Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

Applicants

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(Motion returnable May 13, 2014)

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Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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[1] Bodnar et al. v. The Cash Store Financial Services Inc. et al., Supreme Court of British Columbia, Vancouver Reg. No. S041348;
Stewart v. The Cash Store Financial Services Inc. et al, Supreme Court of British Columbia, Vancouver Reg. No. S126361;
Tschritter et al. v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 0301-16243;
Efthimiou v. The Cash Store Financial Services Inc. et al, Alberta Court of Queen's Bench, Calgary Reg. No. 1201-11816;
Meeking v. The Cash Store Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 10-01-66061;
Rehill v. The Cash Store Financial Services Inc. et al, Manitoba Court of Queen's Bench, Winnipeg Reg. No. CI 12-01-80578;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1452 of 2012;
Ironbow v. The Cash Store Financial Services Inc. et al, Saskatchewan Court of Queen's Bench, Saskatoon Reg. No. 1453 of 2012

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3 *Dondeb Inc. (Re)*, 2012 ONSC 6087, 2012 CarswellOnt 15528.

4 *Metropolitan Toronto Police Widows and Orphans Fund v. Telus Communications Inc.* (2003), 30 B.L.R. (3d) 288, 2003 CarswellOnt 168.

5 *Romspen Investment Corp. v. 6711162 Canada Inc.*, 2014 ONSC 2781, 2014 CarswellOnt 5836.

6 *Romspen Investment Corp. v. Edgeworth Properties*, 2012 ONSC 4693, 2012 CarswellOnt 10902.

TAB 1

2000 CarswellOnt 2824
Ontario Superior Court of Justice

Access Cash International Inc. v. Elliot Lake & North Shore Corp. for Business Development

2000 CarswellOnt 2824, [2000] O.J. No. 3012, 1 P.P.S.A.C. (3d) 209

Access Cash International, Inc., Applicant and Elliot Lake and North Shore Corporation for Business Development, Respondent

Molloy J.

Heard: August 27, 1999
Heard: September 23, 1999
Judgment: August 11, 2000
Docket: 99-CL-3404

Counsel: *Robyn M. Bell*, for Applicant.
Alex L. MacFarlane, for Respondent.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Personal property security --- Scope of legislation — Consignments

Applicant owned, leased and sold automated teller machines — Bankrupt was exclusive Canadian distributor of applicant's ATMs — Respondent supplied credit facilities to bankrupt for which it took two general security agreements, two general assignments of book debts and chattel mortgage over bankrupt's assets — Applicant supplied 173 ATMs to bankrupt between September 1998 and February 1999 for which it had not been paid — Applicant and bankrupt signed Purchase Money Security Interest Agreement in January 1999 — PMSI registered under Personal Property Security Act on January 18, 1999 and served on respondent on January 21, 1999 — Bankrupt made assignment in bankruptcy in April 1999 — Applicant claimed to have ownership interest in ATMs because they were delivered to bankrupt on consignment — To escape priority provisions of PPSA applicant must have supplied ATMs on consignment and consignment must not have been designed to secure payment — Nothing in Placement Agreement between applicant and bankrupt was consistent with it being consignment agreement — One of principle features of consignment agreement is that merchant under no obligation to pay for goods until they are sold to third party — Bankrupt required to pay for any machine returned by retailer within 30 days — No stipulation in Placement Agreement that title to remain in applicant — No requirement that any proceeds received by bankrupt are held in trust for applicant — No right in applicant to demand return of good at will — No right of inspection — Applicant did not own most of ATMs and did not have any priority except through its registered PMSI — Distributorship agreement between applicant and bankrupt did provide that title to remain in applicant although many other indicia of consignment absent —

Agreement expressly reserved title in goods to applicant until such time as they were removed from warehouse — Applicant had established ownership interest in ATMs stored in bankrupt's warehouse which never left warehouse for purpose of delivery to third party under sales, trial or placement programs — Applicant's interest in those ATMs not subject to PPSA — Personal Property Security Act, R.S.O. 1990, c. P.10.

Table of Authorities

Cases considered by *Molloy J.*:

Askin, Re (1960), 1 C.B.R. (N.S.) 153 (Ont. S.C.) — referred to

Farwest Systems Corp. (Receiver of) v. Omron Business Systems Inc. (1988), 69 C.B.R. (N.S.) 82 (B.C. S.C.) — considered

Glengarry A.E.T. Inc. (Trustee of) v. Manhattan Electric Cable Corp. (1986), 6 P.P.S.A.C. 112 (Ont. S.C.) — considered

H & I Carpet Corp., Re (1983), 49 C.B.R. (N.S.) 158 (Ont. S.C.) — referred to

Langley v. Kahnert (1905), 36 S.C.R. 397 (S.C.C.) — referred to

Now Generation Ltd., Re (1969), 13 C.B.R. (N.S.) 194 (Ont. S.C.) — referred to

Revere Electric Inc., Re (1993), 5 P.P.S.A.C. (2d) 39, 13 O.R. (3d) 637, 19 C.B.R. (3d) 29 (Ont. Bktcy.) — referred to

Richardson v. S.K. Dry Goods Co. (1931), 13 C.B.R. 38 (Ont. S.C.) — referred to

Rivabo Truck Bodies Ltd., Re (1975), 20 C.B.R. (N.S.) 252 (Ont. S.C.) — referred to

Seven Limers Coal & Fertilizer Co. v. Hewitt (1985), 52 O.R. (2d) 1, 10 O.A.C. 132, 5 P.P.S.A.C. 45, 56 C.B.R. (N.S.) 319 (Ont. C.A.) — applied

Stephanian's Persian Carpets Ltd., Re (1979), 1 P.P.S.A.C. 71, 31 C.B.R. (N.S.) 196 (Ont. S.C.) — considered

Stephanian's Persian Carpets Ltd., Re (1980), 1 P.P.S.A.C. 119, 34 C.B.R. (N.S.) 35 (Ont. Bktcy.) — considered

Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of) (1998), 40 B.L.R. (2d) 1 (Ont. Gen. Div. [Commercial List]) — referred to

Toyerama Ltd., Re (1980), 1 P.P.S.A.C. 126, 34 C.B.R. (N.S.) 153 (Ont. Bktcy.) — considered

Vitrerie Claveau Glass Inc., Re (1962), 3 C.B.R. (N.S.) 150 (Que. S.C.) — referred to

Statutes considered:

Personal Property Security Act, R.S.O. 1980, c. 375
Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — considered

s. 2(a) — considered

s. 2(a)(ii) — considered

s. 46(5) — considered

APPLICATION claiming ownership interest in personal property.

***Molloy J.*:**

A. Background

1 The parties are the two principal secured creditors of Revenue Plus Limited ("Revenue Plus"), a bankrupt. The applicant claims that it has an ownership interest in certain automated cash teller machines previously in the possession of Revenue Plus and a prior security interest in respect of certain of the machines that is superior to that of the respondent.

2 The applicant ("Access Cash") is a Minnesota company that owns, leases and sells automated teller machines (ATMs). It is, apparently, the largest non-bank deployer of ATMs in the United States.

3 Revenue Plus was the exclusive Canadian distributor for Access Cash ATMs. It also dealt in ATMs from other suppliers. Prior to its bankruptcy, Revenue Plus was principally in the business of supplying ATMs to various merchants. Revenue Plus would also enter into servicing and processing contracts with those merchants pursuant to which it would service the ATMs as required and process the ATM transactions for a fee. In addition to its ATM business, Revenue Plus operated a "Call Centre" which managed calls in respect of transactions involving ATMs.

4 The respondent ("ELNOS") is a company incorporated for the purpose of promoting business development in a number of Northern Ontario communities. In 1997 and 1998, ELNOS supplied credit facilities to Revenue Plus, for which it took various forms of security (two general security agreements, two general assignments of book debts and accounts, and a chattel mortgage over Revenue Plus's assets). Notice of the ELNOS security interest was registered in November 1997 and September 1998.

5 Access Cash supplied 173 ATMs to Revenue Plus on a number of occasions between September 1998 and February 1999, for which it has not been paid. Initially, these machines were delivered on the basis of oral agreements between the parties. A draft agreement confirming the oral arrangements was prepared in October 1998 but the formal written agreements were not signed until January 11, 1999. On January 7, 1999, Access Cash and Revenue Plus signed a Purchase Money

Security Interest Agreement. The PMSI was registered under the *Personal Property Security Act* ("PPSA") on January 18 and served on ELNOS on January 21, 1999. Eighteen ATMs were delivered to Revenue Plus after ELNOS had notice of Access Cash's PMSI.

6 It is conceded that Access Cash has a security interest in the ATMs delivered after ELNOS was given notice of the PMSI and that Access Cash's interest in that regard has priority to that of ELNOS.

7 Revenue Plus made a voluntary assignment into bankruptcy on April 6, 1999 and KPMG Inc. was appointed as trustee of its assets. The assets in the control of the trustee include ATMs supplied by Access Cash.

8 The dispute between Access Cash and ELNOS can be simply stated: Access Cash claims that it owns the ATMs because they were delivered to Revenue Plus on consignment; ELNOS disagrees.

B. The Applicable Law

The PPSA

9 The PPSA applies to "every transaction without regard to its form ...that in substance creates a security interest": s.2(a) of the PPSA. This is stipulated to include a "consignment that secures payment or performance of an obligation": s.2(a)(ii).

10 Access Cash maintains that it is the owner of the ATMs in question because it supplied them to Revenue Plus on consignment with title remaining in Access Cash. To escape the priority provisions of the PPSA, the ATMs must have been supplied on consignment *and* the consignment must not have been designed to secure payment. It is generally accepted that determining whether the PPSA applies involves a two-part test. First, is the arrangement between the parties truly a consignment as opposed to a sale? Second, if it is a consignment agreement, does it secure payment or performance of an obligation? *Stephanian's Persian Carpets Ltd., Re* (1980), 34 C.B.R. (N.S.) 35 (Ont. Bktcy.), at 37-38; *Revere Electric Inc., Re* (1993), 5 P.P.S.A.C. (2d) 39 (Ont. Bktcy.), at 45.

Onus of Proof

11 Both parties agree, and the case law establishes, that the onus of proving a transaction is a consignment rather than a sale is on the person alleging consignment, *i.e.* in this case, Access Cash. ELNOS asserts that the onus of proof remains on Access Cash for both parts of the test; Access Cash contends that the onus shifts to the respondent for the second branch of the test. In other words, Access Cash argues that if it discharges its primary onus by proving it provided the ATMs to Revenue Plus under a consignment agreement, the onus is then on ELNOS to prove the consignment agreement was a means of securing payment and therefore caught by the Act.

12 Access Cash relies upon the decision of Registrar Ferron in *Stephanian's Persian Carpets Ltd., Re* (1979), 31 C.B.R. (N.S.) 196 (Ont. S.C.), as affirmed on appeal by Saunders J. (1980), 34 C.B.R. (N.S.) 35 (Ont. Bktcy.). In *Stephanian's Persian Carpets Ltd.* the trustee in bankruptcy applied for a declaration that the claim advanced by the supplier

Anglo-Oriental Rugs Ltd was subordinate to the interest of the trustee. The decision of Registrar Ferron is brief. He did not deal with whether the agreement pursuant to which the carpets were supplied was a true consignment agreement. (It would appear this was not seriously contested by the trustee.) His focus was entirely upon whether the intention of the parties to the contract was to create a security interest. He held that the "onus is on the trustee to show that the intention of the transaction between the bankrupt and the respondent was to create security". He then stated there was no evidence as to the intention of the parties and therefore dismissed the trustee's motion. It is clear that Registrar Ferron did place the onus on the trustee on this issue and that the question of onus, in the circumstances, determined the result. However, there is no discussion in the decision as to why the onus should be on the trustee and no reference to any authority in that regard. Registrar Ferron did not refer to there being two branches to the test and therefore cannot be taken to have addressed his mind to the issue of a shifting onus.

13 On appeal, Saunders J. reached the same result as did Registrar Ferron (*i.e.* that the goods were supplied pursuant to a consignment agreement not intended as security), but he arrived there by a very different route. Saunders J. set out the two-part test and dealt with both parts of the test in some detail. However, he made no reference to the reasons for decision of Registrar Ferron and did not mention the issue of onus of proof. It would appear from his reasons that the issue of onus did not play a pivotal role in his decision. In these circumstances, it is not clear that the Registrar's decision with respect to onus has been upheld by a higher court.

14 I was not referred to any authority clearly delineating a two-part test with a shifting onus; nor was I referred to any case (other than the decision of Registrar Ferron in *Stephanian's Persian Carpets Ltd.*) in which the onus of proving any aspect of a consignment agreement was placed on the party disputing the consignment. The decision of Registrar Ferron was a marked departure from the existing case law, in which the onus of proof in respect of consignment agreements had always been placed on the party asserting the consignment, often with the comment that it is a very heavy onus: *Askin, Re* (1960), 1 C.B.R. (N.S.) 153 (Ont. S.C.); *Vitrerie Claveau Glass Inc., Re* (1962), 3 C.B.R. (N.S.) 150 (Que. S.C.); *Now Generation Ltd., Re* (1969), 13 C.B.R. (N.S.) 194 (Ont. S.C.); *Rivabo Truck Bodies Ltd., Re* (1975), 20 C.B.R. (N.S.) 252 (Ont. S.C.) (Registrar Ferron); *Seven Limers Coal & Fertilizer Co. v. Hewitt* (1985), 52 O.R. (2d) 1 (Ont. C.A.).

15 In an article entitled "Consignment Sales and the Personal Property Security Act", published just two years after the *Stephanian's Persian Carpets Ltd.* decision at [1981-82] 6 Can. Bus. Law J. 40, Brian Colburn comments as follows on the onus issue (at pp.68-69):

> A significant practical point relating to the characterization issue has arisen recently. In discussing earlier the common law background on consignments, it was noted that the "positioning of the onus of proof became crucial". The Ontario Registrar in Bankruptcy in his decision in *Stephanian Persian Carpets Ltd., Re* determined that the onus is on the applicant trustee to show that the intention of the transaction ...was to create security. This, of course, is a change from the position consistently taken since *Askin, Re*. Because the characterization issue is essentially one of fact, or of mixed fact and law, the shifting of the burden to the party impeaching the transaction may prove to be one of the more significant elements in future contests.

16 In my opinion, the decision of the Court of Appeal in *Seven Limers Coal & Fertilizer Co. Inc. v. Hewitt* (1985), 52 O.R.(2d) 1 is determinative of this issue. This decision was five years after *Stephanian's Persian Carpets Ltd.* but does not refer to it. The issue before the Court was whether the plaintiff had supplied the goods in question to Hewitt "under consignment, not intended as security" such that it was not covered by the PPSA: see p. 4. The Court of Appeal was unequivocal in placing the burden of proof on the plaintiff. Although the Court did not break the test into two components (as was done in *Stephanian's Persian Carpets Ltd.*), and although the primary focus was on whether there was a consignment agreement at all, the Court did consider both aspects of the test and did not shift the burden of proof from the plaintiff supplier. Finlayson J.A., writing the unanimous decision, held at p.10:

> The onus is on the plaintiff in any proceedings to prove on a balance of probabilities what his claim is, but certainly in those unique situations in which there was *ex post facto* representation that the goods were delivered on an unusual basis having regard to the business of the debtor company, a strong evidentiary burden is imposed on the plaintiff to make his case on proper evidence. As I have indicated above, there was no proper evidence upon which the learned trial judge could have made the findings that this was a consignment, not intended as security, or a bailment. The plaintiff's case should have failed for want of proof.

17 Leaving the entire burden of proof on the party alleging the consignment is consistent with a broad body of case law as well as with plain common sense. Typically the party disputing the consignment is a trustee or another creditor, in either case a stranger to the disputed agreement. It would be extremely difficult for a stranger to an agreement to prove what its intent was. As was noted by Mr. Colburn in his article, these issues are largely fact-driven. The onus of proof cannot fairly be placed on a party with no knowledge of the facts. In my opinion, the decision of Registrar Ferron in *Stephanian's Persian Carpets Ltd.* is an anomaly and has been overruled by *Seven Limers Coal.* I find that the onus of proof in this case lies upon Access Cash throughout.

Characteristics of a Consignment Agreement

18 In *Stephanian's Persian Carpets Ltd.* , Saunders J. defined "consignment" as follows (at p. 37-38):

> In its simplest terms, a consignment is the sending of goods to another. An arrangement whereby an owner sends goods to another on the understanding that such other will sell the goods to a third party and remit the proceeds to the owner after deducting his compensation for effecting the sale is an example of a consignment agreement.

19 Brian Colburn, in his article, *supra*, provides the following definition (at p. 40):

> Consignments are transactions in which a consignor physically delivers goods to a consignee (who normally is a retailer of goods of that type) for sale or lease by the consignee on the basis of principal and agent. The consignee acts as the consignee's agent in selling or leasing the goods, and receives the proceeds of sale or lease in trust for the consignor. Title to the goods remains with the consignor. On resale by the consignee, title passes directly to the retail purchaser from the consignor through the agency of the consignee.

20 There is no particular magic in the words used by the parties in describing their agreement. The fact that the formal agreement between the parties is called a "consignment" agreement does not necessarily indicate it is in fact a consignment agreement. Conversely, the failure to use the word "consignment" is not necessarily fatal to the party claiming that the arrangement between the parties is in fact a consignment agreement. It is the substance of the agreement that counts, not the labels used by the parties. To determine the substance of the agreement, the court will look both to the terms of the contract itself and the conduct of the parties in relation to that contract: *Stephanian's Persian Carpets Ltd., Re, supra*, per Saunders J. at p. 41; *Farwest Systems Corp. (Receiver of) v. Omron Business Systems Inc.* (1988), 69 C.B.R. (N.S.) 82 (B.C. S.C.), at 86-87; *Askin, Re* (1960), 1 C.B.R. (N.S.) 153 (Ont. S.C.), at 156; *Rivabo Truck Bodies Ltd., Re* (1975), 20 C.B.R. (N.S.) 252 (Ont. S.C.) (Reg.) at 254-255. Typically, this principle has been applied to look past the words used by the parties to suggest consignment and to determine whether in actual operation the arrangement between the parties was a true consignment as opposed to a sale dressed up to look like a consignment. However, there have also been cases where the formal contract between the parties was consistent with a sale agreement but the actual conduct of the parties demonstrated that the formal agreement had been abandoned and goods were actually delivered on consignment: see *Farwest Systems Corp.*, *supra*; *Glengarry A.E.T. Inc. (Trustee of) v. Manhattan Electric Cable Corp.* (1986), 6 P.P.S.A.C. 112 (Ont. S.C.).

21 In deciding whether an arrangement between parties is a consignment, the court will consider the presence or absence of certain *indicia* found to be characteristic of a consignment. In the list that follows, "supplier" refers to the consignor or vendor (depending on whether the arrangement is a consignment or sale) and "merchant" refers to the consignee or purchaser. The following are *indicia* of consignment:

- The merchant is the agent of the supplier.
- Title in the goods remains in the supplier.
- Title passes directly from the supplier to the ultimate retail purchaser and does not pass through the merchant.
- The merchant has no obligation to pay for the goods until they are sold to a third party.
- The supplier has the right to demand the return of the goods at any time.
- The merchant has the right to return unsold goods to the supplier.
- The merchant is required to segregate the supplier's goods from his own.
- The merchant is required to maintain separate books and records in respect of the supplier's goods.
- The merchant is required to hold sale proceeds in trust for the supplier;
- The supplier has the right to stipulate a fixed price or a price floor for the goods.
- The merchant has the right to inspect the goods and the premises in which they are stored.
- The goods are shown as an asset in the books and records of the supplier and are not shown as an asset in the books and records of the merchant.
- The shipping documents refer to the goods as consigned.
- The supplier maintains insurance on the goods after they are delivered to the merchant.
- It is apparent from the merchant's dealings with others that the goods belong to the supplier rather than the merchant.

(See *Glengarry A.E.T. Inc. (Trustee of) v. Manhattan Electric Cable Corp.*, *supra*, at 117-119; *Stephanian's Persian Carpets Ltd., Re*, *supra*, at 39-40; *Langley v. Kahnert* (1905), 36 S.C.R. 397 (S.C.C.), at 401-402; *H & I Carpet Corp., Re* (1983), 49 C.B.R. (N.S.) 158 (Ont. S.C.), at 159-160; *Toyerama Ltd., Re* (1980), 34 C.B.R. (N.S.) 153 (Ont. Bktcy.); *Vitrerie Claveau Glass Inc., Re*; *Migneault & Fils Cie. v. Archambault*, *supra*, at 151; *Rivabo Truck Bodies Ltd., Re*, *supra*, at 255-256; *Richardson v. S.K. Dry Goods Co.* (1931), 13 C.B.R. 38 (Ont. S.C.), at 39; *Farwest Systems Corp. (Receiver of) v. Omron Business Systems Inc.*, *supra*, at 85; *Seven Limers Coal & Fertilizer Co. Inc. v. Hewitt*, *supra*, at 9; B. Colburn, "Consignment Sales and the Personal Property Security Act", *supra*, at 60-61.)

22 It is not necessary for all of the *indicia* of consignment to be present in order for an agreement to constitute a true consignment agreement. However, the more *indicia* present, the more likely the agreement will be found to be a consignment. Some of the *indicia* are more important than others. The three most important criteria are: the existence of an agency relationship; the right of the merchant to return the goods; and, the stipulation that no payment is due to the supplier until the goods have been sold to a third party: B. Colburn, "Consignment Sales and the Personal Property Security Act" at p.61 and 66-67; *Rivabo Truck Bodies Ltd., Re*, *supra*, at 255; *Stephanian's Persian Carpets Ltd., Re*, at 41. That said, there

are certainly cases in which consignment has been established in the absence of one of these three key factors: *e.g. Toyerama, Re, supra,* (agreement specifically denied agency and contained no express right to return the goods); *Stephanian's Persian Carpets Ltd., Re* (no express right to return the goods, although the court found such a right was inferred).

Whether the Consignment Secures Payment

23 It is clear from the PPSA that not all consignment agreements will be subject to its provisions, only those which secure payment or performance of an obligation. Again, it is the substance of the transaction that counts, not its form. In *Stephanian's Persian Carpets Ltd.* both the supplier and the trustee described the arrangement between the supplier and the merchant as being designed to provide "security". The supplier was a wholesaler of very expensive Oriental rugs. The merchant retailer was financially unable to maintain an inventory of such items without some form of financing. Therefore, the supplier and the merchant entered into an agreement which provided, among other things, that the supplier would provide inventory to the merchant for display to prospective customers, title would remain in the supplier, and the merchant would only become liable for payment to the supplier in respect of any individual carpet upon that carpet being sold to a customer. Saunders J. noted that this arrangement was mutually advantageous to the supplier and the merchant. The supplier was able to expose its goods for sale and the merchant's financial risk was minimized and its cash flow problem solved. Most importantly, Saunders J. held, notwithstanding that the arrangement relieved financial pressures for the merchant and protected the supplier from claims by the merchant's creditors, this was not a security interest as contemplated by the PPSA. The reason is a simple matter of logic. The merchant was only liable for payment once a rug had been sold to a customer. That being the case, in respect of unsold rugs still on the premises of the merchant, there was no money owing and hence nothing to secure. For rugs that had left the premises with customers, payment was owing, but there was no longer any security in place. The supplier would not be any further ahead by repossessing the rugs on the premises as they belonged to the supplier in any event and no payment had been made for them.

24 A similar result was reached in *Toyerama, Re.* The supplier, Regal Toys, had a large quantity of Laffy Cathy dolls and Willie Walker dogs which were surplus stock and which it wanted to offload in the upcoming Christmas season. The retail merchant, Toyerama, was a seasonal business with cash flow problems. It was not prepared to pay for the toys as it was uncertain they could be sold at the retail level. The goods were delivered to Toyerama's warehouse pursuant to an agreement that Toyerama would only become liable for payment for toys which it sold to third parties or delivered to its own retail outlets. Once toys left Toyerama's warehouse, payment obligations were triggered. However, there was no obligation to pay for unsold goods remaining in the warehouse. Saunders J. held that in light of that payment obligation, toys shipped from the warehouse to a Toyerama retail outlet had in effect been sold to Toyerama. However, toys remaining in the warehouse that had neither been sold to third parties nor delivered to retail outlets were found to be held on consignment. Further, Saunders J. held, "There was no security interest created by the consignment in the toys that never left the warehouse and their availability for removal did not provide security for the payment for the toys that had been sold or delivered to retail outlets."

25 The fact that a financing statement is filed under the PPSA does not create a presumption that the legislation applies to the transaction: PPSA s. 46 (5). Likewise, the fact that the agreement refers to its being a security document is not determinative. In *Glengarry A.E.T. Inc (Trustee of) v. Manhattan Electric Cable Corp., supra,* the agreement between the supplier and the merchant specifically provided that it was deemed to be a security agreement. The supplier filed two financing statements under the PPSA but they had technical irregularities. The agreement otherwise had many of the *indicia* of a consignment agreement. Rosenberg J. held that the agreement created a consignment and that it was not intended to create a security interest in respect of unsold goods. He held at p.117:

> In the cases of *Stephanian's Persian Carpets Ltd., Re* ... and *Toyerama, Re* ...[cites omitted] Saunders J. found that since no moneys were owing until a sale was made the goods which belonged to the vendor could not be security for unpaid moneys. In my view, the same considerations apply here. The goods themselves could not be security for any moneys owing. And accordingly, so far as the goods themselves are concerned there was no requirement to register under the

PPSA and Manhattan was entitled to repossess.

C. Factual Context: The Arrangement Between Access Cash and Revenue Plus

26 The evidence before me on this application is in the form of affidavits and cross-examination transcripts. The evidence on behalf of Access Cash comes from Mr. Jon Thomas, its vice-president and the person who dealt directly with John Lennie, the president of Revenue Cash regarding the agreement between the two companies. There was no evidence before me from Mr. Lennie. Therefore, Mr. Thomas's evidence as to the negotiations and discussions underlying the agreement is essentially uncontested. The respondent filed an affidavit of Mr. John Stenger of ELNOS and Mr. Alan Shiner, the receiver for Revenue Cash. While I was initially concerned that conflicting evidence might make it inappropriate to decide this matter in the absence of *viva voce* evidence, a closer analysis now satisfies me that any conflicts in the evidence are more in the nature of inferences to be drawn from the documents and conduct of the parties rather than disputed facts. There are no credibility issues to be resolved.

27 After meetings and discussions that began in the spring of 1998, an understanding was reached that Revenue Cash would become the exclusive distributor of Access Cash ATMs in Canada. Access Cash would supply ATMs to Revenue Cash for three uses:

(i) for sale by Revenue Cash to third parties ("the sales program");

(ii) for placement at a retail location for a monthly fee ("the placement program");

(iii) for placement with a retail location on a trial basis with a view to an ultimate sale ("the trial program").

28 In addition to installing ATMs, Revenue Plus entered into processing and servicing contracts with its customers in all three of its programs. Some of those services were sub-contracted to Access Cash Canada Co. (a company related to the applicant).

29 Mr. Thomas testified that the initial oral arrangement between the parties was that ATMs for the sales program would be sold to Revenue Plus on credit terms, which was the usual practice of Access Cash. However, from the outset, Access Cash had stipulated that ATMs for the placement program and trial program would be supplied on a consignment basis. Title would remain with Access Cash during the placement period. Access Cash would receive 60% of the net transaction revenue for each transaction associated with the placement program and the trial program (instead of the usual 5% it would receive under the sales program). In addition, Revenue Plus would pay Access Cash a monthly fee. The monthly fee and higher share of revenue were meant to compensate Access Cash for its continued ownership interest and its costs of financing the ATMs. Mr. Thomas's evidence on this is not contradicted. However, none of this was confirmed in writing at the time. On September 1, 1998, (prior to the shipment of any ATMs) Mr. Thomas forwarded to Mr. Lennie a draft Distributor Marketing Agreement. This document is clearly a sales agreement, makes no reference to consignment, and contains none of the *indicia* of consignment.

30 On September 24, 1998, Access Cash supplied the first shipment of 37 ATMs to Revenue Plus. This was a clear sale on credit terms with partial payment due in 30 days and the balance in 60 days. Access Cash has never been paid for these 37 ATMs.

31 In mid October, Revenue Plus was pressing for delivery of more ATMs to be used in its placement program. Mr. Thomas testified that at about this time he considered that Access Cash might be better off with a consignment arrangement for all ATMs shipped to Revenue Plus, *i.e.* for the sales program as well as the placement and trial programs. He said that Mr. Lennie agreed to this and that his (Mr. Thomas's) belief was that there was an oral agreement by mid to late October that all ATMs would be delivered on consignment, with title remaining with Access Cash until sale to a third party. Mr. Thomas made revisions to paragraph 15 of the Distributor Marketing Agreement to reflect this change in the contractual terms between the parties and sent it to Mr. Lennie on November 3, 1998. The agreement was eventually signed in this form on January 11, 1999 (with minor changes of no consequence). Mr. Thomas's evidence is that the terms of the oral agreement under which the parties operated from mid October until January 11, 1999 were the same as the terms of the written contract signed on that date. There is no evidence to contradict that.

32 The terms of the Distributor Marketing Agreement relied upon by Access Cash as evidencing a consignment arrangement between the parties are as follows:

> **15. LEASE AGREEMENT, STORAGE AND RELEASE, AND SECURITY AGREEMENT**
>
> (a) [Revenue Plus] shall, at [Access Cash's] request, maintain designated warehouse space and lease the same to [Access Cash] without a charge for rent, for the purpose of storing on [Access Cash's] behalf Products for future sales to [Revenue Plus]. Such Products, until released, delivered and paid for by [Revenue Plus] as hereinafter provided, are [Access Cash's], and title and ownership is acknowledged by [Revenue Plus] to be in [Access Cash], and not in [Revenue Plus] or anyone else. Any Product delivered and placed in [Revenue Plus's] warehouse shall be received in trust by [Revenue Plus], and returned on demand to [Access Cash]. [Revenue Plus] agrees that, at the request of [Access Cash], it will sign any documents or instruments, whether for public filing or otherwise to acknowledge to [Access Cash] and the world and/or give notice thereof, that [Access Cash] owns the Products.
>
> (b) [Revenue Plus] may purchase the Products held in its warehouse from [Access Cash] by giving [Access Cash] a written order no less than 48 hours by facsimile or otherwise. Such order shall state the number of ATM(s) it desires to purchase at the prices published by [Access Cash] and attached as an Exhibit to this Agreement. The credit terms shall be as agreed upon by the parties. Once [Access Cash] accepts [Revenue Plus's] written order and responds in writing by facsimile, then [Revenue Plus] may remove the ATM(s) designated by [Access Cash] from the warehouse.
>
> (c) [Access Cash] may sell Products to [Revenue Plus] and retain a purchase money security interest in the Products. In such event, [Revenue Plus] agrees that, at the request of [Access Cash], it will sign any documents or instruments, whether for public filing or otherwise to acknowledge to [Access Cash] and the world and/or to give notice thereof, that [Access Cash] has retained a purchase money security interest in the Products. [Revenue Plus] will sign a Security Agreement on terms that are mutually agreeable to the parties. (Emphasis added)

33 The other provisions of the Distribution Agreement (which was a pro forma agreement prepared as a sales contract) were unchanged. Those provisions obviously contemplate a sale from Access Cash to Revenue Plus. In addition, ELNOS relies on paragraph 9 and 22(b) of the Distribution Agreement which clearly negate any agency relationship between the parties. Paragraph 9 provides, in part, that Revenue Plus "buys the Product on its own account ...and resells products in its own name and for its own account at its sole risk and expense, but under the trademarks, logos and other indicia assigned by [Access Cash]". Paragraph 22(b) states:

> Should any legislation, including any decree or regulation, be enacted in a jurisdiction within the APR, the effect of which is to convert [Revenue Plus's] status to one of an exclusive agency or distributorship, then, as regards such jurisdiction, this Agreement will be deemed to have terminated with the mutual consent of both parties on the business day immediately preceding the effective date of such legislation.

34 The Distributor Agreement does not actually require that Revenue Plus segregate the consigned goods from other inventory in its warehouse unless requested to do so by Access Cash. However, according to Mr. Thomas, such a request was made and he understood that the Access Cash ATMs were kept in a separate fenced area after November 1998. In practice, however, the Access Cash ATMs were stored in a specific area of the warehouse, but were intermingled with other goods.

35 On the same day as the Distributor Marketing Agreement was executed, the parties signed a separate agreement ("the Placement Agreement") to govern the placement and trial programs of Revenue Plus. The recitals to that agreement refer to Revenue Plus as a "reseller" of ATMs under a Distributor Marketing Agreement with Access Cash. The Placement Agreement does *not* mention "consignment" and does *not* provide that title to the goods is to remain in Access Cash. The recitals provide that the purpose of the Placement Agreement is for Access Cash to provide financial assistance to Revenue Plus for its placement and trial programs under the terms set out therein. Those terms include the following:

- Access Cash agreed "to sell to [Revenue Plus] ATMs at the... Canadian Wholesale Price".
- Access Cash would "finance such ATMs at the monthly rate of .02274% times the Canadian Wholesale Price" for the term of a trial program, not to exceed 6 months.
- At the end of such trial period, one of three things would happen: (1) Revenue Plus could sell the ATM to the trial program customer at the designated retail price and upon such sale immediately pay Access Cash its Canadian Wholesale Price; or (2) the customer could retain the ATM under the placement program and Revenue Plus would continue to make the monthly financing payment to Access Cash referred to above; or (3) if the customer did not purchase the ATM or continue under the placement program, Revenue Plus would pay Access Cash its Canadian Wholesale Price within 30 days.
- During the trial program, in addition to the monthly financing fee, Access Cash would receive 60% of the net transaction revenues.
- During the placement program, in addition to the monthly financing fee, Access Cash would receive 50% of the net transaction revenues.

36 Access Cash made further shipments of ATMs to Revenue Plus in October, November and December, 1998, all of which are alleged to be under the terms embodied in the agreements signed in January 1999.

37 Paragraph 15(c) of the Distributor Agreement contemplated the possibility of Access Cash selling machines to Revenue Plus and retaining a purchase money security interest, in which event an agreement to that effect was to be signed by the parties and appropriate notices filed. A Purchase Money Security Agreement was signed on January 7, 1999 and notices filed as referred to above. Subsequent to the filing of the PMSI, an additional 23 ATMs were delivered to Revenue Plus.

38 Revenue Cash paid GST, PST and Import Tax on all ATMs shipped by Access Cash, without distinction based on the program for which the ATMs in question were to be used or whether they were shipped before or after the-amendment to the Distributor Marketing Agreement in October.

39 With the exception of the first 37 ATMs shipped to Revenue Plus as a sale on credit, all ATMs supplied by Access Cash to Revenue Plus were recorded on Access Cash's internal financial records as continuing to be assets of Access Cash. Access Cash also carried insurance coverage for the ATMs shipped to Revenue Plus.

40 Under the sales program, Access Cash recommended a retail price for sales to third parties. The agreements between the parties did not require Revenue Plus to sell the machines at or above the price suggested by Access Cash, but the prices actually charged by Revenue Plus were at or above that price.

D. Analysis

1. The Original 37 ATMs

41 It is clear on the evidence that the first 37 ATMs-were sold to Revenue Plus on credit terms. There was no PMSI registered in respect of those machines and there is nothing about the arrangement to support any inference that they were supplied on consignment.

2. ATMs Supplied After January 7, 1999

42 The ATMs supplied after January 7, 1999 are protected by the PMSI registered by Access Plus. Therefore, Access Plus has priority over ELNOS in respect of those machines, a conclusion which was not disputed by ELNOS at the hearing before me.

3. Other ATMs (Supplied from October to December 1998)

43 There was a change in the arrangements between the parties in October 1998. The agreements signed in January 1999 reflect any changes made to the agreement between the parties and govern the relationship between them from about the end of October 1998. As is often the case, the arrangements between Access Cash and Revenue Plus contain some of the *indicia* of a consignment agreement and some features inconsistent with consignment.

Language Used

44 Neither of the written agreements use the word "consignment" to describe the arrangement between the parties. Both agreements refer to "sales" to Revenue Plus. To a certain extent, the references in the October revised draft of the Distributor Agreement to the arrangement being a sale can be explained by the fact that it was a *pro forma* agreement used by Access Cash for standard sales agreements. Although Access Cash amended paragraph 15 of the agreement to reflect the change in its arrangements with Revenue Plus in October 1998, it failed to make corresponding amendments in the rest of the agreement. However, considerable time elapsed between October when the draft amendment was first prepared and January 1999 when it was finally signed. In that context, the absence of language indicative of consignment is more significant.

Agency

45 The Distribution Agreement explicitly negates an agency relationship between the parties. While not explicit, the only reasonable inference from the Placement Agreement is that it does not create an agency. Thus, for all three programs, Revenue Plus was not the agent of Access Cash. This is a factor inconsistent with consignment, although not fatally so: *Toyerama Ltd., supra.*

Title to the Goods

46 It is an essential feature of a consignment agreement that title remain in the supplier. The Distributing Agreement provides that the ATMs sent to Revenue Plus are to be stored in the designated area of the Revenue Plus warehouse pending "future sale to Revenue Plus". Title is specified to remain in Access Cash until an ATM is "released, delivered or paid for" by Revenue Plus. The Distributing Agreement further provides that Revenue Plus may give 48 hours notice to Access Cash that it wishes to purchase one of the ATMs, and that if accepted by Access Cash Revenue Plus could then remove the ATM from its warehouse. Title to ATMs sold by Revenue Plus to third parties passes from Revenue Plus to the third party, and not from Access Cash.

47 The Placement Agreement does not stipulate that title is to remain in Access Cash. On the contrary, the Placement Agreement contemplates a sale to Revenue Plus. Further, the Placement Agreement refers to the Distributor Agreement and describes Revenue Plus as a "reseller" under that agreement, which confirms that before Revenue Plus sold goods to a third party, it first purchased them from Access Cash.

48 The only situation in which the agreements between the parties clearly reserves title to Access Cash is when the ATMs are in the Revenue Plus warehouse prior to being placed with or sold to a retailer.

Timing of Merchant's Obligation to Pay for the Goods

49 The mere delivery of ATMs to Revenue Plus and placement in its warehouse did not trigger any obligation by Revenue Plus to pay anything to Access Cash. However, any circumstance in which Revenue Plus could remove inventory from the warehouse gave rise to a payment requirement. For ATMs used in the sales program, there was first a sale to Revenue Plus and Revenue Plus was then obliged to pay the wholesale price to Access Cash, regardless of its selling price to its own customer. For ATMs used in the trial program and placement program, the full price of the machine was not immediately due. However, while the ATM was under the trial program or long term placement program, Revenue Plus was required to make monthly payments to Access Cash as a financing fee and was also required to pay to Access Cash a far higher share of the transaction revenues than would otherwise be the case. Further, upon termination of a trial period without a sale or long term placement to its customer, Revenue Plus was required to pay the wholesale price to Access Cash within 30 days.

Sale Proceeds to be Held in Trust

50 There is nothing in any of the agreements requiring Revenue Plus to hold any proceeds from its sale or lease of the ATMs in trust for Access Cash. The only reference in the agreements to any trust obligations is in paragraph 15(a) of the Distributor Agreement which provides that ATMs delivered and placed in [Revenue Plus's] warehouse shall be received in trust by [Revenue Plus]. This is consistent with the fact that payments received by Revenue Plus from third parties were received in its own right as title always passed through Revenue Plus and never directly from Access Cash. This is not

consistent with consignment.

The Distributing Right of Supplier to Demand Return of the Goods

51 Agreement provided that the ATMs in the Revenue Plus warehouse were held in trust for Access Cash and that Access Cash could demand their return at any time. This is a factor consistent with consignment. There was no such express right in the Placement Agreement, nor can one be inferred as such would be inconsistent with the rights to possession of the third party retailers contemplated in the agreement.

Right of Merchant to Return the Goods at Will

52 Neither of the agreements provides any right to Revenue Plus to return the goods if it wished. Mr. Thomas's evidence was that this was simply not anticipated but that Access Cash would have been willing to accept the return of any unsold ATMs. Such an intention is consistent with the terms of the Distribution Agreement in respect of machines that never left the warehouse. Since Revenue Plus had no obligation to pay for those machines, it is a logical inference that they could be returned.

53 However, a right in Revenue Plus to return ATMs in the trial and placement program is inconsistent with the Placement Agreement. If a customer under the trial program elected not to buy the ATM, and if a long term placement agreement for that customer was not agreed to by Access Cash, then Revenue Plus was required under the agreement to pay the wholesale price of the ATM to Access Cash within 30 days.

Stipulated Sales Price

54 Access Plus did not have right in the agreement to stipulate a sales price or a price below which an ATM could not be sold. This factor does not support consignment. Although Access Plus recommended a retail price, this is an equally common practice for distributors in sales agreements and in any event was not binding on Revenue Plus.

Insurance

55 Access Cash continued to carry insurance for the ATMs delivered to Revenue Plus. However, it did not carry insurance for the full value of the ATMs delivered. Mr. Thomas explained that the full value was not insured because Access Cash believed there would be some turnover of the ATMs provided and because Access Cash did some self-insuring. There would be no reason for Access Cash to insure any goods shipped to Revenue Plus if it did not have an ownership interest in them. This is a factor supportive of Access Cash's understanding that the goods were shipped on consignment. On the other hand, Revenue Plus also carried insurance on the ATMs until it sold them to a third party, a factor inconsistent with consignment. Thus, the insurance treatment of the ATMs is conflicting and may reflect that there was no meeting of the minds on the issue of ownership.

Books and Records of the Parties

56 Access Cash carried the ATMs as an asset on its books, a factor consistent with consignment. Revenue Plus carried the ATMs as an asset on its books, a factor inconsistent with consignment. Again, this may reflect a lack of clear understanding between the parties on the ownership issue.

57 There was no requirement that Revenue Plus keep separate books and records in respect of goods it held on consignment and it did not do so. Further, the records of Access Cash do not clearly show the status of the various ATMs shipped to Revenue Plus after they left the warehouse. Access Cash could not determine from its own records which ATMs were delivered in respect of the sales program and which were destined for the trial or placement program.

58 The shipping records do not reflect a consignment arrangement.

Right of Supplier to Inspect Goods and Premises

59 Access Cash had an ongoing cooperative relationship with Revenue Plus and its representatives were frequently at Revenue Plus' premises. However, this was entirely at the discretion of Revenue Plus as there was nothing in either the Distributor Agreement or the Placement Agreement providing a right of inspection to Access Cash. Access Cash had no right under the agreements to enter and inspect ATMs on the premises of third party retailers who had possession of ATMs under the trial or placement programs. The agreements did not grant any right to Access Cash to inspect the books and records of Revenue Plus in respect of its ATMs.

Other Factors

60 I have also considered the manner in which Revenue Plus dealt with the goods. The Receiver's evidence was that numerous customers who had obtained ATMs from Revenue Plus were unaware of any ownership interest of Access Cash and understood that the ATM was owned by Revenue Plus. On the other hand, Mr. Thomas reports evidence from other customers who apparently understood that Access Cash was the owner of the machines. There was no firsthand evidence from any customers. I do not find this to be a useful factor one way or the other. Likewise, the use of StellarCom or Access Cash brands on the machines is not conclusive one way or the other given the distributorship arrangement between them and the ongoing involvement of both companies in servicing and processing.

E. Conclusions

ATMs in the Trial Program and Placement Program

61 The ATMs used by Revenue Plus in its trial program and its placement program were the property of Revenue Plus, not Access Cash. The only evidence supporting Access Cash's contention that these machines were held on consignment and remained the property of Access Cash is the evidence of Mr. Thomas as to his understanding and subjective intent. However, Mr. Thomas also testified that the terms under which Access Cash provided ATMs for the trial and placement programs were embodies in the written Placement Agreement. That agreement was not an Access Cash standard form agreement. It was drafted by Access Cash specifically for its arrangements with Revenue Plus, was presented to Revenue Plus on November 3, 1998 in draft form and ultimately signed by the parties on January 11, 1999.

62 There is nothing in the Placement Agreement consistent with it being a consignment agreement. One of the principle features of a consignment agreement is that the merchant is under no obligation to pay for the goods until they are sold to a third party. However, under the Placement Agreement, Revenue Plus is required to pay for any machine returned by a retailer within 30 days. The Placement Agreement expressly contemplates a sale to Revenue Plus which is to be financed by Access Cash as long as the ATMs remain in the trial program or are transferred into a long term placement on terms accepted by Access Cash. There is no stipulation that title is to remain in Access Cash, no requirement that any proceeds received by Revenue Plus are to be held in trust for Access Cash, no right in Access Cash to demand the return of goods at will, and no right of inspection. The failure of the Placement Agreement to provide that title remained in Access Cash is particularly telling in light of the inclusion of such a term in the amendment to paragraph 15 of the Distributor Agreement, which was drafted at the same time and by the same party.

63 In short, there is nothing to support a finding of consignment. Mr. Thomas may have had that understanding as to the nature of the agreement, but he was mistaken. Where the agreement between the parties has been committed to writing, the subjective intent or understanding of one party is not admissible to vary the contract's clear terms: *Toronto Dominion Bank v. Leigh Instruments Ltd. (Trustee of)* (1998), 40 B.L.R. (2d) 1 (Ont. Gen. Div. [Commercial List]). This is not a situation, such as in *Farwest Systems Corp. (Receiver of) v. Omron Business Systems Inc.*, *supra*, where it is clear from the actions of the parties that they had decided to abandon their formal written agreement and conduct business on a wholly different basis. Nor is this a case where the court should look beyond the clear words of the written agreement and determine the true nature of the agreement based on the conduct of the parties. There is nothing about the conduct of the parties that is inconsistent with the written Placement Agreement. Further, this situation is distinguishable from cases in which courts have scrutinized the conduct of parties to determine if the description of their relationship in the formal contract as being one of consignment is in fact a sham to benefit the supplier. Here the agreement itself is inconsistent with consignment and it is the supplier who attempts to claim otherwise.

64 As was noted by the Court of Appeal in *Seven Limers Coal & Fertilizer Co. Inc. v. Hewitt*, *supra*, at p. 10, where the supplier makes an *ex post facto* representation that goods were delivered on an unusual basis having regard to the business of the parties, "a strong evidentiary burden is placed on the [supplier] to make his case on proper evidence". That evidentiary burden is not met in this case. Accordingly, I find that the ATMs covered by the Placement Agreement were not on consignment and were the property of Revenue Plus. With the exception of such machines covered by the PMSI, Access Cash has no claim to the machines or their proceeds superior to that of ELNOS.

65 In the alternative, if I have erred in respect of my finding that the ATMs subject to the Placement Agreement were not on consignment, there is nevertheless no priority claim by Access Cash because the agreement falls within the PPSA as being a consignment that "secures payment or the performance of an obligation". Saunders J. found that the consignment agreement in *Stephanian's Persian Carpets Ltd., Re*, *supra*, was not intended as security because no payment was due in respect of the goods until they had been sold to a third party. He noted, at p. 42, that his interpretation of the words "intended as security" in the relevant provision of the PPSA was a narrow one and that as a result "there may rarely be consignment agreements to which the PPSA will apply". He suggested a situation where the consignee enters into lease option arrangements with his customer remitting rental payments to the consignor as an example of a consignment agreement falling within the PPSA. That is not precisely the situation here, but it is similar. The point established in *Stephanian's Persian Carpets Ltd.* is that an Agreement in this case, secure payment if there is no payment due. Under the Placement Agreement in this case, however, two types of payment were due to Access Cash: a monthly financing fee and a percentage of the transaction revenues generated by the ATMs. Therefore, if the Placement Agreement is in the nature of a consignment, then it is one that secures payment and is therefore subject to the requirements of the PPSA. As a result, Access Cash does not have any priority except through its registered PMSI.

ATMs in the Sales Program

66 Unlike the Placement Agreement, the Distributor Agreement does provide that title is to remain in Access Cash. This is one indication that the ATMs may have been placed with Revenue Plus on consignment. There are, however, some features of the agreement that are not fully consistent with a consignment. Although Access Cash carried the ATMs as an asset on its records and insured them, so also did Revenue Plus. There is a stipulation that ATMs delivered to the Revenue Plus warehouse are "received in trust" for Access Cash, but there is no stipulation that proceeds of any sale effected by Revenue Plus are to be held in trust for Access Cash. The obligation to pay for the goods does not arise upon their delivery to Revenue Plus, but neither does it arise only upon a sale to a third party. Rather, the agreement contemplates that Revenue Plus will be the purchaser of the goods. The agreement provides that the ATMs are to be held in the designated area of the warehouse on behalf of Access Cash for the purpose of storage pending "future sale to [Revenue Plus]". Title is stipulated to be in Access Cash "until released, delivered or paid for by [Revenue Plus]". Paragraph 15(b) of the agreement contemplates that ATMs could only be released from the warehouse upon Revenue Plus submitting a purchase order that is accepted by Access plus. To the knowledge of Access Cash, when the ultimate retail customer financed the purchase of an ATM through Alliance, title passed through Revenue Plus. This is, therefore, not a classic consignment agreement in which title passes directly from the supplier to the ultimate retail purchaser without passing through the merchant, such as is described by the Supreme Court of Canada in *Langley v. Kahnert*, *supra*. Further, many of the traditional *indicia* of consignment are missing altogether. For example, there is no relationship of agency, no right of inspection, no requirement to maintain separate books and records for the goods held on consignment, and no stipulation as to a fixed or minimum retail selling price.

67 The agreement is clear, however, in its reservation of title in the goods to Access Cash until such time as they are removed from the warehouse. The goods are required to be stored in a designated area which is deemed to be leased to Access Cash and until the goods leave that space no payment obligations arise. Clearly, a future sale to Revenue Plus is contemplated, but equally clearly that sale is not deemed to arise upon delivery of the goods into the custody of Revenue Plus.

68 The arrangement between the parties in this case has many of the features of the agreement at issue in *Toyerama, Re*, *supra*, in which Saunders J. observed (at page 157) that "the characterization of the agreement as one of consignment or sale is not clear-cut". In *Toyerama, Re* payment obligations were triggered when the toys left the warehouse, whether for sale to a third party or delivery to one of Toyerama's own retail outlets. Saunders J. held that toys delivered from the warehouse to a Toyerama retail outlet were sold to Toyerama and therefore no longer consignment goods. However, he also found that the determining factor in characterizing the agreement was the payment obligation and that since Toyerama had no obligation to pay for goods stored in its warehouse, those goods were held on consignment. In coming to that conclusion, Saunders J. noted (at page 157) that "a consignment contract has been described as one of bailment". Likewise, in the case before me, Access Cash was stipulated to retain title to the ATMs in Revenue Plus's warehouse and as long as the ATMs remained in the warehouse, there was no obligation on the part of Revenue Plus to pay for them. In my opinion, this constituted a consignment or bailment of those goods and they had not been purchased by Revenue Plus.

69 Applying the principles set out in *Stephanian's Persian Carpets Ltd., Re*, *supra*, and *Toyerama, Re*, *supra*, the consignment (or bailment) created under the Distributor Agreement cannot fall within the provisions of the PPSA. Since no payment was required in respect of those goods, there was no payment obligation to secure.

70 Accordingly, Access Plus has established an ownership interest in the ATMs stored in the Revenue Plus warehouse and which never left the warehouse for the purpose of delivery to a third party under the sales, trial or placement programs and its interest is not subject to the PPSA.

Form of Order

71 Access Cash shall be entitled to a declaration in respect of its prior secured interest arising from its PMSI as well as a declaration of its ownership interest in the ATMs stored at the Revenue Plus warehouse as referred to in paragraph 70. Given the determinations I have made and the fact that some of the ATMs may have been removed from the warehouse other than as directly contemplated under the agreement, I will not rule at this time on the right of Access Cash to trace its interest to the proceeds of any sale. If there are outstanding issues to be addressed in this regard, or if counsel are unable to agree on the appropriate form of this order, I can be spoken to.

Other Issues

72 I have not dealt with the marshalling issue in respect of the call centre operation as this was not fully argued before me and will require updated information. To the extent that this issue still needs to be resolved, a further motion or application should be brought. It does not need to be returnable before me.

73 Success on the application before me has been divided. My inclination is to make no order as to costs. However, if counsel do not agree with that disposition, an appointment should be made through my secretary to arrange an appearance to address the issue.

Order accordingly.

TAB 2

2008 BCCA 327
British Columbia Court of Appeal

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.

2008 CarswellBC 1758, 2008 BCCA 327, [2008] 10 W.W.R. 575, [2008] B.C.W.L.D. 6017, [2008] B.C.W.L.D. 6018, [2008] B.C.J. No. 1587, 168 A.C.W.S. (3d) 785, 258 B.C.A.C. 187, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 46 C.B.R. (5th) 7, 83 B.C.L.R. (4th) 214

Cliffs Over Maple Bay Investments Ltd. (Respondent / Petitioner / Respondent) and Fisgard Capital Corp. and Liberty Holdings Excel Corp. (Appellants / Respondents / Applicants)

Frankel, Tysoe, D. Smith JJ.A.

Heard: August 12, 2008
Judgment: August 15, 2008
Docket: Vancouver CA036261

Counsel: G.J. Tucker, A. Frydenlund for Appellants
H.M.B. Ferris, P.J. Roberts for Respondent
M. Sennott for Century Services Inc.
M.B. Paine for Monitor, Bowra Group

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay of proceedings

Applicant creditors held mortgages registered against debtor company's property development — Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") — Stay order was granted pursuant to s. 11 of CCAA — Debtor applied for extension of stay and authorization for debtor-in-possession financing — Creditors applied to have initial stay set aside and sought appointment of interim receiver — Chambers judge granted debtor's application and dismissed creditors' application — Creditors appealed — Appeal allowed — Ability of court to grant or continue stay under s. 11 of CCAA is not free standing remedy that court may grant whenever insolvent company wishes to undertake restructuring — Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors — Stay of proceedings freezing rights of creditors should only be granted in furtherance of CCAA's fundamental purpose — It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan — In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 — Chambers judge failed to take this important

factor into account.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Applicant creditors held mortgages registered against debtor company's property development — Debtor commenced proceeding under Companies' Creditors Arrangement Act ("CCAA") — Stay order was granted pursuant to s. 11 of CCAA — Debtor applied for extension of stay and authorization for debtor-in-possession financing — Creditors applied to have initial stay set aside and sought appointment of interim receiver — Chambers judge granted debtor's application and dismissed creditors' application — Creditors appealed — Appeal allowed — Ability of court to grant or continue stay under s. 11 is not free standing remedy that court may grant whenever insolvent company wishes to undertake "restructuring" — Section 11 is ancillary to fundamental purpose of CCAA, which is to facilitate compromises and arrangements between companies and their creditors — It was not suggested that debtor intended to propose arrangement or compromise to its creditors before embarking on its restructuring plan — In absence of such intention, it was inappropriate for stay to have been granted or extended under s. 11 — If stay under CCAA should not be extended because debtor is not proposing arrangement or compromise with creditors, it followed that DIP financing should not have been authorized to permit debtor to pursue restructuring plan that did not involve arrangement or compromise with its creditors.

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Cases considered by *Tysoe J.A.*:

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s. 47(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

s. 2 "debtor company" — referred to

s. 3(1) — referred to

s. 4 — considered

s. 5 — considered

s. 6 — considered

s. 11 — considered

s. 11(3) — referred to

s. 11(6) — considered

s. 11.7 [en. 1997, c. 12, s. 124] — referred to

APPEAL by creditors from order of chambers judge granting debtor's application to extend stay of proceedings and to

authorize debtor-in-possession financing.

Tysoe J.A. (orally):

1 The appellants appeal from the order dated June 27, 2008, by which the chambers judge extended the stay of proceedings that was initially granted on May 26, 2008, until October 20, 2008, and authorized financing in the amount of $2,350,000.

2 The proceeding was commenced by The Cliffs Over Maple Bay Investments Ltd. (the "Debtor Company") under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "*CCAA*") after the appellants appointed a receiver on May 23, 2008. As is often the case for initial applications under the *CCAA*, no notice was given to the appellants or any other of the Debtor Company's creditors of the application giving rise to the May 26 stay order. In accordance with section 11(3) of the *CCAA*, the stay contained in the order was expressed to expire on June 25.

3 The Debtor Company then made application for further relief at the hearing commonly called the comeback hearing. The Debtor Company requested an extension of the stay until October 20, 2008, and authorization for financing in the amount of $2,350,000. This financing, which, following upon American terminology, is commonly referred to as "debtor-in-possession" or "DIP" financing, was to be secured by a charge having priority over the security held by the appellants and all other secured and unsecured creditors. The appellants made a concurrent application requesting that the May 26 order be set aside and that an interim receiver be appointed pursuant to s. 47(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. The chambers judge granted the Debtor Company's application and dismissed the appellants' application.

Background

4 The business of the Debtor Company is the development of a 300 acre site near Duncan, British Columbia, consisting of single family lots and multi-residential units, a hotel and apartments and a golf course. The business plan was to build the golf course and to construct servicing for subdivided lots, which were to be sold to purchasers.

5 The development of the non-golf course lands was to be carried out in five phases. Phase I consists of 70 single family lots and 60 multi-residential units. Its construction is 95% complete and 54 of the 70 single family lots have been sold and conveyed to the purchasers, with the sale proceeds being applied towards the Debtor Company's mortgage financing.

6 Phase II consists of 76 single family lots and is 50% complete. Phase III consists of 69 single family lots, 112 multi-residential lots and 225 hotel units, and it is 5% complete. Phases IV and V consist of 131 single family lots and 60 multi-residential units, and each is 1% complete.

7 The golf course, which is the focal point of the development, is approximately 60 to 70% complete. A restrictive covenant in favour of the District of North Cowichan stipulates that the golf course must be at least 80% complete before more than 200 lots can be sold.

8 There are four mortgages registered against the development. The first two mortgages are not significant — the first mortgage secures an amount of $900,000 that is also secured by a cash collateral deposit, and the second mortgage secured a loan from Liberty Mortgage Services Ltd. that has not yet been discharged because there is a dispute between the Debtor Company and Liberty Mortgage Services Ltd. as to whether $85,000 of interest is still owing.

9 The third mortgage is held by the appellants. It is in the principal sum of $19,500,000 and has an interest rate of 19.75% per annum. It matured on March 1, 2008, and its balance is approximately $21,160,000 as of June 15, 2008. The fourth mortgage is held by the appellant, Liberty Holdings Excell Corp., and The Canada Trust Company. It is in the principal sum of $7,650,000 and has an interest rate of 28% per annum. It matured on January 1, 2008, and its balance is approximately $8,800,000 as of June 15, 2008.

10 In addition to the indebtedness secured by the mortgages, the Debtor Company has liabilities in the following approximate amounts:

$4,460,000	— trade creditors
1,700,000	— equipment leases
1,135,000	— loans from related parties
45,000	— unpaid source deductions
$7,340,000	

11 The Debtor Company was having some difficulties with respect to the development prior to March 2008 as a result of delays and substantial budget overruns. Ongoing construction on the development was limited. The main two mortgages had matured or were about to mature, and the Debtor was unsuccessful in its efforts to obtain refinancing. However, matters came to a head in March 2008 when the Debtor Company learned that its anticipated water source for the irrigation of the golf course was problematic.

12 It had been contemplated that the Debtor Company would obtain water for the golf course's irrigation from a joint utilities board consisting of representatives of the City of Duncan, the District of North Cowichan and the Cowichan First Nation. The joint utilities board had jurisdiction over reclaimed water from sewage lagoons located on the lands of the Cowichan First Nation. The joint utilities board was apparently prepared to provide water from the sewage lagoons for the irrigation of the golf course but it was unable to enter into an agreement with the Debtor Company because three members of the Cowichan First Nation had rights of possession over part of the sewage lagoons and were being advised by their consultant that they should not agree to an extension of the lease of the lagoons.

13 The Debtor Company advised the mortgage lenders of the water problem, and the lenders reacted by serving the Debtor Company with notices of intention to enforce their security in April 2008. On May 23, 2008, the mortgage lenders appointed a receiver, which precipitated the commencement of the *CCAA* proceeding by the Debtor Company. On May 26, 2008, the chambers judge granted the Debtor Company's *ex parte* application under the *CCAA* and directed the holding of the comeback hearing after notice had been given to the Debtor Company's creditors. The Debtor Company applied for authorization of the DIP financing at the comeback hearing.

14 When the chambers judge granted the *ex parte* application on May 26, 2008, he appointed The Bowra Group Inc. as monitor pursuant to s. 11.7 of the *CCAA* (the "Monitor"). The first report of the Monitor dated June 16, 2008, was before the chambers judge at the comeback hearing. Based on two previous appraisals and discussions with the realtor having the listing

for the development, the Monitor estimated the value of the development under the following three scenarios:

(a) liquidation value with no source of water for irrigation — $10 million;

(b) liquidation value with a source of water for irrigation — $28 million;

(c) going concern value with completion of the development — $50 million.

The Monitor also reported that the realtor believes that if the development were to be completed, there would be sufficient sale proceeds to satisfy all obligations of the Debtor Company. The appellants took issue with the going concern valuation and submitted that the development should be re-appraised by an appraiser they consider to be trustworthy.

15 In its report, the Monitor also recommended that the court authorize the DIP financing to enable it to pursue a water source for the irrigation of the golf course. The Monitor stated that it believes that the existing management of the Debtor Company will be unable to execute the restructuring in the absence of assistance and direction. The Monitor requested that it be given additional powers so that it could pursue the water source and to receive any offers for the purchase of all or part of the development, with the view that once a water source is secured, it would make further recommendations to the court with respect to the completion of the development. The application of the Debtor Company at the comeback hearing included a request for the expansion of the Monitor's powers.

Decision of the Chambers Judge

16 The appellants argued before the chambers judge, as they did on this appeal, that this matter should not be under the *CCAA* because the business of the Debtor Company is a single real estate development and the business was essentially dormant as at the date of the application. The chambers judge considered s. 11(6) of the *CCAA*, which reads as follows:

The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

The chambers judge concluded that the preconditions contained in s. 11(6) had been met. He did not state why he considered a stay order to be appropriate in the circumstances, although his reasons reflect that he understood the nature and state of the Debtor Company's business.

17 The chambers judge considered various authorities in relation to the application for the DIP financing. After considering the benefits and prejudice of the DIP financing, the chambers judge concluded that it was appropriate to authorize it.

18 Finally, the chambers judge granted the expanded powers to the Monitor. This aspect of the order was not directly challenged on appeal, but it may be affected by the outcome on the first ground of appeal.

Appraisal Evidence

19 The affidavit of the principal of the Debtor Company filed at the time of the commencement of the *CCAA* proceeding exhibited the first 11 pages of two appraisals of portions of the development. As a result of the dispute between the parties over the value of the development, the Debtor Company applied for leave to file a supplemental appeal book containing complete copies of the appraisals. We tentatively received the supplemental appeal book subject to a subsequent ruling on the leave application.

20 In view of my conclusion on this appeal, the value of the development is not relevant. I would decline to grant the requested leave.

Standard of Review

21 Both aspects of the order challenged on appeal were discretionary in nature. The standard of review in respect of discretionary orders has been expressed in various ways. In *Reza v. Canada*, [1994] 2 S.C.R. 394, 116 D.L.R. (4th) 61 (S.C.C.), the standard of review was expressed in terms of whether the judge at first instance "has given sufficient weight to all relevant circumstances" (¶ 20).

22 In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-7, 88 D.L.R. (4th) 1 (S.C.C.), the Court quoted the following statement in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130 (U.K. H.L.) at 138 with approval:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

This passage was also referred to by this Court in a case involving the *CCAA*, *New Skeena Forest Products Inc., Re*, 2005 BCCA 192 (B.C. C.A.) at ¶ 20. Newbury J.A. also made reference in that paragraph to the principle that appellate courts should accord a high degree of deference to decisions made by chambers judges in *CCAA* matters and will not exercise their own discretion in place of that already exercised by the chambers judge. She also stated at ¶ 26 that appellate courts should not interfere with an exercise of discretion where "the question is one of the weight or degree of importance to be given to particular factors, rather than a failure to consider such factors or the correctness, in the legal sense, of the conclusion."

23 In my opinion, the comments of Newbury J.A. in *New Skeena* were directed at ongoing *CCAA* matters and do not necessarily apply to the granting and continuation of a stay of proceedings at the hearing of the initial *ex parte* application or the comeback hearing. However, in view of my conclusion on this appeal, I need not decide whether a different standard of review applies in respect of threshold decisions to grant or continue stays of proceedings in the early stages of *CCAA*

proceedings.

Analysis

24 On this appeal, the appellants challenge the decision of the chambers judge to continue the stay of proceedings until October 20, 2008, on the same basis as they opposed the application before the chambers judge. They say that the *CCAA* should not apply to companies whose sole business is a single land development or to companies whose business is essentially dormant. However, the real question is not whether the *CCAA* applies to the Debtor Company because it falls within the definition of "debtor company" in s. 2 of the *CCAA* and it satisfies the criterion contained in s. 3(1) of the *CCAA* of having liabilities in excess of $5 million. The *CCAA* clearly applies to the Debtor Company, and it is entitled to propose an arrangement or compromise to its creditors pursuant to the *CCAA*. The real question is whether a stay of proceedings should have been granted under s. 11 of the *CCAA* for the benefit of the Debtor Company.

25 I agree with the submission on behalf of the Debtor Company that the nature and state of its business are simply factors to be taken into account when considering under s. 11(6) whether it is appropriate to grant or continue a stay. If the more deferential standard of review is applicable to the granting and continuation of the stay of proceedings at the initial and comeback hearings, there would be insufficient basis to interfere with the decision of the chambers judge because he did give weight to these factors. However, there is another, more fundamental, factor that was not considered by the chambers judge.

26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

27 The fundamental purpose of the *CCAA* is expressed in the long title of the statute:

> An Act to facilitate compromises and arrangements between companies and their creditors.

28 This fundamental purpose was articulated in, among others, two decisions quoted with approval by this Court in *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 16 C.B.R. (4th) 141 (B.C. C.A.). The first is *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659, 16 C.B.R. 1 at 2, [1934] 4 D.L.R. 75 (S.C.C.), where the following was stated:

> . . . the aim of the Act is to deal with the existing condition of insolvency in itself to enable arrangements to be made in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy. *Ex facie* it would appear that such a scheme in principle does not radically depart from the normal character of bankruptcy legislation."
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

29 The second decision is *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.) at 315-16, where Gibbs J.A. said the following:

> 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. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. 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. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success, there must be a means of holding the creditors at bay, hence the powers vested in the Court under s. 11.

30 Sections 4 and 5 of the *CCAA* provide that the court may order meetings of creditors if a debtor company proposes a compromise or an arrangement between it and its unsecured or secured creditors or any class of them. Section 6 authorizes the court to sanction a compromise or arrangement if a majority in number representing two-thirds in value of each class of creditor has voted in favour of it, in which case the compromise or arrangement is binding on all of the creditors.

31 The filing of a draft plan of arrangement or compromise is not a prerequisite to the granting of a stay under s. 11: see *Fairview Industries Ltd., Re* (1991), 109 N.S.R. (2d) 12, 11 C.B.R. (3d) 43 (N.S. T.D.). In my view, however, a stay should not be granted or continued if the debtor company does not intend to propose a compromise or arrangement to its creditors. If it is not clear at the hearing of the initial application whether the debtor company is intending to propose a true arrangement or compromise, a stay might be granted on an interim basis, and the intention of the debtor company can be scrutinized at the comeback hearing. The case of *Ursel Investments Ltd., Re* (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), rev'd on a different point (1991), 89 D.L.R. (4th) 246 (Sask. C.A.) is an example of where the court refused to direct a vote on a reorganization plan under the *CCAA* because it did not involve an element of mutual accommodation or concession between the insolvent company and its creditors.

32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the *CCAA* to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at ¶ 7 and *Anvil Range Mining Corp., Re* (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) at ¶ 11), aff'd (2002), 34 C.B.R. (4th) 157 (Ont. C.A.) at ¶ 32. I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

33 Counsel for the Debtor Company also relies upon the decision in *Skeena Cellulose Inc., Re* (2001), 29 C.B.R. (4th) 157 (B.C. S.C.), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

34 In the present case, the Debtor Company described its proposed restructuring plan in the following paragraphs of the petition commencing the *CCAA* proceeding:

> 47 The Petitioner intends to proceed with a three-part strategic restructuring plan consisting of:
>
> (a) securing sufficient funds to complete Phase 2 and 3;
>
> (b) securing access to water for the irrigation system of the golf course; and
>
> (c) finishing the construction of the golf course.
>
> 48 Upon completion of the matters described in the preceding paragraph, the Petitioner believes that proceeds generated from the sale of the remaining units in Phases 1-3, will be sufficient to fund the balance of the costs that will be incurred in completing the remaining portions of the Development.

35 It was not suggested in the petition, nor in the Monitor's report before the chambers judge at the comeback hearing, that the Debtor Company intended to propose an arrangement or compromise to its creditors before embarking on its restructuring plan. In my opinion, in the absence of such an intention, it was not appropriate for a stay to have been granted or extended under s. 11 of the *CCAA*. The chambers judge failed to take this important factor into account, and it is open for this Court to interfere with his exercise of discretion. To be fair to the chambers judge, I would point out that this factor was not drawn to his attention by counsel, and it was raised for the first time at the hearing of the appeal.

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.

37 The failure of the chambers judge to consider the fundamental purpose of the *CCAA* and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the *CCAA* should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.

38 I wish to add that it was open, and continues to be open, to the Debtor Company to propose to its creditors an arrangement or compromise along the lines of the restructuring plan described in paragraph 47 of the petition, although it may be a challenge to make such a plan attractive to its creditors. The creditors could then vote on such an arrangement or compromise which would involve, on their part, the concession that their rights would remain frozen while the Debtor Company carried out its restructuring. What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the

creditors may vote.

Other Matters

39 In addition to the appellants and the Debtor Company, two persons appeared at the hearing of the appeal without having obtained intervenor status. The first was the Monitor, which also filed a factum. Other than clarifying certain facts, the factum was limited to the issue of preserving the charge against the assets of the Debtor Company as security for the Monitor's fees and disbursements in the event that the appeal was allowed on the appellants' first ground. In my opinion, the Monitor should have obtained intervenor status if it wished to make submissions on appeal, but the issue became academic when counsel for the appellants advised that his clients did not object to the Monitor retaining the priority charge for its fees and disbursements up to the day on which the decision on appeal is pronounced.

40 The second additional person appearing at the hearing of the appeal was Century Services Inc., which is the lender arranged by the Debtor Company to provide the DIP financing authorized by the chambers judge. Century Services Inc. wished to make submissions with respect to the priority charge for its financing, the first tranche of which was apparently advanced last week. After counsel for the appellants advised us that there were evidentiary matters subsequent to the decision of the chambers judge bearing on this issue, we declined to hear submissions on behalf of Century Services Inc. We did not have affidavits dealing with this matter, and the Supreme Court is better suited to deal with issues that may turn on the evidence.

Disposition

41 I would allow the appeal and set aside the order dated June 27, 2008. I would declare that the powers and duties of the Monitor contained in the orders dated May 26, 2008, and June 27, 2008, continued until today's date and that the Administration Charge created by the May 26 order shall continue in effect until all of the Monitor's fees and disbursements, including the fees and disbursements of its counsel, have been paid. I would remit to the Supreme Court any issues relating to the DIP financing that has been advanced.

***Frankel J.A.*:**

42 I agree.

***D. Smith J.A.*:**

43 I agree.

***Frankel J.A.*:**

44 The respondent's application to file a supplemental appeal book is dismissed. The appeal is allowed in the terms stated by Mr. Justice Tysoe.

Appeal allowed.

End of Document

TAB 3

2012 ONSC 6087, 2012 CarswellOnt 15528, 223 A.C.W.S. (3d) 772, 97 C.B.R. (5th) 264

2012 ONSC 6087
Ontario Superior Court of Justice [Commercial List]

Dondeb Inc., Re

2012 CarswellOnt 15528, 2012 ONSC 6087, 223 A.C.W.S. (3d) 772, 97 C.B.R. (5th) 264

In the Mater of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of a Proposed Plan of Compromise or Arrangement with Respect to Dondeb Inc. and the Additional Applicants Listed on Schedule "A" Hereto (collectively, the "Applicants"), Applicants

C. Campbell J.

Heard: October 11, 15, 17, 18 2012
Judgment: November 22, 2012
Docket: CV-12-00009865-00CL

Counsel: David P. Preger, Lisa S. Corne, Michael Weinczok for Applicants
Jeffrey J. Simpson, A. Ronson for Pace Savings & Credit Union Limited
Gary Sugar for David Sugar, et al
D.R. Rothwell for RMG Mortgage/MCAP Financial Corporation
Harry Fogul for Regional Financial
Robin Dodokin for Empire Life Insurance Co.
Beverly Jusko, M.R. Kestenberg for TD Bank Canada Trust
Roger Jaipargas for Faithlife Financial
R.B. Bissell for Vector Financial Services Limited
Jeffrey Larry for First Source Mortgage Corporation
Douglas Langley for Virgin Venture Capital Corporation
David Mende for Addenda Capital Inc.
J. Dietrich, W. Rabinovitch for A. Farber & Partners Inc.
M. Church for SEIU (Union)

Subject: Insolvency; Property

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Dismissal of application

Debtors were group of companies which owned and managed properties — Debtors brought application for initial order

under Companies' Creditors Arrangement Act — Application dismissed — Unlikely that plan could be developed that sufficient number of creditors would agree to — Application was opposed by approximately 75 per cent of creditors, who had concerns about principal of group of companies' plan to transfer certain properties to secure additional funding, and did not wish debtor-in-possession financing to occur — Principal had not engaged with creditors from early date and was to some extent author of own misfortune — Goal of protection under Act was liquidation, which could be achieved by appointing receiver.

Table of Authorities

Cases considered by *C. Campbell J.*:

Azure Dynamics Corp., Re (2012), 91 C.B.R. (5th) 310, 2012 CarswellBC 1545, 2012 BCSC 781 (B.C. S.C. [In Chambers]) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — considered

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Octagon Properties Group Ltd., Re (2009), 58 C.B.R. (5th) 276, 2009 CarswellAlta 1325, 2009 ABQB 500, 486 A.R. 296 (Alta. Q.B.) — considered

Shire International Real Estate Investments Ltd., Re (2010), 64 C.B.R. (5th) 92, 2010 CarswellAlta 234, 2010 ABQB 84 (Alta. Q.B.) — considered

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.)*) [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Timminco Ltd., Re (2012), 2012 ONSC 506, 95 C.C.P.B. 48, 2012 CarswellOnt 1263, 85 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.02 [en. 2005, c. 47, s. 128] — referred to

APPLICATION by debtors for protection under *Companies Creditors Arrangement Act*.

C. Campbell J.:

1 The applicants seeking an Initial Order under the *Companies Creditors Arrangement Act* are a group of companies owned and controlled by or through the main holding company Dondeb Inc. The proposed relief would include a stay of proceedings in respect of the various companies which own and or operate businesses and real property in Ontario.

2 The application is vigorously opposed by numerous secured creditors which have mortgage or other security on property beneficially owned by one or more of the companies in the Dondeb "group".

3 The applicants seek the protection of the *CCAA* to enable an orderly liquidation of the assets and property of the various companies to enable what is asserted to be the remaining equity after sale and expenses to accrue to the benefit of the Dondeb Group.

4 It is urged that the flexible mechanism of the *CCAA* is appropriate as there are common expenses across some of the companies', common security across others and that any order in liquidation would prevent the incurrence of added cost should individual properties and companies placed in liquidation with the loss of remaining equity.

5 The applications propose a Debtor in Possession (DIP) financing and administrative charge to secure the fees of professionals and expenses associated with *CCAA* administration. The application is opposed by approximately 75% in value of the secured creditors.

6 The basis of the opposition can be summarized as follows:

i) That in many instances the properties over which security is held is sufficiently discrete with specific remedies including sale being more appropriate than the "enterprise" approach posed by the applicants.

ii) That the proposed DIP/financial and administration changes are an unwarranted burden to the equity of specific properties are evidence of the inappropriate application of the *CCAA*.

iii) That in the circumstances individual receivership orders for many of the properties is a more appropriate

remedy where the creditors and not the debtor would have control of the process.

iv) That the creditors have lost confidence in the Dondeb family owners of the Dondeb group for a variety of reasons including for breach of promise and representation.

v) That it is now evident that the applicants will be unable to propose a realistic plan that is capable of being accepted by creditors given a difference in position with respect to value of various properties.

7 Those who support the applicants in the main wish to see those businesses that are operating on some of the properties such as in one instance, a school, and others like retirement homes continue in a way that may not be possible in a bankruptcy.

8 During the course of the submissions on the first return date an alternative was proposed by a number of secured creditors, namely a joint or consolidated receivership of the various entities to maximizing creditor control of the process and ensure that costs of administration be allocated to each individual property and company.

9 The application was adjourned to be returnable October 15, 2012 to allow both the applicants and the opposing creditors to consider their positions hopefully achieve some compromise. In the meantime 4 notices of intention under the BIA were stayed.

10 The return of the application on October 15, 2012 did produce some modification of position on both sides but not sufficient to permit a *CCAA* order to be agreed to.

11 The applicants revised the proposed form of Initial Order to allow for segregation of accounts on the individual properties an entitlement.

12 The rationale of the applicants for the original Initial Order sought was that if liquidated or otherwise operated in an orderly way by the debtor and a "super" monitor, greater value could be achieved than the secured debt owing in respect to at least a number of the properties which could be available (a) to other creditors in respect of which guarantees or multiple property security could enhance recovery and or (b) the equity holders.

13 The second major reason advanced by a significant number of creditors appearing through counsel was that they no longer had any confidence in Mr. Dandy, the principal of Dondeb Inc. Significant examples of alleged misleading supported the positions taken.

14 I accept the general propositions of law advanced on behalf of the applicants that pursuant to s.11.02 of the *CCAA* the court has wide discretion "on any terms it may impose" to make an Initial Order provided the stay does not exceed 30 days [see *Nortel Networks Corp., Re* [2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List])], 2009, CanLII 39492 at para 35 and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) CF 33.

15 The more recent decision of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) at para 15 confirms the breadth and flexibility of the CCAA to not only preserve and allow for restructuring of the business as a going concern but also to permit a sale process or orderly liquidation to achieve maximum value and achieve the highest price for the benefit of all stakeholders. See also *Timminco Ltd., Re*, 2012 ONSC 506 (Ont. S.C.J. [Commercial List]) at para 49-50 (leave to appeal denied 2012 ONCA 552 (Ont. C.A.)).

16 I also accept the general proposition that given the flexibility inherent in the *CCAA* process and the discretion available that that an Initial Order may be made in the situation of "enterprise" insolvency where as a result of a liquidation crisis not all of the individual entities comprising the "enterprise" may be themselves insolvent but a number are and to propose of the restructuring is to restore financial health or maximize benefit to all stakeholders by permitting further financing. Such process can include liquidation. See *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) and also *Edgeworth Properties Inc. (Re)* CV-11-9409-CL [Commercial List].

17 I also accept that while each situation must be looked at on its individual facts the court should not easily conclude that a plan is likely to fail. See *Azure Dynamics Corp., Re*, 2012 BCSC 781 (B.C. S.C. [In Chambers]) at paras 7-10.

18 In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CarswellBC 1758 (B.C. C.A.), the British Columbia Court of Appeal overturned the decision of the chambers' judge extending a stay of proceedings and authorizing DIP financing under the *CCAA* in the case of a debtor company in the business of land development because:

> 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 exerting their remedies rather than by letting the developer remain in control of the failed development while attempting to rescue it by means of obtaining refinancing, capital injection by a new partner or DIP financing.

19 Similarly, in *Octagon Properties Group Ltd., Re*, 2009 CarswellAlta 1325 (Alta. Q.B.) paragraph 17, Kent, J. made the following comments:

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

20 A similar result occurred in *Shire International Real Estate Investments Ltd., Re*, 2010 CarswellAlta 234 (Alta. Q.B.) even after an initial order had been granted.

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

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

22 At the conclusion of oral submissions which followed on a hearing of the application which commenced on Friday October 11, 2012 continued on October 15 with additional written material and concluded on Wednesday October 17, 2012 again with additional written material and oral submissions the following conclusions were reached.

> (i) The application for an Initial Order under the CCAA based on the material filed be dismissed.
>
> (ii) The issue of costs incurred by the proposed Monitor Farber and of counsel to the debtor be reserved for further consideration (if not resolved) basis on material to be provided to counsel for the creditors and their submissions.
>
> (iii) The request for a more limited *CCAA* Initial Order which like the Original Application is opposed by a significant body of creditors is also rejected.
>
> (iv) A Global Receivership Order which is supported by most of the creditors appearing to oppose the application and which has the support of Farber which will become Receiver of those companies and properties covered by the application will issue in a format to be approved by counsel and the court.

23 For ease of administration the Global Receivership Order will issue in Court File No. CV-12-9794-CL and make reference to the various companies and properties to be covered by the Order.

24 In order to further facilitate administration the following proceedings, each being Notices of Intention to make a proposal

Dondeb Inc.	31-1664344
Ace Sel/Storage & Business Centre	31-1664774
1711060 Ontario Ltd.	31-1664775
2338067 Ontario Ltd.	31-1664772
King City Holdings Ltd.	31-1671612
1182689 Ontario Inc.	31-1671611
2198392 Ontario Inc.	31-1673260

hereby stayed and suspended pending further order of the court.

25 The request for an Initial Order under the *CCAA* was dismissed for the simple reason that I was not satisfied that a successful plan could be developed that would receive approval in any meaningful fashion from the creditors. To a large

extent, Mr. Dandy is the author of his own misfortune not just for the liquidity crisis in the first place but also for a failure to engage with creditors as a whole at an early date.

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

27 Under the proposed Initial Order the fees of the proposed monitor and of counsel to the debtor were an issue as well as leaving the debtor in possession with the cost that would entail.

28 Counsel for each of the various creditors represented urged that their client's individual property should not be burdened with administrative expenses and professional fees not associated with that property.

29 Counsel for the debtor advised that to the extent possible his client and the monitor would keep individual accounts. This proposal did not appease the opposing creditors who did agree that their clients could accept what was described as a "global" receiver and that the Farber firm would be acceptable as long as the receiver's charge was allocated on an individual property basis. In other words, the opposing creditors are prepared to accept the work of the professionals of the receiver but not fund the debtor or its counsel.

30 The issue of the fees of Farber incurred todate in respect of preparation of the *CCAA* application was agreed between the opposing creditors, Farber and its counsel and are not an issue. Counsel for the debtor requested that the court consider a request for fees and costs on the part of the debtor. In order to give an opportunity for the parties to consider the details of such request and possible resolution the issue was deferred to a later date.

31 Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.

32 Counsel are to be commended for the effort and success in reaching agreement on the form of order acceptable to the court.

33 The *CCAA* is a flexible instrument, which with judicial discretion, is capable of permitting restructuring, including in appropriate situations, liquidation.

34 In my view the use of the *CCAA* for the purpose of liquidation must be used with caution when liquidation is the end goal, particularly when there are alternatives such as an overall less costly receivership that can accomplish the same overall

goal.

Schedule "A"

1. Dondeb Inc.

2. Ace Self Storage and Business Centre Inc.

3. 1182689 Ontario Inc.

4. King City Holdings Inc.

5. 1267818 Ontario Ltd.

6. 1281515 Ontario Inc.

7. 1711060 Ontario Ltd.

8. 2009031 Ontario Inc.

9. 2198392 Ontario Ltd.

10. 2338067 Ontario Inc.

11. Briarbrook Apartments Inc.

12. Guelph Financial Corporation

Application dismissed.

TAB 4

2003 CarswellOnt 168
Ontario Superior Court of Justice

Metropolitan Toronto Police Widows & Orphans Fund v. Telus Communications Inc.

2003 CarswellOnt 168, 30 B.L.R. (3d) 288, 6 P.P.S.A.C. (3d) 307

Metropolitan Toronto Police Widows and Orphans Fund et al, Plaintiffs and Telus Communications Inc., Defendant

Ground J.

Heard: September 9, 10, 12, 13, 16-18, 2002
Judgment: January 21, 2003
Docket: 99-CL-003317

Counsel: *Michael E. Barrack, Mark Polley, Jefferson J. Roppell,* for Plaintiff
David S. Stockwood, Johanna Braden, for Defendant

Subject: Corporate and Commercial

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Corporations --- Borrowing — Bonds and debentures — Miscellaneous issues

Securitization transaction between company and special purpose trust was established by agreement for purchase of company's receivables by trust — Company redeemed bonds through application of proceeds of securitization transaction — On redemption date, market price per bond was greater than redemption price paid by company pursuant to trust deed resulting in loss to bondholders — Bondholders brought action for damages and for relief from oppression — Action dismissed — Redemption of bonds was not refunding operation by company through direct application of borrowed funds in that securitization transaction was in law true sale and not secured borrowing — Wording of receivables purchase agreement clearly indicated intention of parties that transaction be true sale and conduct of parties did not negate that intention — Both parties could only get full benefit of transaction if it was true sale — Recourse available to trust under agreement was not full recourse with respect to collectibility and was not economic recourse in sense of guarantee of repayment and did not preclude determination that transaction was sale — Absence of right of trust to retain surplus from collection of receivables was not fatal to determination that transaction was sale — Purchase price under transaction was not uncertain — Subject matter of sale of receivables was ascertainable and fact that agreement contemplated that particular receivable may under certain circumstances be reconveyed to company did not derogate from fact that original conveyance of receivable to trust was true sale — Provisions of agreement relating to collection of purchased receivables by company on behalf of trust were not inconsistent with sale transaction — Agreement did not grant company any right of repurchase or redemption of accounts receivable at its option so as to lead to conclusion that transaction was not true sale.

Conditional sales --- Nature of conditional sale — General

Ultimate test to be applied to determine whether particular transaction is secured loan or true sale is right of borrower, upon repayment of debt, to require lender to reassign to it all of lender's interest in assets secured to pay debt — In case of true sale, vendor has no right to require title to assets sold to be reassigned to it.

Corporations --- Borrowing — Rights and obligations of security holders — Redemption

Securitization transaction between company and special purpose trust was established by agreement for purchase of company's receivables by trust — Company redeemed bonds through application of proceeds of securitization transaction — On redemption date, market price per bond was greater than redemption price paid by company pursuant to trust deed resulting in loss to bondholders — Bondholders brought action for damages and for relief from oppression — Action dismissed — Redemption of bonds was not refunding operation by company through direct application of borrowed funds in that securitization transaction was in law true sale and not secured borrowing — Wording of receivables purchase agreement clearly indicated intention of parties that transaction be true sale and conduct of parties did not negate that intention — Both parties could only get full benefit of transaction if it was true sale — Recourse available to trust under agreement was not full recourse with respect to collectibility and was not economic recourse in sense of guarantee of repayment and did not preclude determination that transaction was sale — Absence of right of trust to retain surplus from collection of receivables was not fatal to determination that transaction was sale — Purchase price under transaction was not uncertain — Subject matter of sale of receivables was ascertainable and fact that agreement contemplated that particular receivable may under certain circumstances be reconveyed to company did not derogate from fact that original conveyance of receivable to trust was true sale — Provisions of agreement relating to collection of purchased receivables by company on behalf of trust were not inconsistent with sale transaction — Agreement did not grant company any right of repurchase or redemption of accounts receivable at its option so as to lead to conclusion that transaction was not true sale.

Table of Authorities

Cases considered by *Ground J.*:

Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc., (sub nom. *Pigott Project Management Ltd. v. Land-Rock Resources Ltd.)* 38 Alta. L.R. (3d) 1, (sub nom. *Pigott Project Management Ltd. v. Land-Rock Resources Ltd.)* 11 P.P.S.A.C. (2d) 1, (sub nom. *Pigott Project Management Ltd. v. Land-Rock Resources Ltd.)* [1996] 1 C.T.C. 395, (sub nom. *Minister of National Revenue v. Alberta (Treasury Branches))* 196 N.R. 105, (sub nom. *Minister of National Revenue v. Alberta (Treasury Branches))* 184 A.R. 1, (sub nom. *Minister of National Revenue v. Alberta (Treasury Branches))* 122 W.A.C. 1, (sub nom. *Alberta (Treasury Branches) v. Minister of National Revenue)* 133 D.L.R. (4th) 609, (sub nom. *Alberta (Treasury Branches) v. Minister of National Revenue)* [1996] 1 S.C.R. 963, (sub nom. *R. v. Alberta Treasury Branches)* 96 D.T.C. 6245, 39 C.B.R. (3d) 157, 27 B.L.R. (2d) 147, (sub nom. *Pigott Project Management Ltd. v. Land-Rock Resources Ltd.)* [1996] 5 W.W.R. 153, [1996] G.S.T.C. 17, (sub nom. *R. v. Province of Alberta Treasury Branches)* 4 G.T.C. 6103, 1996 CarswellAlta 366, 1996 CarswellAlta 366F (S.C.C.) — considered

Inglefield Ltd., Re, [1933] Ch. 1 (Eng. C.A.) — considered

Major's Furniture Mart Inc. v. Castle Credit Corp. (1979), 602 F.2d 538 (U.S. C.A. 3rd Cir.) — considered

Manufacturers Life Insurance Co. v. Dofasco Inc., 9 B.L.R. (2d) 203, 1993 CarswellOnt 175 (Ont. Gen. Div. [Commercial List]) — considered

Pente Investment Management Ltd. v. Schneider Corp., 1998 CarswellOnt 4035, 113 O.A.C. 253, (sub nom. *Maple Leaf Foods Inc. v. Schneider Corp.)* 42 O.R. (3d) 177, 44 B.L.R. (2d) 115 (Ont. C.A.) — followed

Shenandoah Life Insurance Co. v. Valero Energy Corp. (June 1, 1988), Doc. Civ. A. 9032 (U.S. Del. Ch.) — considered

Welsh Development Agency v. Export Finance Co., [1992] B.C.L.C. 148 (Eng. C.A.) — considered

Westfair Foods Ltd. v. Watt, 79 Alta. L.R. (2d) 363, 115 A.R. 34, [1991] 4 W.W.R. 695, 79 D.L.R. (4th) 48, 5 B.L.R. (2d) 160, 1991 CarswellAlta 63 (Alta. C.A.) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
Generally — referred to

s. 241 — pursuant to

s. 241(2) — pursuant to

ACTION by bondholders for damages and relief from oppression.

Ground J.:

1 This action arises out of the redemption by BC Tel., a predecessor of Telus Communications Inc., ("BC Tel"), of Series AL Bonds (the "Bonds") on December 30, 1997. The Bonds were redeemed through the application of the proceeds of a securitization transaction entered into between BC Tel and RAC Trust, a special purpose vehicle sponsored by CIBC/Wood Gundy ("RAC").

2 The Plaintiffs maintain that the redemption of the Bonds was a breach of the No Financial Advantage Convenant (the "NFAC") contained in a Deed of Trust and Mortgage between BC Tel and Montreal Trust Company dated as of March 1, 1946, (the "Trust Deed") pursuant to which the Bonds were issued. The Plaintiffs further maintain that the redemption of the Bonds effected a result that unfairly disregarded the interests of the Bondholders as referred to in Subsection 241(2) of the *Canada Business Corporations Act*, R.S.C. (1985), Ch. c-44, as amended, (the "CBCA"). It has been agreed to proceed with the claim of Sun Life Assurance Co. of Canada ("Sun Life") as to liability only. Sun Life was not an original purchaser of the Bonds but, as of the redemption date, held Bonds in the aggregate principal amount of $26,845,000 purchased by Sun Life at various times. On the redemption date, the market price of the Bonds was approximately $115.00 and, the redemption price paid by BC Tel pursuant to the Trust Deed was approximately $103.00 resulting in a loss to the Bondholders of approximately $12.00 per $100.00 principal amount of Bonds. The Bonds bore interest at the rate of 11.35% per annum and matured on November 15, 2005.

3 The NFAC in the Trust Deed provides as follows:

> The Company shall not, however, redeem any of the Series AL Bonds prior to November 15, 2000 other than for sinking and improvement fund purposes, as part of any refunding or anticipated refunding operation by the application, directly or indirectly, of funds obtained through borrowings, having an interest cost to the Company of less than 11.35% per annum

4 It is agreed that the redemption of the Bonds was effected through a refunding operation and that the redemption was not for sinking or improvement fund purposes. It is also agreed that the proceeds of the securitization transaction were deposited by BC Tel in a separate bank account and applied directly toward the redemption of the Bonds.

The Receivables Purchase Agreement

5 The securitization transaction between BC Tel and RAC was established by a Receivables Purchase Agreement between RAC and BC Tel made as of November 20, 1997 (the "Agreement"). The Agreement contains definitions of Eligible Receivables which must meet certain criteria set out in Schedule A to the Agreement and a definition of Purchased Receivables and provides that RAC purchases from BC Tel and BC Tel sells, assigns and transfers to RAC, all of BC Tel's right, title and interest in and to "the universality of all Eligible Receivables which, from time to time, constitute Purchased Receivables and all Related Security, all without the need of any formal or other instrument of assignment" (Section 2.01). There are some deficiencies in

the drafting of the Agreement with respect to the definition of the purchase price of the Purchased Receivables but the only definition which is consistent with the balance of the Agreement is that the purchase price is comprised of the amounts advanced by RAC and not reduced pursuant to other provisions of the Agreement (defined as the "Outstanding Cash Payments") and the Deferred Amount. The Deferred Amount can only be calculated on the termination of the Agreement and is, in effect, the portion of the Reserve which is not required to be applied to compensate RAC for uncollectible Purchased Receivables.

6 The aggregate amount of Purchased Receivables which, as of any particular day, is sold to RAC, is determined by the Required Amount which is comprised of the Outstanding Cash Payments, the Reserve and the Purchase Discount. The Purchase Discount is determined monthly and is based upon RAC's adjusted cost of funds for the ensuing month. The Reserve is determined by a rather complex calculation but, for purposes of the transaction between BC Tel and RAC, is 5% of the Outstanding Cash Payments at any time. It is agreed that the historic bad debt ratio of BC Tel was between 1% and 2%.

7 It is agreed that the Outstanding Cash Payments and the Reserve may vary over the term of the Agreement and that the Purchase Discount will vary from month to month so that the Required Amount could vary on a day-to-day basis. It appears that, as of any particular day, one can determine exactly which Eligible Receivables are Purchased Receivables by applying the Trial Balance Sequence as defined in the Agreement which establishes an order in which Eligible Receivables are determined to be Purchased Receivables (Section 2.02). In simplified terms, the determination is made by starting with the obligor who owes the least amount of Receivables and proceeding through the obligors in ascending order of the aggregate amount of Receivables owed by each obligor. By following the Trial Balance Sequence, a particular Eligible Receivable may be a Purchased Receivable on day 1, may not be a Purchased Receivable on day 2, and may again be a Purchased Receivable on day 3.

8 The total amount advanced by RAC pursuant to the Agreement was $150,000,000. The Agreement provides that, on each day prior to the termination date, BC Tel shall automatically sell and RAC shall automatically purchase that amount of Eligible Receivables which will result in the Purchased Receivables equaling the Required Amount (Section 2.04). The Agreement also provides that BC Tel may, in effect, reduce the Outstanding Cash Payments by delivering to RAC a Cessation Request which has the effect of RAC ceasing to purchase Eligible Receivables until such time as the Outstanding Cash Payments has been reduced to the amount specified in the Cessation Request. The Cessation Request must be made in multiples of $1,000,000 and cannot reduce the Outstanding Cash Payments to less than $75,000,000 in total (section 2.05). The Agreement further provides that, on each day prior to the termination date, BC Tel shall be deemed to apply the collections from the Purchased Receivables first toward payment of the Purchase Discount for the relevant month to the extent that it has not been previously paid; second, on account of the Deferred Amount in an amount equal to 5% of the daily collections; and third, to the purchase of Eligible Receivables to be purchased by RAC on such a day so as to bring the aggregate amount of Purchased Receivables up to the Required Amount for such day (section 2.06).

9 The Agreement also appoints BC Tel as agent of RAC for the purpose of servicing the portfolio of Purchased Receivables purchased by RAC and sets out in detail the duties and obligations of BC Tel as servicer. No fee is payable by RAC to BC Tel for such services. BC Tel, as the servicer of the Purchased Receivables, is deemed to hold all payments to be applied toward payment of the Purchase Discount in trust for RAC and to remit such payments to RAC on the first day of the following month (section 2.06).

10 On termination, the Agreement provides that there shall be a Final Settlement Period following the termination date and that all collections after the termination date shall be held in trust for RAC and applied in payment to RAC of first, the Purchase Discount in respect of the Final Settlement Period; second, the Outstanding Cash Payments; and third, all other amounts owed to RAC under the Agreement (section 2.07). Following the payment of all such amounts to RAC, RAC shall, in satisfaction of its obligation to pay the Deferred Amount, at its option either pay the Deferred Amount in cash to BC Tel or sell, assign and transfer to BC Tel all of its right, title and interest in Purchased Receivables (section 2.07). The reference in section 2.07 to other amounts owed to RAC pursuant to the Agreement would appear to be a reference to a Program Fee payable to RAC of between .20% and .23% per annum of the Outstanding Cash Payments calculated on a daily basis pursuant to section 2.09 of the Agreement and reimbursement for legal costs up to $50,000 and for various other costs and expenses.

11 The Agreement also contains provisions for the reconveyance by RAC to BC Tel of any Purchased Receivable which ceases to be qualified as an Eligible Receivable or otherwise reduced or cancelled as a result of some action taken by BC Tel. BC Tel shall remit to RAC the amount of such Purchased Receivable or transfer to RAC additional Eligible Receivables to ensure that the Purchased Receivables are equal to the Required Amount (Section 2.08).

12 The Agreement also contains provisions relating to Events of Termination generally similar to events of default under a loan agreement and provides that, if an Event of Termination has occurred and is continuing, BC Tel shall hold all collections separate and apart from its general funds in a segregated trust account for the benefit of RAC and remit such collections to RAC as and when required by RAC. If an Event of Termination has occurred, RAC may designate a Replacement Servicer to replace BC Tel as servicer of the portfolio of Purchased Receivables and the fees of such Replacement Servicer shall be paid by BC Tel to RAC out of the proceeds of collection of Purchased Receivables (Sections 6.04 and 6.05).

13 The Agreement also provides that in the event that any change in any law, regulation or guideline of any governmental authority or any judgment, award or decree of any court results in the cost to RAC of the purchase of Purchased Receivables being increased or the rate of return to RAC in connection therewith being reduced, BC Tel shall from time to time upon demand by RAC, pay such increased costs or compensation for such reduction in rate of return to RAC (Section 7.06).

14 Although there is no specific provision that the Agreement is governed by the law of Ontario, the Agreement does provide that

> The Seller hereby irrevocably submits to the jurisdiction of any court sitting in Toronto in any action or proceeding arising out of or relating to this Agreement, and the Seller hereby irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in such Toronto court (Section 7.09).

Securitization

15 Corporate financing by way of securitization did not become prevalent in the Canadian market until the late 1980s or early 1990s. The basic concept of securitization is that a corporation raises cash by selling certain of its assets to a special purpose vehicle (an "SPV") which, in turn, issues securities, usually commercial paper, in the market to raise the purchase price of the assets purchased from the corporation.

16 The sale of the assets by the corporation to the SPV is structured in such a manner that it removes, to the extent practical, the assets from the estate of the corporation in the event of the bankruptcy or insolvency of the corporation. The assets are owned by the SPV and the realization or collection of those assets by the SPV services the commercial paper issued by the SPV. The holder of the commercial paper, therefore, looks to the cash flow from the assets and not to the credit of the corporation for repayment. The separation of the corporation from the assets themselves enables the corporation to raise funds less expensively through the commercial paper issued by the SPV, than it would cost the corporation to raise funds through securities issued directly by the corporation. There is also an "off balance sheet" advantage to the corporation in that the cash that is raised by the sale of the assets will not require an offsetting liability to be shown on the balance sheet of the corporation. The cash from the sale of the assets and the off-setting decrease in accounts receivable are reflected on the asset side of the corporation's balance sheet but there is no offsetting liability in that the commercial paper issued to raise such cash is a liability of the SPV and not of the corporation.

17 Securitization may have a further advantage to the corporation if it is restricted by trust deed or loan agreement covenants from incurring or securing debt. Securitization may enable the corporation to raise cash without breaching such covenants because the corporation is selling assets and is not incurring or securing debt. An article by Stephen L. Schwarcz "Structured Finance: The New Way To Securitize Assets": (1990) Cardozo Law Review, vol. 11, page 607, (the "Schwarcz Article") which contains a detailed history and analysis of securitization transactions states on page 608 "Whether a structured financing would violate particular covenants requires a case by case inquiry".

18 In the case of a sale of accounts receivable, the commercial paper issued by the SPV is not subject to the risk of the bankruptcy and insolvency or other downturn in the fortunes of the corporation selling its accounts receivable and is subject only to the risk of collectibility of the accounts receivable sold by that corporation to the SPV. This risk is covered by a reserve amount of receivables transferred to the SPV of at least 5% of the amount advanced by the SPV to the corporation and, in many cases, is further covered by a backup security and enhancement agreement entered into by the SPV with a financial institution. In the case of the BC Tel — RAC securitization, RAC negotiated a backup security and credit enhancement agreement with a Swiss bank to an amount of a further 10% of the Purchased Receivables sold to RAC.

History of the BC Tel — RAC Transaction

19 BC Tel was first approached by investment bankers with respect to the possibility of a securitization transaction in the early 1990s. It is clear from the evidence that, at that time, the officers of BC Tel considering these proposals had an imperfect understanding of securitization and had concerns with respect to the accounting and tax treatment of a securitization transaction. At that time, however, the regulatory environment in which BC Tel operated precluded BC Tel from reaping the full benefits of a securitization transaction and none of the proposals from the investment bankers was pursued at that time. The effect of the regulatory environment at the time was that redeeming debt would not permit BC Tel to earn additional income. BC Tel was limited to earning income equal to a percentage of equity on the basis of a 55/45 debt equity ratio.

20 In the period 1996 to 1997, the regulatory environment changed to a system based on certain caps on income as opposed to a limit tied into a percentage of equity and a particular debt equity ratio. It then became advantageous for BC Tel to enter into a securitization transaction and apply the proceeds from the sale of assets to the reduction of debt. BC Tel received a number of securitization proposals from investment bankers at this time and decided to proceed with the proposal from RAC which was sponsored by CIBC/Wood Gundy based upon the best pricing, lower program fees and the historic relationship between BC Tel and CIBC. A presentation was made to the Board of Directors of BC Tel on October 24, 1997, seeking the approval of the sale of up to $175,000,000 principal amount of accounts receivable to RAC. The Board gave its approval for the sale of $150,000,000 principal amount of accounts receivable. The Board, at that meeting, did not make any determination with respect to the use of the proceeds of the securitization but was advised that the most beneficial use of the proceeds would appear to be to redeem the Bonds.

21 The presentation to the Board indicates a net savings to BC Tel of $750,000 a year as a result of the reduction of capital tax after taking into account fees and costs relating to the securitization. BC Tel obtained, at that time, opinions from its outside counsel, its tax counsel and its external auditors addressing the legal nature of the transaction and its accounting and tax treatment. Following the Board's approval, on November 20, 1997, BC Tel entered into the Agreement with RAC. The sale of accounts receivable to RAC pursuant to the Agreement closed on November 20, 1997, and the proceeds of sale paid to BC Tel and deposited to a special bank account.

22 On November 26, 1997, a further presentation was made to the Board of Directors of BC Tel recommending the redemption of the Bonds out of the proceeds from the securitization transaction. The presentation indicates a net savings to BC Tel and, accordingly, a shareholders' gain, of $22,900,000 as a result of such transaction. The risks indicated in the presentation were the reaction of the holders of the Bonds and a risk of losing any legal challenge to the transaction although such risk was thought to be minimal as a result of the decision in *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1993), 9 B.L.R. (2d) 203 (Ont. Gen. Div. [Commercial List]) and the lack of a legal challenge to a securitization transaction entered into by Hudson Bay Acceptance Co. in 1996. The Board of Directors approved the redemption of the Bonds out of the proceeds of the securitization transaction with RAC and the Bonds were redeemed on December 30, 1997.

23 During the currency of the Agreement, BC Tel issued two Cessation Requests resulting in the reduction of the Outstanding Cash Payments by $10,000,000 on January 31, 2002 and by a further $2,000,000 on February 28, 2002.

24 By letter dated August 1, 2002, Telus gave notice of the termination of the Agreement as of August 7, 2002 and proposed a Final Settlement Period ending September 22, 2002, which was agreed to by RAC. RAC proposed to pay the amount payable

to Telus pursuant to the Agreement on the Final Settlement Date and to continue to collect Purchased Receivables rather than transferring Purchased Receivables back to Telus in satisfaction or partial satisfaction of the amount payable to Telus on the Final Settlement Date.

Findings of Fact

25 There are, in my view, very few facts in dispute in this action which are material to the issues to be decided by this court. The evidence did, however, establish the following facts which were relied upon to some extent by counsel in their submissions:

1. both BC Tel and RAC intended the securitization transaction to be a sale of the Purchased Receivables;

2. both BC Tel and RAC would obtain all of the benefits of the securitization transaction only if it was a sale;

3. the financial world recognizes that there is some risk that a securitization transaction may not be found to be a sale in law, particularly, in the case of a revolving type of securitization transaction; and

4. in the majority of securitization transactions, on termination, the seller buys back the Purchased Receivables in satisfaction or partial satisfaction of the amount, if any, payable to the seller on termination.

Issues

26 The three issues in this action may be broadly stated as follows:

1. was the redemption of the Bonds a refunding operation by BC Tel by the indirect application of borrowed funds having an interest cost to BC Tel of less than 11.35%?

2. was the redemption of the Bonds a refunding operation by BC Tel by the direct application of borrowed funds having an interest cost to BC Tel of less than 11.35%?

3. did the redemption of the Bonds by BC Tel effect a result that unfairly disregarded the interests of the holders of the Bonds?

Legal Analysis

Indirect Application of Borrowed Funds

27 It is not in dispute that the securitization transaction constituted a refunding operation in that the proceeds of the securitization were applied toward the redemption of the Bonds. It is also not in dispute that such refunding operation was not for sinking fund or improvement fund purposes.

28 The first issue then becomes whether the securitization transaction constituted the indirect application of funds obtained through borrowing having an interest cost to BC Tel of less than 11.35% per annum. It is agreed that the issuance of commercial paper by RAC to raise the funds advanced to BC Tel through the securitization transaction was a borrowing by RAC and that such borrowing during the relevant period had an interest cost of less than 11.35% per annum. The issue then becomes whether the securitization transaction was an indirect borrowing by BC Tel and whether there was an interest cost to BC Tel.

29 On a straight reading of the wording of the NFAC, there is no requirement that the borrowing be by BC Tel, whereas the NFAC does require that the interest cost be an interest cost to BC Tel. In addition, the NFAC clearly contemplates the refunding operating being by the direct or indirect application of funds obtained through borrowing. In *Manufacturers Life Insurance Co. v. Dofasco Inc.* (1993), 9 B.L.R. (2d) 203 (Ont. Gen. Div. [Commercial List]), although the court determined that funds obtained by Dofasco pursuant to a financing arrangement with Mitsui & Co. Ltd. were not applied directly or indirectly by Dofasco to redeem the debentures issued under a trust indebenture containing an NFAC, the court did deal with the issue of indirect borrowings. Borins, J. cited with approval the decision of Chancellor Allen in *Shenandoah Life Insurance Co. v. Valero Energy Corp.* (U.S. Del. Ch., 1988) where he stated:

> ...suppose an issuer incorporated a subsidiary corporation and transferred sufficient assets to it to permit it to borrow money; and suppose that that subsidiary then did borrow low-cost funds and transferred them to its parent either pursuant to a high-interest note or as a capital contribution; and suppose, of course, that the issuer then used those nominally high-interest funds to redeem debentures to which a provision such as 4.02 pertained. Can there be any doubt that such a course would constitute the indirect application of low-cost borrowed funds in violation of a 4.02-type restriction? The reason that there appears so clearly to be the case is, again, that when the transaction has been completed, all that has occurred, from a realistic point of view, is the substitution of new (cheaper) debt for the higher interest debentures. *The borrowing has no economic purpose or reality other than that substitution.*
>
> While it is impossible to generalize perfectly concerning all of the situations in which the "indirectly" language of Section 4.02 might find application, *it does appear that the inclusion of that phrase is intended to reach situations in which the underlying economic reality of the completed transaction is the functional equivalent of a direct loan for purposes of effectuating a redemption and nothing more.* [emphasis in original]

30 The Plaintiffs submit that this analysis is applicable to the case at bar in that the underlying economic reality of the securitiziation transaction is the functional equivalent of BC Tel directly borrowing funds and applying the proceeds of the loan to the redemption of the Bonds and nothing more.

31 I have some difficulty with this submission. The evidence of the Defendant's witnesses was clear that the securitization transaction was approved by the Board of Directors of BC Tel separate and apart from the approval of the redemption of the Bonds. It was conceded that, at the time of the approval of the securitization, the possible application of the proceeds toward redemption of the Bonds was discussed but that the securitization was not approved strictly for the purpose of using the proceeds to redeem the Bonds. The evidence of the Defendant's witnesses was also undisputed that there were advantages to BC Tel in entering into the securitization transaction whether or not the proceeds were used for the redemption of the Bonds in that the transaction would have the effect of substantially reducing the capital tax paid by BC Tel and would have a positive impact on the presentation of the company's balance sheet. It was also the evidence of the Defendant's witnesses that BC Tel would have gone ahead with the securitization even if the proceeds were not available to redeem the Bonds in that there were other debts that BC Tel could have redeemed out of the proceeds of the securitization.

32 In the Dofasco case, unlike the case at bar, there was a tracing problem as to the source of the funds used to redeem the debentures. In the case at bar, there is no tracing problem; it is clear that the only monies used to redeem the Bonds were from the proceeds of the securitization transaction and, accordingly, the Plaintiffs submit that the source of the funds used to redeem the Bonds was an indirect borrowing using the facility provided by RAC. The Plaintiffs further submit that this indirect borrowing had an interest costs to the company of less than 11.35% per annum in that the interest cost to RAC was passed through to BC Tel by way of the Purchase Discount paid by BC Tel on a monthly basis which was determined by RAC's "actual pooled cost of funds allocated, on a weighted basis, to the cash proceeds relevant to the securitization transaction with BC Tel".

33 The Defendant attempted to draw a distinction between interest and the Purchase Discount payable pursuant to the terms of the Agreement in that the amount of interest paid is dependent upon the length of time that the loan is outstanding whereas the Purchase Discount is fixed for each month in advance and payable in arrears and presumably would be payable at the end of the month even if the total amount of Outstanding Cash Payments was reduced during that month and accordingly, is a discount in the sense of being a deduction from the purchase price of the receivables fixed once and for all at the time it is calculated. This reasoning appears to me to be a considerable stretching of the definition of discount in the authorities. The use of the phrase "Purchase Discount" is, in my view, a particularly inappropriate misdescription of the item. It is clearly not part of the purchase price of the Purchased Receivables and it is certainly not a discount from the purchase price of the Purchased Receivables. An analysis of the Agreement confirms that the Purchase Discount is strictly a flow through to BC Tel of the interest cost payable by RAC on borrowings made by it through the issuance of commercial paper. It is more analogous to consideration or compensation for the use of money than to a discount from the purchase price of assets. The Purchase Discount, in our case, is not described in the Agreement as a component of the purchase price of the Purchased Receivables and the obligation to pay the Purchase Discount is related in no way to the period that the Purchased Receivables are outstanding. It is clearly a mechanism

to flow through to BC Tel the interest cost to RAC of monies borrowed by it and is payable so long as there are Outstanding Cash Payments as between RAC and BC Tel.

34 It is also the submission of the Defendant that, in order for a transaction held to be an indirect borrowing, the transaction must be a sham constructed to circumvent the NFAC and must have no independent economic function, as for example in the subsidiary situation postulated by Chancellor Allen in *Shenandoah Life Insurance Co., supra.* The Defendant submits that this is not applicable to the case at bar. The securitization transaction involved a non arm's length third party which received a financial benefit out of the transaction and the transaction also had an independent economic function for BC Tel in that it resulted in cash assets for BC Tel rather than accounts receivable which cash assets could be applied by BC Tel in a number of different ways including the ability of BC Tel to apply the proceeds from the sale of the receivables to the reduction of its indebtedness and accordingly realize considerable interest savings.

35 I am not satisfied that the fact that the Purchase Discount reflects the interest costs to RAC of funds borrowed by it is necessarily determinative of whether or not the transaction represents an indirect borrowing by BC Tel. If the transaction otherwise meets the criteria for a sale, in my view, it would not be fatal to that determination that the vendor had agreed to compensate the purchaser for the cost of raising funds to complete the purchase.

36 Further, I accept the submission of the Defendant that to find that the transaction was prohibited by the NFAC as being a refunding operation by the indirect application of funds obtained through borrowings, the transaction would have to have been constructed by BC Tel, specifically and exclusively, for the purpose of redeeming the Bonds and have no independent economic function either from the perspective of BC Tel or of RAC, neither of which criteria applies to the case at bar.

37 Accordingly, I conclude that the securitization transaction did not constitute an indirect borrowing of funds having an interest cost to BC Tel of less than 11.35% per annum and is not prohibited by the NFAC.

Direct Application of Borrowed Funds

38 The issue then becomes whether the Funds received by BC Tel through the securitization transaction and applied to the redemption of the Bonds were "borrowed funds". To determine whether the securitization transaction should be characterized as a sale or as a secured loan requires an analysis of the criteria which the courts have considered in determining whether a transaction is a sale. In interpreting a contract, the court must look to the intention of the parties as expressed by the language of the contract itself. The court may also look at the factual matrix or the circumstances existing at the time the contract was entered into to determine which of two possible interpretations of the contract should be preferred. The court must also look to the substance of the transaction and not merely to the form. In *Inglefield Ltd., Re,* [1933] Ch. 1 (Eng. C.A.), Lord Hanworth, M.R. stated at page 17:

> It is old law, and plain law, that in transactions of this sort the Court must consider whether or not the documents really mask the true transaction. If they do merely mask the transaction, the Court must have regard to the true position, in substance and in fact, and for this purpose tear away the mask or cloak that has been put upon the real transaction. In *Helby v. Matthews* (1) Lord Herschell states the principle that we have to follow in the opening sentences of his speech (2):
>
> 'My lords, it is said that the substance of the transaction evidenced by the Agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the Agreement', and Lord Macnaghten and the other learned lords express the same opinion.

39 It is the function of the court to determine the real nature of the transaction by considering not only the intention of the parties as evidenced by the language of the contract but the evidence as to how the transaction in fact transpired and the conduct of the parties in the performance of the contract. Both the wording of the contract and the conduct of the parties in implementing the contract must be examined. In addition to the intention of the parties, the factors considered by the courts in determining whether a transaction constitutes a true sale are: the transfer of ownership risk and the level of recourse, the ability to identify the assets sold, the ability to calculate the purchase price and whether the return to the purchaser will be more than its initial

investment and a calculated yield on such investment. In the case of a sale of receivables, other factors to be considered are the right to retain surplus collections, a right of redemption, the responsibility for collection of the accounts receivables and the ability of the vendor to extinguish the purchaser's rights from sources other than the collection of the receivables.

Intention of the Parties

40 The wording of the Agreement throughout clearly indicates the intention of both parties that the transaction be a true sale. The Agreement is clearly crafted to use the language of a sale throughout. There are no references to a loan or to security or to payments of principal or interest on a loan. The true nature of the transaction can be determined not only by the wording of the Agreement but can also be gleaned from an examination of how the relationship in fact transpired and the conduct of the parties. Although in certain cases, clear, unequivocal conduct of the parties may negate the intention as expressed by the wording of a contract, that would not appear to be applicable to the case at bar. The court must consider various aspects of the transaction to determine whether in law the transaction ought to be regarded as a sale or as a secured borrowing. That does not impact upon the express intention of the parties as demonstrated by the wording of the Agreement which clearly contemplates a sale. In addition, in looking at the factual matrix or context in which the transaction was entered into, it was clearly the intention of BC Tel that it be a sale in order to avoid any problems with breach of the NFAC contained in the Trust Deed under which the Bonds were issued. In the case of RAC, it was clearly the intention of RAC that the transaction be a sale in order to obtain the highest rating for the commercial paper issued by RAC to the public. It accordingly appears to me that both parties could only get the full benefit of the transaction if it was a true sale. It was the intention of both BC Tel and RAC that the transaction be a true sale and the conduct of the parties does not clearly and unequivocally negate that intention. If the court should determine that, in law, the transaction must be regarded as a secured borrowing, this would be a result not intended by the parties.

Ownership Risk and Recourse

41 In any true sale transaction, there must be a transfer of ownership risk to the purchaser. In the case of the sale of accounts receivable, the risk with regard to the non-payment of the receivable must pass to the purchaser subject to whatever forms of recourse the purchaser may have against the vendor. In *Major's Furniture Mart Inc. v. Castle Credit Corp.*, 602 F.2d 538 (U.S. C.A. 3rd Cir., 1979) the U.S. Court of Appeal (Third Circuit) stated at page 545:

> In the instant case the allocation of risks heavily favours Major's claim to be considered an assignor with an interest in the collectibility of its accounts. It appears that Castle required Major's to retain all conceivable risks of uncollectibility of these accounts. It required warranties that retail account debtors, e.g. Major's customers, meet the criteria set forth by Castle, that Major's performed the credit check to verify that these criteria were satisfied, and that Major's warrant that the accounts were fully enforceable legally and were "fully and timely collectible". It also imposed an obligation to indemnify Castle out of a reserve account for losses resulting from the customer's failure to pay, or for any breach of warranty, and an obligation to repurchase any account after the customer was in default for more than 60 days. Castle only assumed the risk that the assignor itself would be unable to fulfil its obligations. *Guarantees of quality alone, or even guarantees of collectibility alone, might be consistent with a true sale, but Castle attempted to shift all risks to Major's and incur none of the risks or obligations of ownership. It strains credulity to believe that this is the type of situation...in which there may be a "true sale of accounts...although recourse exists*". When we turn to the conduct of the parties to seek support for this contention, we find instead that Castle, in fact, treated these transactions as a transfer of a security interest.

42 It was the evidence of Mr. Edward Fujisawa, the former Director of the Securitization Group of CIBC World Markets Inc. with responsibility for RAC, that in reality RAC did not bear any of the risks of uncollectibility of the Purchased Receivables because of the requirement to replace defective receivables prior to termination and ineligible or defective receivables after termination of the Agreement and because of the size of the Reserve of 5% in contrast to BC Tel's historic bad debt ratio of between 1% and 2%.

43 It appears to me that for all practical purposes the only risk of uncollectibility assumed by RAC was the possibility of an insolvency of BC Tel and accordingly, the inability to be compensated by BC Tel in the event of Purchased Receivables in

excess of the amount of the Reserve being uncollectible. Because of that possibility, however remote, RAC did assume some risk with respect to the collectibility of the Purchased Receivables.

44 The risks of ownership obviously decrease with the amount of recourse which the purchaser has, as against the vendor, in the event that the asset purchased is defective or subject to liens or encumbrances. In the case of the sale of accounts receivable, the recourse against the vendor would be with respect to uncollectibility of the accounts receivable. In the Schwarcz Article *supra*, the author states at page 621:

> The most significant factor appears to be the extent of recourse the transferee of the receivables has against the transferor. As the degree of recourse increases, the likelihood that a court will find a true sale decreases. The existence of some recourse does not by itself preclude characterization of the transaction as a true sale. If recourse is present, the issue is whether the nature of the recourse, and the true nature of the transaction, are such that the legal rights and economic consequences of the agreement bear a greater similarity to a financing transaction [that is, a secured loan] or to a sale.

45 In the case at bar, the Plaintiffs submit that, in addition to the right of RAC to have defective or ineligible receivables replaced both before and after termination, RAC is further protected by the overcollaterization provided by the Reserve in that the Reserve of 5% of the amount of Purchased Receivables is far in excess of the bad debt experience of BC Tel which was in the range of 1% to 2% during the years immediately prior to the date of the securitization transaction. The Plaintiffs refer to the evidence of Mr. Fujisawa and submit that the only risk to which RAC was exposed is the insolvency of BC Tel under the provisions of section 2.08(5) of the Agreement which provide, in effect, that RAC will not receive less than the total amount of Outstanding Cash Payments, the Purchase Discount and the Program Fee unless there is an insolvency of BC Tel. The Plaintiffs, therefore, submit that the recourse available to RAC is not a recourse for collectibility but an economic recourse which is the equivalent of a warranty to the buyer of a return of its investment plus an agreed upon yield unrelated to the collectibility of the assets. The Plaintiffs concede that a resource for collectibility is consistent with a true sale of accounts receivable but that an economic recourse which ensures a return unrelated to the collectibility of the accounts receivable is indicative of a secured loan transaction where the receivables serve simply as collateral.

46 It is the submission of the Defendant that full recourse granted to a purchaser of an asset is not inconsistent with a true sale transaction and that warranties, representations and guarantees regularly provided by vendors of assets do not detract from the characterization of the transaction as a true sale of an asset. In both British and Canadian authorities it has been held that even full recourse is not incompatible with a concept of a legal sale. In *Welsh Development Agency, infra*, the purchaser was fully protected by way of recourse to the seller. Lord Justice Ralph Gibson, although concluding that no real risk passed from the seller to the purchaser, found that the transaction was nevertheless one of sale.

47 Purchasers regularly obtain recourse against vendors by way of representations, warranties and guarantees and, in the case of a sale of accounts receivable, a warranty or guarantee that the receivables are collectible. In an article co-authored by Stephen L. Schwarcz and others entitled "Rethinking the Role of Recourse in the Sale of Financial Assets" November, 1996, The Business Lawyer, Vol. 52, p. 159, the authors state at pages 160 to 161:

> Under contract law, parties generally are free to enter into and enforce any contract that is not illegal or against public policy; there is nothing about recourse, for example, that either is illegal or in violation of public policy... There is no legal or public policy which precludes a transferor from improving the value of an asset sold by adding its own guarantee. When a financial asset represented by a check or other draft is transferred, recourse is the common, accepted and sometimes mandatory consequence of transfer. Endorsement with recourse has never been viewed as precluding the existence of a sale ....
>
> In many cases involving the sale of financial assets, a true sale determination can be made even if the buyer were to have full or partial recourse to the seller for collectibility.

48 In the case at bar, the recourse given to RAC under the Agreement is that defective or uncollectible receivables will be replaced either by the transfer of further Eligible Receivables or by cash and the structure of the transaction is such that RAC

will have recourse to such receivables or to cash to recoup the amounts advanced by it together with its cost of borrowing by way of the Purchase Discount and the agreed to Program Fee. It appears to me, however, that the effect of subsection 2.08(5) of the Agreement is that, after the termination date, if RAC determines that the Outstanding Purchased Receivables as of the termination date were less than the Required Amount, BC Tel may, as its option, either pay the difference in cash to RAC or transfer additional Eligible Receivables to RAC to ensure that as of the termination date the Outstanding Purchased Receivables equalled the Required Amount; however, if after the termination date, such Outstanding Purchased Receivables should become uncollectible to an amount in excess of the Reserve, RAC has no further recourse against BC Tel for the amount of such excess.

49 This recourse therefore appears to me to be clearly a recourse as to collectibility and not what the Plaintiffs have defined as an economic recourse which will guarantee a return on an investment regardless of the quality of the assets sold. The recourse available to RAC under the Agreement is not in all events a full recourse with respect to collectibility and is not an economic recourse in the sense of a guarantee of repayment of the Outstanding Cash Payments and a calculated yield thereon. The recourse available to RAC does not therefore preclude a determination that the securitization transaction was a sale of the Purchased Receivables.

50 The fact that RAC had a backup credit enhancement arrangement with a Swiss bank to the extent of a further 10% of the Purchased Receivables does not, in my view, impact on an analysis of the Agreement with respect to assumption of risk and recourse as between RAC and BC Tel. I regard the credit enhancement arrangement as a type of insurance taken out by RAC in the event of uncollectible Purchased Receivables exceeding the amount of the Reserve.

Right to Surplus

51 An analysis of the Agreement leads to the conclusion that RAC is entitled to receive the amount of the Outstanding Cash Payments, the Purchase Discount and a Program Fee calculated as a percentage of the Outstanding Cash Payments, indemnification for legal costs up to $50,000 and for various other costs and expenses and nothing more. To the extent that collections of the Purchased Receivables exceeded that total, the surplus remains with BC Tel. Collections of Purchased Receivables are notionally held in trust by BC Tel for RAC. The Agreement provides that, once the total amount payable to RAC under the Agreement has been paid after the termination date, RAC shall either pay BC Tel the Deferred Amount outstanding or return excess Purchased Receivables in that amount to BC Tel. RAC does not have, therefore, the right to any amount collected on the Purchased Receivables beyond the repayment of amounts advanced by it, certain payments calculated as a percentage of such amounts and specific reimbursement of certain costs and expenses. If, on termination, RAC is paid all amounts payable to it pursuant to the Agreement and collections on the Purchased Receivables exceed that amount, RAC is required to pay the surplus either in cash to BC Tel and/or to return surplus Purchased Receivables to BC Tel.

52 The Schwarcz Article, *supra*, states at page 622:

> Several courts also have considered the existence of a transferor's right to any surplus collections, once the transferee has collected its investment plus an agreed yield, as indicative of secured loan. The right of the transferee of the receivables to retain all collections of transferred receivables for its own account, even after the transferee has collected its investment plus yield, would therefore be a factor in favour of characterization of the receivables transaction as a true sale.

53 It is the submission of counsel for the Plaintiffs that the fact that such surplus is returnable to BC Tel is conclusive of the issue as to whether the securitization transaction is a loan as opposed to a sale.

54 In leading English cases, the inability of the purchaser to retain surplus has not been found to be fatal to the characterization of a transaction as a true sale. In *Inglefield Ltd., Re*, [1933] Ch. 1 (Eng. C.A.), in analyzing a financing agreement, Lord Hanworth, M.R. stated at pages 19 and 20:

> Eve J. [the judge at first instance from whom the appeal was successfully taken] found in clause 18 a factor which was consistent, to his mind, only with the transaction being one of charge, but when the clause is examined and understood it seems impossible to attribute such an effect to it. It provides that after the discount company shall have received from the hirer, or the dealer (that is George Inglefield, Ltd.), in respect of all the hire purchase Agreements comprised in the

> assignment, sums amounting in the aggregate to the purchase price paid by the discount company under the terms of the assignment, that company is to allow the dealer to retain all the subsequent installments of rent, or other monies, if any, due from the hirer, and shall account to the dealer for such sums. If then one approaches clause 18 without any prejudice, either one way or the other, it really amounts to more than that when the discount company have been paid more than they are entitled to receive under the assignment to them of the benefit of the hire purchase agreement, they will pay the excess to George Inglefield, Ltd. That is because the discount company are not entitled to retain payments in excess of those to which they were entitled under the hire purchase agreement. I cannot find from that clause any sufficient ground for treating this assignment as a charge.

55 Similarly, in *Welsh Development Agency v. Export Finance Co.* ("Export"), [1992] B.C.L.C. 148 (Eng. C.A.), the English Court of Appeal was analyzing an agreement pursuant to which funding was provided by Export Finance Co. Ltd. ("Exfinco") to Parrot Corp. Ltd. ("Parrot") which carried on the business of exporting computer discs. The agreement was somewhat complicated but provided that, when Parrot entered into a transaction to sell goods to an overseas buyer, Exfinco made a standing offer to buy such goods and Parrot would sell the goods, as Exfinco's agent, to the overseas buyer. The agreement contained a termination provision which provided that on termination Parrot would satisfy all amounts owing to Exfinco by the overseas buyers and Exfinco would then transfer all interest it had in the goods to Parrot. The financing arrangements were such that Exfinco received only an amount related to the duration of the financing made available by Exfinco. In responding to the submission of Exfinco that the agreement nevertheless constituted a true sale of the goods as between Parrot and Export, Ralph Gibson L.J. stated at page 177:

> Nevertheless, I see no answer to Exfinco's contention that they were under our law entitled to enter into the agreement in the terms therein set out; that no principle of our law is apt to deprive them of the benefit of the rights and obligations thereby created; and that the fact that the provisions of the master agreement were designed to protect Exfinco from any commercial risk on the sale of Parrot's floppy discs, and to contain any commercial profit to a sum demonstrably related to the duration of the financial provisions made available, does not alter the nature of the rights and obligations created by the master agreement.

56 Accordingly, it does not appear to me that the absence of a right in RAC to retain the surplus from the collection of accounts receivable is fatal to a determination that the securitization transaction between BC Tel and RAC was a true sale of the Purchased Receivables.

Determination of Purchase Price

57 As stated above, "Purchase Price" is not a defined term in the Agreement. Subsection 2.01(3) of the Agreement provides that, in effect, the purchase price for any Purchased Receivables will be comprised of the immediate cash payment made by RAC on the purchase of any receivables and the "Deferred Amount". The "Deferred Amount" is not defined in the Agreement. It then becomes necessary to find a provision of the Agreement which would give meaning to the term "Deferred Amount". I accept the Defendant's submission that the only provision of the Agreement which could be referred to is Subsection 2.07(2) which in effect provides that, on termination of the Agreement and the completion of the liquidation of the Purchased Receivables, one can determine what portion of the Reserve is not required to be applied to compensate RAC for uncollectible Purchased Receivables and that the unused portion of the Reserve is the Deferred Amount as referred to in the definition of purchase price. Accordingly, it appears to me that, on any given day during the term of the Agreement, if the Agreement was terminated it would be possible to calculate the purchase price for the Purchased Receivables held by RAC as of that date.

58 I am also not satisfied that fluctuations in the amount of the Purchase Discount results in an indeterminable purchase price. The Agreement clearly indicates that the Purchase Discount is not part of the purchase price of the Purchased Receivables. The Purchase Discount is defined in the Agreement as an amount calculated for each settlement period (generally one month) based upon the weighted average Outstanding Cash Payments and the adjusted cost of funds to RAC. RAC will notify BC Tel of the Purchase Discount as soon as practicable after the first day of each settlement period. It is, in my view, beyond dispute that the Purchase Discount represents the reimbursement by BC Tel to RAC of RAC's costs of borrowing the funds advanced to BC

Tel pursuant to the Agreement and does not bear any direct relationship to the amount of Outstanding Purchased Receivables or form part of the purchase price thereof.

59 Counsel for the Plaintiffs appears to take the position that, because RAC acquires Purchased Receivables with a face amount in excess of the total amount advanced by RAC to BC Tel, the Purchase Discount accordingly becomes a discount off the purchase price rather than a payment to compensate RAC for its costs of funds. I am unable to accept this submission. The amount of the Purchase Discount is clearly based upon the cost of funds to RAC and bears no relationship to the 5% spread (the "Reserve") between the face amount of the receivables purchased by RAC and the total advances made by RAC to BC Tel which is established to protect RAC against uncollectible receivables.

60 I, therefore, do not accept the submission of counsel for the Plaintiffs that the provisions of the Agreement result in a "sale in which the purchase price is unknown to the parties". A certainty of purchase price is a fundamental element of a sale transaction and in my view, the purchase price of the subject matter of the transaction between BC Tel and RAC on any given day can be determined and accordingly, the transaction does not fail to qualify as a sale by virtue of uncertainty of purchase price.

Identification of Assets

61 As a result of the inter-relationship among Outstanding Cash Payments, Purchase Discount and Reserve and the provisions of the Agreement relating to Cessation Requests and Eligible Receivables, it is acknowledged by both parties that a Particular Receivable may be a Purchased Receivable on day 1, not be a Purchased Receivable on day 2, and again be a Purchased Receivable on day 3 with the result that title to such receivable will move back and forth between BC Tel and RAC. The Plaintiffs submit that such provision is inconsistent with a true sale. They rely on certain authorities concerned with the characterization of a general assignment of book debts (a "GABD") as an absolute assignment or as a security agreement. In *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.* (1996), 27 B.L.R. (2d) 147 (S.C.C.) Cory, J. stated at p.167:

> I agree with the MNR that what the actual equity of the borrower in the book debts may be from time to time is irrelevant for the purpose of determining the legal effect of the equity of redemption. It would be absurd if a company were to fluctuate between having title and not having title to their book debts based on their ratio of debt to assets. Yet if a GABD is treated as an absolute assignment, this can be the only result, as the bank is limited to recovering the amount of the loan. Since the bank could not recover any book debts if the company had a surplus in their account, the book debts would belong to the company. When there was a deficit, some or all of the book debts would belong to the bank. Such a fluctuating state of affairs is inconsistent with the certainty required in commercial matters. I believe that the correct view is that a GABD represents a security interest with the legal title being with the lender and the equitable title remaining with the borrower. This is supported both by the jurisprudence and by the wording of the section.

62 In my view, the jurisprudence relating to the characterization of GABDs as security agreements is not determinative of the issue before this court with respect to the subject matter of the sale of receivables by BC Tel to RAC being ascertainable. In *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc.* , *supra*, Cory, J. concluded that it would be inconsistent with the purpose and intention of a GABD to find that it was an absolute assignment or sale of the book debts to the lender and would be inconsistent with the purpose of the transaction and the intention of the parties. In that case, the court was not concerned with the ascertainment of receivables but with the nature of the assignment of ascertained or ascertainable receivables in respect of which there was stated to be an "equity of redemption".

63 In the case at bar, clearly the intention of the parties as stated in the Agreement was to construct a sale transaction with title to the receivables passing to RAC, subject only to reconveyance in certain events contemplated by the Agreement. If one follows the procedure set out in the Agreement with respect to the General Trial Balance, on any particular day, it is possible to determine exactly which receivables constitute Purchased Receivables and accordingly, the subject matter of the sale of receivables by BC Tel to RAC is ascertainable on any given day. The fact that the Agreement contemplated that a particular receivable may, under certain circumstances, be reconveyed to BC Tel, does not, in my view, derogate from the fact that the original conveyance of the receivable to RAC was a true sale. Accordingly, in my view, the subject matter of the sale

of receivables from BC Tel to RAC being ascertainable on any particular day satisfies the requirement that the subject matter of the sale must be ascertainable.

Collection of Receivables

64 The effect of Article 5 of the Agreement is that BC Tel carries out all servicing and collection of the Purchased Receivables as agent for RAC and receives no fee for performing such services. RAC may not replace BC Tel as its collection agent unless there has been a default under the Agreement. The Plaintiffs submit that these provisions are a further indication that the transaction is one of secured borrowing rather than sale. In the Schwarcz Article, *supra*, the author states at page 623:

> In practice, the seller often is appointed as the collection agent initially. This is not necessarily inconsistent with sale characterization if (1) the seller as collection agent, will be acting as an agent for the purchaser pursuant to established standards, much like any other agent, (2) the seller will receive a collection agent fee that represents an arm's length fee for these services, and (3) the purchaser has the right at any time to appoint itself or another person as collection agent in place of the seller.

65 I am not satisfied that the criteria set out by Mr. Schwarcz are determinative of the nature of the transaction between BC Tel and RAC. The Agreement clearly provides that BC Tel will service and collect the Purchased Receivables as agent for RAC and sets out standards of performance. With respect to the payment of a fee, it was the evidence of Mr. Dorwart, the former Assistant Treasurer of BC Tel, that BC Tel was prepared to provide these services without a fee in view of the fact that the fee would have, in any event, been reflected in the purchase price which BC Tel would receive for the Purchased Receivables.

66 It also seems to me that there is no logical reason why the fact that RAC cannot remove BC Tel as the collector of the Purchased Receivables so long as it is complying with the Agreement should be fatal to a determination that the transaction between BC Tel and RAC was a sale transaction. For practical purposes, it would seem to me to be both logical and efficient for BC Tel to continue to collect the Purchased Receivables and deal with the debtors.

67 Accordingly, in my view, the provisions of the Agreement relating to the collection of the Purchased Receivables by BC Tel on behalf of RAC are not inconsistent with a sale transaction.

Right of Redemption

The courts have determined that, where the vendor of an asset has a right of redemption or repurchase at its option, this will be a strong factor in favour of the characterization of a receivable transaction as a secured loan rather than a true sale transaction. An essential term of a secured loan transaction is the right of the borrower, upon repayment of the debt, to require the lender to reassign to it all of the lender's interests in the assets secured to pay the debt. In the case of a true sale, the vendor has no right to require title to the assets sold to be reassigned to it. In my view, this is the ultimate test to be applied to determine whether a particular transaction should be interpreted as a secured loan or as a true sale. The Plaintiffs submit that the Agreement grants to BC Tel the right to repurchase the Purchased Receivables from RAC in the event of a "Change in Circumstances" as defined in the Purchase Agreement and that the Agreement also provides that, after the Final Collection Date, RAC has the option of paying the Deferred Amount to BC Tel or transferring Purchased Receivables in that amount back to BC Tel. It was the evidence of witnesses for both parties that the usual practice was that on termination the Deferred Amount would normally be paid by the purchaser transferring Purchased Receivables back to the vendor. The Plaintiffs also submit that if the rights of the transferee of an asset can be extinguished upon repayment to the transferee of amounts advanced by it from a source other than the realization of the assets transferred, that is indicative of the transaction being a loan and not a sale of the subject assets and point out that all amounts paid by BC Tel to RAC during the term of the Agreement were paid out of general funds and not directly traceable to the proceeds of the collection of the Purchased Receivables by BC Tel which were not segregated from BC Tel's general funds.

68 Subsection 2.07(2) of the Purchase Agreement provides in effect that after termination of the Agreement and the payment to RAC of all amounts payable to it under the Purchase Agreement, RAC may, at its option, either pay the Deferred Amount to BC Tel in case or transfer to BC Tel Purchased Receivables in a total face amount equal to the Deferred Amount. I have difficulty interpreting this as a right of redemption in favour of BC Tel. Clearly, it is at the option of RAC as to whether it

wishes to pay the Deferred Amount in cash and retain the excess Purchased Receivables or to transfer the excess Purchased Receivables back to BC Tel. The authorities cited by the Plaintiffs with respect to a right of redemption all appear to me to be situations where the assignor of the receivables was entitled at its election to redeem or repurchase the receivables upon payment of a specified amount to the assignee. In describing the fact situation in *Canada Trustco Mortgage Corp. v. Port O'Call Hotel Inc., supra*, Cory, J. stated at page 156:

> Further, all the assignments limit liability to the extent of the outstanding indebtedness. Thus, if the loan secured by the GABD was repaid by the Bank or Treasury Branch would have no further interest in the assignment. The documents themselves refer to the assignment as being a continuing collateral security for the payment of the indebtedness. The clear intention of the parties is that the assignment is given as security for the payment of a debt and upon payment of the debt the GABD is to be of no force or effect. That is to say the lending institution could not, after payment of the debt, make use of the GABD to realise upon any of the book debts of the assignor. In my view since the assignment by its terms can be redeemed by payment of the debt it cannot or at least should not be construed as an absolute assignment.

69 That is not our case. Nowhere in the Agreement is BC Tel given any right at its option to repurchase or redeem the Purchased Receivables upon payment of a specified amount of RAC. The only instance in which BC Tel has the right to repurchase the Purchased Receivables is in the event of a "Change In Circumstances" as defined in section 7.06 of the Agreement. Section 7.06 provides that, in the event of any change in law which has the effect of increasing the cost to RAC of complying with its obligation to Purchased Receivables under the Agreement or reducing the rate of return to RAC in connection therewith, BC Tel will upon demand by RAC pay to RAC such increased costs or reduction in rate of return provided that if RAC makes such a demand upon BC Tel, BC Tel may, at its option, terminate the Purchase Agreement on written notice to RAC by repurchasing the Purchased Receivables for an amount equal to the Outstanding Cash Payments, the Purchase Discount and all other amounts payable to RAC pursuant to the Agreement. This again does not appear to me to be a right of redemption or repurchase granted to BC Tel and exercisable at its option. It only becomes operative in the event of a Change of Circumstances as defined and then only upon a demand being made by RAC to reimburse it for the effect upon it of such Change of Circumstances.

70 The Plaintiffs have also made reference to the Cessation Requests provided for in the Agreement which enable BC Tel at any time to request that RAC cease purchasing receivables until such time as the amount of Purchased Receivables matches the Required Amount. Section 2.05 of the Agreement provides that BC Tel may deliver Cessation Requests from time to time in amounts in multiples of $1,000,000 up to a total aggregate amount of $75,000,000. Upon delivery of such a Cessation Request by BC Tel, RAC shall cease to purchase receivables until such time as the amount of the Outstanding Cash Payments has been reduced to the amount specified by BC Tel in the Cessation Request. It is clear from the wording of the Agreement that the exercise by BC Tel of its right to make Cessation Requests does not result in the redemption or repurchase by BC Tel of Purchased Receivables.

71 Even on the termination of the Agreement, BC Tel has no right to elect to repurchase Purchased Receivables in payment of the Deferred Amount. RAC may elect either to pay the Deferred Amount in cash or to retransfer Purchased Receivables to BC Tel. The evidence before this court was that on termination of the Purchase Agreement, RAC will continue to collect the Purchased Receivables and will pay BC Tel the Deferred Amount in cash.

72 Accordingly, I am unable to conclude that the Agreement grants to BC Tel any right of repurchase or redemption of accounts receivable at its option so as to lead to the conclusion that the securitization transaction is a secured loan transaction rather than a true sale.

73 I, therefore, conclude that none of the factors to be considered by the court in determining whether the securitization transaction in this instance was a true sale or a secured loan transaction negates the clear wording of the Agreement and the clear intention of the parties that the transaction be a true sale of receivables from BC Tel to RAC.

Oppression

74 The Plaintiffs in this action also seek relief pursuant to the oppression remedy provisions of section 241 of the *Canada Business Corporations Act*, R.S.C. (1985) c. C-44 (the "CBCA") and submit that the determination of the directors of BC Tel to effect a redemption of the Bonds through the proceeds of the securitization transaction with RAC unfairly disregarded the interests of the Plaintiffs as security holders of BC Tel. It is agreed that in order to find conduct which unfairly disregards the interest of security holders of a corporation, the Plaintiffs need not prove *male fides* on the part of the directors of the corporation and that the reasonable and legitimate expectations of security holders must be considered by the court in determining whether the oppression remedy is applicable. The concept of "reasonable and legitimate expectations" is defined by Kerans, J.A. in *Westfair Foods Ltd. v. Watt* (1991), 5 B.L.R. (2d) 160 (Alta. C.A.) at page 702 as follows:

> One deserving case is where the person to whom the profit will go has nourished that hope. The company and the shareholders entered voluntarily, not by duty or chance, into a relationship. Our guides are the rules in other contexts, such as contract law, equity and partnership law, where the courts have also considered just rules to govern voluntary relationships. In very general terms, one clear principle that emerges is that we regulate voluntary relationships by regard to the expectations raised in the mind of a party by the word or deed of the other, and which the first party ordinarily would realize it was encouraging by its words and deeds. This is what we call reasonable expectations, or expectations deserving of protection. Regard for them is a constant theme, albeit variously expressed, running through the cases on the section or its like elsewhere. I emphasize that all the words and deeds of the parties are relevant to an assessment of reasonable expectations, not necessarily only those consigned to paper, and not necessarily only those made when the relationship first arose.

75 In the case at bar, it is conceded that the prospect of a securitization transaction was not in the contemplation of BC Tel or the Bondholders at the time that the Trust Deed was entered into or at the time that the Bonds were issued. The evidence before this court, and particularly that of Ms. Shaw of Sun Life, was that the Plaintiffs purchased the Bonds on reliance in part on the NFAC contained in the Trust Deed and with the understanding that the Bonds could not be redeemed, other than for sinking fund or improvement fund purposes, through the proceeds of borrowings by BC Tel at a lower interest rate. Ms. Shaw conceded, however, that the Bonds could be redeemed from the proceeds of a sale of assets and that was understood by Sun Life at the time that the Bonds were purchased. The evidence also establishes that, although the directors of BC Tel were aware at the time that the redemption of the Bonds was approved, that there would be an adverse reaction on the part of the Bondholders and that there was a risk of the redemption being challenged by legal action, they proceeded with the redemption based on legal, tax, and accounting advice that the transaction could be legitimately treated as a sale and that any legal challenge to the transaction would, in all probability, be unsuccessful. The directors also approved the redemption on the basis that there were substantial financial advantages to the company in the reduction of interest costs and capital tax and that it was clearly in the best interests of the company, and therefore of its shareholders, to enter into the securitization transaction and apply the proceeds to the redemption of the Bonds.

76 It appears to me that, in the context of the case at bar, the reasonable and legitimate expectations of the Plaintiffs when they purchased the Bonds have been frustrated not by the action of the directors in approving the securitization transaction and the redemption of the Bonds from the proceeds of such transaction but rather by the fact that securitization developed as a financing mechanism after the Bonds were purchased and the courts to date have not interpreted such transactions as being borrowing transactions and not true sales.

77 The decision of the directors of BC Tel to take advantage of the opportunity provided by securitization also raises the issue of the directors taking action which is in the best interests of the company, and therefore of the shareholders, but may be to the disadvantage of other security holders, in this case, the Bondholders. In this regard, I would adopt the statement of Weiler, J.A. in *Pente Investment Management Ltd. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (Ont. C.A.)at page 191 as follows:

> However, acting in the best interests of the company does not necessarily mean that the directors must act in the best interests of one of the groups protected under s.234. There may be a conflict between the interests of individual groups of shareholders and the best interests of the company. *Brant Investments v. Keep Rite* (1987), 60 O.R. (2nd) 737 ... affirmed

(1991), 3 O.R. (3d) 289 at 301 ... Provided that the directors have acted honestly and reasonably, the court ought not to substitute its own business judgment for that of the Board of Directors. *Brant Investments, supra*. ...

78 I am, therefore, of the view, that the reasonable legitimate expectations of the bondholders were not frustrated by the entering into of the securitization transaction and the subsequent redemption of the bonds in that the Bondholders were aware that the Bonds could be redeemed by application of the proceeds of a sale of assets. I further find that the actions of the directors were in the best interests of the corporation and its shareholders and accordingly, although to the disadvantage of the Bondholders, do not constitute oppressive conduct giving rise to any remedy pursuant to the provisions of the CBCA.

Disposition

79 On the issues in this action I find as follows:

1. the redemption of the Bonds was not a refunding operation by BC Tel by the indirect application of borrowed funds,

2. the redemption of the Bonds was not a refunding operation by BC Tel by the direct application of borrowed funds in that the securitization transaction was in law a true sale and not a secured borrowing,

3. the redemption of the Bonds by BC Tel did not affect the result that unfairly disregarded the interests of the Bondholders so as to give rise to an oppression remedy.

80 The action is dismissed. Counsel may make brief written submissions as to the costs of this action to me on or before February 28, 2003.

Action dismissed.

End of Document

TAB 5

2014 ONSC 2781
Ontario Superior Court of Justice [Commercial List]

Romspen Investment Corp. v. 6711162 Canada Inc.

2014 CarswellOnt 5836, 2014 ONSC 2781

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

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

In the Matter of 6711162 Canada Inc., and Those Other Companies Listed in Schedule "A" Hereto

D.M. Brown J.

Heard: May 2, 2014
Judgment: May 5, 2014
Docket: CV-14-10470-00CL, CV-14-10529-00CL

Counsel: S. Jackson, for Romspen Investment Corporation
D. Magisano, S. Puddister, for Respondents / CCAA Applicants, 6711162 Canada Inc., 1794247 Ontario Inc., 1387267 Ontario Inc., 1564168 Ontario Inc., 2033387 Ontario Inc., Hugel Lofts Ltd. and Casino R.V. Resorts Inc.
A. Bouchelev, for Altaf Soorty and Zoran Cocov
E. Tingley, for Pezzack Financial Services Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency

Headnote

Bankruptcy and insolvency

Civil practice and procedure

Construction law

Debtors and creditors

D.M. Brown J.:

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

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

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

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

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

II. Evidence about the debt and secured assets

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

A. The Loan and the demands

6 By Commitment Letter dated July 18, 2011, Romspen agreed to provide 671162 Canada Inc. ("671") and 1794247 Ontario Inc. ("179") with a $16 million loan facility for a two year term expiring August 1, 2013. The Commitment Letter stated:

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

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

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

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

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

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

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

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

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

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

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

13 Yet, as will be discussed in detail shortly, on June 7, 2013, one year after the First Supplement, both Soorty and Cocov signed a forbearance letter with Romspen, including Soorty signing the letter on behalf of Casino R.V. Resorts Inc. Why, one might ask, if the First Supplement which added Casino R.V. as a Borrower was a "forgery" or was based on a lack of "understanding and appreciation", would Soorty proceed to sign, one year later, the forbearance letter on behalf of Casino? In my view the answer is clear — there is absolutely no basis to support the allegations of Soorty and Cocov that the First

Supplement was a forgery or that they did not understand it. Their allegations of forgery can only be described as falsehoods, and such falsehoods severely undermine the credibility of the *CCAA* application given that Soorty and Cocov are the principals of the CCAA Applicants.

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

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

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

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

> **4. Cost to Complete**
>
> The Lender shall not be required to make any advance unless prior to making such advance, the Lender is satisfied that the unadvanced portion of the Loan will be sufficient to pay the cost to complete the Project. Where insufficient unadvanced funds remain, the Borrower shall be required to pay such additional funds to the Lender so as to make the unadvanced portion of the Loan equal to the cost to complete.

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

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

19 Notwithstanding putting the Borrowers on notice that they had committed an act of default, in the forbearance letter

Romspen stated that it agreed to forbear from exercising its available rights and remedies with respect to the act of default and would make the current advance requested by the Borrowers under the Loan "to fund continuing construction with respect to the condominium development at 151 Marina Park Avenue, Midland, Ontario".

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

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

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

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

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

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

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

B. The businesses of the CCAA Applicants

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

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

C. The Midland Condo Project and other Midland properties

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

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

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

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

> Based on the information available, the structure was erected a few years ago by the previous owner. Due to finance and other difficulties, the construction work was (sic) for several years. This property in conjunction with the remaining undeveloped lands was sold under power of sale in 2012. Our client (the new owner) reported that the construction work was resumed in summer 2013.
>
> . . .
>
> The building as of the date of appraisal is described as about 50% completed.
>
> It is also reported that all units were completely presold by the previous owner for about $275 per sq ft. These sales were however void after liquidation of the previous owner.
>
> Per our client, that marketing of the new project will be launched in Spring 2014 and the new price range will be between $300 and $325 per sq ft. *Our client reported that many of the previous buyers show strong interest of coming back.*
>
> (emphasis added)

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

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

34 Hugel Lofts proposes to build on the two undeveloped parcels (Vindon and Victoria Streets) 68 condo apartment units, 39 senior apartment units, 66 bungalows, 62 townhouse units and 80,000 sq. ft. of commercial space. The RE Appraisal assigned an "as is" value to 151 Marina Park of $10.6 million, and a "hypothetical" "as if" value of $7.4 million to the other two parcels.

35 Romspen's internal valuations placed the worth of the Midland properties at far less than $18 million.

D. The Ramara properties

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

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

38 A November 21, 2013 "draft" appraisal prepared by Schaufler also used a $27.1 million hypothetical value.

39 Romspen's internal valuations placed the "as is" worth of the Ramara properties at far, far less than $27.1 million.

E. The Cambridge Properties

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

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

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

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

Soorty deposed elsewhere:

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

A. Proposed sources of funds

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

Harbour Mortgage

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

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

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

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

National Bank

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

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

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

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

A.2 Proposed DIP Financing

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

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

A.3 HST Refund

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

B. Costs to complete the Midland Condo Project

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

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

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

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

Sierra's letter contained no "guarantee" that it would complete construction for $5.5 million.

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

> The outstanding Construction Liens cumulative balance is $1,378,605.02 per our understanding you intend to vacate the liens. Some contractor Liens are in dispute, the true Lien value is $957,949.00. The remaining cost to complete the construction portion of the project plus consulting fees, Tarion Warranty inspections, Models suite upgrades, the all in number to complete should be $5,500,000.00 (HST is not included). Based on earlier submission/correspondence Sierra is prepared to enter into a fix price contract for the remainder of the project work.
>
> Collectively and in the interest of the Lien holders, we request the project/developer not be placed in receivership and the courts allow the project to be completed. We look forward in assisting you in completing this project.

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

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

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

C. Summary

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

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

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

58 Soorty, in his *CCAA* affidavit, deposed that save for Hugel Lofts, the other CCAA Applicants have "nominal financial

obligations", and Crowe Soberman made no mention of any other liabilities concerning the CCAA Applicants, from which I infer that such liabilities are limited to the amounts contained in the charges registered against the Ramara and Cambridge properties owned by the CCAA Applicants.

IV. Analysis

A. A summary of the applicable legal principles

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

> The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently...It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed....
>
> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver - and even contemplates, as this one does, the secured creditor seeking a court appointed receiver - and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.[1]

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

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

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

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

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

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

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

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

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

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

. . .

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

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

. . .

> Following further submissions on behalf of the debtor I advised the parties that in my view the conditions necessary for approval of an Initial *CCAA* Order were not met but that a comprehensive Receivership Order should achieve an orderly liquidation of most of the properties and protect the revenue from the operating properties with the hope of potential of some recovery of the debtor's equity.[4]

B. Applying the legal principles to the evidence

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

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

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

66 While the authorities certainly contemplate that a court may refuse to appoint a receiver where the lender's conduct has placed the debtor in default of its borrowing obligations,[5] that is not this case. When the Loan facility was amended to permit the use of funds for the continued construction of the Midland Condo Project, the Second Supplement, by incorporating Section 4 of Romspen's Standard Construction Conditions, made quite express the circumstances under which Rompsen was required to advance further funds for that project:

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

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

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

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

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

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

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

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

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

liquidation of part of their businesses — they want to carry on just as they have in the past.

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

> They have evidently been unable to manage their mutual partnership relationship. Moreover, notwithstanding their purported ability according to the Soorty affidavit to refinance their obligations to Romspen with other assets they control, they have had over 12 months to make those arrangements and have failed to do so. Had they done so, Romspen would have extended the facility.
>
> There is no plan acceptable to Romspen short of immediate payment in full. The plan proposed by the Debtors, apart from the priming of Rompsen's security and the multi-layered professional expenses associated with a CCAA, in circumstances where there is no operating business, amounts to little more than what Messrs. Soorty and Cocov have been unable to do over the past 12 months.

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

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

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

77 Finally, I would have very strong reservations about leaving the court-supervised completion of the Midland Condo Project in the hands of Soorty and Cocov, even with a Monitor present. As I mentioned earlier, their allegations that their signatures had been forged on the First Supplement were without foundation and most seriously undermined their credibility. Also, Soorty exaggerated his evidence on other important issues, such as the actual purposes of the funds being sought from

National Bank and Harbour Mortgage, as well as his initial characterization of Sierra Construction having offered a "guaranteed" cost to complete.

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

C. The scope of the appointment

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

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

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

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

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

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

V. Costs

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

86 Any responding cost submissions should include a Bill of Costs setting out the costs which that party would have claimed on a full, substantial, and partial indemnity basis. If a party opposing a cost request fails to file its own Bill of Costs, I shall take that failure into account as one factor when considering the objections made by the party to the costs sought by any other party. As Winkler J., as he then was, observed in *Risorto v. State Farm Mutual Automobile Insurance Co.*, an attack on the quantum of costs where the court did not have before it the bill of costs of the unsuccessful party "is no more than an attack in the air".[6]

Footnotes

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

2 [2010] 3 S.C.R. 379, para. 14.

3 2008 BCCA 327, para. 36.

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

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

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

Tab 6

2012 ONSC 4693
Ontario Superior Court of Justice [Commercial List]

Romspen Investment Corp. v. Edgeworth Properties

2012 CarswellOnt 10902, 2012 ONSC 4693, 222 A.C.W.S. (3d) 854

Romspen Investment Corporation, Applicant and Edgeworth Properties - Derrick View Estates Inc., 1253122 Alberta Ltd., Edgeworth Properties - Heartland Ridge Inc., Edgeworth Properties - Southpoint Landing Inc., Edgeworth Place at Spruce Ridge Drive Inc., Edgeworth Properties — Creekside Estates Inc., Edgeworth Place at Heartland Inc., Edgeworth Properties — Wolf Creek Estates Inc., Edgeworth Estates at Manning Drive Phase I Inc., Edgeworth Properties — Ellerslie Ridge Inc., 1519560 Alberta Ltd., Derrick View Estates Phase II Inc., 1330433 Alberta Ltd., Respondents

C. Campbell J.

Heard: July 31 - August 3, 2012
Judgment: August 15, 2012
Docket: CV-11-9452 CL

Counsel: David P. Preger, Lisa S. Corne, for Plaintiff, Romspen Investment Corporation
R. Shayne Kukulowicz, Kate Stigler, for Defendants, Edgeworth Properties Inc. et al.
Katherine McEachern, for Monitor
Craig A. Mills, Terrence Warner, Lesley Akst, for Receiver
Ken Lenz, for Edgeworth Mortgage Investment Corporation, Edgeworth Mortgage Investment II Corporation, Biggs Avenue Mortgage Investment Corporation and the preferred shareholders of same
John Salmas, for Canada Mortgage and Housing Corporation

Subject: Property; Corporate and Commercial; Insolvency; Securities

Headnote

Real property --- Mortgages — Priorities — Between types of creditors — Registered and unregistered or equitable mortgagee

Table of Authorities

Cases considered by *C. Campbell J.*:

Dominion Stores Ltd. v. United Trust Co. (1976), 1 R.P.R. 1, 11 N.R. 97, [1977] 2 S.C.R. 915, 71 D.L.R. (3d) 72, 1976 CarswellOnt 383, 1976 CarswellOnt 404 (S.C.C.) — considered

Holt Renfrew & Co. v. Henry Singer Ltd. (1982), 1982 CarswellAlta 92, 20 Alta. L.R. (2d) 97, 135 D.L.R. (3d) 391, 37 A.R. 90, [1982] 4 W.W.R. 481 (Alta. C.A.) — considered

RIC New Brunswick Inc. v. 1301725 Alberta Ltd. (2012), 2012 CarswellAlta 547, 2012 ABQB 213 (Alta. Master) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Land Titles Act, R.S.A. 2000, c. L-4
Generally — referred to

s. 161(a) — considered

s. 203 — considered

APPLICATION by mortgagee for declaration of priority and for orders that receiver distribute proceeds of sale to it and permitting it to proceed with judicial sale or foreclosure.

***C. Campbell J.*:**

1 Romspen Investment Corporation ("Romspen") claims as the first secured mortgage creditor of the Respondents and seeks on this motion a declaration of the validity of its security over the real property and related personal property of the Respondents and an order as against Edgeworth (in CCAA) and other claimant creditors for the listing and sale of various remaining receivership properties.

2 The relief sought is opposed on behalf of the many holders of undivided interest investors (the "UDI Investors") and various lot purchasers (the "Lot Purchasers") in many of the properties over which Romspen claims for security. The UDI Investors also oppose the distribution proposed by the Receiver to Romspen of funds from the sale of properties previously authorized by orders of this Court.

3 As the UDI Investors and the Lot Purchasers were not represented by counsel at this time, the Court requested the Receiver of Edgeworth to undertake an investigation of the claims of the UDI Investors and Lot Purchasers and obtain a report from Alberta counsel to the Receiver with respect to the priority claim of Romspen.

4 The Romspen relief is also opposed on behalf of mortgage corporation investors (MIC) in respect of receivership properties over which they claim priority of security interest.

5 The Court having heard the Romspen position delayed rendering a decision to enable representatives on behalf of UDIs and Lot Purchasers to make further submissions. Written submissions were received from Mr. Clinton Thierman who also made oral submissions as did Mr. Wei Cheng Tan and Mr. Edwin Neo. Mr. Murray Wotherspoon made oral comments.

6 Having heard submissions on behalf of all parties and for the reasons below, I am satisfied that Romspen is entitled to the relief sought and the Order with the amendments agreed on by counsel discussed in the telephone conference call of August 3 should issue.

7 Romspen seeks an order:

a) declaring that it holds valid, enforceable, first, and in certain cases second, ranking security against the real properties and related personal property owned by the Edgeworth Respondents, subject only to certain charges created by the Receivership Order, the *Bankruptcy and Insolvency Act*, and liens for unpaid municipal realty taxes collectively;

b) directing MNP Ltd. in its capacity as Court-appointed receiver to distribute to Romspen from the net sale proceeds realized from the Properties sold by the Receiver, all amounts required to repay the indebtedness of the Respondents to Romspen; and

c) permitting Romspen to proceed with judicial sale/foreclosure proceedings in Alberta in respect of the remaining Receivership Properties (other than the property owned by Edgeworth Place at Spruce Ridge Drive Inc.).

8 Romspen advanced funds to the Respondents pursuant to a Commitment Letter dated September 27, 2010, as amended by Supplement No. 1 dated October 7, 2010. Of the funds advanced by Romspen, $9.7 million was used by the Respondents to refinance and replace preexisting mortgages registered against Spruce Ridge, $1.34 million was used to refinance and replace a pre-existing mortgage on a property known as Half Moon Lake and $5.5 million was used to purchase the Blackfalds property.

9 Romspen's advances to the Respondents are secured by a mortgage and supplemental mortgage registered against title to all of the Properties, and a security interest in all of the Respondents' personal property.

10 In addition, Romspen acquired an assignment of certain loans and security held by Liberty Mortgage Services Ltd., Sterling Bridge Mortgage Corp. and Hurlburt Farms Ltd., each of which rank in priority to Romspen's blanket mortgage.

11 Based on the material before the court, I accept the analysis by Romspen that all of the existing interests and encumbrances registered against the Receivership Properties and in particular as set out in the table in the material where the interests of Rompsen, the MIC investors, the UDI investors and the Lot Purchasers rank in terms of priority i set out.

12 There are seven properties in which postponements were given by Edgeworth Mortgage Investment Corporation to Romspen's $23.5 million blanket mortgage. In respect of each of those seven Properties, Romspen's $23.5 million blanket mortgage is either in first or second position (behind one of the assigned mortgages noted above). In respect of three of the seven properties, the first-ranking mortgage which has now been assigned to Romspen was registered before the MIC mortgage was registered. Therefore, Romspen as assignee of the first ranking mortgages, ranks in priority to the MICs with respect to those three properties regardless of whether the postponements granted by the MICs are valid. Moreover, there are four Properties which are subject to a mortgage held by Edgeworth Mortgage Investment II Corporation or Biggs Avenue Corporation. However, in each case where there is a mortgage held by Edgeworth Mortgage Investment II Corporation, or Biggs Avenue Corporation, Romspen's $23.5 million blanket mortgage was registered before Edgeworth Mortgage Investment II Corporation's charge, and before Biggs Avenue Corporation's charge.

13 In response to the Edgeworth Group's application for relief pursuant to the *CCAA*, Romspen sought leave to commence foreclosure proceedings in respect of the Properties. In light of objections raised by the Respondents and certain other stakeholders, and a proposal for a compromise which would avoid seeing Romspen ensnared in a costly, full-blown *CCAA* proceeding, Romspen sought the appointment of the Receiver, as an alternative to foreclosure, provided that it was on terms which treated all mortgagees equally.

14 Although all mortgagees were initially treated equally under the Appointment Order, that changed with the Order dated December 12, 2011 lifting the stay of proceedings to permit Firm Capital Mortgage Funds Inc. to proceed with judicial sale/foreclosure proceedings to be supervised by this Court.

15 When Romspen proffered the receivership option, the Edgeworth group and its chief restructuring officer were optimistic that they would be in a position to seek approval of a sale of the Properties within 60 to 90 days which would generate sufficient proceeds to repay the third party mortgagees, including Romspen, in full. Unfortunately, that has not happened.

16 Romspen now wishes to realize upon the Judicial Sale Properties, without the associated costs of the Receiver. The expenses associated with the within the receivership are significant. For example, where a Receiver's sale of a property has been approved by the Court in Ontario, an associated recognition motion in Alberta has been necessary. The costs associated with the receivership could may well represent the difference between a partial recovery for MIC and UDI investors and lot purchasers (or some of them) and a shortfall for Romspen. In the circumstances, I conclude, there is no benefit to be gained by incurring further professional costs associated with the receivership which will only reduce potential recoveries for all of the stakeholders, including the MICs, UDIs and lot purchasers.

17 The position of the UDI investors is well set out in the written submissions by Mr. Thierman which in essence comes down to a statement of the UDI contractual position against Edgeworth which is urged was one of trust given the promise of registration of their interest which is urged should be binding on the Romspen given imputed or actual knowledge of the UDI interests.

18 Mr. Thierman in an impassioned written submission urges rejection of the Romspen position in summary as follows:

a) that UDI investors are innocent victims of the breaches of trust and contract by Edgeworth and its officers;

b) since the UDI investors were entitled to property by their investment, Edgeworth could not issue the postponements to Romspen as it did not have the legal capacity to do so.

c) Romspen must have known that Edgeworth did not have the power to grant a mortgage in favour of Romspen and should not be entitled to priority.

19 Alberta Counsel to the Receiver provided 2 opinions. The first dated July 20, 2012 and the second dated July 27, 2012 to address additional queries from various stakeholders.

20 In the opinion of Alberta Counsel to the Receiver, based on the clear wording of s. 203 of the Land Titles Act Alberta which is amply supported by case law, absent fraud considerations, a mortgagee even with actual knowledge of a prior unregistered interest will acquire title without any impact of the unregistered interest.

21 Section 203 of the *Act* provides as follows:

203(1) In this section,

(a) "interest" includes any estate or interest in land;

(b) "owner" means

(i) the owner of an interest in whose name a certificate of title has been granted,

(ii) the owner of any other registered interest in whose name the interest is registered, or

(iii) the caveator or transferee of a caveat in whose name the caveat is registered.

(2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,

(a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or

(b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.

(3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.

(4) This section is deemed to have been in force since the commencement of *The Land Titles Act*, SA 1906 c24, in place of section 135 of that Act and similar sections in successor Acts.

22 The Receiver's Alberta Counsel, Mr. Warner, adds the following:

> The question is whether there is present an additional element of dishonesty that the cases refer to such that the mortgage of Romspen should be subordinated to the UDI and Lot Purchaser interests. Simply having knowledge of the terms and conditions of the UDI and Lot Purchase agreements, and knowledge that taking the mortgage would defeat those interests, does not, by itself elevate the transaction to the level of fraud. Edgeworth *may* have acted in breach of the UDI and Lot Purchaser agreements, but we are not prepared to assume that Edgeworth fraudulently and do not do so in the context of this supplemental opinion; that is simply not for us to determine. However, even if Edgeworth did act fraudulently based upon its agreements with the UDI and Lot Purchaser holders, which we are not either suggesting or assuming, that would not lead to the conclusion that Romspen either acted fraudulently, or that its mortgage should be tainted by that alleged fraud. Absent evidence of collusion with intent to defeat the interests of the UDI and Lot Purchaser interests, we stand by our opinion that Romspen has priority.

23 Section 203 of the *Act* represents an unequivocal abrogation of the doctrine of actual notice in Alberta such that, absent fraud, an unregistered interest cannot under any circumstances trump a registered interest. This absolute rule, codified in section 203 of the *Act*, was recognized by the Supreme Court of Canada in *Dominion Stores Ltd. v. United Trust Co.*, 1976 CarswellOnt 383 (S.C.C.), in paragraph 75, where Spence J., on behalf of the majority, remarked as follows:

> ***There is no doubt that when such a term appears*** in the governing ***statute, the result is that unregistered encumbrances fail in any way to affect the title of the purchaser for value.***
>
> [emphasis added]

24 Further, in *Holt Renfrew & Co. v. Henry Singer Ltd.*, 1982 CarswellAlta 92 (Alta. C.A.), the Alberta Court of Appeal noted that the *Act* expressly provides that "knowledge of the existence of an unregistered interest shall not of itself be imputed as fraud". The Court in *Holt Renfrew & Co. v. Henry Singer Ltd.* explained that there must be some additional element or dishonesty of some sort on the part of a mortgagee, in addition to knowledge of an unregistered interest, in order to defeat or subordinate a registered charge. Knowledge that a proposed charge or transfer will defeat an unregistered interest is not sufficient to subordinate a registered transfer or mortgage.

25 In *RIC New Brunswick Inc. v. 1301725 Alberta Ltd.*, 2012 ABQB 213 (Alta. Master), the court followed the interpretation of section 203 of the *Act* set out in *Holt Renfrew*, and upheld a mortgage over lands notwithstanding the mortgagee's knowledge of an unregistered agreement by the mortgagor to convey a portion of the lands to a third party after that portion of the lands had been subdivided. Although the mortgagee had knowledge of that agreement, there was no instrument registered on title to protect the third party at the time the mortgage was granted and the funds were advanced. The mortgagee was not a party to the agreement between the mortgagor and the third party, had not been party to any misrepresentations or discussions with the third party, or agreed to discharge its mortgage over the portion of the lands to be conveyed after subdivision. Accordingly, as there was no evidence of any bad faith or any element of *mala fides* or dishonesty on the part of the mortgagee, it was entitled to rely upon the certainty of title and the protection afforded to mortgagees by the *Act*.

26 The assertion on behalf of the UDI investors is that Edgeworth breached a contractual or trust relationship and that Romspen should not be able to take advantage of that failure even though Romspen advanced some $15 million by way of its mortgage and other first mortgages on some properties it assumed.

27 There is no evidence before the court to suggest that Romspen itself committed a fraud and in the absence of that finding, Romspen is entitled to have its priority confirmed. I accept the opinion of Alberta counsel for the Receiver that there

are no facts before the court that would support an argument for Equitable Subordination of the Romspen debt even assuming the concept were to apply.

28 A further submission was made on the behalf of UDI investors by Mr. Wei Cheng Tan to the effect that Romspen should be required to first be repaid from properties that are not subject to UDI interests. A mortgage creditor such as Romspen is entitled to recover against any property over which it has priority of security.

29 There is no basis in Alberta land law to limit the Romspen recovery in the way the UDI investors propose.

The MICs

30 The MIC Investors Committee opposes the declaration of validity of the postponements granted to Romspen by the corporations referred to as MICs.

31 It is the position of the MICs that these corporations raised some $57 million from investors on the basis that those investors would receive first or second priority security on specific properties covered by the mortgages granted in favour of the MICs.

32 The issue on this motion is whether the postponements granted by one of the MICs, [EMIC. 1] to Romspen are valid and enforceable

33 The position put forward by Mr. Lenz on behalf of the MICs is that Romspen is not entitled to rely on the postponements granted by the MICs since the MICs were not parties to either of the commitment letters or either of the mortgages relied on by Romspen.

34 Basically put, it is asserted that the MICs were not parties to the main agreement and there is no evidence of any consideration flowing from the MICs to Romspen since the MICs were not owned by Edgeworth.

35 The MICs position is that there may be a lack of corporate seals in respect of some of the postponements is also relied on as is the assertion of independent shareholders in the MIC's from those of Edgeworth.

36 The response of Romspen to the position of the MIC's is twofold. The first being that the MIC in question had at least one common corporate officer with Edgeworth and their officer signed postponements on behalf of the MIC.

37 The second response of Romspen is reliance on section 161 (a) of the *Alberta Land Titles Act* which reads as follows:

"161 An instrument or caveat executed by a corporation notwithstanding anything to the contrary in the Act, statute, constating documents, charter or memorandum and articles of association incorporating the corporation, is for the purposes of this Act deemed to be sufficiently executed if the instrument or caveat is

(a) ***sealed with the corporate seal of the corporation and countersigned by at least one officer or director of the corporation***, ..."

[emphasis added]

38 On the material before the court I am prepared to conclude that the postponements granted by the MICs in favor of Romspen were executed by an authorized officer and there is no evidence to suggest that the were not sealed with the appropriate corporate seals.

Conclusion

39 For the foregoing reasons I conclude that Romspen be entitled to the declaratory relief requested and to the distribution of funds in the hands of the Receiver as set out in the motion record. The form of draft order that was settled on the teleconference call on August 3, 2012 will issue in the form signed.

40 There will be an opportunity for the UDI investors and others to claim against future sums if any that may be recovered once Romspen has been repaid its debt.

Application granted.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CASH STORE FINANCIAL SERVICES INC., THE CASH STORE INC., TCS CASH STORE INC., INSTALOANS INC., 7252331 CANADA INC., 5515433 MANITOBA INC., 1693926 ALBERTA LTD DOING BUSINESS AS "THE TITLE STORE"

APPLICANTS

Court File No. CV-14-10518-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF TRIMOR ANNUITY FOCUS LP #5

(Motion returnable May 13, 2014)

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