Court File No. CV-23-00703161-00CL
Court of Appeal File No. COA-23-CV-1129
M54665

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

B E T W E E N:

ROMSPEN INVESTMENT CORPORATION

Applicant (Respondent on Appeal)

- and -

TUNG KEE INVESTMENT CANADA LTD. and TUNG KEE INVESTMENT LIMITED PARTNERSHIP

Respondents (Appellants on Appeal)

FACTUM OF THE APPELLANTS, TUNG KEE INVESTMENT CANADA LTD. and TUNG KEE INVESTMENT LIMITED PARTNERSHIP (November 9, 2023)

November 6, 2023

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PART I - OVERVIEW[1]

1. Romspen, the first ranking secured creditor over the Appellants' property, commenced a private power of sale proceeding for the Real Property in April 2023. The Appellants challenged Romspen's sale process and put Romspen on notice that if the Real Property were to be sold for the price listed for sale by Romspen, they would pursue Romspen for damages for improvident sale.

2. In July 2023, Romspen concluded that a power of sale proceeding for the Real Property was not likely to generate the highest price for the Real Property and brought a receivership application to appoint a receiver for the express purpose of facilitating "a fair and transparent marketing and sale process for achieving a definitive disposition of the [Real] Property". In its

[1] All capitalized terms not defined in this section of the Factum, shall be given the meaning ascribed to such terms in the body of this Factum.

application record Romspen led evidence that a marketing process by a court appointed receiver would generate a better price than a private power of sale process. The Appellants agreed with Romspen's application and the need for a receiver to conduct an open and transparent sale of the Real Property.

3. Concurrent with Romspen's application for the appointment of a receiver, Sow, the fifth mortgagee, notified all parties that it had entered into a binding agreement of purchase and sale under its own private power of sale proceeding for the Real Property. Sow took the position that its sale transaction should be allowed to proceed.

4. On August 28, 2023, the Commercial Court scheduled the hearing of Romspen's receivership application for October 6, 2023.

5. Less than one week before the hearing, Romspen delivered motion materials and, for the first time, advised that: (i) it entered into the Times Agreement under its power of sale proceeding; and (ii) that it will seek a "pre-packaged" receivership that includes a simultaneous appointment of a receiver for the purpose of completing the Times Transaction and an order vesting title to the Real Property in Times free and clear of all claims, a combination of orders colloquially referred to as a "quick-flip transaction".

6. The "as is" appraised value of the Real Property is $130 to $140 million. The purchase price under the Times Agreement is approximately $60 million less than the appraisal.

7. Romspen's request for a vesting order was nothing more than a contrivance designed to protect Romspen from an improvident sale claim and is an abuse of process. No explanation was provided as to why an approval and vesting order was necessary or appropriate. Romspen has the

ability to transfer clear title to Times under its private power of sale process without a further Court order. In addition, the APS for the Times Agreement expressly contemplated clear title being transferred by way of private of power and sale without a receiver being appointed.

8. At the hearing the Appellants took the position that the Application Judge should either:

a. instruct Sow and/or Romspen to complete their sale transactions extrajudicially under their respective power of sale proceedings, thereby preserving the Appellants' improvident sale claim; or

b. appoint a receiver for the purpose of marketing and selling the Real Property in an open and transparent marketing process for the benefit of all stakeholders.

9. In the alternative, the Appellants asked the Application Judge to declare that any order made at the hearing be without prejudice to the Appellants rights to advance a claim for improvident sale against Romspen in the future.

10. The Application Judge approved the "quick flip" sale transaction and granted orders: (i) appointing (the "**Appointment Order"**) Ernst and Young Inc. as receiver and manager over the Appellants' property (the "**Receiver**"); and (ii) approving the Times Transaction and the Times Agreement, authorizing the Receiver to complete the Times Transaction and vesting title to the Real Property in Times, free and clear of encumbrances (the "**Approval and Vesting Order**" and collectively with the Appointment Order, the "**Orders**"). The Application Judge also refused to preserve the Appellants' rights to advance a claim against Romspen for improvident sale in the future.

11. The Appellants appeal the Orders and the findings of the Application Judge. The Appellants respectfully submit that they have an automatic right of appeal pursuant to Section 193(a) through (d) of the *Bankruptcy and Insolvency Act* ("***BIA***"). In the alternative, if leave is required, the Appellants submit that they have met the test for leave under Section 193(e) of the *BIA* and that the Orders should be stayed pending the resolution of the Appeal.

PART II - SUMMARY OF FACTS

Background

12. The Appellants are the owners of the property municipally known as 3143 19th Avenue, Markham, Ontario (the "**Real Property**"). The Real Property consists of three separate legally described parcels which collectively comprise approximately 66.29 acres of developable vacant land in Markham, Ontario. The Appellants were in the process of developing the Real Property as a mixed used development comprised of film studios, offices, a hotel and retail.[2]

13. In January 2019, the Appellants retained Cushman & Wakefield to provide an appraisal of the Real Property which valued the Real Property at $146 million subject to assumptions which have now been satisfied.[3] This appraisal was further updated in September 2023.

14. The development of the Real Property by the Appellants had the support of the Town of Markham, which is currently working on infrastructure in the area where the Real Property is located. In 2021, the Appellants were successful in obtaining a fast-track rezoning order from the City of Markham (the "**Zoning Order**"), the effect of which is to substantially expedite the

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[2] Cross Motion Record of the Appellants, Tung Kee Investment Canada Ltd. and Tung Kee Investment Limited Partnership, Tab 8, Affidavit of Pui Ling Lai sworn October 5, 2023 (the "**Lai Affidavit**") at para. 6.
[3] Lai Affidavit at paras. 7 to 9.

rezoning and development process. The Zoning Order significantly increases the development potential and therefore the value of the Real Property.[4]

15. There are five mortgages and one lien claim registered on title to the Real Property. The Appellants challenge the validity of the fourth mortgage and the lien and the amounts claimed as owed by a number of the mortgagees and the lien claimant.

Romspen Commences a Power of Sale Process

16. In September 2022, the Appellants defaulted on their loan with Romspen Investment Corporation ("**Romspen**"), which holds the first mortgage registered against the Real Property. Notices of Sale were served by Romspen in October 2022, and in April 2023 Romspen commenced a power of sale proceeding pursuant to its contractual right and the *Mortgages Act*.[5]

17. The listing price for the Real Property advertised by Romspen did not reflect the true market value of this property but was instead the estimated value of the amounts owing under the mortgages. Upon becoming aware of Romspen's deficient marketing process, the Appellants provided Romspen with a copy of its 2019 appraisal and the relevant information regarding the Zoning Order.[6]

18. Once Romspen commenced a power of sale process, the Appellants had two available remedies: (i) to redeem the mortgage prior to a sales agreement being entered into (and therefore

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[4] Lai Affidavit at para. 9. See also Motion Record of 2816513 Ontario Inc., Affidavit of Hunter Lam sworn November 3, 2023 at paras 14-20.
[5] Cross Motion Record of the Appellants, Tung Kee Investment Canada Ltd. and Tung Kee Investment Limited Partnership, Tab 6, Affidavit of Wesley Roitman sworn July 19, 2023 (the "**Roitman Affidavit**") at paras 22-25.
[6] Lai Affidavit at para. 11.

prevent the property from being sold); or (ii) if the property was sold improvidently, to commence an action for damages against Romspen.

19. The Appellants put Romspen on notice of its position: that (i) Romspen and its realtor were not properly marketing the Real Property and the zoning approvals, including the Zoning Order; (ii) they listed the Real Property at a price that was substantially lower than the Real Property was worth; and (iii) if the Real Property were sold at a price close to the listing price, that the Appellants intended to commence an action against Romspen for improvident sale.

Romspen's Receivership Application

20. After marketing the Real Property for sale for a period of less than four months, on July 21, 2023, Romspen commenced a proceeding for the appointment of the Receiver. In support of its receivership application, Romspen served and filed an affidavit sworn by Wesley Roitman on July 19, 2023 (the "**Roitman Affidavit**"), in which Mr. Roitman deposed that it was just and convenient to appoint a receiver to "ensure that the interests of all of the Debtors' stakeholders are considered and facilitate a fair and transparent marketing and sale process for achieving a definitive disposition of the Property." In the Roitman Affidavit, Mr. Roitman also deposed that "a Court-supervised marketing and sale process is likely to be a better approach to achieving a definitive sale than a power of sale process in which buyers may be inclined to try and leverage price reductions before waiving conditions".[7]

[7] Roitman Affidavit at paras. 32 and 44.

21. The need for a receiver to market the Real Property for sale in an open and transparent matter was the primary reason advanced by Romspen for why a receivership order was just and convenient. This evidence was never retracted by Romspen.

22. A scheduling conference for Romspen's receivership application took place on August 28, 2023 (the "**Scheduling Conference**") before the Honourable Mr. Justice Osborne (the "**Application Judge**"). The hearing of Romspen's receivership application was scheduled for October 6, 2023 (the "**Hearing Date**").

23. As the Appellants learned on October 4, 2023 from the Receiver's pre-filing report, Romspen was aware at the Scheduling Conference that it had received an offer from Times 1010 Inc. ("**Times**") to purchase the Real Property (the "**Times Transaction**") Romspen did not disclose the existence of the offer or its negotiations with Times to the other parties or the Court.

24. The Appellants did not object to the appointment of a receiver for the purpose of marketing and selling the Real Property in an open and transparent manner. Accordingly, the Appellants did not instruct counsel to prepare responding materials.

The Sow Agreement

25. The Scheduling Conference was attended by, among others, counsel for Romspen and counsel for Sow Capital Ontario Limited ("**Sow**"), which holds a fifth mortgage against the Real Property. At the scheduling conference, Sow advised the Court and the counsel in attendance that: (i) it had commenced its own power of sale process concerning the Real Property; and (ii) it had entered into an agreement of purchase and sale under power of sale for the Real Property (the "**Sow Agreement**") with 281653 Ontario Inc. ("**281**") on or around July 18, 2023 for the sale price of

$66 million.[8]

26. On August 30, 2023, counsel for Sow wrote to all stakeholders to indicate that: (i) the Sow Agreement was now firm; (ii) a deposit in the amount of $3 million was received; and (iii) the closing date was rescheduled to November 30, 2023.[9]

27. In response to Sow's communications and its determination that the Sow Agreement was grossly deficient given the true value of the Real Property, the Appellants notified Sow that if the Sow Agreement closed they intended to pursue Sow for damages for improvident sale. To facilitate either its claim for an improvident sale or its dealings with the Receiver, if appointed, the Appellants commissioned an updated appraisal from Cushman & Wakefield.

28. On September 27, 2023, the Appellants obtained an updated appraisal from Cushman & Wakefield which demonstrated that the current "as is" appraised value of the Real Property is between $130 million and $141.9 million (the "**Appellants' Appraisal**").[10]

Motion by Romspen

29. At 7:23 pm on Friday, September 29, 2023, less than one week before the Hearing Date, Romspen served motion materials wherein it, for the first time, advised the parties that:

a. on September 15, 2023, it had exercised its power of sale rights to enter into an agreement of purchase and sale with Times (collectively with amendments, the "**Times Agreement**"); and

[8] Motion Record of the Receiver, Ernst & Young Inc., Tab 2, Appendix H, Affidavit of Philip Wong, sworn September 26, 2023 (the **"Wong Affidavit"**) at paras. 6 and 21.
[9] Wong Affidavit at para. 11.
[10] Lai Affidavit at para. 23.

b. in addition to the Appointment of a Receiver it would be seeking court orders: (i) approving the Times Agreement; (ii) authorizing the Receiver to complete the Times Transaction; and (iii) vesting title in and to Times free and clear of claims and encumbrances (the "**Approval and Vesting Order**").

30. No explanation was provided in Romspen's motion record for the short service of Romspen's motion or why, having previously opined that a court-supervised process was the preferred method for obtaining the best and highest price for the Real Property, Romspen had now entered into the Times Agreement under its power of sale process.

31. The net sale price under the Times Agreement is only marginally better than the net sale price under the Sow Agreement once commissions are taken into account. Any upside offered by the Times Agreement is further eroded by the professional fees of the Receiver and its counsel.

32. The Times Agreement expressly contemplated for the Times Transaction to close by way of power of sale with Romspen providing clear title pursuant to its rights as a mortgagee selling under private power of sale. In the alternative, the Times Agreement contemplates the appointment of the Receiver whereby the delivery of the Approval and Vesting Order to provide clear title to Times is a required condition for closing.

33. At 2:00 pm on October 4, 2023, counsel to the proposed receiver indicated that they would be delivering a pre-filing report, which was subsequently delivered at 3:41 pm on the same date. The Appellants had no prior indication that a pre-filing report would be delivered. In its pre-filing report, the proposed receiver disclosed that Times delivered its offer to Romspen on August 25, 2023, three days in advance of the Scheduling Conference.

34. The pre-filing report contained a number of unsubstantiated assumptions, including the following:

a. That the purchase price under the Times Agreement will not be sufficient to pay the amounts owing to Sow under its fifth mortgage in full;[11]

b. That 281 appears to be related to the Appellants. This statement was based on bald unsubstantiated assumptions made by Romspen and was contradicted by direct affidavit evidence of Sow, 281 and the Appellants. No cross-examinations were conducted on these affidavits in advance of the hearing;

c. That 281's agreement "may be subject to a claim by Romspen's realtor for a commission". This statement was made based on representations of Romspen's realtor and without the benefit of any independent analysis by the proposed receiver;[12]

d. That Romspen's sale process was conducted in a manner that was fair to all who participated in it and considered the interests of all parties;

e. That disclosure of the sale price under the Sow Agreement "effectively sets a price ceiling" and could have a chilling effect on the market.

35. Prior to issuing its pre-filing report, the Receiver did not consult with either counsel for Sow or the Appellants despite being fully aware that both parties were the only fulcrum

[11] Cross Motion Record of the Appellants, Tung Kee Investment Canada Ltd. and Tung Kee Investment Limited Partnership, Tab 9, Report of the Proposed Receiver dated October 4, 2023 (the **"Pre-Filing Report"**) at paras. 38 and 47.
[12] The Pre-Filing Report at paras. 45 and 47.

stakeholders in this proceeding and were represented by legal counsel. The Receiver also did not consider or opine on the Appellants' appraisal which valued the property at an amount approximately $60 million higher than the sale price under the Times Agreement.

The October 6 Hearing

36. The following positions were set out by counsel in attendance at the October 6 hearing:

a. Romspen sought the Orders and opposed any reservation of rights by the Appellants;

b. Sow and 281 requested that they be permitted to conclude the Sow Agreement under power of sale. They did not oppose the appointment of a Receiver but requested that the appointment be delayed until after the completion of the transaction contemplated by the Sow Agreement; and

c. The Appellants did not oppose the appointment of a receiver for the purpose of marketing and selling the Real Property. The Appellants opposed the "quick flip" sale of the Real Property and the appointment of a Receiver for the sole purpose of closing the "quick flip" transaction. The Appellants' position was that unless the Receiver was appointed to market and sell the Real Property, the Court should dismiss Romspen's Application leaving Romspen and/or Sow to complete their power of sale transactions without judicial interference. In the alternative, the Appellants asked that any relief granted be without prejudice to their rights to pursue Romspen (or Sow) for damages for improvident sale.

Decision of the Application Judge

37. The Application Judge: (i) appointed the Receiver; (ii) granted the approval and vesting order; and (iii) barred the Appellants from advancing their improvident sale claim in the future.

PART III - ISSUES

38. There are three issues to be determined on this motion:

a. Do the Appellants have an appeal as of right from the Application Judge's decision?

b. In the alternative, should the Respondents be granted leave to appeal the Application Judge's decision?

c. If the Respondents' have a right of appeal or leave to appeal is granted, should the Orders be stayed?

PART IV - LAW & ARGUMENT

Power of Sale Process

39. On this motion, it is important that the Court first consider the nature of the power of sale process in Ontario and the remedies available to Romspen and Sow as mortgagees.

40. A mortgagee's right to conduct a power of sale process results from the contractual terms of the charge between the mortgagee and the mortgagor and operates pursuant to the provisions of the *Mortgages Act*. The right to conduct a power of sale arises upon a mortgagor's default. The conduct of the power of sale process must be compliant with the *Mortgages Act* and the mortgagee's common law duties.

41. Power of sale proceedings are extrajudicial proceedings. The jurisprudence is clear that under ordinary circumstances, a court will not restrain a mortgagee, acting in good faith and

without fraud, from the proper exercise of its power of sale, except upon tender by the mortgagor of amounts due.[13]

42. Section 22 of the *Mortgages Act* provides for opportunities for the mortgagor to cure a default or redeem the charge. A mortgagor's right to redeem exists until the mortgagee has entered into an agreement of purchase and sale to sell the property to a purchaser. Once an agreement of purchase and sale has been entered, the mortgagor loses its right to redeem.[14] Its only remaining remedy at that point is to sue damages following closing if the sale is improvident.

43. Under Sections 35 and 36 of the *Mortgages Act* as well as Section 99(1) of the *Land Titles Act*, the effect of the completion of power of sale to a *bona fide* purchaser for value is to extinguish the equities of redemption of subsequent encumbrances and to convey "good title" to the purchaser. Under such circumstances, the purchaser's claim to title cannot be impeached and is free of any potential claims.[15]

44. Upon the completion of the sale, the sales proceeds are to be distributed by the mortgagee pursuant to the priorities established in Section 27 of the *Mortgages Act.*

45. Where a debtor does not redeem the charge, the mortgagee still owes it certain obligations when selling its property. In exercising its rights under power of sale, "the mortgagee is under a duty ... to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it."[16]

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[13] *Arnold v. Bronstein*, 1970 CanLII 245 (ON SC), [1970] 1 O.R. 467-470 (C.A.); *Hornstein v. Gardena Properties Inc.*, 2006 CanLII 23142 (ON CA), [2006] 149 ACWS (3d) 876 at para 9.
[14] *Hornstein v. Gardena Properties Inc.*, 2006 CanLII 23142 (ON CA), [2006] 149 ACWS (3d) 876 at para 9.
[15] *Walcott v. De Lucia*, 2011 ONSC 649 at para 18; *Stanbarr Services Limited v. Metropolis Properties Inc.*, 2018 ONCA 244 at paras 47-48; *2544176 Ontario Inc. v. 2394762 Ontario Inc.*, 2022 ONCA 529, at para 25.
[16] *Bank of Nova Scotia v. Barnard*, 1984 CanLII 2095 (On SC), [1984] 46 OR (2d) 409

46. If the mortgagee fails to comply with its common law duty and does not take reasonable precautions in selling the property for its true market value, the mortgagor has a cause of action for improvident sale as against the mortgagee for damages in the amount of the difference between the sale price and the land's fair market value.[17]

I. The Respondents Have a Right to Appeal under Section 193(a) and (c) of the *BIA*

47. Pursuant to Section 193 of the *BIA*, where the order or decision under appeal is subject to one of the enumerated grounds provided in Sections 193(a) through 193(d), the appeal is as of right to this Court and leave is not required. All other appeals from *BIA* orders and decisions require leave of this Court pursuant to Section 193(e) of the *BIA*. [18]

48. On this motion, the Appellants submit that its appeal of the Application Judge's decision is as of right pursuant to both of Sections193(a) and 193(c) of the *BIA*.

a. The Application Judge Denied the Appellant's Future Right to Commence a Power of Sale Proceeding

49. Section 193(a) of the *BIA* provides for a right of appeal "if the point at issue involves future rights".[19] The Appellant's right to commence an improvident sale proceeding following the sale of a property clearly is a future right" and the Application Judge's decision generates an appeal as of right under Section 193(a) of the *BIA.*

50. In *Pine Tree Resorts*[20], Justice Blair summarized the jurisprudence as to what constitutes a "future right" to qualify under Section 193(a). He held that future rights" are legal rights (as

[17] *1427814 Ontario Limited v. 3697584 Canada Inc.*, 2013 ONCA 597 at paras 4-5, 23.
[18] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (***"BIA"***) s.193
[19] See *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 202
[20] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282

opposed to procedural rights or commercial advantages/disadvantages arising from the order). In addition, the legal rights must not presently exist but could be exercised in the future.[21]

51. On the facts of *Pine Tree Resorts*, the Court determined that a receivership order which caused the loss of the mortgagee's right sell a property under power sale did not constitute a future right under Section 193(a) of the *BIA.* Justice Blair noted that this was because a mortgagee's power of sale right was not a "future right" as it had already crystallized upon the mortgagor's default, which had occurred prior to the receivership order. As a result, Justice Blair found that the mortgagee's right to sell under power of sale was "at best rights presently existing but exercisable in the future" rather than a "future right" which did not presently exist. [22]

52. The rights asserted by the Appellants in the case at bar are distinguishable from the rights asserted in *Pine Tree Resorts*. Unlike *Pine Tree Resorts*, the legal right that is lost is the mortgagor's future right to commence an improvident sale action following the completion of a sale by a mortgagee. This right did not exist at the Hearing Date.

53. The Appellants specifically requested, and the Application Judge specifically rejected, the Appellants' request to preserve their rights to challenge the Times Agreement as an improvident sale.

54. In making his decision, the Application Judge not only appointed a receiver, but he effectively terminated the Sow Agreement, which if completed would preserve the Appellants' rights to sue Sow for improvident sale. He also took away the Appellants' rights to sue Romspen for improvident sale, which the Appellants had if Romspen had completed the Times Transaction

[21] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 15.
[22] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 16.

as mortgagee exercising its power of sale rights (a scenario expressly contemplated by the Times Agreement).

55. The jurisprudence is clear that the right to commence an improvident sale claim only arises once the sale has actually closed. A cause of action for improvident sale "assumes that a sale has been completed".[23] Similarly, the jurisprudence has also clearly established that a defect in the power of sale process only becomes actionable if the property is sold and the limitations period only begins to run following closing.[24]

56. In *Bending Lake*, this Court also considered whether section 193(a) applied to an approval and vesting order where the debtor argued that the order involved the future rights of affected indigenous communities. In determining that the approval and vesting order did not fall within subsection 193(a), Justice Brown noted that for an order to involve future rights, it must involve the future rights of those with an economic interest in the debtor property and there was no evidence of such an interest by the indigenous communities. Justice Brown also noted that to the extent the approval and vesting order affects the rights of those with an economic interest in the Debtor, it affects the present, existing rights of the Debtor's creditors and shareholders, not their future rights.[25]

57. Unlike the facts in *Bending Lake*, the parties opposing the approval and vesting order, being the Appellants and Sow clearly had an economic interest in the Real Property and the sale proceeds. It was clear from the evidence on the motion that the prior ranking mortgagees, and

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[23] *CIBC Mortgages Inc. v. Derlago*, 2018 ONSC 5949 at para 28; *Muhammad v. 2156555 Ontario Inc.*, 2017 ONSC 7226 at para 52.
[24] *Ruffolo v. Toronto-Dominion Bank*, 2019 ONSC 4333 at para 56; *Ramadhin v. New Venture Group Inc.*, 2018 ONCA 6 at para 5.
[25] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 17.

Romspen in particular, were fully secured and would not suffer a loss if the approval and vesting order was not granted and Sow completed the sale to 281 under power of sale.

b. The Property Involved in this Appeal Exceeds $10,000

58. Section 193(c) of the BIA states that there is an automatic right of appeal "where the property involved in the appeal exceeds in value ten thousand dollars". [26]

59. The Appellants recognize that recent jurisprudence of this Court has identified a narrower right of appeal than the strict text of Section 193(c). Yet, even under this narrower interpretation, this Court has recognized that the right to appeal under Section 193(c) exists in certain cases.[27]

60. In *Bending Lake*, Justice Brown summarized the applicable jurisprudence interpreting Section 193(c). He held that the appropriate approach to interpreting this section was an approach "which is alive to and satisfies the need of modern, "real-time" insolvency litigation".[28] In considering its approach in this case, this Court should note that the urgencies that exist in most "real time" insolvency cases do not exist presently since the Orders concern the sale of vacant parcels of land, Romspen (the moving creditor) is well-secured, and not one, but two power of sale transactions had gone firm with meaningful deposits and were already close to completion. There would be no change in circumstances of any of the mortgagees had either of the power of sale transactions were completed extrajudicially. The Appellants were the only party whose rights were directly impacted by the orders of the Application Judge and who will suffer a substantial economic loss as a consequence.

[26] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (***"BIA"***) s.193

[27] See *inter alia* *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 202; *Comfort Capital Inc. Yeretsian*, 2019 ONCA 1017; *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185; *Crate Marines Sales Ltd., Re*, 2016 ONCA 140; and *Menzies Lawyers Professional Corporation v. Morton*, 2015 ONCA 553

[28] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 53.

61. *Bending Lake* established three limitations of the scope of the right of appeal under Section 193(c). Specifically, a right of appeal does not apply to:

a. orders that are procedural in nature;

b. orders that do not bring into play the value of the debtor's property;

c. orders that do not result in a loss;[29]

62. None of these limitations are applicable in this case.

63. The Application Judge's order was not procedural in nature. In *Bending Lake*, the Court held that Section 193(c) did not apply to orders concerning the conduct of a sale process by a trustee or receiver.[30] However, in this case, the sales process was conducted by Romspen under power of sale without judicial supervision or participation of the Appellants or any other stakeholders. The proposed receiver (without consulting with all of the relevant stakeholders and without meaningful time for their response) merely endorsed it, relying solely on Romspen's evidence. It is apparent from the pre-filing report that the proposed Receiver did not conduct any independent due diligence.

64. These Orders are substantive and not procedural in nature since they effectively: (i) disclaimed the Sow Agreement despite Sow exercising its legitimate power of sale rights; and (ii) immunized Romspen from an improvident sale claim for its own power of sale transaction (which was not required because the Times APS expressly contemplated the completion of the Times Transaction by way of private power of sale).

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[29] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 53.
[30] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 54.

65. The Orders also bring the value of the debtor's property in play since the Application Judge's Orders fully disposed of all issues concerning the value of the Appellants' property. The decision in the case at bar is distinguishable from *Pine Tree* where it was held that the Receivership Order "simply appoints an officer to preserve and monetize those assets"[31] or in *Bending Lake* where the approval and vesting order was described as "marking the final step in the Receiver's monetization" of the Debtor's assets. [32]

66. Finally, there is substantial evidence that the Motion's Judge Order may have the effect of causing a loss to the Appellants. *Bending Lake* notes that the question of loss is fact-specific and the Debtor "must do more than make a bald allegation of improvident sale" by demonstrating there was "some basis in the evidentiary record considered by the motion judge…that the Approval and Vesting Order resulted in a loss of more than $10,000".[33]

67. The requirement of evidence of loss is satisfied in this case for the following reasons:

a. the Appellants produced two appraisals on the motion which demonstrated that Romspen had not marketed the property correctly and that its sales price was far too low given the existence of the Zoning Order and other supports provided by the City of Markham;

b. the appraised value of the property was approximately $60 million higher than the sale price under the Times Agreement;

c. the Appellants' appraisals were not considered in the pre-filing report or considered by the Application Judge in his decision;

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[31] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 17.
[32] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 60.
[33] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 64.

d. 281 has filed evidence on this motion confirming the enhanced value of the Real Property resulting from the Zoning Order; and

e. the sale price under the Times Transaction or the Sow Transaction was sufficient to pay out the legitimate claims of the mortgagees in full, leaving the Appellants as the only stakeholders to suffer a substantial loss.

II. If Necessary, the Appellants Should be Granted Leave to Appeal

The Test for Leave

68. Section 193(e) of the *BIA* allows the Appellants to seek leave to commence their appeal where the decision/order in question is not covered by one of enumerated automatic rights of appeal.[34]

69. The factors to be considered on an application for leave to appeal are as follows:

a. Whether the appeal raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address;

b. whether the appealed point raised is of significance to the action itself;

c. whether the appeal is *prima facie* meritorious, or on the other hand, whether it is frivolous; and

d. whether the appeal would unduly hinder the progress of the proceedings[35]

[34] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (**"*BIA*"**) s.193
[35] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 29; *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697 at para 3; Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited, 2012 ONCA 569 at para 47.

70. These factors are not a stringent test and the weighing of the factors depends on the circumstances of the case. The two most prominent factors are: issues of significance to the bankruptcy practice and the existence of arguable grounds of appeal.[36]

a. This Appeal Raises Issues of General Importance to Bankruptcy Law:

71. This appeal raises an important general issue to the practice, namely it concerns the principles governing the use of the "quick flip" remedy (also known as a "pre-pack") in insolvency law and the appropriate test to be applied to evaluate these transactions.

72. A "quick flip" order is "not the usual transaction"[37] approved by the Court. It is an extraordinary measure whereby a receiver or trustee is appointed (usually on a highly urgent basis with minimal opportunity for other stakeholders to respond) over a debtor's property and the Court immediately approves the sale of that property by the Receiver in reliance on a pre-existing sales process that was not conducted under court supervision by the Court-officer (but which it has recommended).[38]

73. Based on the Appellants' review of the jurisprudence concerning "quick-flip" orders it appears that this Court has never directly addressed the issue of when a "quick flip" order is an appropriate use of a Court's discretion under the *BIA* or the principles that should govern the Court's decision in making this determination.

74. The sole appellate level decision discussing the appropriate principals concerning a "quick flip" order is the Alberta's Court of Appeal's decision in *Athabasca Workforce*[39] which involves

[36] *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited*, 2012 ONCA 569 at para 48.
[37] *Tool-Plas Systems Inc. (Re)*, 2008 CanLII 54791 (ON SC), 48 CBR (5th) 91 at para 15.
[38] *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 at para 33.
[39] *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.*, 2021 ABCA 66.

facts substantially different than the ones at bar. In that case, the property at issue was an in-use bitumen production plant and the risk of environmental damage was a key consideration by the Court.[40] This case involves vacant land with no environmental concerns where the only prejudice identified by the Court is accrual of interest.

75. There is significant need in the general insolvency practice for certainty from this Court as to the circumstances under which a "quick flip" is appropriate and whether there are any additional criteria beyond the *Soundair* principles to be considered.

76. In *Menzies Lawyers*, an appeal concerning the appropriateness of denying a charging order and a salvage order in a bankruptcy, Justice Lauwers of this Court granted leave stating that "there is a need for this court to consider afresh the principles…and the discretionary factors that would lead a Court to deny a charging order. It would also be helpful to the practice to identify the circumstances in which a salvage lien is properly obtained and the discretionary factors that would lead a Court to deny a salvage lien." [41]

77. Based on the Appellants' review of the jurisprudence, "quick flips" have generally only been used in circumstances involving (a) active businesses; (b) where there is an immediate risk of business failure that would impact other stakeholders such as customers and employees; and (c) where an approval and vesting order was the most appropriate way of conveying title to the debtor's property free and clear of all claims.[42]

[40] *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.*, 2021 ABCA 66 at paras 4, 19 and 22.
[41] *Menzies Lawyers Professional Corporation v. Morton*, 2015 ONCA 553 at para 28.
[42] See, *inter alia*, *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 297 (ON SC), [2007] 27 CBR (5th) 1; *Tool-Plas Systems Inc. (Re)*, 2008 CanLII 54791 (ON SC), 48 CBR (5th) 91; *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009; and *Bank of Montreal v. Ingenious Packaging Group ULC*, Endorsement of J. McEwen (ON SC) dated July 24, 2018, Deloitte Insolvency Receivership Documents Website

78. None of these elements are present in the case at bar. There is no active business as the Real Property is vacant land. In addition, there is no risk to any other stakeholders such as employees, customers or the environment if the order is not granted. Romspen, as well the other mortgagees will be paid out regardless of whether the "quick-flip" is granted. The only parties that are prejudiced by the "quick flip" not granted, namely Sow and the Appellants, oppose the "quick-flip".

79. Finally, a key distinction between this case and the usual "quick flip" circumstances, is that unlike those cases an approval and vesting order is not necessary to pass clear title to the purchaser. If the Real Property is sold to Times under power of sale, it will acquire clear title pursuant to Section 35 and 36 of the *Mortgages Act* and Section 99(1) of *Land Titles Act*.[43] At the hearing of the motion, Sow advised that it was content to have the proceeds paid into Court before any priority claims between its mortgage and the lien claimant are determined.

80. The only stakeholder who benefits from the Times Agreement proceeding by way of an approval and vesting order as opposed to a power of sale proceeding is Romspen who, by virtue of the Application Judge's Orders and findings, is now immunized from an improvident sale claim by the Appellants.

81. In addition, there is a lack of clarity as to whether "quick-flips" have additional requirements for approval beyond the traditional *Soundair* principals. In *Elleway*, Justice Morawetz held that while the Court is "still to consider *Soundair* principles", there are two

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[43] *Walcott v. De Lucia*, 2011 ONSC 649 at para 18; *Stanbarr Services Limited v. Metropolis Properties Inc.*, 2018 ONCA 244 at paras 47-48.
See also *Mortgages Act*, RSO 1990, c M.40 ss. 35-36; and *Land Titles Act*, RSO 1990, c L.5 s. 99(1).

additional requirements for a Court to consider in determining whether a "quick flip sale" is to be granted:

a. whether an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and

b. whether the delay of the transaction will erode the realization of the security of the creditor in sole economic interest[44]

82. The Appellants' raised these two criteria from *Elleway* at the hearing and argued that neither were met under the circumstances. In his Reasons, the Application Judge referred to the *Elleway* decision but did not appear to consider whether these specific requirements were met. It is important for this Court to opine on the weight to be given to the requirements identified in *Elleway* on a motion for approval of a "quick-flip" and whether the failure by a judge to consider them constitutes a mistake in law.

b. The Appeal is Prima Facie Meritorious and Not Frivolous

83. There are clear genuine factual and legal errors in the Application Judge's decision that require appellate intervention.

84. The Appellants appeal is not frivolous and has significant merit. The Appellants' submit that the Application Judge incorrectly identified the issue at the hearing as "which Transaction ought to be approved", the Times Transaction or the 281 Transaction. His Honour was not being

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[44] *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009 at para 33.

asked by 281 or Sow to approve the Sow Transaction and neither Sow nor 281 brought a motion for an approval and vesting order.

85. The Appellants also submit that the Application Judge failed to properly consider the issue of whether the appointment of a receiver and an approval and vesting order were appropriate when Romspen could transfer clear title to the Real Property to Times under power of sale.

86. The court has the power to appoint a receiver where it is "just or convenient to do so". In *Freure Village*, Justice Blair stated that 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**." [emphasis added][45]

87. The appointment of a receiver for the sole purpose of completing the Times Transaction entered into under Romspen's power of sale proceeding was not just and convenient. There was no evidence before the Court that Romspen could not complete the Times Transaction under its power of sale proceeding and transfer clear title to Times (in fact the Times Agreement specifically contemplated such a scenario). The necessity for the appointment of the receiver was further negated by the fact that another purchaser was ready and willing to purchase the Real Property under power of sale pursuant to a binding agreement of purchase and sale which included payment of a $3 million deposit.

88. Furthermore, the Application Judge erred in denying the Appellants the ability to preserve their rights to advance a claim for an improvident sale against Romspen in the future. In making

[45] *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC), [1996] 40 CBR (3d) 374.

this determination His Honour held as follows:

> "I accept the submission of Romspen that such a condition or term is antithetical to the basis upon which the sale transaction is approved in the first place. The purchaser in the Times Transaction wants, and in my view is entitled to, a vesting order confirming that title is free and clear. The other stakeholders equally desire this, in order that purchasers are properly incentivized to offer maximum value and favourable terms."[46]

89. The Appellants' reservation of rights to sue Romspen does not impact the clear title transferred to Times pursuant to either a power of sale or a vesting order . The Appellants' claim for improvident realization is limited to a claim against Romspen only and has no impact on the purchaser. [47]

90. The Appellants submit that the Application Judge made several material errors in his decision including the following:

a. failing to consider whether it was appropriate to grant the requested relief on short notice without adequate time for the Appellants (or other opposed parties) to adequately respond;

b. finding that the sale process followed by Romspen was fair and reasonable despite Romspen having filed uncontradicted evidence that "a court-supervised marketing

[46] Cross Motion Record of the Appellants, Tung Kee Investment Canada Ltd. and Tung Kee Investment Limited Partnership, Tab 3, Endorsement of Justice Osborne dated October 19, 2023 at para 87.
[47] For an example of an alternative approach that the Application Judge could have taken see *Laurentian Bank of Canada v. World Vinters Corp.*, 2002 CanLII 49605 (ON SC), [2002] 35 CBR (4th) 144.

and sale process is likely to be a better approach to achieving a definitive sale than a power of sale process";

c. failing to consider or give any or adequate weight to the Appellants' appraisals or comment on the Receiver's failure to consider them;

d. ,is applying the test relating to "quick flip" sale transactions and failing to consider whether there were any additional requirements beyond the *Soundair* Principles;

e. finding that there was prejudice to the first four mortgagees if the "quick flip" is not approved when it clear that either Sow or the Appellants were the only fulcrum stakeholders who could suffer a loss;

f. finding that the test for a "quick flip" transaction as set out in *Elleway* was met because "there may well be erosion of realization by further delay, with the professional costs and the very significant interest that continues to accrue on all of the mortgages.";

g. erroneously relying on the proposed Receiver's pre-filing report in its assessment of prejudice;

h. concluding that a vesting order was appropriate in the circumstances where: (i) Romspen had been marketing the Real Property for sale through a real estate agent under power of sale; (ii) Romspen had served an Application Record in August 2023 returnable October 10, 2023 for the appointment of a receiver on the basis that a court-supervised sale process was a better approach for marketing and selling the Property; (iii) while the application was pending, Romspen entered into the

Times Agreement under power of sale with Times; (iv) Romspen had the ability under the *Mortgages Act* (Ontario) to transfer title to the Property free and clear of all claims; and (v) the Times Agreement permitted power of sale and the request for a vesting order was nothing more than a contrivance designed to protect Romspen from an improvident sale claim and was an abuse of process; and

i. failing to allow the Appellants to preserve their future claim for an improvident sale.

91. This is not a case where the Appellants are simply pursuing an appeal as a delay tactic to avoid a sale. The Appellants are prepared to have the Real Property sold either in a court supervised receivership process or by Romspen or Sow under power of sale where the Appellants' improvident sale claims are preserved.

c. The Appeal Would Not Unduly Hinder the Progress of the Proceedings

92. Granting leave to appeal would not have any material hindrance on the progress of the Receivership Proceeding.

93. Romspen has not led any evidence that Times will not extend its closing date past November 15, 2023. Any alleged urgency, was manufactured by Romspen by its own conduct and failure to engage with the Appellants and Sow in an open and transparent manner.

94. In any event, 281 has led affidavit evidence that "it is ready, willing and able to complete the [Sow Agreement]" and that Sow has confirmed that they will close the Agreement if the Appeal is successful. Sow has been advised by the Appellants that they will commence a claim for an

improvident sale if the Sow Agreement is completed and Sow is prepared to close in the face of that risk.

95. This means that Romspen and the other non-Sow secured creditors will be fully paid in either scenario on this appeal given the purchase price of the Sow Agreement. As a result, there is no prejudice if the "quick-flip" order is delayed.

III. **The Automatic Stay Should Not be Cancelled by this Court**

96. Pursuant to Section 195 of the *BIA*, if the Appellants have a right of appeal or if leave is granted to pursue their appeal, there will be an automatic stay of the Application Judge's Orders.[48]

97. In considering whether the automatic stay should be cancelled, the Court will principally consider two factors:

a. the merits of the appeal; and

b. the relative prejudice to the parties.[49]

98. For the reasons outlined herein, the Appellants' appeal has significant merit.

99. In terms of prejudice to both sides, the difference is very significant. If the stay is cancelled, the Times Agreement will be completed at an improvident price and the Appellants will lose their right to commence an improvident sale action concerning a sales process they believe is grossly deficient and will cost them millions of dollars.

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[48] BIA s. 195.
[49] *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185 at para 11.

100. By contrast, Romspen will be fully paid out even if the Times Agreement ultimately does not proceed. There is no risk to its security.

101. The balance of convenience clearly favours maintaining the status quo while this appeal is heard by the Court.

PART V. RELIEF REQUESTED

102. The Appellants respectfully requests that this Court grant an order in accordance with paragraphs 1-6 of its Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: November 6, 2023

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SCHEDULE "A"

1. *Arnold v. Bronstein*, 1970 CanLII 245 (ON SC), [1971] 1 O.R. 467-470 (C.A.)
2. *Hornstein v. Gardena Properties Inc.*, 2006 CanLII 23142 (ON CA), [2006] 149 ACWS (3d) 876
3. *Walcott v. De Lucia*, 2011 ONSC 649
4. *Stanbarr Services Limited v. Metropolis Properties Inc.*, 2018 ONCA 244
5. *2544176 Ontario Inc. v. 2394762 Ontario Inc.*, 2022 ONCA 529
6. *Bank of Nova Scotia v. Barnard*, 1984 CanLII 2095 (On SC), [1984] 46 OR (2d) 409
7. *1427814 Ontario Limited v. 3697584 Canada Inc.*, 2013 ONCA 597
8. *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 202
9. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282
10. *CIBC Mortgages Inc. v. Derlago*, 2018 ONSC 5949
11. *Muhammad v. 2156555 Ontario Inc.*, 2017 ONSC 7226
12. *Ruffolo v. Toronto-Dominion Bank*, 2019 ONSC 4333
13. *Ramadhin v. New Venture Group Inc.*, 2018 ONCA 6
14. *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225
15. *Comfort Capital Inc. Yeretsian*, 2019 ONCA 1017
16. *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185
17. *Crate Marines Sales Ltd., Re*, 2016 ONCA 140
18. *Menzies Lawyers Professional Corporation v. Morton*, 2015 ONCA 553
19. *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697
20. *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited*, 2012 ONCA 569
21. *Tool-Plas Systems Inc. (Re)*, 2008 CanLII 54791 (ON SC), 48 CBR (5th) 91

22. *Elleway Acquisitions Limited v. 4358376 Canada Inc.*, 2013 ONSC 7009

23. *Athabasca Workforce Solutions Inc. v. Greenfire Oil & Gas Ltd.*, 2021 ABCA 66

24. *Textron Financial Canada Limited v. Beta Limitee/Beta Brands Limited*, 2007 CanLII 297 (ON SC), [2007] 27 CBR (5th) 1

25. *Bank of Montreal v. Ingenious Packaging Group ULC*, Endorsement of J. McEwen (ON SC) dated July 24, 2018, Deloitte Insolvency Receivership Documents Website

26. *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC), [1996] 40 CBR (3d) 374

27. *Laurentian Bank of Canada v. World Vinters Corp.*, 2002 CanLII 49605 (ON SC), [2002] 35 CBR (4th) 144

SCHEDULE "B"

***Mortgages Act*, RSO 1990, c M.40– Sections 22, 27, 35, 36**

Relief before action

22 (1) Despite any agreement to the contrary, where default has occurred in making any payment of principal or interest due under a mortgage or in the observance of any covenant in a mortgage and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,

(a) at any time before sale under the mortgage; or

(b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,

the mortgagor may perform such covenant or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.

Statement of arrears, expenses, etc.

(2) The mortgagor may, by a notice in writing, require the mortgagee to furnish the mortgagor with a statement in writing,

(a) of the amount of the principal or interest with respect to which the mortgagor is in default; or

(b) of the nature of the default or the non-observance of the covenant,

and of the amount of any expenses necessarily incurred by the mortgagee.

Idem

(3) The mortgagee shall answer a notice given under subsection (2) within fifteen days after receiving it, and, if without reasonable excuse the mortgagee fails so to do or if the answer is incomplete or incorrect, any rights that the mortgagee may have to enforce the mortgage shall be suspended until the mortgagee has complied with subsection (2). R.S.O. 1990, c. M.40, s. 22.

Application of purchase money

27 The money arising from the sale shall be applied by the person receiving the same as follows:

Firstly, in payment of all the expenses incident to the sale or incurred in any attempted sale;

Secondly, in discharge of all interest and costs then due in respect of the mortgage under which the sale was made;

Thirdly, in discharge of all the principal money then due in respect of the mortgage;

Fourthly, in payment of the amounts due to the subsequent encumbrancers according to their priorities;

Fifthly, in payment to the tenants of the mortgagor of the rent deposits paid under section 106 of the *Residential Tenancies Act, 2006* where the rent deposit was not applied in payment for the last rent period,

and the residue shall be paid to the mortgagor. R.S.O. 1990, c. M.40, s. 27; 1991, c. 6, s. 1; 1997, c. 24, s. 215 (1); 2006, c. 17, s. 252 (1).

Statutory declarations conclusive

35 Subject to the *Land Titles Act* and except where an order is made under section 39, a document that contains all of the following is conclusive evidence of compliance with this Part and, where applicable, with Part II, and is sufficient to give a good title to the purchaser:

1. A statutory declaration by the mortgagee or the mortgagee's solicitor or agent as to default.
2. A statutory declaration proving service, including production of the original or a notarial copy of the post office receipt of registration, if any.
3. A statutory declaration by the mortgagee or the mortgagee's solicitor that the sale complies with this Part and, where applicable, with Part II. 1998, c. 18, Sched. E, s. 183.

Impeachment of title

36 Where a notice has been given in professed compliance with this Part and, where applicable, with Part II, the title of the purchaser is not liable to be impeached on the ground that the provisions of this Part or, where applicable, Part II respecting default and the provisions of this Part respecting notice, have not been complied with, but any person damnified thereby has a remedy against the person exercising the power of sale. R.S.O. 1990, c. M.40, s. 36.

***Land Titles Act*, RSO 1990, c L.5 - Section 99**

Remedy of owner of charge with power of sale

99 (1) Subject to the *Mortgages Act* the registered owner of a registered charge that contains a power of sale, upon registering the evidence specified by the Director of Titles, may sell and transfer the interest in the land or any part thereof that is the subject of the charge in accordance with the terms of the power in the same manner as if the registered owner of the registered charge were the registered owner of the land to the extent of such interest therein. R.S.O. 1990, c. L.5, s. 99 (1); 1998, c. 18, Sched. E, s. 137 (1).

Compliance with *Mortgages Act*

(1.1) The evidence specified by the Director of Titles under subsection (1) is conclusive evidence of compliance with Part III of the *Mortgages Act* and, where applicable, with Part II of that Act and, upon registration of a transfer under that subsection, is sufficient to give a good title to the purchaser. 1998, c. 18, Sched. E, s. 137 (2).

Effect of sale by chargee

(2) Upon the registration of a transfer under subsection (1) and upon satisfactory evidence being produced, the land registrar may delete from the register the entry of an instrument or writ appearing to rank subsequent to the charge under which the land is sold, and thereupon the interest of every person claiming under such subsequent instrument or writ ceases to affect the land. R.S.O. 1990, c. L.5, s. 99 (2).

Dealings with registered charge

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3 - Sections 193(a) and (c) and (e) and 195**

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- **(a)** if the point at issue involves future rights;
- **(b)** if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- **(c)** if the property involved in the appeal exceeds in value ten thousand dollars;
- **(d)** from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- **(e)** in any other case by leave of a judge of the Court of Appeal.

- R.S., 1985, c. B-3, s. 193
- 1992, c. 27, s. 68

Appeal to Supreme Court

194 The decision of the Court of Appeal on any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is granted by that Court.

- R.S., c. B-3, s. 164
- R.S., c. 44(1st Supp.), s. 10

Stay of proceedings on filing of appeal

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

ROMSPEN INVESTMENT CORPORATION
Applicant (Respondent)

-and-

TUNG KEE INVESTMENT CANADA LTD. et. al.
Respondents (Appellants)

Court of Appeal File No. COA-23-CV-1129
Court File No. CV-23-00703161-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE APPELLANTS, TUNG KEE INVESTMENT CANADA LTD. and TUNG KEE INVESTMENT LIMITED PARTNERSHIP

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