Court File No. CV-24-00716381-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

1599285 ONTARIO LIMITED, RICK BERWICK, 2702749 ONTARIO INC., PETER ADAMO, CROCETTA ADAMO, ANJAY LIMITED, A-ONE AUTO INVESTMENTS INC., CINZIA SORRENTI, ELCRM HOLDINGS INC., SERGIO MOLELLA, DONALD IERFINO, PIERINA PIZZARDI, PIZZARDI INVESTMENTS, AMOND MANAGEMENT INC., SALISI INVESTMENTS LTD., LORENZO ANTONINI, CARMEN ANTONINI, TINA BETTI, ANTHONY BONDI, GIUSEPPA BONDI, C.P.M.C MARQUEZ HOLDINGS INC., FREDY ROSSI, 2438747 ONTARIO LIMITED, 2205633 ONTARIO LIMITED, 1620375 ONTARIO LIMITED, 1288601 ONTARIO LIMITED, AMSTEL MANUFACTURING (1993) INC., BRUCE MCKINLAY, M ANTONINI HOLDINGS INC., GABRIELE PIZZARDI, IMPERIO SA HOLDINGS INC., RONALD CHEMIJ, MARY CHEMIJ, TERRY CHEMIJ, LUBA CHEMIJ, and TAXMART INC.

Applicants

- and –

1000195736 ONTARIO LTD., 1000193772 ONTARIO LTD., and MORGIS CORPORATION

Respondents

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

FACTUM OF THE APPLICANTS

Dated: May 24, 2024

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PART I: INTRODUCTION

1. The Lenders (defined below) seek an order appointing TDB Restructuring Limited as receiver (**"Receiver"**) over all of assets, undertakings and properties of the Respondents, 1000195736 Ontario Ltd. (**"736 Ont"**), 1000193772 Ontario Ltd. (**"772 Ont"**), and Morgis Corporation (**"Morgis Corp",** together with 736 Ont and 772 Ont collectively the **"Debtors"**) and the proceeds therefrom (the **"Property"**), including without limitation, certain real property owned by the Debtors in Toronto, Ontario.

2. In response, and under the guise of a CCAA application, the Debtors seek additional time in the hope of completing a refinancing and if, as anticipated, the refinancing fails, the Debtors seek to implement a SISP (the "**CCAA Application**").

3. There is no dispute that the Debtors are in default of their loan obligations. There is also no dispute that the Debtors have been on notice since May 30, 2023, that the Loans (defined below) would not be renewed beyond their then maturity date of September 1, 2023. There is also no dispute that the Debtors have paid no interest on the Loans since September 1, 2023.

4. The Debtors come to this Court with the hope of completing a refinancing with a proposed lender. The commitment letter presented by the Debtors is subject to significant deposit obligations and onerous conditions precedent. The Debtors have provided no proof that the deposit obligations have been satisfied or that any of the onerous conditions have been satisfied.

5. The Debtors have been generously afforded an entire year to complete any refinancing, but all of their previous engagements with other prospective lenders have failed.

6. The Debtors fruitless refinancing efforts sit against the backdrop of Lenders who have extended Loans totalling approximately $53 Million with monthly interest accruing at approximately $464,791.67 per month and with current total interest arrears alone amounting to $4 Million.

7. The Lenders, understandably, have lost any confidence in the Debtors ability to refinance and simply want the return of their money.

8. There is no reason why this Court should further entertain the refinancing efforts of the Debtors as it will only serve to increase costs, particularly where the 'as-is' value of the Real Property (defined below) has depreciated by $6 Million between June 2023 and December 2023.

9. The Lenders have a contractual right to the appointment of a Receiver. In the circumstances, the appointment of a Receiver is both just and convenient.

PART II: FACTS

The Parties

10. The Applicants are Ontario corporations and individual Ontario residents.[1]

11. The Debtors are Ontario corporations controlled by Chris Morgis ("**Mr. Morgis**") under the "Morgis Group".[2]

12. The chart below more particularly sets out the parties to each of the Loans (defined below): [3]

Loan	**Applicant/Lender**	**Respondent/Borrower**
Loan 1: $15,500,000.00	1599285 Ontario Limited. Rick Berwick 2702749 Ontario Inc. Peter Adamo Crocetta Adamo Anjay Limited A-One Auto Investments Inc. Cinzia Sorrenti ELCRM Holdings Inc. Sergio Molella Donald Ierfino Pierina Pizzardi Pizzardi Investments Amond Management Inc. Salisi Investments Ltd. Lorenzo Antonini Carmen Antonini Tina Betti	Morgis Corp

[1] The Affidavit of Donald Ierfino, sworn April 19, 2024 (the "First Ierfino Affidavit") at Application Record of the Applicant, ("AR"), at Tab 2 at para 5.
[2] The First Ierfino Affidavit, AR, Tab 2 at paras 6-11.
[3] The First Ierfino Affidavit, AR, Tab 2 at para 12.

	Anthony Bondi Giuseppa Bondi C.P.M.C Marquez Holdings Inc. (collectively the "**Loan 1 Lenders**")	
Loan 2: $33,000,000.00	Fredy Rossi 2438747 Ontario Limited 2205633 Ontario Limited 1620375 Ontario Limited 1288601 Ontario Limited Amstel Manufacturing (1993) Inc. Bruce McKinlay Salisi Investments Ltd. M Antonini Holdings Inc. Gabriele Pizzardi (collectively the "**Loan 2 Lenders**")	Morgis Corp 772 Ont 736 Ont
Loan 3: $4,500,000.00	Imperio SA Holdings Inc. Ronald Chemij Mary Chemij Terry Chemij Luba Chemij Donald Ierfino Taxmart Inc. (collectively the "**Loan 3 Lenders"** and with the Loan 1 Lenders and Loan 2 Lenders, hereinafter known as the **"Lenders**")	Morgis Corp 772 Ont 736 Ont

The Real Property and Project

13. The Real Property (defined below) consists of four adjacent parcels along Eglinton Avenue West, Toronto, Ontario.[4]

    i. 350 Eglinton Avenue West, Toronto, bearing PIN: 21169-0184 ("**Parcel 1**");

    ii. 356 Eglinton Avenue West, Toronto, bearing PIN: 21169-0183 ("**Parcel 2**");

[4] The First Ierfino Affidavit, AR, Tab 2 at para 13.

iii. 366 Eglinton Avenue West, Toronto, bearing PIN: 21169-0182 ("**Parcel 3**"); and

iv. 368, 378 Eglinton Avenue West, Toronto, bearing PIN: 21169-0181 ("**Parcel 4"** and collectively with Parcel 1, Parcel 2 and Parcel 3, the **"Real Property**").

14. Morgis Corp is the registered owner of Parcel 1 and Parcel 2, 772 Ont is the registered owner of Parcel 3, and 736 Ont is the registered owner of Parcel 4. [5]

15. The Real Property was intended for a redevelopment project consisting of a 10-storey mixed-use residential building with a retail component on the ground floor (the "**Project**").[6]

16. Despite the assertion by the Debtors that the Project is in the advanced stages of planning approval, [7] the Project remains in the initial plan approval stage with the City of Toronto.[8]

Other Encumbrances and Creditors

17. There are no subsequent encumbrancers on the Real Property and there are no other secured creditors registered under the *Personal Property Security Act*. [9]

The Loans and Security

Loan 1: $15.5 Million

18. Pursuant to a commitment letter dated April 6, 2021 (the "**Loan 1 Commitment Letter**") between the Loan 1 Lenders, as lender, and Morgis Corp, as borrower, the Loan 1 Lenders advanced a mortgage loan in the principal amount of $15,500,000.00 to Morgis Corp ("**Loan 1**"). [10]

[5] The First Ierfino Affidavit, AR, Tab 2 at para 14.
[6] The First Ierfino Affidavit, AR, Tab 2 at para 15.
[7] First Affidavit of Chris Morgis, sworn May 9, 2024 ("the First Morgis Affidavit") at para 9.
[8] The First Ierfino Affidavit, AR, Tab 2 at para 16.
[9] The First Ierfino Affidavit, AR, Tab 2 at paras 17-18.
[10] The First Ierfino Affidavit, AR, Tab 2 at para 19.

19. Loan 1 was secured by, amongst other things, a general security agreement, a general assignment of rents and a first ranking charge on title to Parcel 1 and Parcel 2 registered on July 16, 2021.[11]

Loan 2: $33 Million

20. Pursuant to a commitment letter dated April 6, 2022 (the "**Loan 2 Commitment Letter**") between the Loan 2 Lenders, as lender, and the Debtors, as borrower, the Loan 2 Lenders advanced a mortgage loan in the principal amount of $33,000,000.00 to the Debtors ("**Loan 2**"). [12]

21. Loan 2 was secured by, amongst other things, a general security agreement, a general assignment of rents and a first ranking charge on title to Parcel 3 registered on May 13, 2022 and a first ranking charge on Parcel 4 registered on May 18, 2022. Loan 2 was also registered as a second ranking charge on Parcel 1 and Parcel 2 on May 13, 2022. [13]

Loan 3: $4.5 Million

22. Pursuant to a commitment letter dated March 1, 2023 (the "**Loan 3 Commitment Letter**") between the Loan 3 Lenders, as lender, and Morgis Corp and 736 Ont, as borrower, the Loan 3 Lenders advanced a mortgage loan in the principal amount of $4,500,000.00 to the Debtors ("**Loan 3**").[14]

23. Loan 3 was secured by, amongst other things, a general security agreement, a general assignment of rents and a third ranking charge on Parcel 1 and Parcel 2 registered on March 17, 2023, a second ranking charge on Parcel 3 and Parcel 4 registered on March 17, 2023.[15]

24. Mr. Morgis guaranteed all of the obligations of the Debtors under Loan 1, Loan 2, and Loan 3 (collectively the "**Loans**").[16]

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[11] The First Ierfino Affidavit, AR, Tab 2 at para 20.
[12] The First Ierfino Affidavit, AR, Tab 2 at para 22.
[13] The First Ierfino Affidavit, AR, Tab 2 at para 23.
[14] The First Ierfino Affidavit, AR, Tab 2 at para 26.
[15] The First Ierfino Affidavit, AR, Tab 2 at para 27.
[16] The First Ierfino Affidavit, AR, Tab 2 at paras 21, 24, 25, 28, 29.

The Extension Agreements

25. The Loans were due to mature on September 1, 2023. [17]

26. The Loans were extended three times (at the request of the Debtors) with a final maturity date of February 1, 2024.[18]

Demands

27. The Debtors failed to redeem the Loans on their maturity on February 1, 2024.[19]

28. On February 5, 2024, the Loan 1 Lenders issued a demand letter and a Notice of Intention to Enforce Security in accordance with section 244 of the *BIA*.[20]

29. On February 5, 2024, the Loan 2 Lenders issued a demand letter and a Notice of Intention to Enforce Security in accordance with section 244 of the *BIA*.[21]

30. On February 5, 2024, the Loan 3 Lenders issued a demand letter and a Notice of Intention to Enforce Security in accordance with section 244 of the *BIA*.[22]

31. The Debtors acknowledge that they are under default of the Loans.[23]

Just and Convenient to appoint a Receiver

32. The Debtors are unable to fulfil their obligations to the Lenders and are unable to complete the Project.[24]

33. Pursuant to the terms of the Loans and security documents, upon an event of default that has not been cured, the Lenders are entitled to appoint a receiver in writing and/or make an

[17] The First Ierfino Affidavit, AR, Tab 2 at para 30.
[18] The First Ierfino Affidavit, AR, Tab 2 at paras 33, 35, 38.
[19] The First Ierfino Affidavit, AR, Tab 2 at para 39.
[20] The First Ierfino Affidavit, AR, Tab 2 at para 40; Exhibit "HH".
[21] The First Ierfino Affidavit, AR, Tab 2 at para 41; Exhibit "II".
[22] The First Ierfino Affidavit, AR, Tab 2 at para 42; Exhibit "JJ".
[23] The First Morgis Affidavit at para 16.
[24] The First Ierfino Affidavit, AR, Tab 2 at para 44.

application for the court appointment of a receiver of the property, assets and undertakings of the Debtors.[25]

34. The Lenders have commenced this receivership application to protect their respective investments and preserve and maximize the value of the Real Property for all stakeholders.[26]

35. TDB is a licenced insolvency trustee and has consented to be appointed as Receiver, without security, of the Real Property.[27]

CCAA is not the Appropriate Procedure

36. The Applicants have lost all confidence in Mr. Morgis and the Debtors. The Debtors under the direction of Mr. Morgis, have failed or refused to remit any of the monthly interest payments due since September 1, 2023.[28]

37. In this regard, as of May 14, 2024, the Debtors are in default of their interest payment obligations alone under the Loans to the extent of almost $4 Million ($3,932,264.98).[29]

38. The equity in the Real Property also appears to be eroding. The Debtors have provided two appraisals, conducted by the same appraiser, in the confidential affidavit of Mr. Morgis. The second appraisal dated December 14, 2023 identifies an approximate $6 Million reduction in the "as-is" market value of the Real Property in the six months since the first appraisal dated June 6, 2023.[30]

39. The Respondents seek to complete refinancing and seek the protections afforded under the CCAA Application. However, the commitment letter dated May 3, 2024, upon which the Debtors rely on, contains onerous conditions precedent, including a requirement to pay a

[25] The First Ierfino Affidavit, AR, Tab 2 at para 45.
[26] The First Ierfino Affidavit, AR, Tab 2 at para 46.
[27] The First Ierfino Affidavit, AR, Tab 2 at para 47; Exhibit "KK".
[28] The Second Affidavit of Donald Ierfino, sworn May 16, 2024 (the "Second Ierfino Affidavit") at Reply Application Record of the Applicant, ("RAR"), at Tab 1 at para 11.
[29] The Second Ierfino Affidavit, RAR, Tab 1 at para 12.
[30] The Second Ierfino Affidavit, RAR, Tab 1 at para 13.

deposit of $12 Million by May 15, 2024, to be held in an interest bearing GIC for the duration of the new loan. [31]

40. The Commitment Letter also requires the payment of a commitment fee of $1.4 Million before May 15, 2024.[32]

41. On May 16, 2024, Sara Mosadeq, counsel for the Applicants, wrote to Mr. Jason Wadden, counsel for the Respondents, asking if the Respondents had paid the required deposit and the commitment fee and, if so, requesting documentation in support thereof.[33]

42. In response, counsel for the Debtors said, without supporting documentation, that the commitment fee was paid but that the proposed lender and the Debtors agreed to postpone the payment of the $12 Million, again without any supporting documentation evidencing such an agreement.[34]

43. If the proposed refinancing does not materialize, the Debtors have provided no plan or proposal other than the sale of the Real Property. This will be the very mandate of the Receiver. [35]

44. The Lenders have already generously afforded the Debtors some nine months since the maturity of the Loans (September 1, 2023) to secure and complete any refinancing but, to date, the Debtors' efforts have been unsuccessful. [36]

45. The Lenders have been fair and patient. However, their patience has understandably worn thin as interest continues to accrue on the Loans at a rate of $464,791.67 per month, with no payments whatsoever from the Debtors, and as the equity in the Real Property continues to erode. [37]

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[31] The Second Ierfino Affidavit, RAR, Tab 1 at para 14.
[32] The Second Ierfino Affidavit, RAR, Tab 1 at para 15.
[33] The Second Ierfino Affidavit, RAR, Tab 1 at para 16.
[34] The Affidavit of Francesca Sgambelluri, sworn May 24, 2024 at para 3; Exhibit "A".
[35] The Second Ierfino Affidavit, RAR, Tab 1 at para 17.
[36] The Second Ierfino Affidavit, RAR, Tab 1 at para 18.
[37] The Second Ierfino Affidavit, RAR, Tab 1 at para 19.

PART III: ISSUES

46. There are two issues to be determined on this Application:

    i. Whether this Court should appoint TDB as Receiver over the Real Property?

    ii. Which of a receivership or a CCAA proceeding is preferable in the circumstances of this case?

PART IV: LAW AND ARGUMENT

A. The Appointment of the Receiver

47. The Lenders seek the appointment of a receiver in accordance with subsection 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the **"BIA"**) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended (**"CJA"**).

48. Subsection 243(1) of the BIA provides that, on application by a secured creditor, a court may appoint a receiver when it is "just or convenient" to do so.[38] Similarly, section 101(1) of the CJA provides for the appointment of a receiver where it is "just or convenient".[39]

49. The Lenders also have the contractual right to appoint a receiver under the terms of the Loans.[40]

50. As secured creditors of the Debtors under the real property charge registrations and the PPSA registrations, the Lenders are able to bring this application under section 243 of the BIA.[41]

51. In accordance with section 244(1) of the BIA, the Lenders sent notices of intention to enforce security on the Debtors on February 5, 2024. The 10-day notice period for enforcement has expired.

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[38] *Bankruptcy and Insolvency Act* (R.S.C., 1985, c. B-3), s 243.
[39] *Courts of Justice Act*, RSO 1990, c C. 43, s 101.
[40] The First Ierfino Affidavit, AR, Tab 2 at paras 19, 22, 26; Exhibit "G"; Exhibit "L"; Exhibit "T".
[41] The First Ierfino Affidavit, AR, Tab 2 at paras 20, 23, 26, 27; Exhibit "H"; Exhibit "I"; Exhibit "M"; Exhibit "N"; Exhibit "O"; Exhibit "P"; Exhibit "U"; Exhibit "V"; Exhibit "W"; Exhibit "X".

52. The Debtors are incorporated under the laws of the Province of Ontario and all share the same registered office in King City, Ontario. The Real Property is in Toronto, Ontario.[42]

53. The locality of the Debtors is Ontario and therefore this application is properly brought before this Honourable Court.

54. TDB is qualified to act a Receiver in accordance with subsection 243(4) of the BIA and has provided its consent to act as Receiver of the Real Property.[43]

Appointing TDB as Receiver is Just and Convenient

55. In determining whether it is just or convenient to appoint a receiver, the Court must consider all the circumstances of the case, but in particular the nature of the property and the rights and interests of all parties in relation to the property, which includes the rights of the secured creditor pursuant to its security.[44]

56. It is well established that when dealing with a secured creditor who has the right to receivership under its security arrangements, the "extraordinary nature" of the remedy "**is significantly reduced**."[45].

57. In this regard, in *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd*, Justice Morawetz, as he then was, stated:[46]

> "[W]hile the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver. This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties."

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[42] The First Ierfino Affidavit, AR, Tab 2 at paras 6-9.
[43] The First Ierfino Affidavit, AR, Tab 2 at para 47; Exhibit "KK".
[44] *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258 at para 10.
[45] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII) at para 43.
[46] *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866 at para 27.

58. As noted by Justice Koehnen in *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*. (*"**The Clover on Yonge**"*), "[t]he appointment of a receiver becomes even less extraordinary when dealing with a default under a mortgage".[47]

59. In *Romspen Investment Coporation v. Atlas Healthcare (Richmond Hill) Ltd*., this Court held that there must be good reason to deny a secured creditor's request to appoint a receiver where the secured party has lost faith in the debtor's management and the receivership applicant has the contractual right to appoint a receiver.[48]

60. No such good reason to deny this receivership application. On the contrary, it is both just and convenient for this Court to appoint the Receiver over the Property because:

    i. as of May 14, 2024, interest alone has accrued on the Loans in the amount of approximately $4 Million ($3,932,264.98);[49]

    ii. the Lenders have lost all confidence in the Debtors as they have refused to remit any of the monthly interest payments due since September 1, 2023 and are unable to complete any refinancing;[50]

    iii. the equity in the Real Property appears to be eroding. From December June 2023 to December 2023, there has been an approximate $6 Million dollar reduction in the "as-is" market value of the Real Property;[51]

    iv. the Lenders have generously afforded some nine months since the maturity of the Loans (September 1, 2023) to secure and complete refinancing, but the Debtors' efforts to do so have been unsuccessful;[52] and

    v. the appointment of the Receiver will provide for a transparent and court-supervised sale of the Property.

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[47] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII) at para 44.
[48] *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al*, 2018 ONSC 7382 (Commercial List) at para 100.
[49] The Second Ierfino Affidavit, RAR, Tab 1 at para 12.
[50] The Second Ierfino Affidavit, RAR, Tab 1 at para 11.
[51] The Second Ierfino Affidavit, RAR, Tab 1 at para 13.
[52] The Second Ierfino Affidavit, RAR, Tab 1 at para 18.

61. Therefore, the appointment of TDB as Receiver is just and convenient in the circumstances given the significant debt owing to the Lenders, the continuing default of the Debtors and their clear inability to refinance the Loans, which refinancing attempts have been ongoing since May 2023.

B. A receivership is preferable over a CCAA proceeding

62. The Debtors seek additional time to complete refinancing and, under the guise of a CCAA application, seek to avoid the appointment of a receiver.

63. In doing so, the Debtors rely on a commitment letter with onerous unsatisfied conditions, and when such financing fails to materialize, the Debtors propose a SISP.

64. In short, the Debtors seek to remain in control of the Property and any sales process rather than having the Receiver appointed in accordance with the Loans.

65. The Lenders oppose the CCAA application – after a year of providing the Debtors the opportunity to get their business affairs in order, the Lenders have lost all confidence in the Debtors. At this stage, the Lenders simply want their monies returned.

66. The Debtors fail to provide any conceivable reason why the SISP would provide a better process of enhancing recovery for the Lenders, particularly when the SISP would leave control and management in the hands of the Debtors, who have failed for over a year to find and complete a refinancing and have refused to pay any interest under the Loans during the intervening period.

Competing Interests: CCAA vs. Receivership

67. In the recent unreported decision of *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.* (**"*AFC*"**), Justice Black outlines several relevant factors that the court is to consider in competing receivership and CCAA applications. These factors include:[53]

[53] *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.* (29 February 2024), Toronto (Ont. S.C.J. [Commercial List]) at para 70.

(a) While CCAA can apply to companies whose sole business is a single land development, such companies do have difficulty proposing an arrangement or compromise acceptable to secured creditors;

(b) The priorities of security are often straightforward and there is little incentive for secured creditors having greater priority to agree to an arrangement that involves money being paid to more "junior creditors." (And on this parameter, the Lenders note that in this case even the "junior creditors" oppose the relief sought by the Debtors);

(c) If a developer is insolvent and not able to complete a development "without further funding, the secured creditors may feel that they will be in a better position by exercising the remedies rather than letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or a DIP financing; and

(d) Where a mortgagor has provided an express "covenant" agreeing to the appointment of a receiver, the Court "should not ordinarily interfere with the contract between the parties."

68. In *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*. (*"The Clover on Yonge"*), against the backdrop of the aforementioned factors, Justice Koehnen summarized the law and issues to be considered when deciding between a receivership and a CCAA application. In *AFC*, Justice Black cited Justice Koehnen's following summary with approval:[54]

1. Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements;

2. The relief becomes even less extraordinary when dealing with a default under a mortgage;

3. The court should consider factors as set out by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 at para 20:

    (a) the lenders' security is at risk of deteriorating;

[54] *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.* (29 February 2024), Toronto (Ont. S.C.J. [Commercial List]) at para 71.

(b) There is a need to stabilize and preserve the debtors' business;
(c) Loss of confidence in the debtors' management; and
(d) Positions and interests of other creditors.

4. In choosing between receivership or CCAA process, the court must balance the competing interests of various stakeholders to determine which process is more appropriate; and

5. The factors to be considered are:

(a) Payment of the receivership applicants;
(b) Reputational damage;
(c) Preservation of employment;
(d) Speed of the process;
(e) Protection of all stakeholders;
(f) cost;
(g) nature of the business.

(a) Payment of the Receivership Applicants:

69. Despite being notified almost a year ago (May 30, 2023) that the Lenders did not intend to renew the Loans and Debtors being generously afforded some nine months since the maturity of the Loans (September 1, 2023) to secure and complete a refinancing, to date, the Debtors efforts have failed.

70. The Debtors now seek to complete a refinancing and request protection under the CCAA until the anticipated closing date of August 31, 2024.

71. This would have the Lenders waiting in limbo for an additional three months—beyond the already nine-month grace period—without any control over the process to recover on their security.

72. The commitment letter produced by the Debtors contains onerous conditions precedent. These include a requirement to pay a deposit of $12 million by May 15, 2024, to be held in an interest-bearing GIC for the duration of the new loan, and a commitment fee of $1.4 million, also due by May 15, 2024.[55]

[55] The Second Ierfino Affidavit, RAR, Tab 1 at para 14.

73. Despite the Debtors' assurances that the refinancing is "expected to close on August 31, 2024," no evidence has been provided to demonstrate that the extensive list of conditions precedent have been satisfied or that the deposit and commitment fee was paid by May 15, 2024.

74. In *Romspen Investment Corporation v. 6711162 Canada Inc.* (**"*6711162 Canada Inc.*"**), this Court rejected the debtor's CCAA application in favor of the secured lenders' receivership application. At the time of the initial application, the development projects were significantly over budget, and the secured lenders had already refrained from enforcement for 12 months. The debtors were unable to secure refinancing within that period, prompting the secured lender to file for receivership.[56]

75. In *6711162 Canada Inc.*, this court determined that the debtors sought the CCAA initial order to "secure for them a compelled extension of the term of the Romspen Loan at minimal cost," which was not "a proper use of the CCAA process." Furthermore, the court held that the debtors' proposed plan was characterized by "a certain unfairness."[57]

76. In *The Clover on Yonge Inc.*, in determining that the receivership was preferable to a CCAA procedure, Justice Koehnen, stated the following concerning payment of the receivership applicants:[58]

> [T]he Receivership Applicants should not necessarily be compelled to remain in the project either permanently or temporarily while they wait for a project specific company to obtain new financing without the Receivership Applicants having any control of the process. Forcing the Receivership Applicants to remain without control of the process is even more unfair when the contracts to which the Debtors agreed give the Receivership Applicants a right to control the process through a receivership.

77. In the present case, the Debtors have had almost a year in total to refinance the Loans. They failed to do so. The Lenders submit that compelling them to remain in the Project for an additional three months while the Debtors attempt to sort out refinancing in unfair. Moreover, if the heavily conditioned refinancing does not materialize, the Lenders will

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[56] *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781 (CanLII).
[57] *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781 (CanLII) at paras 72-74.
[58] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII) at para 71.

then again remain in an unfair situation with no control over their security. This is particularly unfair given that, under the Loans, the Debtors expressly gave the Lenders a right to control the process through the appointment of a receiver.

(b) Reputational damage:

78. Any alleged reputational damage to the Debtors, would be attributable to the Debtors own failure to comply with their contractual obligations under the Loans, and not to the appointment of the Receiver.[59]

(c) Preservation of employment:

79. The Debtors admittedly have no employees. Therefore, there are no employees that will suffer as a result of the appointment of a Receiver.

80. In *The Clover on Yonge Inc.,* the debtors were part of a corporate group with approximately 75 employees, whose jobs they argued were at risk if a receivership was granted. The debtor group claimed that CCAA proceedings would preserve these jobs. However, Justice Koehnen found that the evidence did not support this assertion, as there was no evidence of how many of the 75 employees were devoted exclusively to the projects in question, nor how many, if any, would lose their jobs as a result of a receivership.[60]

81. Furthermore, Justice Koehnen noted that any jobs lost due to the appointment of a receiver would also be lost if the projects were sold through a CCAA process.[61]

82. While the Debtors have no direct employees, they claim that the Morgis Group uses its own employees, service providers, and contracts to carry out tasks for both the Debtors. However, as in *The Clover on Yonge Inc*., there is no evidence of any employees exclusively dedicated to the projects in issue, nor to any potential job losses resulting from a receivership.

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[59] *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781 (CanLII) at para 72.
[60] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII) at paras 77-81.
[61] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII) at 78.

83. In any case, in the likely event that the refinancing fails to be completed, any such purported employees would still face the same job loss risks under the SISP.

(d) Speed of the process:

84. The Debtors say that the receivership will not speed up the time in which the Lenders are repaid, and will rather only serve to increase costs and destroy value. This assertion hinges on the shaky assumption that the refinancing will be completed. If not completed, the process will unnecessarily be extended by three months beyond what would be achieved if the Receiver was appointed immediately. Upon appointment, the Receiver may immediately take measures to facilitate the sale of the Real Property, such measures will faster than under any proposed SISP.

85. All the while, interest continues to accrue on the Loans at a rate of approximately $464,791.67 per month.

(e) Protection of all stakeholders:

86. The Lenders are the first priority secured creditors over the Real Property – there are no other encumbrancers or secured creditors. The Debtors do not identify any other stakeholders that would be affected by the appointment of the Receiver beyond tangential third parties that may benefit from the completion of the Project.[62]

87. The interests of tangential third parties who may benefit from the completion of the Project ought not outweigh the interests of the Lenders who have not received a penny of interest since September 1, 2023.

88. In any event, if a SISP is implemented, the tangential third parties would be in the same position that they would be if a Receiver was appointed.

[62] The First Morgis Affidavit at para 5.

(f) Cost

89. In *The Clover on Yonge Inc.* Justice Koehnen identified the following with respect to the cost of CCAA proceedings:

    i. "CCAA proceedings are inherently expensive";

    ii. "They require regular court attendances, probably with greater frequency than a receivership does"; and

    iii. "Even if I accept that a CCAA proceeding will be less expensive than a receivership, that does not outweigh the equitable interests that the creditors have in a receivership by virtue of their lending agreements."[63]

90. The Debtors claim that the Morgis Group will cover the costs of the CCAA proceedings and sustain the planning process.[64] However, they have failed to make any monthly interest payments since September 1, 2023, neglecting to make the payments for nearly nine months.

91. If the Morgis Group has the means to finance the CCAA proceeding and planning, such funds should have been utilized, at least in part, to settle the outstanding arrears totalling approximately $4 Million.

92. Nonetheless, even if the Morgis Group covers the costs of the CCAA proceedings and same is less than a receivership, that does not outweigh the equitable interests that the Lenders have to the appointment of a receiver by virtue of their Loans, as noted by Justice Koehnen.

(g) Nature of the business

93. In the present case, the Debtors are single-purpose land development companies.

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[63] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*., 2020 ONSC 1953 (CanLII) at paras 93-94.

[64] The First Morgis Affidavit at para 28.

94. In *AFC*, Justice Black, citing "Receivership versus CCAA in Real Property Development; Constructing a Framework for Analysis" (2020 CanLIIDocs 3602) by Opolsky et al., confirms that in a significant majority of real estate development cases, courts will be inclined to grant receiverships rather than CCAA orders as follows:[65]

> [64] In a very helpful article: "Receivership versus CCAA in Real Property Development; Constructing a Framework for Analysis" (2020 CanLIIDocs 3602), Opolsky et al. confirm that, when it comes to choosing receivership over CCAA in the real estate context, "this is not the legal rule; there is nothing barring a CCAA proceeding for a real estate development company or other real property-centric company. Nor is it absolute: there are examples of a CCAA being granted instead of a receivership."
>
> [65] The article goes on to acknowledge that, notwithstanding that it is not a "legal rule" it is nonetheless the case that "in a significant majority of [real estate] cases, secured creditors' receivership applications will be granted instead of competing debtors' CCAA applications."
>
> [66] In discussing the reasons why, despite the continuously increasing recognition of the CCAA as a flexible and helpful mechanism for preserving assets and restructuring insolvent entities, and even, increasingly, for facilitating liquidations, receiverships are more often granted in the real estate development context than CCAA orders, the authors identify factors in recent cases that incline courts in that direction.

95. However, this inclination is not due to them simply being single-purpose land use companies but rather these cases turn on "*the nature of the security and the position of a security holder with respect to a CCAA proceeding*." [66] In this respect, Justice Koehnen stated the following *in The Clover on Yonge*:[67]

> [98] In a much quoted paragraph from *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp*., 2008 BCCA 327 the British Columbia Court of Appeal stated at paragraph 36:
>
> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it

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[65] *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.* (29 February 2024), Toronto (Ont. S.C.J. [Commercial List]) at paras 64-66.
[66] *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.* (29 February 2024), Toronto (Ont. S.C.J. [Commercial List]) at para 79.
[67] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*., 2020 ONSC 1953 (CanLII) at paras 98-103.

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

[99] Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors.

[100] The proposition articulated in *Cliffs Over Maple Bay* has been widely accepted. See for example: *Romspen* at para. 61*; Dondeb Inc., Re*, 2012 ONSC 6087 (Commercial List), at para.16; *Octagon Properties Group Ltd.*, [2009] A.J. No. 936, 2009 CarswellAlta 1325 (Q.B.), at para. 17.

[102] As Justice Kent pointed out in *Octagon*, as para 17,

> …if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[103] Once again it is the nature of the security and the secured creditor's attitude towards a CCAA proceeding that are the factors to consider in arriving at an equitable result.

96. In *The Clover on Yonge Inc* Justice Koehnen rejected the CCAA application and found that there was no reason to restrain the exercise of the receivership applicants' contractual rights because:[68]

[68] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge* Inc., 2020 ONSC 1953 (CanLII) at para 105.

i. the breakdown in the relationship was caused by persistent and deliberate wrongdoing by the debtor;

ii. there were no significant differences to the outcome for other stakeholders between a receivership or a CCAA proceeding; and

iii. there were no material employment concerns.

97. In *AFC*, Justice Brown rejected the CCAA application and granted the receivership for the following reasons:[69]

(a) the Lenders have clear and uncontested rights, under various of their security instruments, to appoint receivers;

(b) in terms of other stakeholder, there is not a single person or entity who expresses support for the Debtors' proposed CCAA protection. In fact, all stakeholders who have expressed a view strongly favour receiverships;

(c) the Lenders have a legitimate evidentiary basis for their avowed lack of confidence in the Debtors' management. There are uncontested findings of past misappropriation, more recent concerns the Lenders see arising in the Debtors' recent financial statements, and an abiding lack of cooperation and transparency on the part of the Debtors and their principals;

(d) while in general there is ostensible appeal to the notion that appointing a single monitor rather than two receivers should yield costs savings, here the Lenders assert, fairly in my view, that the Stayner Property and the Elmvale Property are very different projects giving rise to the need for independent analysis and decision-making for each of them. As such, the Lenders argue, the notional savings associated with having a single monitor rather than two receivers will prove illusory, inasmuch as two separate and independent exercises will be required, meaning that there will be no economies of scale or other efficiencies readily achieved;

(e) although the Debtors propose to imbue the monitor with "super monitor" powers, it seems evident that nonetheless the Debtors, and their principals, envision retaining a role in the CCAA proceedings they seek. The Lenders' level of distrust is such (and reasonably so in my view) that proposing "super powers" for the monitor does not entirely allay these concerns in the way that appointing receivers will;

[69] *AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.* (29 February 2024), Toronto (Ont. S.C.J. [Commercial List]) at para 80.

(f) the priorities here, and the Lenders' strong preference simply to realize on their security in accordance with those priorities, is reasonable when compared to a SISP process which, although as yet undefined, will inevitably forestall to some extent the Lenders' recovery, and may well lead to payments to more junior creditors – in the fashion described in the caselaw – before the Lenders are fully paid out; and

(g) this concern is particularly apt and pronounced, in circumstances in which, as stated at the outset, the Debtors have come back to court before me with nothing more than aspirations.

98. Similarly, in this case there is no reason to restrain the Receivership Applicants' contractual rights because:

i. the Lenders have lost confidence in the CCAA Applicants ability to pay and secure financing;

ii. all of the secured creditors are in favour of the Receivership and oppose the CCAA Application; and

iii. there will be no effect on any other stakeholders beyond the Lenders; and

iv. There are no employment concerns supported by any evidence.

PART V: ORDER REQUESTED

99. The Lenders respectfully request:

i. The appointment of TDB over the Property; and

ii. The dismissal of the CCAA application with costs on a full indemnity basis pursuant to the terms of the Loans.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of May, 2024.

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SCHEDULE "A"
LIST OF AUTHORITIES

TAB	CASE OR SECONDARY MATERIAL
1.	*Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.
2.	*BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953 (CanLII).
3.	*Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.*, 2013 ONSC 6866.
4.	*Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al*, 2018 ONSC 7382 (Commercial List).
5.	*AFC Mortgage Administrative Inc. v. Sunrise Acquisitions (Stayner) Inc. et al.* (29 February 2024), Toronto (Ont. S.C.J. [Commercial List]).
6.	*Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781 (CanLII).

SCHEDULE "B"
RELEVANT STATUTES

***Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3**

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, receiver means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition receiver in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of disbursements

(7) In subsection (6), disbursements does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 892005, c. 47, s. 1152007, c. 36, s. 58

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

> (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
>
> (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

Idem

(4) This section does not apply where there is a receiver in respect of the insolvent person.

1992, c. 27, s. 891994, c. 26, s. 9(E)

…

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

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

CITATION: Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al, 2018 ONSC 7382
COURT FILE NO.: CV-18-607303-00CL
COURT FILE NO: CV-18-00609634-00CL
DATE: December 10, 2018

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUJSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30, AS AMENDED

RE: ROMSPEN INVESTMENT CORPORATION, Applicant

AND:

ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS (RICHMOND HILL) LIMITED PARTNERSHIP, ATLAS SHOULDICE HEALTHCARE LTD., ATLAS SHOULDICE HEATHCARE LIMITED PARTNERSHIP, ATLAS HEALTHCARE (BRAMPTON) LTD. and ATLAS BRAMPTON LIMITED PARTNERSHIP, Respondents

AND RE:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ATLAS SHOULDICE HEALTHCARE LTD., ATLAS HEALTHCARE (BRAMPTON) LTD., ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS HEALTHCARE ASSET MANAGEMENT LTD., ATLAS GLOBAL HEALTHCARE LTD., GRIGORAS DEVELOPMENTS LTD. AND ATLAS INVESTMENTS AND SECURITIES COPORATION

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

COUNSEL: *David Preger* and *Linda Corne*, for Romspen Investment Corporation

Clifton Prophet, for Meridian Credit Union Limited

Marc Wasserman and *Mary Paterson*, for the Atlas Respondents and the Applicants under the *Companies' Creditors Arrangement Act* application

Robert Chadwick and *Andrea Harmes*, for PointNorth Capital Inc., the Proposed DIP Lender

Eric Golden, for Ernst & Young Inc., Proposed Receiver

Mario Forte, for KSV Kofman Inc., the Proposed Monitor

HEARD: November 27, 2018

ENDORSEMENT

[1] There are two applications before the Court.

[2] In the first application (the "Receivership Application"), Romspen Investment Corporation ("Romspen") applies for the appointment of Ernst & Young Inc. as receiver, manager and construction lien trustee of the undertaking, assets and properties of the Respondent, Atlas Healthcare (Richmond Hill) Ltd., and as receiver and manager of the undertakings, assets and properties of the remaining Respondents including Atlas Healthcare (Richmond Hill) Limited Partnership ("Richmond Hill"), Altas Shouldice Healthcare Limited Partnership ("Shouldice") and Altas Brampton Limited Partnership ("Brampton") (collectively, Richmond Hill, Shouldice and Brampton are referred to as the "Debtors").

[3] In the second application (the "CCAA Application"), certain corporations related to the Debtors including the general partners of the Debtors (collectively, the "CCAA Applicants") request certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") including an initial stay of proceedings in respect of the Debtors and approval of a proposed debtor-in possession facility in respect of Richmond Hill (the "DIP Facility").

[4] On December 3, 2018, the Court advised the parties that the CCAA Application was denied and that the Receivership Application was granted for written reasons to follow. This Endorsement sets out the Court's reasons for these determinations.

Factual Background

The Debtors

[5] Richmond Hill is the owner of a 5.59 acre parcel of land that fronts on the west side of Brodie Drive and the east side of Leslie Street in Richmond Hill, Ontario and has a municipal address of 25 Brodie Street (the "Richmond Hill Property").

[6] Richmond Hill is currently building a six-story medical office building on the Richmond Hill Property (the "Project"), which is addressed in greater detail below.

[7] Shouldice owns a 22.467 acre parcel of land at 7750 Bayview Avenue (the "Shouldice Property") in Markham, Ontario. The Shouldice Property is currently improved with a three-storey hospital and is occupied by Shouldice Hospital Limited under a lease (the "Hospital Lease").

[8] Atlas owns a 4.59 acre parcel of land at 241 Queen Street East in Brampton, Ontario (the "Brampton Property"). The Brampton Property is currently improved with a single-storey commercial building. The building is currently vacant.

[9] In this Endorsement, the Richmond Hill Property, the Shouldice Property and the Brampton Property are referred to collectively as the "Properties".

Financing of the Project

[10] The Project has been financed by a combination of loans from third-party lenders and equity contributions of Richmond Hill, representing equity contributed principally by the limited partners of Richmond Hill.

[11] At the present time, the principal financing arrangements in place are the following:

(1) Loans made by Meridian Credit Union Limited ("Meridian") in favour of Richmond Hill (collectively, the "Meridian Loan") secured by a first charge on the Project (the "Meridian Charge") and a first general assignment of rents; and

(2) A loan made by Romspen in favour of the Debtors together with an outstanding loan acquired by Romspen (collectively, the "Loan"), secured by the Bridging Charge (defined below) and the Romspen Third Charge (defined below), both of which rank behind the Meridian Charge.

These financing arrangements are further described below.

The Meridian Loan

[12] Pursuant to a credit agreement dated March 2, 2017 (the "Meridian Credit Arrangement"), Meridian extended a loan in the maximum principal amount of $59 million to Richmond Hill. In addition, pursuant to an agreement dated July 27, 2018, Meridian extended an interim loan of $4.4 million to Richmond Hill. As of November 7, 2018, Richmond Hill owed $43,371,985 under these loan arrangements and certain other facilities extended by Meridian (collectively, the "Meridian Loan"). Interest has not been paid on the Meridian Loan since August 2018 and continues to accrue. As mentioned, the Meridian Loan is secured by a first ranking charge, the Meridian Charge, in the principal amount of $75 million.

The Romspen Loan Arrangements

[13] The Romspen loan arrangements comprise a loan made to the Debtors and an outstanding loan acquired by Romspen, which will be addressed in turn.

The Romspen Loan

[14] Pursuant to a financing commitment dated December 11, 2017, as amended by a supplement dated June 10, 2018 (collectively, the "Commitment"), Romspen loaned the amount of $81.2 million to the Debtors on a joint and several basis (the "Romspen Loan"). The Romspen Loan was evidenced, among other things, by a joint and several promissory note of the

Debtors in the principal amount of $81.2 million. Of this amount, approximately $49 million was loaned to Shouldice and $10 million was loaned to Brampton, in each case to repay all outstanding debt in respect of these properties. In addition, $19.5 million was loaned to Richmond Hill to partially repay the Bridging Finance Loan (defined below) and $3,280,500 was loaned to Richmond Hill for use in respect of the Project.

[15] The Romspen Loan is fully advanced. Interest accrues on the Romspen Loan at the rate of 11.45 percent per annum. As of November 1, 2018, according to a schedule derived from the records of Richmond Hill, $22,382,788 was owed in respect of the monies loaned to Richmond Hill (I note that Romspen calculates a slightly larger amount that is used below but the difference is not material for these proceedings), $49,324,156 was owed in respect of the monies loaned to Shouldice, and $10,071,200 was owed in respect of the monies loaned to Brampton, for a total of $81,778,143 owing on a joint and several basis by the Debtors. Interest has not been paid on the Romspen Loan since August 2018 and is accruing at the rate of slightly less than $1 million per month.

The Bridging Finance Loan and the Bridging Charge

[16] The Bridging Charge secures a loan made by Sprott Bridging Income Fund LP to Richmond Hill pursuant to a commitment letter dated February 9, 2016, as amended. This loan was originally in the principal amount of $15,840,201 but was subsequently increased in stages to $40,850,000 (the "Bridging Finance Loan"). In this Endorsement, the Romspen Loan and the Bridging Finance Loan are collectively referred to as the "Loan".

[17] Pursuant to the Commitment, Romspen loaned Richmond Hill $19.5 million, which was used to reduce the outstanding amount of the Bridging Finance Loan. The outstanding balance of the Bridging Finance Loan and the security therefor, including the Bridging Charge, were then acquired by Romspen by way of a transfer upon payment by Romspen to Bridging Finance Inc. of $19,590,206.47.

[18] At the present time, Romspen says approximately $25 million is owing in respect of monies advanced to Richmond Hill. There is an issue regarding whether the amount secured by the Bridging Charge is limited to the amount outstanding at the time of the transfer of the Bridging Finance Loan to Romspen plus accrued interest or is the principal amount of the Bridging Charge, being $40.85 million. However, this is not an issue to be determined in these proceedings. I have proceeded on the basis that the total amount owing by the Debtors jointly and severally secured against the Properties is the amount of the Romspen Loan and therefore the resolution of this issue does not affect the analysis or the determinations made below.

The Romspen Security in the Properties

[19] As security for the Bridging Finance Loan and the Romspen Loan, Romspen holds the following:

(3) a second charge on the Project in the principal amount of $40,850,000, originally given in favour of Bridging Finance Inc. and transferred to Romspen on May 24, 2018 (the "Bridging Charge");

(4) a third charge against the Project in the principal amount of $5 million (the "Romspen Charge");

(5) a subordinate general assignment of rents of the Project;

(6) a first charge over the Shouldice Property in the principal amount of $81.2 million (the "Shouldice Charge"), together with a general assignment of rents and a specific assignment of the Hospital Lease; and

(7) a first charge over the Brampton Property in the principal amount of $81.2 million (the "Brampton Charge") together with a general assignment of rents in respect of the Brampton Property.

Status of the Project

[20] The Project is over budget. Based on the most recent report dated November 23, 2018 of Pelican Woodcliff Inc. ("Pelican") (the "Pelican Report"), the Project's cost consultant, the net project budget has increased by approximately $39,000,000 from $83,000,000 to $122,000,000 (including holdback and reserves).

[21] Meridian stopped funding the Project under the Meridian Loan in early 2018 due to increases in the construction budget. Since then, the Debtors have funded construction costs, including the costs of certain remediation work required as a result of cracks in the slab-on-grade, which are the subject of a dispute between Richmond Hill and Dineen Construction Corporation ("Dineen"), the former general contractor for the Project.

[22] The Project is also behind schedule. Based upon the latest construction schedule, construction was to have been completed on October 1, 2018. However, at the present time, it is only 80 percent complete. Moreover, construction has effectively ceased, apart from a small amount of work that is proceeding as a result of settlement agreements with three lien claimants, which have enabled these trades to continue to work on the Project.

[23] Richmond Hill originally contracted with Dineen as the general contractor for the Project. In August 2018, Dineen terminated its contract, prompted by Dineen's concern for payment after learning that Meridian was no longer advancing funds to finance the construction and that Meridian had refused to confirm that it would advance the funds necessary to complete the Project.

[24] Between August 3, 2018 and September 28, 2018, Dineen and eleven trades filed construction liens totalling $16,542,335.75 against the Richmond Hill Property (collectively, the "Liens"). The largest Lien was registered by Dineen. Richmond Hill says Dineen's Lien claim duplicates the other claims of the trades with respect to the Project. Richmond Hill says that currently approximately $8 million is required to discharge all the Liens in respect of the Project. Romspen and Meridian acknowledge there is duplication in the Lien claims.

[25] Because the Loan was fully advanced and Meridian had stopped advancing monies under the Meridian Loan, the Debtors, and in particular Richmond Hill, have experienced a liquidity crisis commencing August 2018. Since that time, the Debtors have made serious, but unsuccessful, efforts to enter into a sale or refinancing transaction that would pay out Romspen and Meridian.

[26] Richmond Hill has selected a different general contractor, Greenferd Construction Inc. ("Greenferd"), to manage the interior works to make the Project suitable for the future tenants, referred to as the "Fit-Out Works". Richmond Hill has recently also engaged Greenferd to take over the role of general contractor for the remaining construction of the Project.

[27] Richmond Hill says that it now expects substantial completion of the Project to occur during May 2019. In view of the construction delay, Richmond Hill has sought and obtained signed acknowledgements regarding the new target occupancy date from future tenants who have contracted for 72 percent of the gross leasable space in the Project and who represent 76 percent of the total projected rent roll. These acknowledgements have provisions that permit Richmond Hill to extend the commitments of these tenants to May 30, 2018.

[28] Meridian's consultant on the Project, Glynn Group Incorporated ("Glynn"), has reviewed the Pelican Report and has made a number of comments, including the following.

[29] First, Glynn agrees with Pelican that construction of the Project will only be back up and running in a productive manner by the middle of January 2019. Second, given the volume of construction remaining, the Project requires "extremely intensive" supervisory, scheduling and management oversight" to achieve the timelines contemplated by Pelican and the Debtors. Third, the selection of a new general contractor/construction manager is "pivotal" to the success of the Project going forward. Fourth, the scenario of a new general contractor/construction manager working with the existing trades is the best scenario and is contemplated by the budget reviewed by Pelican. However, Pelican was also of the opinion that it may not be possible to convince these trades to return to the Project given the recent history of non-payment and the existence of the Liens.

Demands under the Loan and the Meridian Loan

[30] The registration of the Liens and the failure of the Debtors (and the other guarantors under the Loan) to remove the Liens from title to the Richmond Hill Property constitutes a default under the Commitment under and each of the Meridian Charge, the Romspen Charge, the Shouldice Charge, the Brampton Charge and the Bridging Charge (collectively, the "Charges").

[31] The existence of the Liens on the Richmond Hill Property also constitutes a serious material adverse change under the Loan. Section 16.16 of the Commitment provides that if, in the opinion of Romspen, an adverse material change occurs in respect of any of the Debtors, its business, a charged property or Romspen's security, the whole balance of the Loan becomes immediately due and payable and becomes enforceable. The Bridging Finance Loan and the Meridian Credit Agreement contain similar provisions.

[32] In addition, the failure to pay municipal taxes when due also constitutes a default under the Commitment and the Charges. It is understood that tax arrears are owing in respect of each of the Properties and that further arrears are being incurred.

[33] On September 12, 2018, Romspen made demand on the Debtors (among others) and issued notices pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). On November 12, 2018, Meridian also made demand on Richmond Hill, among others, and issued similar notices under s. 244 of the BIA. The Debtors do not deny that they are in default under the Commitment, the Bridging Finance Loan, the Meridian Loan and the Charges.

[34] The Debtors also do not dispute that each Charge held by Romspen and Meridian in respect of the Properties provides for the appointment of a receiver in the event of default under the Loan and the Meridian Loan. The Romspen Charge also expressly contemplates the appointment of a construction lien trustee under the *Construction Act*, R.S.O. 1990, C. 30 (the "CA") in the event of default.

The Receivership Application

[35] As mentioned, in the Receivership Application, Romspen seeks the appointment of a receiver over the properties and assets of Richmond Hill having the necessary powers to engage third parties to complete the construction of the Project. Romspen also seeks the appointment of a receiver over the assets of Shouldice and Brampton.

[36] The receivership order sought by Romspen included the power to sell the assets of each of the Debtors. However, the principal purpose of the Romspen application in respect of Richmond Hill is the appointment of a receiver to supervise the completion of construction of the Project. Romspen also says the principal purpose of the appointment of a receiver over the assets of Shouldice and Brampton is to ensure that the priority of funds advanced under the proposed Receivership Financing (defined below) is preserved in respect of these Properties as well as the Richmond Hill Property. Accordingly, Romspen has indicated that it is prepared to exclude the power of sale in respect of the Properties from any order that the Court may grant.

[37] Romspen has filed a report of Ernst & Young Inc., the proposed receiver (the "Proposed Receiver"), which sets out its proposed course of action. The Proposed Receiver states that it intends to engage Elm Development Corp. as the construction manager for the Project.

[38] Meridian supports the Receivership Application of Romspen and has committed to the Receivership Financing (defined below) with Romspen. In this Endorsement, the term "Receivership Applicants" refers to Romspen and Meridian in the circumstances in which they join in making the same submissions in these proceedings.

The Receivership Financing

[39] Romspen and Meridian have provided the Court with a signed term sheet for a joint financing in the amount of $35 million to fund the proposed receivership (the "Receivership Facility"). The following are the principal terms of this Facility.

[40] The principal amount of the Facility of $35 million is available in two tranches – a tranche of $15 million to be provided by Romspen (the "Romspen Tranche") and a tranche of $20 million to be provided by Meridian (the "Meridian Tranche"). The Meridian Tranche is to be available only after specified construction work described in a schedule to the Pelican Report (although the term sheet refers to a prior Pelican report dated October 21, 2018) is completed, in which event the loan/value covenant under the Meridian Credit Agreement would be brought into compliance permitting further advances under that Agreement.

[41] The Receivership Facility would have a one-year term, and would bear interest at a rate of 15 percent under the Romspen Tranche and at the rate provided for under the Meridian Credit Agreement for the Meridian Tranche. The Receivership Applicants say this would result in a blended rate of approximately nine percent.

[42] Advances under the Romspen Tranche of the Receivership Facility are to be secured by a charge ranking behind the Meridian Charge but ahead of all other charges on the Properties, including the Liens. Advances under the Meridian Tranche are to be secured on the Richmond Hill Property in priority to all other charges on that Property.

[43] The Receivership Facility contemplates fees of three percent of the maximum amount of the Romspen Tranche to Romspen and of $170,000 to Meridian.

The CCAA Application

[44] In addition to opposing the Receivership Application, the CCAA Applicants, which effectively includes the Debtors, have brought an application for certain relief under the CCAA, including an initial stay of proceedings and the appointment of KSV Kofman Inc. as the Monitor in respect of the proposed proceedings. The order sought also includes approvals of the DIP Facility and related charge (the "DIP Charge"), of a financial advisor agreement dated October 19, 2018 between Atlas Global Healthcare Ltd., one of the CCAA Applicants, and FTI Capital Advisors – Canada ULC ("FTI") and a related charge (the "FTI Charge"), of a directors' and officers' charge in the aggregate amount of $500,000, and of an administration charge in the aggregate amount of $1.5 million.

The DIP Facility

[45] In the CCAA Application, the CCAA Applicants have included a signed term sheet dated as of November 26, 2018 respecting the DIP Facility between PointNorth Capital (PNG) LP and PointNorth Capital (O) LP (collectively, "PointNorth"), as lenders on behalf of certain funds and accounts (collectively "PointNorth"), on the one hand, and each of the CCAA Applicants, on the other. The following sets out the principal terms of the DIP Facility.

[46] The DIP Facility is a non-revolving facility that accrues interest at 15 percent per annum compounded monthly and has a term of one year, subject to earlier termination under certain circumstances. The total availability under the DIP Facility is $50 million to be funded in two equal tranches – the first upon the issuance of the initial order sought under the CCAA including approval of the DIP Facility and the second on or about February 1, 2019. The DIP Facility also includes provision for an additional loan of up to $2,830,000 to cover overrun construction costs (the "Bulge Facility").

[47] The DIP Loan requires payment of a commitment fee of $750,000, a monthly administration fee of $50,000 and an early exit payment fee on repayment of any portion of the DIP Facility to top up aggregate interest payments to $6,875,000.

[48] The DIP Facility contemplates the following use of proceeds: (1) to pay advisory, consultant and legal fees of the lenders, the CCAA Applicants and the Monitor; (2) to pay interest, fees and other amounts owing under the DIP Facility; (3) to fund the working capital requirements of Richmond Hill and property taxes and insurance of the other Debtors during the CCAA proceedings; and (4) to fund the costs to complete the Project in accordance with the budget for the Project, estimated to be $28.261 million plus certain amounts to address certain Lien claims.

[49] The DIP Facility contemplates a charge over all the property and assets of the CCAA Applicants, including the Richmond Hill Property, ranking prior to all other charges other than the Meridian Charge. Accordingly, the DIP Facility requires a charge ranking behind the security in favour of Meridian on the Richmond Hill Property but ahead of the security in favour of Romspen on each of the Properties. Further, the DIP Facility contemplates subordinate charges over a fourth property (the "Mississauga Property") that is not subject to any security in favour of either Meridian or Romspen.

Applicable Law

[50] The appointment of a receiver and manager is governed by s. 43 of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, both of which provide that the Court may appoint a receiver where it is "just or convenient" to do so. Although s. 68 of the CA does not specify that the requirement for the appointment of a construction lien trustee is satisfaction of the "just or convenient" test, Ontario courts have relied on this test in making such an appointment: see, for example, *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CanLII 31188 (Ont. S.C.).

[51] It is trite law that, in considering whether to appoint a receiver, a court should have regard to all the circumstances of the case but in particular to the nature of the property and the rights and interests of the affected parties in relation thereto: see, for example, *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. C.J. (Gen. Div.)), at para. 11.

[52] The granting of a stay of proceedings on an initial application under s. 11.02(1) of the CCAA requires the applicant demonstrate that it is a "debtor company" as defined in s. 2(1) of the CCAA and that circumstances exist that make the order appropriate.

[53] For this purpose, I adopt the following description of the purpose of the CCAA in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at p. 88:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. ... When a company has recourse to the C.C.A.A., the

> Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

[54] There is no dispute that each of the CCAA Applicants are debtor companies for the purposes of the CCAA. Further, each of the Debtors is insolvent in that, regardless of the values of the Richmond Hill Property on completion of the Project, and of the Shouldice Property after redevelopment of that Property, they are currently unable to meet their respective obligations as they fall due.

[55] In the present case, because the CCAA Application also requires approval of the DIP Facility at this time, the provisions of s. 11.2 of the CCAA governing the approval of any charge to secure debtor-in-possession financing, while not technically applicable unless the CCAA Application is granted, also inform the determinations made in this Endorsement. In this regard, s. 11.2(4) provides that, among other things, in deciding whether to approve such a charge, a court is to consider the following factors:

(a) the period during which the company is expected to be subject to proceedings under the CCAA;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report, if any.

Analysis and Conclusions

[56] There is no obvious priority of consideration of the Receivership Application and the CCAA Application. Moreover, each must be judged independently on its own merits. It is at least theoretically possible that each application could be denied. However, as a practical matter, the parties require that the Court grant the relief sought in one of the applications in order that construction of the Project can restart under the supervision of either a court-appointed receiver or Richmond Hill as a debtor-in-possession. Further, the considerations respecting the merits of each application are broadly similar. Accordingly, I propose to address the considerations raised by the parties first and then to set out my determinations regarding the applications.

[57] The considerations raised by the parties fall broadly into four categories – operational issues, the nature of the property involved, the respective rights and interests of the parties and the respective costs of the prospective proceedings. I will deal with each of these considerations in turn.

Operational Issues Pertaining to the Competing Applications

[58] The CCAA Applicants have raised two considerations that they urge the Court to take into account pertaining to the manner in which it is proposed to conduct the remaining construction of the Project: (1) the comparative feasibility of the respective financial plans of the parties; and (2) the comparative feasibility of the respective construction plans of the parties. I will address each of these considerations separately before addressing whether one of the operational plans is demonstrably superior to the other.

The Competing Financial Plans

[59] The CCAA Applicants argue that their financial plan is more realistic than the Romspen receivership plan, which they suggest is unrealistic in the sense of not feasible.

[60] The financial plan of the CCAA Applicants contemplates an availability of $50 million under the DIP Facility. In the current cash flows provided to the Court, which also form the budget for the purpose of the DIP Facility, Richmond Hill would have a cushion of approximately $5 million to cover cost overruns. In addition, the DIP Facility provides for the possibility of the Bulge Facility to cover further cost overruns.

[61] The financial plan of the proposed receivership is based on the Receivership Facility. It is limited to $35 million, of which the Meridian Tranche of $20 million is available only if the hard construction costs do not materially exceed those contemplated in a schedule to the Pelican Report. The Receivership Facility also does not have any significant amount of cushion for cost overruns. However, each of Romspen and Meridian are of the view that these costs are achievable and that they will deal with any unanticipated cost overruns. They are also of the view that the budget of the CCAA Applicants includes certain costs in amounts that are either unnecessary or larger than necessary.

[62] The principal differences between the two plans pertain to lower interest costs and professional fees of the Receivership Financing as well as a different view of the amounts required to pay the Lien claimants and a larger cushion for contingencies under the DIP Facility.

[63] While there is some benefit in the greater flexibility provided by the DIP Facility, I am not persuaded that, on balance, the financial plan for the receivership is unrealistic, as the CCAA Applicants suggest. It is consistent with the estimate of capital costs to completion of Pelican, Richmond Hill's own quantity surveyor, which the CCAA Applicants also use in their budget. Those capital costs have also been reviewed and approved by Meridian's quantity surveyor. Further, as Romspen acknowledges, the terms of the Receivership Financing, as well as the limited scope of the proposed receivership order in respect of Shouldice and Brampton, effectively require Romspen to fund any cost overruns provided they will translate into increased equity in the Project. In addition, as mentioned, a principal difference between the two plans is a more conservative estimate of certain payments (i.e. involving larger payments) in the financial

plan of the CCAA Applicants. It is not possible to estimate these latter costs with any degree of certainty at the present time.

[64] Based on the foregoing assessment of the considerations raised by the parties, I conclude that the evidence before the Court does not establish that the financing plan of the Receivership Applicants is unrealistic in the sense that it is not feasible or that the financing plan of the CCAA Applicants is materially better than the plan of the Receivership Applicants.

The Competing Construction Plans

[65] The CCAA Applicants also argue that their construction plan is more reliable than that of the proposed receivership. In particular, the CCAA Applicants argue that they are better placed to get the construction restarted because of their prior familiarity with the construction plan and schedule, as well as their relationship with the trades. Romspen and Meridian say that Elm is experienced in workout construction projects and is therefore more than capable of restarting the Project in a reasonable time.

[66] I do not think that the record provides a basis for preferring one construction plan over the other for the following reasons.

[67] First, while Richmond Hill has more experience of, involvement in, and knowledge of, the Project, this cuts both ways. Under its supervision, the capital costs of the Project have increased very significantly. While Richmond Hill disputes the $38 or $39 million figure of Pelican, it acknowledges at least $32 million in cost overruns. There are, therefore, valid grounds for concern regarding the ability of Richmond Hill's management to control construction costs. In addition, under Richmond Hill's supervision, the trades previously working on the Project have ceased working and registered construction liens. A decision will have to be made on an individual trade basis whether to settle with, or to replace, the trade. This may be affected in part by the state of the current relationship between Richmond Hill and each of the affected trades.

[68] Second, Richmond Hill has been forced to engage a new general contractor for the construction, Greenferd. Both Greenferd and Elm appear to have a similar degree of familiarity with the Project and a similar challenge of "getting up to speed". I cannot find that Elm is any more of a risk than Greenferd on the record before the Court.

[69] Third, the more aggressive construction schedule proposed by Richmond Hill in the affidavit of Peter Grigoras, sworn November 14, 2018 (the "Grigoras Affidavit"), is not consistent with the opinion of Pelican, its own quantity surveyor. As noted above, Pelican is of the view that construction would restart in early January and that substantial performance would not be achieved until late June 2019. I see no basis for concluding that there will be no "ramp-up" time under a CCAA proceeding, as the CCAA Applicants suggest.

[70] Fourth, the CCAA Applicants say the Court should be mindful of the specialized nature of the Project as a hospital and the fact that Richmond Hill has engaged specialized employees and consultants to address the complicated issues associated with construction of such a building. However, to the extent that Richmond Hill has engaged any such individuals as employees or consultants, a receiver would also be in a position to engage them to receive the benefit of their

expertise. The real significance of this consideration, if any, lies in the increased costs that would be incurred beyond those currently contemplated by the Receivership Facility but are apparently included in the budget used for the DIP Facility.

[71] Fifth, the CCAA Applicants also suggest that the involvement of OMERS, as an investor in PointNorth, and of Dream Alternatives Lending Services LP, as a participant in the DIP Facility, is a significant advantage. They suggest that the expertise of these organizations will translate into better cost administration and the availability of construction expertise. While such involvement would be desirable, there is nothing to demonstrate that such benefits will accrue to the Project. Moreover, each of PointNorth and Romspen has expertise in the administration of construction projects in a workout situation and an incentive to require careful oversight.

[72] Lastly, while I agree that, in certain circumstances, a debtor-in-possession restructuring may impart greater confidence in the financial stability of the debtor than a receivership, I am not persuaded that this is an important consideration in the present case. The liquidity problems of Richmond Hill have been transparent to all of the trades working on the Project for some time and to the future tenants. It is not clear that a CCAA proceeding would restore confidence in Richmond Hill if the same management continued to be involved with the Project, even with a new general contractor.

Conclusion Regarding Operational Issues Pertaining to the Competing Applications

[73] Each of the proposed plans for completing the Project of the Receivership Applicants and the CCAA Applicants carries its own risks. I have considered whether, when viewed in their entirety, the construction and financing plans of one of these parties is materially superior to the other, or more credible than the other, such that this should be a consideration to be taken into account in the Court's determination. Given the evidence before the Court, I am not persuaded, however, that the plan of either the CCAA Applicants or the Receivership Applicants is materially superior to, or more credible than, the other. In particular, I cannot conclude that either the CCAA Applicants' plan or the Receivership Applicants' plan is more likely to achieve construction completion on time and on budget. Given the number of variables involved, any such determination would be highly speculative at this time. Nor do I think that the CCAA Applicants have demonstrated that the Receivership Application, if granted, will result in the Project failing to be completed, as the CCAA Applicants suggest. Accordingly, I do not consider the operational features of the plans of the parties to be a significant consideration weighing in favour of either the CCAA Application or the Receivership Application.

The Nature of the Property

[74] An important consideration in this proceeding is the nature of the property at issue.

[75] The Receivership Applicants say that each of the Debtors is a single-project real estate development company. Romspen says that courts have generally held that there is no principled basis for granting a stay under the CCAA to prevent real estate lenders from enforcing their security. Meridian submits that courts will generally refuse to grant a stay where CCAA protection would place the value of the security of secured creditors at risk. Both rely on the

decisions in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 83 B.C.L.R. (4th) 214 and in *Dondeb Inc. (Re)*, 2012 ONSC 6087, 97 C.B.R. (5th) 264.

[76] In *Cliffs Over Maple Bay Investments*, Tysoe J.A. stated the following at para. 36:

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

[77] In *Dondeb Inc.*, after referring to the above statement of Tysoe J.A., C. Campbell J. went on to refer with approval to the following comments of Kent J. in *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 A.R. 296, at para. 17:

> This is not a case where it is appropriate to grant relief under the CCAA. First, I accept the position of the majority of first mortgagees who say that it is highly unlikely that any compromise or arrangement proposed by Octagon would be acceptable to them. That position makes sense given the fact that if they are permitted to proceed with foreclosure procedures and taking into account the current estimates of value, for most mortgagees on most of their properties they will emerge reasonably unscathed. There is no incentive for them to agree to a compromise. On the other hand if I granted CCAA relief, it would be these same mortgagees who would be paying the cost to permit Octagon to buy some time. Second, there is no other reason for CCAA relief such as the existence of a large number of employees or significant unsecured debt in relation to the secured debt. I balance those reasons against the fact that even if the first mortgagees commence or continue in their foreclosure proceedings that process is also supervised by the court and to the extent that Octagon has reasonable arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[78] The CCAA Applicants do not deny this line of cases but suggest that it is not applicable in the present circumstances. They suggest that the circumstances are much closer to the circumstances in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319, 96 B.C.L.R. (4th) 77 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775, in which courts ordered a stay under the CCAA in preference to the appointment of a receiver.

[79] In *Forest & Marine Financial Corp.*, at para. 26, Newbury J.A. distinguished the circumstances from those in *Cliffs Over Maple Bay Investments* as follows:

> In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the status quo while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

[80] The same analysis was applied by Fitzpatrick J. in *Pacific Shores Resort & Spa Ltd.*, at para. 39:

> I am of the view that, similar to the facts under consideration in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, 273 B.C.A.C. 271, this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The CCAA proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

[81] The CCAA Applicants suggest that Richmond Hill in particular should be treated as a business because it has approximately 20 employees and consultants and because it has contracted with approximately 20 future tenants. They also suggest that the relationships among the CCAA Applicants and the Debtors are complex with the result that a CCAA proceeding is more appropriate.

[82] I do not think that any of the Debtors can properly be characterized as a business in the sense contemplated in the cases relied upon by the CCAA Applicants. There is no demonstrated ongoing business of any of the Debtors. There are only a limited number of employees and consultants of Richmond Hill and these individuals are employed solely for the purpose of building the Project. The fact that approximately 20 entities have executed leases for space in the Project when it is completed also does not establish the existence of a business at the present time. Nor have the CCAA Applicants demonstrated that the relationship between themselves is sufficiently complex to require a CCAA proceeding to properly identify the respective stakeholder interests in the debtor companies and ensure fair treatment of such interests.

[83] More generally, the circumstances in the cases relied upon by the CCAA Applicants are very different from the present circumstances in a number of significant respects. In *Forest & Marine Financial*, the debtor companies were engaged in a very different business from real estate development – that of providing financing and advisory services. The assets of the debtor companies comprised a loan portfolio of many types of assets as well as an office building and the liabilities included both secured debt and "investment receipts" issued to the public. In *Pacific Shores Resort & Spa*, the debtor companies employed approximately 250 persons and were in the business of selling vacation ownership products and deeded ownership products, and the management of such interests, including the management of several resorts. Moreover, and significantly, in both cases, the court concluded that the secured creditors were well covered by the equity in the debtor companies. In my view, therefore, the present circumstances are much closer to those in *Dondeb* and *Cliffs Over Maple Bay Investments* than they are to the circumstances in *Forest & Marine Financial* and *Pacific Shores Resort & Spa*.

[84] The foregoing analysis suggests that there are no features of the business of the Debtors, or of the Properties, that render a CCAA proceeding necessary, or more appropriate than a receivership proceeding, to address the current liquidity difficulties of the Debtors and the need to complete the Project with an additional injection of funds from third parties. The proposed receivership proceeding and the proposed CCAA proceeding should each accomplish the objective of completion of construction of the Project. However, the case law suggests that, in similar circumstances, particularly where the security coverage of secured creditors is in question, courts have given effect to the rights of secured creditors by granting a receivership order. This consideration weighs in favour of a receivership order in the present circumstances. To be clear, however, I think that the judicial preference for a receivership over a CCAA proceeding in the circumstances of a single-project real estate development corporation is not so much a free-standing rule, as Romspen suggests, as it is the outcome of a consideration of the other factors discussed below.

Legal Rights and Interests of Meridian and Romspen

[85] Meridian and Romspen submit that where the contract between a lender and a borrower provides for the appointment of a receiver in the event of a default, a court should not ordinarily interfere. In short, they argue that the Court should give effect to their contractual rights.

[86] As mentioned, the Court is required to assess whether the appointment of a receiver is "just or convenient" having regard to all of the circumstances. In this context, I do not think that the rights of secured creditors who choose to seek the benefits of a court-appointed receiver over a privately-appointed receiver are as unqualified as Romspen suggests. Nevertheless, the legal rights of Meridian and Romspen are an important consideration in making a determination regarding the appropriateness of relief under the CCAA as well as the application of the "just or convenient" test for the appointment of a receiver. In this regard, two considerations are of particular significance.

The Security Position of Meridian and Romspen

[87] First, there is a real possibility that the consequence of the priority to be afforded the DIP Charge, which is a condition of any CCAA proceeding, would be to diminish the security of Romspen and, to a lesser extent, of Meridian. For clarity, it should be noted, however, that the security of these creditors will only be "primed" as a practical matter to the extent that the monies advanced under the DIP Facility exceed the monies that would otherwise be advanced under the Receivership Financing, given that prior-ranking construction financing is required under each plan to complete the Project.

[88] The CCAA Applicants argue that, on the basis of their evidence, both Romspen and Meridian are fully secured with the result that there is no practical significance to this concern. I agree that, given the terms of the DIP Facility, and subject to the resolution of one issue acknowledged by counsel for PointNorth, it is unlikely that Meridian would be adversely affected by the imposition of that Facility in priority to the Meridian Loan. However, the situation in respect of Romspen is not as clear. This requires a consideration of the evidence in the record.

[89] The CCAA Applicants have provided appraisals of the Properties that they say demonstrate that Romspen is very well secured. Conversely, Romspen has provided internal valuations for the Properties that place Romspen's security "on the cusp", in that they suggest that the aggregate value of the equity in the Shouldice Property, the Brampton Property and the completed Project, after deduction of the amount of the Meridian Loan and the DIP Facility, would be no greater than the outstanding amount of the Loan at the present time and could be materially less than such amount. Romspen also notes that, given the interest rate under the Loan, interest continues to accrue at the rate of slightly less than $1 million per month eroding any existing equity. Accordingly, under these valuations, Romspen could suffer a deficiency under a CCAA proceeding using its estimate of the costs of such a proceeding. On the other hand, using more optimistic assumptions, the same valuation models would provide a cushion of coverage for Romspen.

[90] I do not think that the appraisals provided by the CCAA Applicants are sufficiently reliable that the Court can rely on them on a balance of probabilities standard for the following reasons.

[91] With respect to the Project, the appraisal of the CCAA Applicants was conducted on a "fully built" basis. It also assumes 100 percent occupancy at certain projected rental rates. While Richmond Hill has contracted for a large portion of the rental space, there is a real risk until the Project is fully completed that the projected rental stream will not be achieved for a number of reasons. Accordingly, it logically follows that the value of the Project at the present time must be discounted from this appraisal value to reflect such risks. With respect to the Shouldice Property, the appraisal of the CCAA Applicants is based on the assumption that the Shouldice Property can be rezoned for the development contemplated in the appraisal. There is, however, no evidence on the feasibility of such development. Accordingly, neither of these appraisals provides a reliable valuation of these Properties at the present time.

[92] On the other hand, the internal valuations of Romspen make certain assumptions regarding occupancy rates and an appropriate capitalization rate that are likely to be conservative given Romspen's status as a subordinated lender to the Debtors. The sensitivity analysis provided by Romspen demonstrates a range of values as these assumptions are varied that would result in Romspen's security position falling between a material deficiency and a moderate excess of coverage. In the absence of any basis for determining the appropriate assumptions, it is also not possible to rely on these internal valuations.

[93] It is therefore necessary to seek other objective evidence regarding a realistic range of values for the Project.

[94] In this case, the best objective evidence is PointNorth's position, as the lender under the DIP Facility. If PointNorth accepted the Debtor's estimate of value, it would not have required that the DIP Charge prime the Romspen security, much less required that the CCAA Applicants provide the additional security on the Mississauga Property. Given PointNorth's requirement of these terms of the DIP Facility, I think it is a fair inference that PointNorth does not share the Debtor's confidence in the value of the Properties.

[95] In addition, the inability of the Debtors to obtain financing at the indicative values in the term sheets set out in the Grigoras Affidavit is further evidence that the appraisal values put forward by the CCAA Applicants are not reliable indicators of the current values of the Properties. In this respect, the indicative term sheet of PointNorth attached to that Affidavit is of particular relevance.

[96] Similarly, the failure of a proposed sale of the Shouldice Property on the terms, and at the value, set out in the Grigoras Affidavit due to the purchaser's failure to satisfy the financing condition is also evidence that the value ascribed to that Property by the CCAA Applicants is not credible.

[97] The foregoing evidence does not, however, establish a credible value or range of values for the Richmond Hill Property or the Shouldice Property. In these circumstances, I think the Court can find no more than that the equity in the Properties lies somewhere between the

Romspen internal values and values that are materially less than the aggregate value ascribed to them by the Debtors.

[98] The Court must therefore proceed on the basis that there is at least a reasonable possibility that the DIP Facility would adversely affect the Romspen security position. There is, therefore, a real possibility that, under the proposed CCAA proceedings, the Debtors would be "playing with Romspen's money" by virtue of the terms of the DIP Facility, as Romspen suggests. In other words, as in *Octagon Properties Group*, under the proposed CCAA proceedings, Romspen would be paying the cost to permit the Debtors to buy some time. This is also a consideration that weighs in favour of a receivership.

[99] I note, as well, that there is an inherent check and balance on the foregoing value assessment in the CCAA Applicants' favour. The grant of the requested receivership order would not prevent the CCAA Applicants from continuing to market the Properties with a view to a sale or refinancing transaction that would repay Meridian and Romspen. If the values of the Properties do in fact approach the values suggested by the CCAA Applicants, it should be possible to conclude such a transaction and, thereby, to retain the remaining equity in the Properties for the benefit of the subordinated lenders and equity holders.

The Contractual Rights of Meridian and Romspen

[100] Second, the effect of a CCAA proceeding would be to deprive Meridian and Romspen of the right to cause a change in the management of the Project in the very circumstances in which their security contemplates such a right. The Receivership Applicants have lost faith in the Debtors' management and an acknowledged default has occurred. Meridian and Romspen have bargained for the right to have a receiver take over control of, and to complete, the construction of the Project in these circumstances. There must be a good reason to deprive them of that right.

[101] In the present circumstances, however, this right has a particular significance because oversight and control of the construction costs is likely to impact the value of Romspen's security and, in an extreme case, of Meridian's security. A court-appointed receiver must justify its actions to the court and thereby to the creditors. It is exposed to potential liability if it is grossly negligent in the performance of its duties. Accordingly, secured creditors would reasonably expect to have more input into a receiver's actions than they would into the actions of the Debtors' management in a CCAA proceeding. While this might not be significant in a status quo situation, it is an important consideration in the present circumstances in which significant construction activity must take place, and significant additional debt must be incurred, to complete the Project.

[102] Accordingly, I conclude that the assertion by the Receivership Applicants of their contractual rights in the present circumstances, as well as their loss of faith in the management of the Debtors, must be important considerations for the Court.

The Interests of the Other Stakeholders in the Project

[103] Based on the foregoing, the proposed CCAA proceedings would have the two adverse or potentially adverse effects on the Receivership Applicants described above. The CCAA Applicants argue, however, that any such prejudice to the Receivership Applicants is more than

offset by the operational benefits of a CCAA proceeding and the benefits to the other stakeholders in the Project.

[104] I have dealt with the alleged operational benefits of the proposed CCAA proceeding above. I have concluded that the CCAA Applicants have not established that there are material operational benefits that make a CCAA proceeding superior to a receivership proceeding. This is therefore not a factor to be taken into consideration.

[105] The position of the CCAA Applicants that there are other stakeholders who will benefit from a CCAA proceeding and whose interests counterbalance the interests of the Receivership Applicants raises an important issue in these applications. Such stakeholders fall into two categories – future tenants and subordinate creditors and equity owners.

[106] The future tenants are critical to the success of the Project. It is of fundamental importance that the tenancy agreements in place continue and that any unrented space be rented as soon as possible. However, I am not persuaded that the future tenants who have contracted with Richmond Hill are more likely to favour a CCAA proceeding over a receivership. There is no evidence to this effect in the record. The more likely position is that the future tenants are more concerned with satisfaction that the Project, including the Fit-Out Works in respect of their space, will be completed in accordance with the timelines contemplated. In this respect, I think the future tenants are likely to be neutral as between a receivership or CCAA proceedings.

[107] The subordinated creditors of the Project comprise the trade creditors and certain unsecured lenders to the Project. The former include the Lien claimants whose priority has been established and any future trade creditors who will need to be kept current in order to complete the Project. The interests of these parties pertain to operational issues that are not affected by the nature of the proceeding that results in a restart of construction of the Project.

[108] On the other hand, the unsecured creditors and the equity holders in the Project rank junior to Meridian and Romspen. A CCAA proceeding, which entails prejudice or potential prejudice to senior ranking creditors in favour of junior ranking creditors and equity holders can only be justified, if ever, on the basis of larger societal interests.

[109] Meridian and Romspen submit that, as single-project real estate development companies, the insolvency of the Debtors, and in particular of Richmond Hill, does not raise any such interests. They rely on the decisions in *Cliffs Over Maple Bay Investments* and *Dondeb*, and in particular on the statements in those decisions cited above. Three considerations emerge from the case law set out above which are important in the present circumstances.

[110] First, where there is no business but rather a single-project real estate development company having mortgage lenders, it is not realistic to contemplate the possibility of a plan of compromise or arrangement under the CCAA that gives Meridian and Romspen less than a full payout of their indebtedness from the proceeds of any sale or a refinancing. In particular, there can be no justification for transferring value from Meridian and Romspen to more junior creditors or the equity holders.

[111] Second, for the same reason, there is no basis on which subordination of the priority position of Meridian and Romspen to that of a DIP Lender can be justified beyond the

construction costs contemplated by the financing plans of the parties to the extent such costs translate into equity in the Project and therefore do not diminish the security of these creditors.

[112] Third, for the foregoing reasons, it is questionable whether the CCAA proceedings contemplated by the CCAA Application can be said to further the purpose of the CCAA as set out above for the following reasons.

[113] In the present case, the CCAA is not being proposed with a view to "stabilizing" the present circumstances of the Debtors and allowing the Debtors the benefit of the status quo with a view to putting a restructuring plan to the stakeholders. There are two elements to this conclusion.

[114] First, it is not meaningful to talk of the maintenance of the status quo for the reason that, as discussed above, construction of the Project, being the only activity of Richmond Hill, is currently almost completely shut down. The Court is not being asked to grant relief to maintain that status quo. It is being asked to determine which of the two legal procedures – a receivership or a CCAA proceeding – should be ordered with a view to furthering a resumption of the construction of the Project under a new construction general contractor. Moreover, while the DIP Facility provides for some working capital, the DIP Facility is a non-revolving facility whose predominant purpose is to provide construction financing in a material amount which is necessary to permit construction to restart. In effect, the CCAA Applicants ask the Court to impose a third construction lender on the Project in priority to the existing lenders. This is beyond the usual nature and purpose of a DIP loan for working capital purposes. It underscores the fact that mere "stabilization" of the alleged business of the Debtors would serve no useful purpose. In short, the CCAA Applicants do not seek relief under the CCAA for the purpose of maintaining the status quo, or for "stabilizing" the situation, in the sense in which those terms are generally understood in the context of CCAA proceedings.

[115] Second, the CCAA Applicants do not contemplate a plan of compromise or arrangement as understood for the purposes of the CCAA for the reason that, as mentioned, Meridian and Romspen cannot be compelled to accept less than a complete payout of the Meridian Loan and the Loan, respectively, out of the proceeds of a sale or a refinancing. The "plan" of the CCAA Applicants is to seek to repay Meridian and Romspen out of the proceeds of a future sale or refinancing, if possible, after completion of the Project.

[116] Fundamentally, the purpose of the CCAA Application is not to restructure the business of the Debtors with a view to continuing their business but rather to maintain control of the Project by a Court-ordered imposition of new construction financing in the hope of realizing value for the subordinated lenders and equity holders. However, such control comes at the cost of prejudice to the rights, and potentially to the security position, of Romspen and Meridian. In this regard, the circumstances are similar to those in *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300.

[117] The Debtors have experienced a liquidity crisis since August 2018. None of the Debtors has any working capital with which to carry on business. The Debtors have explored a number of sales and refinancing options and have been unsuccessful. There is no sale or refinancing

option available to the Debtors at the present time. The CCAA Application is the only means available to them to preserve control over the continued construction of the Project.

[118] The purpose of the CCAA Application is to maximize the value of the Project. In the abstract, this is a desirable objective. However, in the present circumstances, it is not. It is the hope of the CCAA Applicants that sufficient value will be realized upon completion of the Project to make a sale or refinancing transaction feasible. If they are successful in realizing additional value, the subordinate creditors and the equity holders will benefit. However, if they are unsuccessful, Romspen and, in an extreme case, Meridian may well suffer a loss. The proposed CCAA proceeding therefore places the risk of a reduction in the value on Romspen and Meridian.

[119] This is inconsistent with the purpose of the CCAA which is to preserve the status quo in order to facilitate a plan of compromise or arrangement among the creditors of a debtor company, not to transfer risk, and potentially value, from senior creditors to junior creditors and equity holders without the consent of the senior creditors.

[120] Based on the foregoing, I conclude that the CCAA Applicants have failed to establish that the prejudice to the Receivership Applicants is offset by the benefits of the proposed CCAA proceeding.

The Respective Costs of a Receivership Versus a CCAA Proceeding

[121] Romspen alleges that the costs of a receivership will be less than the costs of a CCAA proceeding. While this is acknowledged by the CCAA Applicants, the parties dispute the extent of the difference. Counsel agree that the disputed difference is roughly $5-6 million i.e. between a difference of $5 million and a difference of $11 million. The difference pertains largely to the difference in the estimated costs discussed above in respect of the financing plans of the parties. Romspen says this consideration is important in respect of its position as a secured lender to the extent that the security for the Loan may not exceed, or only minimally exceeds, the current value of the Properties, which it considers to be the case.

[122] However, for the reasons discussed above, the Court is not in a position to make any determination on the likely difference in costs between these two proceedings beyond the agreed difference of $5 million. Any other figure would be speculative based on operational assumptions regarding the Project construction operations that may or may not prove to be appropriate.

[123] The more important cost considerations, which have been addressed above, are the extent to which the CCAA proceeding would result in less control over the financing of the much larger costs of completion of the Project, in a larger advance under the DIP Facility than would otherwise have been made under the Receivership Financing, and in a larger subordination of the security position of Romspen and Meridian.

[124] Accordingly, while the CCAA proceeding appears to entail costs of at least $5 million more than as receivership proceedings, the fact that a receivership proceeding would be less expensive than a CCAA proceeding is, by itself, not a significant factor in the Court's determination in this Endorsement.

Conclusions

[125] Based on the considerations addressed above, I conclude that it would not be appropriate to grant the CCAA Application and that it is instead just and convenient to grant the Receivership Application for the appointment of a receiver without a power of sale in respect of the Properties.

Wilton-Siegel J.

Date: December 10, 2018

SUPERIOR COURT OF JUSTICE

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00710361-00CL
CV-24-00713287-00CL
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DATE: February 29, 2024

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TITLE OF PROCEEDING:

AFC MORTGAGE ADMINISTRATIVE INC. v. SUNRISE ACQUISITIONS (STAYNER) INC. et al
AFC MORTGAGE ADMINISTRATIVE INC. v. SUNRISE ACQUISITIONS (ELMVALE) INC. et al

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SUNRISE ACQUISITONS (STAYNER) INC., 2846862 ONTARIO INC. AND SUNRISE ACQUISITIONS (ELMVALE) INC.

BEFORE: JUSTICE BLACK

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ENDORSEMENT OF JUSTICE BLACK:

Overview

[1] Before me in this matter were competing sets of applications: the lenders' applications seeking to appoint receivers pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"); and the debtors' application seeking protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

[2] The procedural history of these matters, and other related proceedings, is somewhat complex. In order to decide between the proposed approaches, it is necessary to consider and weigh a host of competing considerations against a set of criteria established by the growing case law on this choice between statutory paths.

Conclusion

[3] Having done so, for the reasons set out in detail below, I have decided to grant the receiverships sought by the Lenders, rather than making the CCAA Order sought by the Debtors.

The Debtors - The Sunrise Group

[4] Sunrise Acquisitions (Stayner) Inc., 2846862 Ontario Inc. ("284") (together "Sunrise Stayner"), and Sunrise Acquisitions (Elmvale) Inc. ("Sunrise Elmvale" and, together with Sunrise Stayner, the "Sunrise Entities") are part of a broader group of companies (the "Sunrise Group"). The Sunrise Group also includes Sunrise Acquisitions (Hwy 7) Inc. ("Sunrise Hwy 7").

[5] The Sunrise Group includes a number of real estate development companies, in each case "single purpose" corporations incorporated under the *Business Corporations Act* (Ontario) R.S.O. 1990, c. B.16 for the purposes of a particular project.

[6] The principals of the Sunrise Group and the Sunrise Entities include Sajjad Hussain and Muzammil Kodwavi. Mr. Hussain and Mr. Kodwavi have provided certain guarantees relative to loans at issue (The Sunrise Group, the Sunrise Entities, Mr. Hussain, and Mr. Kodwavi will sometimes be referred to collectively as the "Debtors").

[7] Mr. Hussain and Mr. Kodwavi also own certain personal properties involved in this matter, together with their respective spouses, Mahvesh Hussain and Safana Kodwavi.

The Lenders – AFC and Brexit

[8] AFC Mortgage Administration Inc. ("AFC") and Brexit Holdings Inc. ("Brexit") are privately held lenders that provided mortgage financing to the Sunrise Entities and Sunrise Hwy 7 (AFC and Brexit will sometimes be referred to as the "Lenders").

The Stayner Loan

[9] In the case of Sunrise Stayner, pursuant to a Commitment Letter dated April 12, 2022 (amended May 10, 2022), AFC and Brexit (together with another lender that subsequently transferred its interest to Brexit) provided mortgage financing to the Debtors in the principal amount of $11,000,000.00 (the "Staynor Loan"). The Stayner Loan was guaranteed by Mr. Hussain and Mr. Kodwavi, (the "Stayner Guarantees").

[10] The Stayner Loan was for a 12-month term, maturing June 1, 2023, and was secured by a first mortgage charge (the "Stayner Mortgage") on a 66-acre parcel of vacant land in Stayner (the "Stayner Property"), as well as the Stayner Guarantees, and various other security. Under their security, AFC and Brexit had the right to appoint a receiver in the event of default.

[11] In April of 2023 Sunrise Stayner advised AFC and Brexit that it was unable to repay the Stayner Loan on the maturity date, and the loan accordingly went into default.

[12] The parties to the Stayner Loan entered into a Forbearance Agreement dated July 6, 2023 as a result of which 284 (a company wholly owned and controlled by the Guarantors) provided an additional guarantee of Sunrise Stayner's obligations. The Forbearance Agreement also provides AFC and Brexit a further right to appoint a receiver in the event of a default.

[13] 284 also granted to the Lenders, as additional security, a second charge on a property at 299 Mowat Street North in Stayner (the "Mowat Property"). There is a first charge on the Mowat Property in favour of Louis Harvey Bellwood. Mr. Bellwood, who sold his farm on the Mowat Property to the Debtors, financed by a Vendor Take-Back mortgage (the "VTB"), has a claim outstanding against the Debtors, currently the subject of Power of Sale proceedings. Mr. Bellwood was represented by counsel before me. He supports a receivership and opposes a CCAA Order.

[14] Sunrise Stayner has defaulted under the Forbearance Agreement and remains in default on the Stayner Loan (and under Mr. Bellwood's VTB).

The Elmvale Loan

[15] In the case of Sunrise Elmvale, AFC has two mortgages registered against a 10-acre collection of lands beneficially owned by Sunrise Elmvale in Elmvale, Ontario (the "Elmvale Property"). The Elmvale Property is approved for a 65 freehold townhome development.

[16] A first mortgage on the Elmvale Property (the "First Elmvale Mortgage") was transferred to AFC on June 30, 2022. It is in the principal amount of $1,960,000.00 and contains a right for the mortgagee to appoint a receiver in the event of default.

[17] On October 27, 2022, Sunrise Elmvale granted a second mortgage to AFC (the "Second Elmvale Mortgage") in the principal amount of $2,010,000.00. The Second Elmvale Mortgage also contains a right for AFC to appoint a receiver in the event of default.

[18] The Second Elmvale Mortgage is collateralized over four additional (residential) properties (the "Collateral Properties") owned, in each case, by Mr. Hussain, Mr. Kodwavi, Ms. Hussain and/or Ms. Kodwavi. These properties are at 9 Cicada Court in Toronto (the "Cicada Property"), 72 Grand Vellore Crescent in Vaughan (the "Grand Vellore Property"), 88 Abbruzze Court in Woodbridge (the "Abbruzze Property") and 91 Longshore Way in Whitby (the "Longshore Property").

[19] While there was initially some confusion about this in the evidence, it appears now to be common ground that, among the Collateral Properties, only the Longshore Property is occupied by any of the Debtors (specifically Mr. and Ms. Hussain and their three children).

[20] The Cicada Property is unoccupied and in the midst of a major renovation, the Grand Vellore Property is rented to a tenant or tenants, and the Abbruzze Property was the subject of a catastrophic fire. It appears that the proceeds of insurance coverage are currently in dispute and the subject of litigation.

[21] The Debtors owe various amounts to other creditors, secured by various additional charges on the Collateral Properties.

[22] There is also a third mortgage on the Elmvale Property (the "Third Elmvale Mortgage"). The Third Elmvale Mortgage was registered by KSV Restructuring Inc. ("KSV") on May 10, 2023. The Third Elmvale Mortgage secures (in part) a debt owed by Sunrise Hwy 7 to KSV arising from the settlement of proceedings involving property near Highway 7 owned by Sunrise Hwy 7 (the "Hwy 7 Property"). The principal amount of the Third Elmvale Mortgage is $10,500,000.00.

[23] Sunrise Elmvale is in default under the First, Second and Third Elmvale Mortgages, and the Lenders have taken various steps to enforce their loans, including serving notices under s. 243 of the BIA.

Events Arising in the Highway 7 Receivership Proceedings

[24] The significance of events within the proceedings relative to the Hwy 7 Property is the subject of debate before me.

[25] In those proceedings, Wilton-Seigel J. appointed KSV as the receiver on June 9, 2021.

[26] During the course of its investigations, KSV discovered and reported that certain funds had been improperly diverted from Sunrise Hwy 7 to one or more of the principals of Sunrise Hwy 7. In an affidavit filed in response to KSV's motion to recover these funds, which affidavit Kimmel J. referred to in an endorsement from a case conference on November 2, 2022, Mr. Kodwavi admitted that he and other Debtors had received the funds at issue, and that the funds ought to be repaid to Sunrise Hwy 7. Justice Kimmel ordered these amounts to be repaid.

[27] The same issue came on before Osborne J. on December 20, 2022. At that time, His Honour noted that KSV's position was that the Debtors had misappropriated over $14 million from Sunrise Hwy 7, that the Debtors had themselves admitted that they owed over $5 million to Sunrise Hwy 7 that had not been repaid despite Kimmel J.'s Order, and that in fact the Debtors now accepted that they owed at least a net amount of about $12.6 million to Sunrise Hwy 7. Justice Osborne wrote that the Debtors admitted to paying a portion of the funds at issue to a Mr. Shabbar, that all parties agreed that "there is no evidence in the Record justifying these payments" and "no evidence of any justification or basis for the payments made to him whatsoever."

[28] Justice Osborne granted an amended and restated Order on April 14, 2023, requiring the Debtors to pay the amount of $14,510,545.24 to KSV forthwith. Then, on May 8, 2023, Osborne J. made an Order approving a settlement agreement, pursuant to which KSV agreed to accept $10,500,000.00 in full and final settlement of the amounts owing under the Debtors' obligations.

[29] Despite the settlement confirmed in Osborne J.'s May 8, 2023 Order, the Debtors have failed to pay the amounts owing. The settlement contemplated the Debtors paying off the settlement debt in instalments of $2,000,000.00. Having made one $25,000.00 payment in December of 2022 (before the settlement), the Debtors made one partial payment under the settlement agreement, in the amount of $1,000,000.00 on June 13, 2023, but since then have made no further voluntary payments. KSV has garnished some relatively modest amounts from certain bank accounts of the Debtors, but the vast majority of the debt (which, given the Debtors' failure to comply with the settlement, has reverted to the full debt of over $14 million) remains outstanding.

[30] The evidence also confirms that the Debtors have not been particularly co-operative in KSV's efforts to identify and attach assets. Mr. Hussain and Mr. Kodwavi failed to attend at a number of appointments for examinations in aid of execution, and when they finally did attend, did so without bringing any documentation (despite being directed to do so in the Notice of Examination). They have also failed to provide answers to undertakings that they gave in that setting. It was during the examinations in aid of execution that KSV determined, despite Mr. Hussain's affidavit evidence that the Collateral Properties are "currently occupied by Mr. Kodwavi and my families" that that was, with the exception of one property (the Longshore Property), not the case.

[31] KSV had of course registered writs of seizure and sale against the Debtors in various jurisdictions in Ontario. KSV agreed to temporarily lift some or all of those writs to permit the Debtors to make payment of the settlement confirmed in May of 2023, but once it became apparent that the Debtors would not be paying any amounts beyond the initial partial payment, KSV re-registered the various writs.

[32] For the most part, the Debtors do not contest this description of events.

Acknowledgement of Misappropriation

[33] In the materials, relative to the funds that admittedly were diverted from Sunrise Hwy 7 into the hands of individuals, which funds largely remain outstanding and unaccounted for, the Debtors at one point described Osborne J.'s finding about the diversion of funds as being a finding that the funds were "misallocated", a characterization with which the Lenders took umbrage.

[34] However, in his submissions, counsel for the Debtors fairly acknowledged that the apt description is "misappropriation" rather than "misallocation." He also fairly acknowledged that the asserted debts are owing and have largely not been repaid (and not repaid at all in the case of the Stayner Property and the Elmvale Property).

[35] While not engaging particularly with the complaints about his clients' non-co-operation with the execution process, he also did not deny that lack of co-operation.

[36] Rather, he purported to argue that all of that backdrop is "water under the bridge" and is not really germane to the currently pressing imperative, which is to determine the way forward that will maximize value for all concerned.

Justice Kimmel's February 21, 2024 Endorsement

[37] In terms of significant recent procedural history, the parties in the matter in relation to the Stayner Property were before Kimmel J. on February 21, 2024. Her Honour's endorsement on that date is instructive.

[38] At that time, AFC and Brexit were seeking to have a receiver appointed over the Stayner Property and the Collateral Properties.

[39] Justice Kimmel noted that AFC's receivership application relative to the Elmvale Property was also pending, at that point scheduled to proceed on February 28, 2024. Her Honour observed that "there are a number of bankruptcies and receiverships involving other affiliated Sunrise entities" and made specific mention of the Sunrise Hwy 7 proceedings, leading to the "December 20, 2022 judgment of Osborne J. that was granted against various Sunrise entities and Kodwavi and Hussain, with a finding of misappropriation."

[40] Justice Kimmel remarked, as I have, that "it is not disputed by the respondent Borrowers that the loan that is the subject of this application [the Stayner Loan] matured on June 1, 2023 and that they are in default." She continued "They are also in default of the Forbearance Agreement dated July 6, 2023."

[41] Her Honour found that "The Lenders have been patient and have granted the Borrowers many indulgences," that the "Lenders' security grants them a contractual right to appoint a receiver, and that in addition "Under the Forbearance Agreement, the Borrowers consented to the appointment of a receiver if there were further defaults."

[42] The Lenders submitted before Kimmel J. that they had "lost faith in the Borrowers and their ability to manage the situation," and highlighted various reasons why the immediate appointment of a receiver would be appropriate in the circumstances. They argued that they met the "just and convenient" test under s. 243 of the BIA and relevant case law.

[43] There was also discussion of the fact that the Debtors had had at least since June 1, 2023 to obtain refinancing or new investors, were given extra time to do so by way of the Forbearance Agreement, and that they nonetheless provided no evidence of the Debtors making any progress on those fronts, nor that "they have any ability to do so."

[44] In response to the proposed receivership, the Debtors filed materials, including an affidavit from Mr. Hussain, asserting that in the circumstances, an Order bringing the matters, collectively, under the CCAA would be preferable and would better maximize the value for all concerned.

[45] Justice Kimmel described the contents of Mr. Hussain's affidavit before her as "aspirational", and in her endorsement implicitly analogized the circumstances before her to Penny J.'s endorsement in *1180554 Ontario Limited v. CBJ Developments Inc. et al*, in which His Honour had labelled the basis for an adjournment request before him as "nothing more than a wing and a prayer."

[46] However, Kimmel J., while acknowledging that "the Lenders are not wrong to be skeptical about whether the Borrowers will be able to come up with a concrete plan," found that there was "not obvious immediate prejudice to the Lenders in affording the Borrowers this brief further adjournment to allow them to deliver their CCAA Application material and make their arguments so that the question of the appropriate manner of proceeding can be decided with the benefit of their CCAA Application material before the Court."

[47] Justice Kimmel also expressed the view that "While it remains to be seen whether the Borrowers can put together a CCAA package that makes sense and accomplishes what they aspire to, the court sees some advantage to one judge hearing both this receivership application, the receivership application involving Sunrise (Elmvale) and the CCAA application at the same time."

[48] All of Kimmel J.'s comments are supported in the record, and factor into the analysis required by the caselaw, discussed in more detail below.

[49] Against that backdrop, the matters – and all interested parties – came before me on February 29, 2024.

Agreement That the Threshold Requirements for Either Receiverships or CCAA Met

[50] I should note at the outset that the Debtors do not contest the appropriateness of receiverships in the event that I find that route is preferable to the CCAA here. That is, the Debtors acknowledge that they are insolvent and in default in each proceeding, that the evidence in the record satisfies the requirement that a receivership is "just and convenient", and they confirm that AFC and Brexit are entitled, under their security in each

case, to the appointment of a receiver. Even more specifically, the Debtors' counsel advised at the outset that the Debtors consent, should I find a receivership to be the preferable approach, to a receivership Order (and indeed counsel made submissions about a couple of items that the Debtors say should be included in the receivership Order if that is the result).

[51] However, the Debtors argue that in the circumstances, an Order under the CCAA is preferable, in a number of ways, to the receiverships sought by the Lenders.

[52] At the outset of the argument, I advised all counsel that I had formed the view from the materials that the technical threshold requirements for either receiverships or a protective Order under the CCAA were met.

[53] In other words, focusing on the CCAA criteria, I was satisfied that each of the Sunrise Entities is a "debtor company" as defined in the CCAA, meeting the definition of an "insolvent person" under the BIA (which has been adopted for purposes of CCAA proceedings), with a place of business in Ontario, and with a total indebtedness in excess of $5 million.

[54] No party took issue with these preliminary observations, and the argument turned to an application of the growing body of case law - regarding the choice between receivership and CCAA protection – to the facts at hand.

Initial Problem for the Debtors – No Progress on a Plan

[55] A significant shortcoming for the Debtors' position is that, notwithstanding Kimmel J.'s admonition that the Debtors would have to "put together a CCAA package that makes sense and accomplishes what they aspire to", the Debtors came before me with no concrete plan whatsoever.

[56] Counsel for the Debtors said that the "plan" is to establish a Sales and Investment Solicitation process (a "SISP") to be presented at a Comeback hearing in 10 days. He also explained that, inasmuch as the Debtors have expressed a willingness to engage - as the monitor for purposes of the intended CCAA proceedings - the same person whom AFC/Brexit propose as the receiver for one of the matters, and given the uncertainty and attendant awkwardness about that person's role going forward, the Debtors have not yet been able to have a meaningful discussion with their proposed monitor about the relevant details of the plan including the SISP.

[57] Accordingly, there is really nothing concrete, or really any elements of a plan at all before me, and so the Debtors' proposal remains aspirational.

[58] That is not to say that I would have expected an elaborate or close-to-final plan to be presented before me. I understand and accept that there was only so much that could have been done between February 21 and February 29, 2024, particularly given the limited meaningful access that the Debtors had with their would-be monitor during that interim period.

[59] On the other hand, I also find that it is reasonable to have expected the Debtors to show up on February 29 with even a modicum of flesh on the bones. They knew from the Lenders' position before Kimmel J. that whatever proposal they showed up with would be carefully scrutinized.

[60] It was suggested in argument by the Lenders, and I agree, that one might have expected at least some evidence that the Debtors had approached and not been rebuffed out of hand by potential investors, or even just a list of players within the industry to be approached in the proposed SISP process. The Debtors did

none of that and saying that a SISP will be developed in time for a comeback hearing 10 days down the road effectively amounts to saying that nothing has yet been done.

[61] Consistent with this lack of a plan, the Debtors' materials, and their counsel's submissions, were replete with references to the "possibility" that a SISP might lead to enhanced creditor recovery. In my view, given the history of this matter, the Lenders had the right to expect something more tangible.

Overarching Observations About Relevant Cases in Real Estate Development Context

[62] Apart from this significant threshold problem, the situation in this case also fits better in other respects with the cases in which receiverships have been chosen rather than a CCAA Order.

[63] I should note at the outset of this discussion that it is no longer the case that there is or should be any presumption that, when it comes to real property, a receivership will inevitably be the preferred choice over a CCAA proceeding.

[64] In a very helpful article: "Receivership versus CCAA in Real Property Development; Constructing a Framework for Analysis" (2020 CanLIIDocs 3602), Opolsky et al. confirm that, when it comes to choosing receivership over CCAA in the real estate context, "this is not the legal rule; there is nothing barring a CCAA proceeding for a real estate development company or other real property-centric company. Nor is it absolute: there are examples of a CCAA being granted instead of a receivership."

[65] The article goes on to acknowledge that, notwithstanding that it is not a "legal rule" it is nonetheless the case that "in a significant majority of [real estate] cases, secured creditors' receivership applications will be granted instead of competing debtors' CCAA applications."

[66] In discussing the reasons why, despite the continuously increasing recognition of the CCAA as a flexible and helpful mechanism for preserving assets and restructuring insolvent entities, and even, increasingly, for facilitating liquidations, receiverships are more often granted in the real estate development context than CCAA orders, the authors identify factors in recent cases that incline courts in that direction.

Reliance on Koehnen J.'s Decision in The Clover on Yonge

[67] In particular, by way of a recent illustrative example, the authors focus on Koehnen J.'s decision in *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, 78 CBR (6th) 299.

[68] The Lenders also rely on *The Clover on Yonge*, and aptly describe it as a case that not only synthesizes and discusses various important considerations in choosing between receivership and CCAA in the real estate development setting, but which shares many evidentiary similarities with the case at hand.

Relevant Considerations Emerging from Previous Cases

[69] Before discussing the application of *The Clover on Yonge* to the facts before me, the Lenders identify, fairly in my view, a number of relevant factors arising from such cases as *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 DLR (4th) 577, *Romspen Investment Corporation v. 6711162 Canada Inc.*, 2014 ONSC 2781, *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911, and *Octagon Properties Group Ltd.*, 2009 ABQB 500, 486 A.R. 296.

[70] These factors include:

(a) While CCAA can apply to companies whose sole business is a single land development, such companies do have difficulty proposing an arrangement or compromise acceptable to secured creditors;
(b) The priorities of security are often straightforward and there is little incentive for secured creditors having greater priority to agree to an arrangement that involves money being paid to more "junior creditors." (And on this parameter, the Lenders note that in this case even the "junior creditors" oppose the relief sought by the Debtors);
(c) If a developer is insolvent and not able to complete a development "without further funding, the secured creditors may feel that they will be in a better position by exercising the remedies rather than letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or a DIP financing; and
(d) Where a mortgagor has provided an express "covenant" agreeing to the appointment of a receiver, the Court "should not ordinarily interfere with the contract between the parties."

Application of Relevant Factors by Koehnen J. in The Clover on Yonge

[71] Against the backdrop of these and other factors arising in the cases comparing receiverships to CCAA protection, Koehnen J. summarized, in *The Clover on Yonge*, the law and issues bearing on the choice. His Honour wrote:

1. Although receivership is generally considered to be an extraordinary remedy, there is ample authority for the proposition that its extraordinary nature is significantly reduced when dealing with a secured creditor who has the right to a receivership under its security arrangements;
2. The relief becomes even less extraordinary when dealing with a default under a mortgage;
3. The court should consider factors as set out by Justice Farley in *Confederation Life Insurance Co. v. Double Y Holdings Inc.*, 1991 CarswellOnt 1511 at para 20:

    (a) the lenders' security is at risk of deteriorating;
    (b) There is a need to stabilize and preserve the debtors' business;
    (c) Loss of confidence in the debtors' management; and
    (d) Positions and interests of other creditors.

4. In choosing between receivership or CCAA process, the court must balance the competing interests of various stakeholders to determine which process is more appropriate; and
5. The factors to be considered are:

    (a) Payment of the receivership applicants;
    (b) Reputational damage;
    (c) Preservation of employment;
    (d) Speed of the process;
    (e) Protection of all stakeholders;
    (f) cost;
    (g) nature of the business.

Argument re Application of Case Law to the Matter

[72] Applying these factors to the case at hand, the Lenders first argue that there is no doubt that their security is at risk of deteriorating, inasmuch as interest continues to accrue, at significant rates, on a daily basis, and defaults continue, with no servicing of the debts and evidence, by way of construction liens being registered on title, that trades are not being paid.

[73] The Lenders argue that there is also no dispute about the need to stabilize the business, and that, given the need to avoid leaving the "foxes in the henhouse" (discussed a bit more below) a receivership will achieve more stability than a CCAA order.

[74] The Lenders place particular emphasis on their loss of confidence in the Debtors' management. The Lenders say that in fact, having regard to past and ongoing irregularities, they have lost complete confidence in management. They point in particular to the Debtors' mismanagement and a specific judicial finding of misappropriation by the Debtors' principals. The Lenders also allege irregularities in recent financial statements produced by the Debtors, suggesting that still more funds are unaccounted for. To allow management to remain in place, they say, would be akin to leaving proverbial "foxes in the henhouse." They also rely on their contractual rights to appoint receivers and note the disappointing absence of any concrete plan by the Debtors (even in the face of the need, confirmed by Kimmel J. about a week before the attendance before me, for some evidence that the Debtors have some semblance of a plausible way forward).

[75] Turning to the seven factors articulated by Koehnen J., the Lenders reiterate that the Debtors have known for many months that the mortgages at issue would mature and have had ample opportunity to refinance during the forbearance period, and even for several months after the forbearance had expired. Despite this opportunity, the Lenders assert, the Debtors have still come to court with nothing more than continued aspirations (and no evidence of potential financing, or even potential financiers).

[76] With respect to potential reputational damage, the Lenders note Koehnen J.'s conclusion in *The Clover on Yonge* that "in the circumstances of this case, that is irrelevant. Any reputational damage to [the debtor] is of its own making. Similarly here, the Lenders argue, given the earlier findings of misappropriation, previous receiverships and bankruptcies, given the Sunrise Group's ongoing lack of transparency and cooperation, and given additional irregularities that the Lenders allege appear in recent financial statements of the Debtors, any reputational damage to the Debtors is "of their own making."

[77] The Lenders also note (and the Debtors concede) that there is no evidence in this case of any employees whose employment will be at risk if a receivership is granted rather than CCAA protection.

[78] They also argue that, in terms of the speed of the competing proposed processes, it would be preferable "to have a receiver acting as an officer of the Court who can act without being hamstrung by closing a transaction that favours equity over creditors" and that "CCAA proceedings are inherently expensive," requiring as they do "regular court attendances, probably with greater frequency than a receivership does."

[79] Finally, the Lenders rely on jurisprudence relating to single-use land development companies showing that "Courts are inclined against using CCAA proceedings for single purpose land development companies." The Lenders astutely acknowledge that "this is not as a result of them being single purpose land use companies, but rather "they turn on the nature of the security and the position of a security holder with respect to a CCAA proceeding." On this point, they again rely on Koehnen J.'s findings (in *The Clover on Yonge*) as follows:

"In a much quoted paragraph from *Cliffs Over Maple Bay*, the British Columbia Court of Appeal stated at paragraph 36

> Although the CCAA can apply to companies whose sole business is a single land development as long as the requirements set out in the CCAA are met, it may be that, in view of the nature of its business and financing requirements, such companies would have difficulty proposing an arrangement or compromise that was more advantageous than the remedies available to its creditors. The priorities of the security against the land development are often straightforward, and there may be little incentive for the creditors having senior priority to agree to an arrangement or compromise that involves money being paid to more junior creditors before the senior creditors are paid in full. If the developer is insolvent and not able to complete the development without further funding, the secured creditors may feel that they will be in a better position by exerting their remedies rather than letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining financing, capital injection by a new partner of DIP financing…..Although the paragraph refers to the nature of the business, the real thrust of the analysis turns on the nature of the security and the attitudes of the secured creditors….In the case at hand, where the breakdown in the relationship was caused by persistent and deliberate wrongdoing by the debtor, where there were no significant differences to the outcome to other stakeholders between a receivership or a CCAA proceeding, and where there were no material employment concerns, three was no reason to restrain the exercise of the Receivership Applicants' contractual rights."

Key Considerations and Findings

[80] I find that many of these same factors have direct application to the situation before me. Distilling and applying some of the key considerations, I note as follows:

(a) the Lenders have clear and uncontested rights, under various of their security instruments, to appoint receivers;
(b) in terms of other stakeholder, there is not a single person or entity who expresses support for the Debtors' proposed CCAA protection. In fact, all stakeholders who have expressed a view strongly favour receiverships;
(c) the Lenders have a legitimate evidentiary basis for their avowed lack of confidence in the Debtors' management. There are uncontested findings of past misappropriation, more recent concerns the Lenders see arising in the Debtors' recent financial statements, and an abiding lack of cooperation and transparency on the part of the Debtors and their principals;
(d) while in general there is ostensible appeal to the notion that appointing a single monitor rather than two receivers should yield costs savings, here the Lenders assert, fairly in my view, that the Stayner Property and the Elmvale Property are very different projects giving rise to the need for independent analysis and decision-making for each of them. As such, the Lenders argue, the notional savings associated with having a single monitor rather than two receivers will prove illusory, inasmuch as two separate and independent exercises will be required, meaning that there will be no economies of scale or other efficiencies readily achieved;

(e) although the Debtors propose to imbue the monitor with "super monitor" powers, it seems evident that nonetheless the Debtors, and their principals, envision retaining a role in the CCAA proceedings they seek. The Lenders' level of distrust is such (and reasonably so in my view) that proposing "super powers" for the monitor does not entirely allay these concerns in the way that appointing receivers will;
(f) the priorities here, and the Lenders' strong preference simply to realize on their security in accordance with those priorities, is reasonable when compared to a SISP process which, although as yet undefined, will inevitably forestall to some extent the Lenders' recovery, and may well lead to payments to more junior creditors – in the fashion described in the caselaw – before the Lenders are fully paid out; and
(g) this concern is particularly apt and pronounced, in circumstances in which, as stated at the outset, the Debtors have come back to court before me with nothing more than aspirations.

Receiverships Granted

[81] For all of these reasons, and others set out in the review of the caselaw set out above, I am granting the receiverships sought by the Lenders relative to the Stayner Property and the Elmvale Property respectively.

Debtors' Requests Concerning Certain Contents of Receivership Orders

[82] Counsel for the Sunrise entities asked, in the event I would order receiverships, that I make allowances for a couple of factors.

[83] First, since the evidence shows that one of the principals (Mr. Hussain) and his family are living at the Longshore Property, the Debtors asked that I carve that property out of the potential set of assets to be used by the Lenders to recover the debts. Alternatively, counsel asked that there be a "staging" of recovery, and that resort to the Longshore Property not be taken unless and until there is a demonstrated shortfall from the realizations of other assets.

[84] The Lenders fairly point out that the Longshore Property is among the Collateral Properties offered by the Debtors as security for the Stayner Loan and should not be excluded from resort by the Lenders if necessary. That said, the Lenders expressed a willingness to resort to the Longshore Property last in sequence, and only in the event of an evident shortfall. I find that this is an entirely reasonable position, and that this can be addressed in the fullness of the Stayner receivership.

[85] The Debtors also asked that I provide them with a period within which they should be entitled to redeem the debts on the Stayner and Elmvale Properties, in priority to other proposed realizations, and they asked that they be given until June 15, 2024, or at least until May 15, 2024.

[86] While it may well prove to be the case that, as a practical matter the Debtors will have an opportunity to redeem until those dates (because the properties may not be sold before then) I decline to build in a specific protected priority for the Debtors beyond whatever ordinary right or ability they may have to redeem. As noted, the Debtors have had ample time and opportunity to source financing and repay the debts, and I see no benefit in giving them yet more time to do so. Again, as a practical matter if they can source financing, it may prove to be the case that the Debtors will have an opportunity to redeem before other sales are made, but to put it bluntly they have not earned the right to additional protection for their potential redemption.

Costs

[87] The Lenders are entitled, as the successful parties here, to their costs of these motions. No costs outlines were uploaded before me, and I have no insight into how the labour was divided among the Lenders in terms of preparing the written and oral submissions. I direct the parties to discuss the costs issue and to propose both the amount of costs and a proposed allocation.

[88] In the event that the parties cannot agree on costs, I can be spoken to.

Black J.

Court File No. CV-24-00716381-00CL

1599285 ONTARIO LIMITED, et al		**1000195736 ONTARIO LTD., et al**
Applicants	- and-	Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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