Court File No. CV-21-00663051-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

SUNRISE ACQUISITIONS (HWY 7) INC.

Respondent

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 APPLICANT
(APPLICATION RETURNABLE JUNE 9, 2021)

June 3, 2021

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TO THE SERVICE LIST

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(Current to May 28, 2021)

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FACTUM OF THE APPLICANT
(APPLICATION RETURNABLE JUNE 9, 2021)

PART I - INTRODUCTION

1. KingSett Mortgage Corporation ("**KingSett**") seeks an order (the "**Receivership Order**") appointing KSV Restructuring Inc. ("**KSV**") as receiver and manager (the "**Receiver**") pursuant to section 243(1) 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 (the "**CJA**") over all of the assets, undertakings and properties of Sunrise Acquisitions (Hwy 7) Inc. ("**Sunrise**") and the proceeds therefrom (the "**Property**"), including, without limitation, certain real property owned by Sunrise in Markham, Ontario (the "**Real Property**").

2. The Real Property primarily comprises five remaining townhome units developed and built by Sunrise as part of its "Unionvillas" development project located in Markham, Ontario. Since

2015, KingSett has provided senior secured financing to Sunrise to enable the development of the Unionvillas project, which comprises 52 built townhomes, the vast majority of which have been sold and transferred to purchasers. The five remaining townhome units (the "**Remaining Units**") are subject to sale agreements that do not meet the net minimum purchase price thresholds under KingSett's loan terms due to the deposits and raise significant issues and concerns.

Affidavit of Daniel Pollack sworn May 28, 2021 ("**Pollack Affidavit**"), Tab 2 to the Application Record of KingSett Mortgage Corporation dated May 28, 2021 ("**Application Record**"), at paras 3-4

3. In particular, four of these five sale agreements are between Sunrise and related parties (including three that are between Sunrise and the spouse of one of Sunrise's principals) and contain unusually high deposits (in some cases exceeding 50% of the total purchase price) which have purportedly been spent by Sunrise and are no longer available. In the circumstances, KingSett and Sunrise's second-ranking mortgagee have not consented to the sales of the Remaining Units and are not prepared to discharge their security against those units.

Pollack Affidavit, at paras 5-6

4. On May 1, 2021, Sunrise defaulted under its loan facility with KingSett by failing to make a required interest payment, which default is continuing. KingSett's security gives it the right to appoint a receiver upon a default by Sunrise.

Pollack Affidavit, at para 7

5. As at May 10, 2021, the amount owing by Sunrise to KingSett is $1,950,807.35, plus accrued and accruing interest, fees and costs (the "**Indebtedness**"). Despite demand and the delivery of a notice of intention to enforce security pursuant to subsection 244(1) of the BIA, the Indebtedness remains unpaid.

Pollack Affidavit, at paras 9, 40

6. KingSett is seeking to appoint KSV as Receiver of the Property to thoroughly examine the circumstances of the sales agreements for the Remaining Units with a view to completing a sale of the Remaining Units, distributing the proceeds to Sunrise's creditors and addressing any related outstanding issues. KingSett has lost confidence in Sunrise's management and believes that it is just and convenient in the circumstances that KSV be appointed as Receiver.

Pollack Affidavit, at paras 8, 10

7. KingSett's application is supported by the second-ranking mortgagee of Sunrise.

Supplemental Affidavit of Daniel Pollack sworn June 1, 2021 ("**Supplemental Pollack Affidavit**"), Supplemental Application Record dated June 1, 2021 ("**Supplemental Application Record**")

PART II - SUMMARY OF FACTS

8. Sunrise is incorporated pursuant to the *Business Corporations Act*, R.S.O. 1990, c. B-16 (the "**OBCA**").

Pollack Affidavit, at para 12

The Loan and Security

9. Pursuant to a commitment letter dated May 5, 2015, as amended from time to time (the "**Commitment Letter**"), KingSett advanced several loan facilities to Sunrise to enable the development of the Unionvillas project. Following several amendments to the Commitment Letter (13 in total), at present, the Commitment Letter provides for a non-revolving demand loan facility in the maximum principal amount of $4,410,000 loan (the "**Loan**") and bearing interest at the Royal Bank of Canada prime rate +6.05% (floor rate of 10%) per annum, calculated on the daily outstanding balance, compounded and payable monthly, not in advance, both before and after maturity, plus costs and expenses. The Loan matures on July 1, 2021.

Pollack Affidavit, at paras 16 and 19

10. The Loan is secured by, among other things, a general security agreement (the "**GSA**"), a general assignment of rents in respect of the Real Property, and a mortgage (the "**Mortgage**") from Sunrise to KingSett, which KingSett registered as the first-ranking charge on title to the Real Property on June 2, 2015. KingSett has registered its interest in the personal property of Sunrise pursuant to the *Personal Property Security Act,* R.S.O. 1990, c. P-10, as amended ("**PPSA**").

Pollack Affidavit, at paras 21, 32

11. On November 3, 2016, KingSett registered a subsequent charge (the "**Subsequent Charge**") against title to the Real Property in the principal amount of $1,648,878.75. On September 12, 2018, KingSett registered a notice amending the Subsequent Charge to the principal amount of $5,500,000.

Pollack Affidavit, at para 23

12. Pursuant to a Guarantee and Postponement of Claim dated May 15, 2015 (the "**Guarantee**"), the Loan is guaranteed by Sajjad Hussain and Muzammil Kodwavi (the "**Guarantors**"), who are the directors and officers of Sunrise. Under the terms of the Guarantee, the Guarantors agreed to jointly and severally guarantee payment to KingSett of all of Sunrise's debts and liabilities.

Pollack Affidavit, at para 20

Other Creditors of Sunrise

13. In addition to KingSett, the other primary financing source for the Unionvillas project was a syndicated mortgage financing arranged by Fortress Real Developments Inc. and its affiliates ("**Fortress**") and administered by an Ontario lawyer named Derek Sorrenti ("**Sorrenti**") through

his law firm, Sorrenti Law Professional Corporation ("**Sorrenti Law**"). Through this financing vehicle, investors could participate in the mortgage financing with their security being held in trust on their behalf by Sorrenti Law.

Pollack Affidavit, at para 24

14. On August 18, 2015, Sorrenti Law registered a charge against the Real Property in the amount of $8,000,000, which was later amended by the registration of a notice on September 15, 2016 to increase the principal amount of the charge to $9,873,262 and to list Sorrenti Law and Olympia Trust Company ("**Olympia**") as chargees (the "**Sorrenti Law Charge**").

Pollack Affidavit, at para 25

15. Pursuant to Subordination and Standstill Agreements dated August 14, 2015 and October 21, 2016, respectively, and postponements registered on title to the Real Property on November 22, 2016 and September 12, 2018, the holders of the Sorrenti Law Charge confirmed that the indebtedness and security held by Sorrenti Law and Olympia was postponed and subordinated to the senior indebtedness and security held by KingSett.

Pollack Affidavit, at paras 27-29

16. On September 30, 2019, FAAN Mortgage Administrators Inc. ("**FAAN**") was appointed by this Court as trustee (the "**Sorrenti Trustee**") over all of the assets, undertakings and properties of Sorrenti and Sorrenti Law relating to their trusteeship and administration of syndicated mortgage loans in projects affiliated with Fortress, including any real property mortgages registered in the names of Sorrenti and Sorrenti Law.

Pollack Affidavit, at para 30

17. On September 9, 2020, a further charge in favour of Rehanna Ameerullah and Mansi Kumari in the principal amount of $573,750 (the "**September 2020 Charge**") was registered on title to the real property bearing PIN 02985-0591 (LT), but not the other parcels of real property owned by Sunrise. The registration of the September 2020 Charge constitutes a default under the Commitment Letter.

Pollack Affidavit, at para 31

Sunrise's Default and Current Circumstances

18. Over the past several months, KingSett has granted Sunrise a series of extensions of the maturity date of the Loan, enabling Sunrise to benefit from months of relief. Pursuant to the thirteenth amendment to the Commitment Letter dated January 26, 2021, the maturity date was most recently extended to July 1, 2021.

Pollack Affidavit, at para 36

19. However, Sunrise has committed certain events of default under the Loan and KingSett's security, including failing to make its required interest instalment payment on May 1, 2021.

Pollack Affidavit, at para 37

20. On May 11, 2021, KingSett delivered a demand letter and a notice of intention to enforce security in accordance with subsection 244(1) of the BIA ("**NITES**") to Sunrise. Further, on the same day, KingSett delivered a demand letter to the Guarantors demanding that the Guarantors repay the Sunrise Indebtedness in full by no later than May 21, 2021.

Pollack Affidavit, at paras 37-39

21. The notice period under the NITES has since expired and Sunrise has not repaid the Indebtedness in full or in part.

Pollack Affidavit, at para 40

22. With respect to the Remaining Units, Sunrise has purportedly entered into agreements of purchase and sale which raise significant issues and concerns. In particular:

(a) the purchase price under these agreements does not meet the minimum threshold for a compliant sale under the Commitment Letter, which is $930,000 per sale;

(b) four of the five agreements are with related parties, including three with the spouse of one of the Guarantors;

(c) the deposits were purportedly approximately $500,000 per agreement, which are unusually high. Some of the deposits exceeded 50% of the purchase price for the properties. By comparison, the deposits for the prior townhome sales were typically paid in multiple smaller payments totalling $120,000 in aggregate per unit; and

(d) Sunrise has also advised KingSett that the deposits (totalling $2,575,000) have been depleted by Sunrise and are no longer available.

Pollack Affidavit, at para 42

23. In these circumstances, KingSett is not prepared to consent to the proposed Remaining Unit sales and discharge its security against those properties. KingSett has lost faith with Sunrise's management and wishes to exercise its rights under its security to appoint a receiver to market and sell the Property for the benefit of KingSett and Sunrise's other creditors.

Pollack Affidavit, at para 43

24. In its capacity as the Sorrenti Trustee, FAAN has advised KingSett that it supports KingSett's application and the appointment of KSV as receiver, including because of additional concerns and issues with respect to Sunrise and its conduct to date that FAAN has raised. The

Sorrenti Trustee holds the second-ranking mortgage on the Property and it is expected that, after payment of the Indebtedness, there will likely be insufficient proceed to repay the indebtedness under the Sorrenti Law Charge.

Supplemental Pollack Affidavit, at para 3 and Exhibit "A"

Pollack Affidavit, at para 46

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

25. The only issue on this Application is whether this Court should appoint KSV as Receiver over the Property.

26. It is appropriate for the Court to appoint KSV as Receiver over the Property because:

(a) the technical requirements under the BIA and CJA have been satisfied; and

(b) it is just and convenient in the circumstances.

The Technical Requirements Are Satisfied

27. Section 243 of the BIA grants the Court the jurisdiction and authority to appoint a receiver of the property of an insolvent person if it is "just or convenient to do so". The section states as follows:

> **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.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), at section 243

28. KingSett is a secured creditor of Sunrise with a perfected security interest pursuant to its real property registrations and PPSA registrations and is therefore able to bring this Application under section 243 of the BIA in respect of the Borrower.

Personal Property Security Act, R.S.O. 1990, c. P-10, as amended ("**PPSA**"), at sections 19 and 24

Pollack Affidavit, at paras 21, 22, 23, 32 and Exhibits F, H, I, J, and R

29. KingSett also has the contractual right to the appointment of a receiver under the terms of its Mortgage and Sunrise consents to such appointment.

Pollack Affidavit, at para 45

30. As required under subsection 243(1.1) of the BIA, KingSett sent notices of intention to enforce security under subsection 244(1) of the BIA to Sunrise on May 11, 2021. The 10-day notice period for enforcement has since expired. Therefore, pursuant to subsection 243(1.1) of the BIA, the Court may appoint KSV as Receiver at this time.

BIA, at subsections 243(1.1) and 244(1) and (2)

Pollack Affidavit, at paras 38, 40

31. Subsection 243(5) of the BIA specifies that an application under subsection 243(1) of the BIA is to be filed in a court having jurisdiction in the judicial district of the "locality of the debtor", which is defined in section 2 of the BIA as follows:

> **2.** In this Act,
>
> *locality of a debtor* means the principal place
>
> (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
>
> (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
>
> (c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

BIA, at section 2, subsection 243(5)

32. Sunrise incorporated under the *Business Corporations Act* (Ontario), R.S.O. 1990, c. B. 16 and has its registered head office in Ontario. Sunrise's owned Real Property is located in Markham, Ontario.

Pollack Affidavit, at paras 2 and 12

33. The locality of Sunrise is Ontario, and, therefore, this Application is properly brought before the Ontario Superior Court of Justice (Commercial List).

34. KSV is qualified to act as Receiver in accordance with subsection 243(4) of the BIA and has provided its consent to act as Receiver of the Property.

BIA, at subsection 243(4)

Pollack Affidavit, at para 50 and at Exhibit V

Appointing KSV as Receiver is Just and Convenient

35. Subsection 243(1) of the BIA provides that on application by a secured creditor, a court may appoint a receiver where it is "just or convenient." Similarly, section 101 of the CJA permits the appointment of a receiver where it is "just or convenient".

BIA, at subsection 243(1)

Courts of Justice Act, R.S.O. 1990, c C-43, as amended, at section 101

36. To determine whether it is "just or convenient" to appoint a receiver, this Court has stated that the Court "must have regard to all of the circumstances but in particular to the nature of the property and the rights and interest of all parties in relation thereto", which includes the rights of the secured creditor under its security.

***Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont SCJ)** [*Freure Village*], at para 10

37. It is not essential that a secured party moving for the appointment of a receiver establish that it will suffer irreparable harm if a receiver is not appointed.

Freure Village, at para 10

38. Where the rights of the secured creditor under the security instrument include the right to seek the appointment of a receiver, the burden on the applicant seeking the appointment is relaxed. As stated by Morawetz J, as he then was, in *Elleway Acquisitions Ltd. v Cruise Professionals Ltd.,*

> …while 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. [emphasis added]

***Elleway Acquisitions Ltd. v Cruise Professionals Ltd.*, 2013 ONSC 6866** [*Elleway*], at para 27

Freure Village, at para 12

***Meridian v Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755**, at para 21

39. Where a creditor is entitled under its agreement with the debtor to seek the appointment of a receiver, a court will consider in its discretion whether, on an examination of the surrounding circumstances, it is in the interests of all concerned to have the receiver appointed by the court. The Court should consider the following facts:

(a) the potential costs of the receiver;

(b) the relationship between the debtor and the creditors;

(c) the likelihood of preserving and maximizing the return on the subject property; and

(d) the best way of facilitating the work and duties of the receiver.

Elleway, at para 28

Freure Village, at para 12

40. This Court has held that there must be a good reason to deny a secured creditor's request to appoint a receiver where a secured party has lost faith in the debtor's management and the receivership applicant has the contractual right to appoint a receiver. Here, no such reason exists.

Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al, 2018 ONSC 7382, at para 100 (See **Schedule "C"** of this Factum for a copy of this decision)

41. In the present case, having regard to all of the circumstances, it is both just and convenient for this Court to appoint the Receiver over the Property for the following reasons:

(a) As at May 10, 2021, Sunrise was indebted to KingSett in the amount of $1,950,807.35 (which amount continues to accrue) and, after demand for repayment and the expiry of applicable notice periods, Sunrise is unable or unwilling to satisfy its financial obligations to KingSett.

Pollack Affidavit, at paras 40, 41

(b) Sunrise is in default and the Mortgage contemplates the appointment of a receiver in the event the Mortgage is in default.

Elleway, at para 27

Pollack Affidavit, at para 31, 37 and 45

(c) KingSett has lost confidence in Sunrise's management due to the circumstances regarding its proposed non-arm's length sales of the Remaining Units.

Pollack Affidavit, at para 42

(d) The appointment of a receiver is the most effective and appropriate manner to address the Remaining Units and all related issues, including the ultimate sale of the Remaining Units and the distribution of proceeds to creditors.

Pollack Affidavit, at para 46

(e) FAAN, in its capacity as the Sorrenti Trustee, supports the appointment of KSV as the Receiver and has advised KingSett that in, its view, "the application made by KingSett for the appointment of a receiver is in the best interest of all stakeholders, as such a appointment will bring transparency through the receiver taking possession of the financial records of [Sunrise] and will maximize value with respect to the disposition of the Remaining Units."

Supplemental Pollack Affidavit, at Exhibit "A"

42. There is no good reason to deny the request to appoint a receiver by KingSett, a secured creditor with a contractual right to a receiver. The appointment of KSV as Receiver is just and convenient in the circumstances given the sizeable debt owing to KingSett, Sunrise's defaults, and its questionable conduct with respect to the Remaining Units.

The Receiver's Borrowings & Priority Charges

43. Pursuant to subsection 243(6) of the BIA, if the Receiver is appointed pursuant to subsection 243(1) of the BIA, the Court may make an order respecting the payment of fees and disbursements of the Receiver, including one that gives the Receiver a charge, ranking ahead of any secured creditors, over all or part of the Property, but only if the Court is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations. Specifically, subsection 243(6) of the BIA states:

> (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.

BIA, at subsection 243(6)

44. The proposed Receivership Order provides for a "Receiver's Charge" to secure the reasonable fees and disbursements of the Receiver and its counsel, in each case at their standard rates and charges, and a "Receiver's Borrowings Charge" (together, with the Receiver's Charge, the "**Charges**") to secure monies borrowed by the Receiver from time to time for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by the Receivership Order up to a maximum amount of $200,000 without further order of the Court.

Draft Receivership Order, Tab 3 to the Application Record ("**Draft Receivership Order**"), at paras 17 and 20

45. The proposed Receiver's Borrowings Charge, if granted, will rank in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

Draft Receivership Order, at para 20

46. A Receiver's Borrowings Charge is required in the present matter because there are no readily available funds that can be used to pay the expenses of the receivership in the short term. If such a charge is granted, it will allow the Receiver to obtain payment of its fees and also to make necessary expenditures to realize upon the Property**.**

47. The granting of priority administrative and borrowing charges on a debtor's property is common in receivership proceedings. In *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*, D.M. Brown J highlighted that priority for such charges should be set out with

certainty at the commencement of a receivership proceeding. In that case, as reasonable notice of the application for priority was provided and no affected person appeared to oppose the relief, the Court granted the priority sought.

***CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.*, 2012 ONSC 1750**, at paras 18-23,

48. KingSett is the first-priority secured creditor of the Property. Notice of the application for the Receivership Order, which includes KingSett's request for the approval of the Charges, has been provided to the affected parties, including the other mortgagees with registrations on title to the Real Property. Therefore, KingSett requests that the Court grant the Charges and that such Charges rank in the order of priority as set out above and at paragraphs 17 and 20 of the proposed Receivership Order.

Pollack Affidavit, at paras 21 and 31

Affidavit of Service of Benjamin Goodis sworn May 28, 2021

Affidavit of Service of Norman Ng sworn May 28, 2021

PART IV - ORDER REQUESTED

49. For the reasons stated herein, it is just and convenient to appoint KSV as Receiver of the Property in the circumstances. KingSett seeks an order in the form attached as Tab 3 of the Application Record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of June, 2021.

Ryan Jacobs/ Joseph Bellissimo / Ben Goodis

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Lawyers for the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont SCJ).

   Link:

   https://www.canlii.org/en/on/onsc/doc/1996/1996canlii8258/1996canlii8258.html?autocompleteStr=bank%20of%20nova%20scotia%20v%20fr&autocompletePos=1

2. *Elleway Acquisitions Ltd. v Cruise Professionals Ltd.*, 2013 ONSC 6866.

   Link:

   https://www.canlii.org/en/on/onsc/doc/2013/2013onsc6866/2013onsc6866.html?autocompleteStr=elleway&autocompletePos=1

3. *Meridian v Okje Cho & Family Enterprise Ltd.*, 2021 ONSC 3755.

   Link:

   https://www.canlii.org/en/on/onsc/doc/2021/2021onsc3755/2021onsc3755.html

4. *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al,* 2018 ONSC 7382.

   Please see **Schedule "C"** to this Factum

5. *CCM Master Qualified Fund Ltd. v blutip Power Technologies Ltd.,* 2012 ONSC 1750.

   Link:

   https://www.canlii.org/en/on/onsc/doc/2012/2012onsc1750/2012onsc1750.html?autocompleteStr=2012%20ONSC%201750&autocompletePos=1

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

Definitions

2 In this Act,

locality of a debtor means the principal place

> **(a)** where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,
>
> **(b)** where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or
>
> **(c)** in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated; (*localité*)

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.
>
> **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.

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.

***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).

***Personal Property Security Act*, R.S.O. 1990, c P.10**

Perfection

19 A security interest is perfected when,

(a) it has attached; and

(b) all steps required for perfection under any provision of this Act have been completed, regardless of the order of occurrence. R.S.O. 1990, c. P.10, s. 19.

Perfection by registration

23 Registration perfects a security interest in any type of collateral. R.S.O. 1990, c. P.10, s. 23.

SCHEDULE "C"

Copy of *Romspen Investment Corporation v Atlas Healthcare (Richmond Hill) Ltd., et al,* 2018 ONSC 7382.

See attached.

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

KINGSETT MORTGAGE CORPORATION
Applicant

and

SUNRISE ACQUISITIONS (HWY 7) INC.
Respondent

Court File No. CV-21-00663051-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPLICANT
(APPLICATION RETURNABLE JUNE 9, 2021)

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