleged protective advances.

Pursuant to s. 244 of the BIA, a secured creditor who intends to enforce a security on all or substantially all of the inventory, the accounts receivable or the other property of an insolvent person that was used in relation to its business is to send notice of that intention. The secured creditor is not to enforce the security for 10 days absent consent. As is clear from the wording, s. 244 only applies to the enforcement of security on the property of insolvent persons. Insolvent person is defined in s. 2 of the BIA and would encompass RRDI.

S. 47 of the BIA provides that where the court is satisfied that a s. 244 notice has or is about to be sent, the court may appoint an interim receiver. An appointment may be made only if it is shown to the court to be necessary for the protection of the debtor's estate or the interests of the creditor who sent the s. 244 notice. (In the proposed amendments to the BIA, a receiver may be appointed before the expiry of 10 days if the court considers it appropriate.) Ground J. held in

BNS v. DG Jewelry Inc. (2002), 38 CBR (4th) 7 that the test is whether the appointment of a court-appointed receiver will enable that receiver to more effectively and efficiently carry out its duties and obligations than it could do if privately appointed.

S. 47.2 provides that the court may make any order respecting the payment of fees and disbursements of the interim receiver that it considers proper including giving the receiver security over the assets of the debtor ranking ahead of secured creditors.

Section 47.2(2) provides that disbursements do not include payments made in operating a business of the debtor.

Of course, a receiver or receiver manager may also be appointed pursuant to s. 101 of the CJA where it appears to a judge to be just or convenient to do so. As noted in the explanatory notes for the standard form template receivership order of the standard form template subcommittee of the Commercial List Users' Committee, the standard form adopts the format of a s. 47(1) BIA appointment together with a s. 101 CJA appointment. This was stated to have been recommended because a receiver and manager under the CJA may be provided with a priming charge in respect of its disbursements and thereby avoid issues concerning the limits on the authority of the court to grant a priming charge in respect of business losses suffered by an interim receiver.

In *Robert F. Kowal Investments Ltd. et al v. Deeder Electric Ltd.* (1975), 9 OR (2d) 84 the Court of Appeal examined the issues of receiver borrowings and the granting of security over the debtor's assets. A receiver must look to the assets under its control for payment of its charges and expenses. As a general rule, a receiver will have no power to subject the security of secured creditors to liability for disbursements made by the Receiver. Houlden J.A., writing for the court, noted that there are exceptions to the general rule. "If a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred by him" (at para 16). Such an order will require compelling and urgent reasons for the court to grant its approval if the secured creditors oppose the making of the order. Another exception is if the receiver has expended money for the necessary preservation and improvement of the property, it may be given priority for such an expenditure over secured creditors.

The Contruction Lien Act also provides for the appointment of a trustee who may act as a receiver and manager. Section 68 of that Act states that any person having a lien or any other person having an interest in the premises may apply to the court for the appointment and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate. The trustee may act as a receiver and manager, complete or partially complete the improvement, take appropriate steps for the preservation of the premises and, subject to the approval of the court, take such other steps as are appropriate in the circumstances.

A lien arises when a person supplies services or materials to an improvement for an owner, contractor or subcontractor (s.14 and s.15 of CLA) and where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement

have priority over that mortgage (s.78 of CLA). Advances to the trustee take priority over liens existing at the date of the trustee's appointment.

In *Royaledge Industries Inc. v. Perma-Roof Ontario Ltd.* (1991), 44 C.L.R. 160, Lane J. discusses 3 general areas in which it may be appropriate to appoint a trustee: where the premises is an income earning property, and the lien claim may be satisfied out of the income; where the owner has become insolvent but the project itself would be a viable one if it were refinanced and carried to completion; and where the appointment of a trustee may be of use to obtain management of the premises in order to prevent its deterioration. The statutory provision is described by Lane J. as being primarily intended to protect the interests of the lien claimants. The relief is extraordinary in nature and should not be sought for a collateral purpose. In *Atlas-Gest Inc. v. Brownstones Building Corp* (1992) 26 R.P.R. (2d) 233, a trustee and a receiver manager were appointed in circumstances where a 68 unit luxury condominium project was substantially complete but required an additional $200,000 to permit the remaining condo units to be sold.

In my view, the applicant has met the requisite tests and has established the need for relief on an urgent basis.

RRDI is insolvent, has no further access to funds and is in a cash crisis. The only source of funding available is the proposed receiver's borrowings. Funding is desperately needed to fund the costs to complete the hotel, maintain operations and generate value for stakeholders. Numerous construction trades have outstanding receivables and are in a position to assert lien rights. Construction progress has already slowed. Stoppage, slow downs and liens if filed would impede scheduled closings. Unit purchasers would be impacted, the applicant's interests would deteriorate further and service providers would be prejudiced. Many innocent stakeholders are affected by a do-nothing approach. Although the parties have faced these financial problems for some time, no solutions are advanced except that proposed by the applicant. In this regard, I reject Fortress' argument that this is an attempt by the applicant to enhance its security rights. While there are benefits to the applicant that are associated with the proposed funding, it seems to me that neither the applicant nor Fortress should be precluded from providing a loan to the Interim Receiver. Fortress will continue to be at liberty to challenge both the security taken by the applicant from KFE and the $5.6 million in protective advances.

In my view, there is ample evidence to support the conclusion that the appointment of a s. 47 interim receiver is necessary for the protection of RRDI's estate and the interests of the applicant and I so order. Stability is required; there is a need for immediate conservation of the debtor's assets and protection of the interests of the applicant and other stakeholders.

Although not free from doubt, I do have some concerns about the s. 101 CJA and s. 68(2)(a) CLA powers. These are both adjourned to be addressed on June 1, 2009. I am satisfied that the requisite tests for a section 68(1) CLA appointment with subsection (2)(b), (c) and (d) powers are met. The owner is insolvent but the project would be a viable one if it were refinanced and moved towards completion. The applicant qualifies as a person having an interest. I am also satisfied that this order at this time assists in protecting the interests of the lienholders.

I am in the circumstances granting the applicant the s. 47 BIA relief and s. 68(1) and 2(b), (c) and (d) CLA relief. I am granting authorization to borrow as contemplated by paragraph 20 of the proposed order, however the amounts that can be borrowed are limited to $1,500,000 until June 1, 2009 or further order of this court. Any interested party may apply to this court to vary or amend this order on not less than 5 days' notice. Counsel are to confer with respect to finalizing the proposed terms of the order.

The confidential Appendix 1 contains commercially sensitive material and disclosure would impose a serious risk on an important commercial interest. Furthermore, there is no reasonable alternative. See *Sierra Club of Canada* (2002), SCC 41 in this regard.

Subsequent to the delivery of these reasons, I signed the proposed amended order.

S. E. Pepall, J.

Schedule "A"

The parties agree that the following disbursements by the Receiver shall not constitute payments made in operating a business of the Debtor for the purposes of s.47.2 of the BIA:

- wages for employees of the Debtor
- wages for employees of Rock Ridge Contractors Inc. who are providing dedicated services to the Debtor
- Payments to independent contractors of Rock Ridge Contractors Inc. for services provided to or for the benefit of the Debtor
- security costs
- payments for essential goods and services including hydro, propane and telephone

TAB 7

Case Name:

Royal Bank of Canada v. Penex Metropolis Ltd.

RE: Royal Bank of Canada, Applicant, and Penex Metropolis Ltd. et al., Respondents

[2009] O.J. No. 3645

180 A.C.W.S. (3d) 258

Court File No. CV-09-8157-00CL

Ontario Superior Court of Justice

G.R. Strathy J.

Heard: August 24, 2009.
Judgment: September 4, 2009.

(58 paras.)

Bankruptcy and insolvency law -- Administration of estate -- Sale of property -- Receivers -- Motion by Wagner Van Communications Co. Canada for an order declaring that the respondents' court-appointed receiver was not entitled to disclaim the exclusive sales agency agreement between Van Wagner and the respondents, dismissed -- Cross-motion by receiver for a declaration that the agreement was not binding on a purchaser of the respondents' business assets and that the receiver was entitled to sell the business' assets free of any obligations under the agreement, granted -- It could not be said that the receiver acted in a commercially unreasonable manner, unfairly, or in bad faith in deciding to disclaim the agreement.

Motion by Wagner Van Communications Co., Canada, for an order declaring that the respondents' court-appointed receiver, Ernst & Young Inc., was not entitled to disclaim the exclusive sales agency agreement between Van Wagner and the respondents. Van Wagner also sought a declaration that certain funds were held in trust by the receiver for the benefit of Van Wagner, pursuant to an agreement. Cross-motion by receiver for a declaration that the agreement was not binding on a purchaser of the business of the respondents and that the receiver was entitled to sell the assets of the business free and clear of any obligations under the agreement. The proceeding concerned a 13-floor, 332,000 square foot complex in downtown Toronto owned by Penex Metropolis Ltd. Van Wagner and Penex entered into an exclusive third party exterior signage license agreement in 1999. In Sept. 2005, Penex purported to terminate the agreement. After Van Wagner commenced litigation, the parties reached an agreement in 2006 whereby Van Wagner would be Penex's exclusive sales agent for the marketing and sale of advertising on a number of static signs located at the property. As a result of allegations that Penex had breached this agreement by causing its personnel to sell advertising on static signs in competition with Van Wagner, Van Wagner commenced an action to enforce the agreement. An injunction subsequently issued. In March 2009, a motion for relief by Van Wagner with respect to allegations that Penex continued to breach the agreement, resulted in a consent order. On April 27, 2009, the Royal Bank successfully applied to appoint Ernst & Young as receiver of all the assets, undertakings and properties of Penex, including the property. Presently, the issues were: (1) whether the

receiver was entitled to disclaim the agreement; (2) whether the fees due to Van Wagner by Penex were held in trust; and (3) whether the agreement bound a purchaser of the property.

HELD: Van Wagner's motion dismissed; receiver's motion granted. (1) Although there were points to be made on both sides as to whether the agreement was advantageous or not, it could not be said that the receiver acted in a commercially unreasonable manner, unfairly, or in bad faith in deciding to disclaim the agreement. The receiver made appropriate inquiries and investigations prior to disclaiming the contract. Based on the evidence, the receiver could reasonably conclude that the rates paid to Van Wagner under the agreement were above market value and included a premium to compensate Van Wagner for rights it had given up under the joint venture agreement It could also reasonably conclude the exclusivity provisions of the agreement fettered its ability to negotiate signage agreements with potential users, limited the flexibility it would require to deal with signage issues, and was potentially cumbersome, inconvenient and inefficient. This was a case where the receiver was to choose between several courses of action, none of which was obviously preferable to another. The court could not conclude the receiver acted unreasonably, arbitrarily or inappropriately in disclaiming the agreement. (2) It was not necessary to resolve the second issue at this time. It was to be addressed when the court was asked to make an order regarding the distribution of the proceedings of the property. (3) In order to run with the land, the covenant was required to be negative in substance and a burden on the covenantor's land. It was not disputed that the appointment order gave the receiver the authority to market the property, to sell it, and to apply for a vesting order or other orders necessary to convey it or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting the property. In view of the authorities cited by counsel for the receiver, and in the absence of any authority placed forward by Van Wagner, the agreement did not run with the property. The receiver was entitled to a declaration that a purchaser of the property was not bound by the agreement.

Counsel:

David Foulds and *Jonathan Davis-Sydor*, for Van Wagner Communications Company, Canada.

Hilary Clarke, Larry Crozier and Lisa Brost, for Ernst & Young Inc. (Receiver).

Liz Pillon, for EPR Metropolis Trusts and Metropolis Entertainment Holdings Inc.

Fred A. Platt, for Cambrian Court[1].

ENDORSEMENT

1 G.R. STRATHY J.:-- There are two motions before the Court. First, Van Wagner Communications Company, Canada ("Van Wagner") moves for an Order declaring that Ernst & Young Inc., the Court-appointed Receiver (the "Receiver") of the Respondents[2] is not entitled to disclaim the Exclusive Sales Agency Agreement between Van Wagner and the Respondents (the "Agreement"). Van Wagner also seeks a declaration that certain funds are held in trust by the Receiver for the benefit of Van Wagner, pursuant to the Agreement.

2 Second, the Receiver brings a cross-motion for a declaration that the Agreement is not binding on a purchaser of the business of the Respondents and that the Receiver is entitled to sell the assets of the business free and clear of any obligations under the Agreement.

Factual Background

3 This proceeding concerns a 13-floor, 332,000 square foot, mixed use, multi-media entertainment, retail and office complex located on the northeast corner of Yonge-Dundas Square in Toronto (the "Property") that is owned by Penex Metropolis Ltd. ("Penex"). Yonge-Dundas Square, which is said to be modeled after Times Square in New York and Piccadilly Circus in London, is home to a number of digital and billboard-type signs. The Property itself is covered on all sides by approximately 25,000 square feet of digital and static signage used for outdoor advertising. Penex is the legal owner of the Property.

4 Van Wagner is in the business of developing, marketing and selling outdoor advertising signage. It is an affiliate of one of the largest privately held out-of-home communications companies in North America.

5 Royal Bank of Canada ("RBC") acts as agent for a syndicate of lenders that provided financing for the construction of the Property and is the first secured creditor. The second secured creditor is a subsidiary of Entertainment Properties Trust, a REIT with its head office in Kansas City, Missouri. The second secured creditor has entered into a strategic alliance with the parent of Penex.

6 Van Wagner and Penex entered into an Exclusive Third Party Exterior Signage License Agreement (the "Joint Venture Agreement") for the Property in June, 1999. Under the Joint Venture Agreement, Van Wagner was to own 35% of the signs and receive 35% of the advertising revenue from the signs, while Penex would own 65% of the signs and receive 65% of the advertising revenue. Among other duties, Van Wagner would exclusively market the signs.

7 The Property was delayed in construction and in the fall of 2005 had just started above ground construction. In September of 2005 Penex purported to terminate the Joint Venture Agreement. Van Wagner commenced litigation against Penex, which was settled in the summer of 2006 when Penex and Van Wagner entered into the Agreement that is the subject of this litigation.

8 The Agreement provides that Van Wagner is to be Penex's exclusive sales agent for the marketing and sale of advertising on a number of static signs located at the Property. Van Wagner is a non-exclusive sales agent on the "tri-vision" sign, which rotates through a maximum of three advertisements on the same sign. Van Wagner has no rights or responsibilities with respect to the digital video board.

9 The only exception to Van Wagner's exclusive agency rights on static signs relates to tenant advertising and sponsorship opportunities. Pursuant to paragraph 2C of the Agreement, these remain exclusive to Penex. Accordingly, should any tenant or sponsor of the Property require signage rights on any one of the static signs, Penex has the right to grant such signage rights (per paragraph 2F of the Agreement), but must pay Van Wagner a sales commission as detailed below. This commission is in recognition of Van Wagner's surrender of its rights to part ownership of the signs and the limitations placed on Van Wagner's marketing efforts.

10 As consideration for the services to be provided by Van Wagner as Penex's exclusive sales agent, paragraph 4A of the Agreement provides that Penex is to pay Van Wagner a sales commission equal to:

> 22.5% of "Net Advertising Revenues" (as defined in paragraph 4C of the Agreement) derived from signs sold by Van Wagner; and
>
> 20% of Net Advertising Revenues derived from signs other than sign 2 or sign 3 that are sold to sponsors and tenants by Penex.

11 As a result of allegations that Penex had breached the Agreement by causing its personnel to sell advertising on static signs in competition with Van Wagner, Van Wagner commenced an action in this court against Penex to enforce the Agreement.

12 Van Wagner also sought an interim and interlocutory injunction to prevent Penex from violating the exclusivity provisions of the Agreement until trial. That motion was heard before Patillo J. on December 5, 2007, following the exchange of extensive affidavit materials and cross-examinations.

13 After a full day of argument, Patillo J. agreed that if Penex was allowed to continue breaching the Agreement, Van Wagner would be irreparably harmed and granted Van Wagner an injunction until trial. Following the language of the Agreement, the injunction is binding on any successors or assigns of Penex.

14 Penex sought leave of the Divisional Court to appeal the decision of Patillo J. In a decision released April 23, 2008, Carnwath J. found that there was no good reason to doubt the correctness of the decision and denied Penex's motion for leave to appeal to the Divisional Court.

15 Van Wagner alleged that Penex continued to breach the Agreement in spite of the order of Pattillo J. As a consequence, Van Wagner brought a motion for appropriate relief. This motion was ultimately settled

on consent in March, 2009, with the parties agreeing to an Order setting out the terms of the relationship between Van Wagner and Penex until trial. This Order was issued by Lederer J. on March 10, 2009.

16 On April 27, 2009, RBC applied to this Court to appoint Ernst & Young as the Receiver of all of the assets, undertakings, and properties of Penex, including the Property. This Court granted the relief sought. The initial appointment order (the Initial Order) is based on the model receiving order of the Commercial List, and contains the following standard provisions:

> 3. THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> ...
>
> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor;

17 Neither Van Wagner nor its counsel was provided with notice of the application to appoint a receiver. Van Wagner was not informed of RBC's application until the afternoon of Friday, May 1, 2009, when Van Wagner received a letter from the Receiver attaching a copy of the Initial Order and advising that the Receiver did not intend to perform the Agreement. The letter further stated that the Receiver would not require Van Wagner's further services, and would not be making any payments or be responsible for any amounts payable under the Agreement.

The Issues

18 There are three issues before me:

> First Issue: Was the Receiver entitled to disclaim the Agreement?
>
> Second Issue: Are the fees due to Van Wagner by Penex held in trust?
>
> Third Issue: Does the Agreement bind a purchaser of the Property?

19 I will discuss these in turn.

Discussion

First Issue: Was the Receiver entitled to disclaim the Agreement?

20 The Appointment Order authorizes the Receiver to cease to perform any contracts of Penex. This reflects the established law and practice: *Bank of Montreal v. Scaffold Connection Corp.* (2002), 36 C.B.R. (4th) 13, [2002] A.J. No. 959 (Q.B.) at para. 11. A receiver must have the ability to refuse to adopt contracts in order to give meaning to its power to convey the assets free and clear of other parties' interests: *New Skeena Forest Products Inc. v. Don Hill & Sons Contracting Ltd.* (2005), 9 C.B.R. (5th) 267, [2005] B.C.J. No. 546 (C.A.) at paras. 18 and 20.

21 There is little dispute about the principles concerning disclaimer of contracts by a receiver. The real issue is the application of those principles to the facts of this case. I will begin, however, by briefly outlining the principles.

22 Both counsel refer to the leading text, *Bennett on Receiverships*, 2nd ed. (Toronto: Thompson Canada Limited, 1999) in support of the proposition that the receiver is an officer of the court. The learned author states at p. 180:

> A court-appointed receiver represents neither the security holder nor the debtor. As an officer of the court, the receiver is not an agent but a principal entrusted to discharge the

> powers granted to the receiver *bona fide.* Accordingly, the receiver has a fiduciary duty to comply with such powers provided in the order and to act honestly and in the best interests of all interested parties including the debtor. The receiver's primary duty is to account for the assets under the receiver's control and in the receiver's possession. This duty is owed to the court and to all persons having an interest in the debtor's assets, including the debtor and shareholders where the debtor is a corporation. As a court officer, the receiver is put in to discharge the duties prescribed in the order or in any subsequent order and is afforded protection on any motion for advice and directions. The receiver has a duty to make candid and full disclosure to the court disclosing not only facts favourable to pending applications, but also facts that are unfavourable.

23 The author notes that a court-appointed receiver is not bound by existing contracts, but the receiver must exercise discretion before disclaiming a contract. If it seeks to break a *material* contract, it must seek leave of the court. At p. 341:

> In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor nor is the receiver personally liable for the performance of those contracts entered into before receivership. However, that does not mean the receiver can arbitrarily break a contract. The receiver must exercise proper discretion in doing so since ultimately the receiver may face the allegation that it could have realized more by performing the contract rather than terminating it or that the receiver breached the duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a material contract, the receiver should seek leave of the court.

24 I also accept the general proposition, set out in *Bank of Montreal v. Probe Exploration Inc.*, [2000] A.J. No. 1750 (Q.B.) affirmed 33 C.B.R. (4th) 182, [2000] A.J. No. 1751 (C.A.), at para 40, that a receiver is not entitled to prefer the interests of one creditor over another. Its duty is to act for the benefit of all interested parties:

> The obligation of the Receiver/Manager in carrying out those duties is to act for the benefit of all interested parties. As an officer of a court of equity charged with the obligation of managing the equity of redemption, the Receiver/Manager is bound to act in an equitable manner, to be fair and equitable to all. It cannot prefer one party over another.

25 A receiver is obligated to act honestly and in good faith and to deal with the debtor's property in a commercially reasonable manner. In deciding whether or not to adopt a contract, the duty of the receiver is to exercise the care "comparable to the reasonable care, supervision and control that an ordinary man would give to the business if it were his own": *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159, [1991] N.S.J. No. 488 (C.A.) at para. 15; *Textron Financial Canada Limited v. Beta Ltee/Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296 (Ont. S.C.J.) at para. 21.

26 If a decision by a receiver is within the broad bounds of reasonableness, and if the receiver conducts itself fairly and considers the interests of all stakeholders, the receiver's business decisions will not be interfered with lightly by the Court. As noted by the Ontario Court of Appeal in *Ravelston Corp. (Re)* (2005), 24 C.B.R. (5th) 256, [2005] O.J. No. 5351 (C.A.) at para. 40.

> Receivers will often have to make difficult business choices that require a careful cost/benefit analysis and the weighing of competing, if not irreconcilable differences. These decisions will often involve choosing from among several possible courses of action, none of which may be clearly preferable to the others ... The receiver must consider all of the available information, the interests of all legitimate stakeholders, and proceed in an evenhanded manner. That, of course, does not mean that all stakeholders must be equally satisfied with the course of conduct chosen by the receiver. If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision.

See also *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, [1991] O.J. No. 1137 (C.A.) at para. 14.

27 A receiver should be permitted to disclaim an agreement if continuing the agreement would create a significant preference in favour of the contracting party: *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.* (2008), 44 C.B.R. (5th) 171, [2008] B.C.J. No. 1297 (S.C.) at para. 96.

The Receiver's Position

28 The Receiver says that after its appointment it considered the Agreement for the purpose of determining whether it should continue to perform it. As part of its analysis, the Receiver says that it:

(a) reviewed the terms of the Agreement;
(b) reviewed the historical sales revenue generated from all signage by both Van Wagner and Penex;
(c) had discussions with the former manager of the Property, regarding signage issues and with the individuals who formerly managed the signage;
(d) on the recommendation of the Receiver's court-approved property manager, had discussions with a Toronto signage company, about the signage business, including the market conditions for signage, the market participants and the locations within Dundas Square;
(e) reviewed with Penex: (i) signage contracts to which Penex was party on the Receivership Date; (ii) signage contracts that were out for signature on the Receivership Date; (iii) Penex's process for dealing with Van Wagner; and (iv) the amounts owed to Van Wagner by Penex as at the Receivership Date;
(f) met with representatives of Penex's second secured creditor, who are familiar with the signage at the Property;
(g) reviewed the websites of certain major signage companies operating in Canada as well as industry associations, to obtain market information;
(g) had discussions with representatives from Brookfield Financial Real Estate Group Limited ("Brookfield") regarding the sales process previously undertaken by Penex regarding the Property, including the impact of the Agreement on that sales process;
(h) reviewed an appraisal report dated January 30, 2009 that set out information on current utilization of the signage and the signage market; and
(i) reviewed pleadings in the 2007 litigation between Penex and Van Wagner as well as the decision of Patillo J. in that litigation.

29 The Receiver reports that after considering this information, it concluded that it was not in the interests of Penex or its stakeholders to continue to perform the Agreement. Broadly speaking, there were three reasons for this decision.

30 First, the Receiver had concerns that there were terms of the Agreement that were not in the interests of Penex or its stakeholders: (a) there was an indemnification clause in the Agreement that requires Penex to indemnify Van Wagner for claims arising in connection with the operation of the sign structures except in cases of Van Wagner's gross negligence -- the Receiver felt that this term was excessively onerous; (b) the Receiver concluded that the rate of 22.5% for third party sales commissions was above market, which it considered to be in the range of 15%; (c) the Receiver concluded that the exclusivity provisions in the Agreement had a negative effect on Penex's ability to earn advertising revenue, created inefficiencies and confusion in the marketplace, and limited Penex's marketing options; and (d) the Receiver concluded that performance of the Agreement would require the Receiver and its advisors to work closely with Van Wagner in relation to the signage issue. In view of the history of the relationship between Van Wagner and Penex, which the Receiver considered to be "plagued by recriminations, acrimony and disagreements", the Receiver was concerned that there would be continued discord and that a viable business relationship would not be possible.

31 Second, the Receiver had concerns about Van Wagner's performance of the Agreement, including: (a) it had only one sales representative in Canada; (b) sign utilization appeared to be considerably less than market; and (c) since the opening of the Property in 2008, static signage revenues were about $3.75 million, of which Van Wagner was responsible for only about a third, the balance being generated through sales to tenants of the Property or leads of Penex staff or other agents.

32 Third, the Receiver considered that adoption of the Agreement would give Van Wagner a higher interest than it had prior to the making of the appointment order. The Receiver says that the first and second secured lenders provided financing before the Agreement came into effect and were unaware of the Agreement. They, and other secured creditors, are entitled to sell the Property free of any claims of unsecured creditors. The Receiver believes that Van Wagner's pre-receivership claim is an unsecured claim against Penex and does not anticipate that the proceeds of sale of the Property will be sufficient to satisfy the claims of any unsecured creditors. The Receiver says that Van Wagner is seeking payment of its pre-receivership claim and the effect of this would be to elevate that claim above the claims of the secured creditors, who had negotiated for and took security in the property.

Van Wagner's Position

33 I will briefly summarize the arguments made on behalf of Van Wagner. They are set out extensively in the factum filed by counsel on behalf of Van Wagner and my summary is not intended to be exhaustive, nor is it in precisely the same order as addressed by counsel.

34 First, Van Wagner says that the Receiver should have sought court approval for the disclaimer of the Agreement, because the contract was a material one.

35 Second, it submits that the Receiver had no experience in the signage market and it should have made greater investigations of the market and should not have relied upon advice received from Penex employees, whose views about Van Wagner were biased and who were themselves the cause of the disruptive relationship between the parties.

36 Third, it says that in light of the history of the relationship between the parties and Van Wagner's knowledge of the market, the Receiver should have discussed the issues with Van Wagner before terminating the contract and should have given Van Wagner an opportunity to respond to the Receiver's concerns.

37 Fourth, Van Wagner says that the Receiver erroneously concluded that the Agreement was not advantageous to Penex and the 22.5% commission rates in the Agreement were "well above market rate". Van Wagner says that while rates may be lower where the agreement is for brokerage only, this was not a simple brokerage contract and therefore it has a higher rate. As well, Van Wagner says that the rate is partly for the purpose of compensating Van Wagner for the loss of part ownership of the signs as a result of Penex's breach of the earlier Joint Venture Agreement.

38 Fifth, Van Wagner takes issue with the Receiver's conclusion that the Agreement is detrimental to the stakeholders and fundamentally disagrees with the Receiver's analysis of the Agreement. I will not set out the various arguments made by Van Wagner under this heading, which occupy some five pages of the factum and took up a considerable part of oral submissions.

39 Sixth, Van Wagner says that its performance to date has not been detrimental to the Property and that the Receiver's investigation of this issue was neither balanced nor informed. Van Wagner says that the Receiver relied upon tainted information from former Penex employees whose conduct was responsible for the prior litigation between the parties that was successfully resolved in favour of Van Wagner. Again, the submissions on this issue were extensive.

40 Seventh, the Receiver failed to give adequate consideration to the impact of termination of the Agreement on Van Wagner, particularly in light of the previous conclusion of Patillo J. that Van Wagner would suffer irreparable harm if the Agreement was breached.

41 Eighth, Van Wagner says that continued performance of the Agreement is actually financially beneficial to the stakeholders.

42 Ninth, the disclaimer of the Agreement has the effect of expropriating the commissions that were earned by Van Wagner and transferring them to the secured lenders. It is alleged that this is unfair to Van Wagner and confers a windfall on the secured lenders.

Conclusion on the First Issue

43 Having considered the Receiver's reasons and the concerns raised by Van Wagner, I have come to the conclusion that, although there are points to be made on both sides as to whether the Agreement was

advantageous or not, it cannot be said that the Receiver acted in a commercially unreasonable manner, unfairly, or in bad faith in deciding to disclaim the Agreement. On the contrary, the Receiver's report indicates that the Receiver made appropriate inquiries and investigations prior to disclaiming the contract. Based on the evidence before me, the Receiver could reasonably conclude that the rates paid to Van Wagner under the Agreement were above market value and included a premium to compensate Van Wagner for rights it had given up under the Joint Venture Agreement. The Receiver could also reasonably conclude that the exclusivity provisions of the Agreement fettered its ability to negotiate signage agreements with potential users, limited the flexibility that it would require to deal with signage issues, and was potentially cumbersome, inconvenient, and inefficient.

44 This is precisely one of those cases, referred to in *Ravelston Corp. (Re.)*, above, in which a receiver must choose between several courses of action, none of which is obviously preferable to another. While I do not necessarily accept every reason advanced on behalf of the Receiver on this issue, or reject every one of Van Wagner's objections, I cannot conclude that the Receiver acted unreasonably, arbitrarily or inappropriately in disclaiming the Agreement.

Second Issue: Are the fees due to Van Wagner held in trust for Van Wagner?

45 In support of its submission that the fees are held in trust, Van Wagner refers to paragraph 4D of the Agreement, which provides, in part:

> All Gross Revenue shall be made payable to the Owner and deposited in a designated chequing account with Royal Bank of Canada in Toronto (with statements to both parties), or such other bank as is designated by Owner, with cheque signing to be a person representing and designated by the Owner. The Fee due to Van Wagner shall be held in such account in trust for Van Wagner and shall be remitted to Van Wagner, and the balance of the Gross Revenue shall be remitted to Owner, in each case, within fifteen (15) days following the end of each calendar month together with a statement showing the amounts collected and the manner in which compensation is calculated. [...] The parties shall hold all funds received in trust for the benefit of the parties hereunder in accordance with their interests. Notwithstanding the above, the aforementioned payment and banking provisions shall be subject to the prior approval of Owner's lenders from time to time and the parties hereto agree to follow such other payment and banking procedures as reasonably may be required by Owner's lenders from time to time and which are consistent with the principles set forth in this Agreement and are approved by Van Wagner (which approval shall not be unreasonably conditioned, withheld or delayed). [emphasis added]

46 Van Wagner submits that the "three certainties" required to establish a trust are present -- certainty of intention, certainty of subject matter, and certainty of object: see: *Air Canada v. M & L Travel Ltd.*, [1993] S.C.J. No. 118, *Citadel General Assurance Co. v. Lloyds Bank Canada*, [1997] 3 S.C.R. 805, [1997] S.C.J. No. 92. It submits that paragraph 4D shows a clear intention to create a trust, that the subject matter of the trust is clear (fees owing to Van Wagner), and the object of the trust is clear (Van Wagner).

47 The difficulties with Van Wagner's submissions are set out in the Receiver's factum. First, clause 4D itself contemplates that the trust arrangement was subject to the approval of Penex's lenders. It provides:

> ... Notwithstanding the above, the aforementioned payment and banking provisions shall be subject to the prior approval of Owner's lenders from time to time ...

48 There is no evidence that the lenders approved the trust arrangement and at least some evidence that one lender did not approve it. There is certainly an argument that a condition-precedent to the establishment of a trust was not satisfied.

49 The second problem with Van Wagner's submission on this issue is that no trust account was in fact established, and that Van Wagner was either aware, or ought to have been aware, that one had not been established. One could conclude from this that the parties never gave effect to their intention to create a trust.

50 The third problem is that revenues from sales of static signage advertising space, from which Van Wagner was entitled to fees, were in fact deposited in Penex's general operating account where they were co-mingled with other funds. The Receiver submits that the co-mingling of the trust funds is fatal to the existence of a trust: *GMAC Commercial Credit Corporation -- Canada v. TCT Logistics Inc.* (2005), 7 C.B.R. (5th) 202, [2005] O.J. No. 589 (C.A.).

51 These concerns are serious and more than simply technical objections. I have concluded, however, that it is not necessary to resolve the issue at this time. I accept the submission of counsel on behalf of the Receiver that this issue should be addressed when the Court is asked to make an order regarding the distribution of the proceedings of the Property. That motion will be made on notice to all potential claimants and can be considered, if necessary, on a more complete evidentiary record than exists before me.

Third Issue: Does the Agreement bind a purchaser of the property

52 Van Wagner takes the position that any purchaser of the Property must assume and be bound by the Agreement. The Receiver reports that, having consulted with the financial adviser engaged and approved by the Court to sell the property, it is concerned that uncertainty about the existence of a legal obligation to assume the Agreement will have a detrimental affect on the marketability of the Property. Based on this submission, I agree that the issue should be resolved at this time and not deferred until offers to purchase the Property have been submitted.

53 Van Wagner relies upon paragraph 13(k) of the Agreement, which provides:

> This Agreement shall be binding upon and inure to the benefit of [Penex] and its successors and permitted assigns, including, without limitation, any subsequent fee owner of the Building and shall be binding upon and inure to the benefit of Van Wagner and its successors and permitted assigns. [Emphasis added]

54 Van Wagner submits that, in light of the history between the parties, it would be fair and equitable to require the Receiver to abide by this term of the Agreement.

55 Apart from this, Van Wagner offers no authority for the proposition that the Agreement runs with the Property, such that a purchaser would be bound to assume it.

56 Paragraph 13(k) is, with variations, a standard clause in many forms of agreement, including agreements for the supply of services. It cannot reasonably be construed as creating an interest in land so as to bind a subsequent purchaser from the Receiver. I accept the submission of counsel on behalf of the Receiver that in order to run with the land, two conditions must be met. First the covenant must be negative in substance and a burden on the covenantor's land: *Westbank Holdings Ltd. v. Westgate Shopping Centre Ltd.*, 2001 BCCA 268, [2001] B.C.J. No. 852, at para. 16; *Durham Condominium Corp. No. 123 v. Amberwood Investments* Ltd. (2002), 58 O.R. (3d) 481, [2002] O.J. No. 1023 (C.A.) at paras. 18 and 20. A positive covenant does not run with the land. Second, in order to run with the land, the Agreement must touch and concern the land. This covenant does not concern the Property. It concerns services to be provided to the owner of the Property.

57 It is not disputed that the Appointment Order gives the Receiver the authority to market the Property, to sell the Property, and to "apply for a vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting the Property." In view of the authorities cited by counsel for the Receiver, and in the absence of any authority put forward by counsel for Van Wagner, I find that the Agreement does not run with the Property. The Receiver is entitled to a declaration that a purchaser of the Property is not bound by the Agreement.

Conclusion

58 For these reasons, Van Wagner's motion is dismissed and the Receiver's motion is granted. If costs cannot be agreed upon, they may be addressed by brief written submissions, including a costs outline, addressed to me care of Judges' Administration. Counsel for the Receiver and for EPR Metropolis Trusts shall serve and file submissions within fifteen days. Counsel for Van Wagner shall file responding submissions within fifteen days of receipt of the other parties' submissions. Those parties may file brief reply submissions, if necessary, within five days thereafter.

G.R. STRATHY J.

cp/e/qlrxg/qljxr/qlmxl/qlaxw/qlana

1 At the outset of the hearing, Mr. Platt advised the Court that his client's only interest in the motions pertains to alleged trust claims being asserted by his client and by Van Wagner. He stated that counsel had agreed that issues between those parties would be left for another day, if necessary. On that basis, Mr. Platt was excused and withdrew from the hearing.

2 The Respondents are Penex Metropolis Ltd., in its capacity as general partner of, and as nominee and trustee of, and for, Metropolis Limited Partnership and Metropolis Limited Partnership.

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Construction Lien Act, R.S.O. 1990, c. C.30

68. (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate. R.S.O. 1990, c. C.30, s. 68 (1).

Powers of trustee

(2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,

(a) act as a receiver and manager and, subject to the Planning Act and the approval of the court, mortgage, sell or lease the premises or any part thereof;

(b) complete or partially complete the improvement;

(c) take appropriate steps for the preservation of the premises; and

(d) subject to the approval of the court, take such other steps as are appropriate in the circumstances. R.S.O. 1990, c. C.30, s. 68 (2).

Liens a charge on amounts recovered

(3) Subject to subsection 78 (7), all liens shall be a charge upon any amount recovered by the trustee after payment of the reasonable business expenses and management costs incurred by the trustee in the exercise of any power under subsection (2). R.S.O. 1990, c. C.30, s. 68 (3).

Sale subject to encumbrances

(4) Any interest in the premises that is to be sold may be offered for sale subject to any mortgage, charge, interest or other encumbrance that the court directs. R.S.O. 1990, c. C.30, s. 68 (4).

Orders for completion of sale, etc.

(5) The court may make all orders necessary for the completion of any mortgage, lease or sale by a trustee under this section. R.S.O. 1990, c. C.30, s. 68 (5).

IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD. FOR THE APOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

Court File No. CV15-10843-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES

Re: Parking Matters
Originally Returnable: October 5, 2015

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