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

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C.B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF 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 ROMSPEN INVESTMENT CORPORATION

(Receiver's Motion for Directions Before a Single Judge of the Court of Appeal returnable November 9, 2023)

November 4, 2023

DICKINSON WRIGHT LLP
Barristers & Solicitors
199 Bay Street, Suite 2200,
Commerce Court Postal Station
Toronto, Ontario M5L 1G4

DAVID PREGER (36870L)
Email: dpreger@dickinsonwright.com
Tel: 416-646-4606

LISA S. CORNE (27974M)
Email: lcorne@dickinsonwright.com
Tel: (416) 646-4608

DAVID SEIFER (77474F)
Email: dseifer@dickinsonwright.com
Tel: 416-646-6867

Lawyers for the Applicant and Respondent on Appeal, Romspen Investment Corporation

TO: **SERVICE LIST**

TABLE OF CONTENTS

PAGE

PART I - OVERVIEW

1. Romspen Investment Corporation ("**Romspen**"), the first-ranking secured creditor in this insolvency proceeding, supports the receiver's motion to ensure that a Court-approved sale of real property, which is the subject of these proposed appeals, closes as scheduled on November 15, 2023. If completed as scheduled, the transaction will result in substantially all of the secured creditors recovering their money.

2. On October 19, 2023, Justice Osborne allowed Romspen's "pre-packaged" receivership application, and granted orders pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**"): (i) appointing (the "**Appointment Order**") Ernst and Young Inc. ("**EY**") as receiver and manager (the "**Receiver**") of the Respondents (the "**Debtors**"), including the property at 3143 19th Avenue, in Markham, Ontario (the "**Property**"); and (ii) approving a transaction (the "**Times Transaction**") contemplated in an agreement of purchase and sale between Romspen and Times 1010 Inc. ("**Times**") dated September 15, 2023, as amended (the "**Times APS**"), and authorizing the Receiver to complete the Times Transaction and vest title to the Property in Times, free and clear of encumbrances (the "**Approval and Vesting Order**" and collectively with the Appointment Order, the "**Orders**").

3. The practical issue at play is whether two notices of appeal filed by the Debtors and 2816513 Ontario Inc. ("**281**"), respectively, stand in the way of the Receiver completing the Times Transaction as scheduled, in circumstances where there is no assurance that Times is willing to extend the closing date beyond November 15, 2023.

4. Romspen agrees with the Receiver that there is no automatic right to appeal the Orders. Moreover, there is no basis for leave to appeal to be granted: (a) the proposed

appeals are not of general importance to the bankruptcy/insolvency practice or to the administration of justice as a whole; (b) the proposed appeals are not p*rima facie* meritorious; and (c) a stay arising from the granting of leave would unduly hinder the progress of these proceedings.

5. Finally, if the Orders are stayed, then the balance of convenience dictates that the stay should be cancelled to permit the Receiver to complete the Times Transaction, as scheduled. Staying the Orders would risk losing the Times Transaction and have a chilling effect on the market for the Property.

PART II - FACTS

A. Background

i. The Debtors and the Property

6. Tung Kee Investment Canada Ltd. ("**TKIC**") holds title to the Property for the benefit of Tung Kee Investment Limited Partnership ("**TKIL**").[1]

7. The Property consists of three, separate, legally described parcels which, collectively, comprise approximately 66.29 acres of developable vacant land at the southeast corner of 19th Avenue and Woodbine Avenue East, approximately 1 kilometre east of Highway 404, in the City of Markham.[2]

---

[1] *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911 at para 1 (the "***Reasons***").
[2] *Reasons* at para 2.

ii. Romspen's Loan and Security

8. Romspen advanced a secured loan (the "**Loan**") of $30M to the Debtors, with interest at the rate of 9.4% per annum, and a maturity date of January 1, 2023.[3]

9. Romspen's security includes a first-ranking mortgage over the Property and a security interest over all of the Debtors' personal property. Romspen's mortgage and security documents contain contractual rights to appoint a receiver upon default.[4]

10. As of July 6, 2023, the amount owing under the Loan was $32,628,671.54.[5] Interest accrues at a *per diem* rate of $8,359.84.

iii. Other Secured Creditors

11. The Property is subject to four subordinate mortgages behind Romspen's mortgage. The overall amount currently owing to all of the mortgagees is approximately $70.32M and monthly interest of approximately $709,000 is accruing thereon.[6]

12. There is also a construction lien registered against the Property for $4,653,028.11 for the supply of project management and architectural services.[7]

iv. Default Under Romspen's Loan

13. The Loan has been in financial default under the since September 1, 2022.[8]

[3] *Reasons* at para 15.
[4] *Reasons* at para 16.
[5] *Reasons* at para 15.
[6] *Reasons* at paras 17 and 60.
[7] *Reasons* at para 18.
[8] *Reasons* at para 15.

14. On October 7, 2022, Romspen made demand for payment and issued a notice of intention to enforce security pursuant to Section 244 of the BIA. The Debtors failed to repay the amount owing under the Loan and the cure period has long expired.[9]

v. Romspen's Sale Efforts

15. On October 25, 2022, Romspen issued a notice of sale under its mortgage.[10]

16. In April, 2023, Romspen engaged Royal LePage to list the Property for sale on MLS under power of sale, at a listing price of $69.5 million.[11]

17. Two offers were received by the initial bid deadline. Romspen accepted the higher offer, which was subject to a due diligence condition in favour of the buyer. Before the expiry of the conditional period, the buyer terminated its obligations. Thereafter, on July 15, 2023, the same buyer submitted an unconditional offer to Romspen for 75% of the price that it originally offered, which Romspen did not accept.[12]

18. On July 12, 2023, Romspen reduced the listing price to $64.5 million.[13]

19. As Justice Osborne noted, Royal LePage conducted a very thorough and extensive marketing and sale process:[14]

- The Property was listed for sale on MLS for more than 162 days, and exposed to a wide audience of land developers, and commercial brokers.
- physical signs at the Property;

[9] *Reasons* at para 20.
[10] *Reasons* at para 21.
[11] *Reasons* at para 53.
[12] *Reasons* at para 53.
[13] *Reasons* at para 54.
[14] *Reasons* at paras 53 and 55; see also Affidavit of Wesley Roitman sworn September 29, 2023 at para 8 ("**Second Roitman Affidavit**"), Appendix F to First Report of the Receiver dated October 31, 2023 ("**First Report**"), Motion Record of the Moving Party, Receiver ("**MR**"), p. 835.

- advertising on the realtors' business websites and through marketing brochures, as well as advertising on over 100 other websites. Statistics from realtor.ca, the largest online search engine in Canada, reflect that the Property was viewed 6309 times on 32 sites;
- proactive email announcements by Royal LePage to subscribers that included over 1000 cooperating and regional brokers and 201 land developers in Ontario. Of those recipients, 540 brokers and 70 land developers opened the email; and
- advertising specifically to the Mandarin speaking and Asian market in Canada.

vi. Romspen's Pre-Packaged Receivership Application

20. Although the Property continued to be listed for sale by Romspen under power of sale, given the economic climate of high interest rates and real estate market illiquidity, Romspen believed that a Court-supervised marketing and sale process would likely 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.[15] Thus, on July 21, 2023, Romspen commenced its application to appoint the Receiver.

21. On September 15, 2023, Romspen entered into the Times APS in the context of Romspen's pending receivership application.[16] The purchase price under the Times APS is higher than the listing price of $64.5 million. It is also higher than the values determined by Romspen's appraiser and the appraisers engaged by the fifth mortgagee SOW Capital Ontario Limited ("**SOW**").[17]

22. On September 29, 2023, Times waived conditions and went firm, subject only to the Appointment Order and Approval and Vesting Order being granted, and the Times

[15] Affidavit of Wesley Roitman sworn July 19, 2023 at para 32 ("**First Roitman Affidavit**"), Appendix F to First Report, MR, p. 111
[16] *Reasons* at para 3; Second Roitman Affidavit at para 4, Appendix F to the First Report, MR, p. 834.
[17] *Reasons* at para 3.

Transaction being completed on November 15, 2023.[18] A deposit of $3 million is being held in trust by the Receiver as security for Times' obligation to close.

23. Immediately upon waiver of conditions, Romspen served its motion for approval of the Times APS for hearing together with its application to appoint the Receiver.

vii. The Debtors' Prior Efforts to Refinance or Sell the Property

24. The Debtors, with SOW's assistance, had been attempting to sell or refinance the Property since at least 2021. The Debtors' evidence was that SOW's principal, Philip Wong ("**Wong**"), was a "business partner" of the Debtors. Wong was involved in both assisting the Debtors with municipal zoning applications and communicating with potential buyers. The Debtors say that "on or around June, 2023, the Respondents and Mr. Wong had a falling out. The Respondents have not had any business or personal dealings with Mr. Wong or Sow since then."[19]

25. In April, 2023, the Debtors notified Romspen that they were on the verge of accepting an offer to purchase the Property from Lee Li Holdings Inc. ("**Lee Li**") for an amount which, in retrospect, was less than the prices payable under the Times APS, the 281 APS (defined below), and below the values estimated by Romspen's and SOW's appraisers. For reasons that were never explained, no agreement of purchase and sale with Lee Li materialized.[20] The Debtors' willingness to sell the Property to Lee Li for less than the price payable under the Times APS did not reconcile with their argument before Justice Osborne that the price payable under the Times APS was improvident and that a further marketing and sales process by Receiver should be conducted.

---

[18] Second Roitman Affidavit at para 14, Appendix F to the First Report, MR, p. 837.
[19] *Reasons* at paras 24 and 72.
[20] Exhibit 55, First Roitman Affidavit, Appendix E to the First Report, MR, p. 788; *Reasons* at para 67c.

viii. SOW Capital's Power of Sale

26. SOW, as fifth mortgagee, issued its own notice of sale on May 17, 2023, and entered into an agreement of purchase and sale with 281 dated July 18, 2023, as amended (the "**281 APS**"). The closing date under the 281 APS was extended on several occasions, ultimately to November 30, 2023.[21]

27. On September 26, 2023, SOW served a motion in the within receivership proceeding for an order delaying the appointment of EY as receiver until November 30, 2023, or a reasonable time thereafter, to permit SOW to complete the 281 APS.[22]

28. As Justice Osborne noted, the process leading to the 281 APS did not include many of the hallmarks of a typical power of sale process with attendant marketing and sale features. 281 is related to Lee Li. The purchase price under the 281 APS was lower than the purchase price under the Times APS. The Times APS is scheduled to close 15 days sooner than the 281 APS was scheduled to close. The closing date under the 281 APS was extended twice, without explanation, raising valid concerns about the execution risk associated with the closing of the 281 APS.[23]

B. The Parties' Respective Positions at the Hearing on October 6, 2023

29. The positions advanced by the parties before Justice Osborne were as follows:

Party	Involvement	Position
TKIC and TKIL	Debtors	Consented to the Appointment Order. Objected to the Times Transaction by relying on an appraisal appended to an affidavit of the Debtors' representative sworn the day prior to the hearing.
Romspen	First mortgagee	That the Orders should be granted.

[21] *Reasons* at paras 27 and 69.
[22] *Reasons* at para 5.
[23] *Reasons* at paras 66-70.

Party	Involvement	Position
Amber Mortgage Investment Corporation	Second mortgagee	Supported the relief sought by Romspen.
2149602 Ontario Inc., Frank Pa and Stephen Tung	Third and fourth mortgagees	Supported the relief sought by Romspen.
SOW	Fifth mortgagee	Opposed relief sought by Romspen. Moved for an order authorizing it to complete the 281 APS.
281	Purchaser under 281 APS	Supported the relief sought by SOW.
DX Strategies Inc.	Construction lienclaimant	No position that is material to this motion.
Times	Buyer under the Times APS.	Supported the relief sought by Romspen.

C. Justice Osborne's Reasons for Granting the Orders

30. Justice Osborne considered the factors applicable to appointing a receiver under section 243 of the *BIA* and held that those factors were easily satisfied on the record.[24]

31. His Honour dismissed SOW's motion to delay the Receiver's appointment.[25]

32. Justice Osborne considered and dismissed the Debtors' request to direct the Receiver to embark upon a fresh marketing and sales process. In doing so, His Honour considered the legal framework applicable to "quick flip" transactions.[26] Applying this framework, he found that it was neither necessary nor appropriate for the Receiver to embark upon a fresh marketing and sales process[27] all of which were firmly anchored in the evidentiary record:

[24] *Reasons* at paras 28-33 and 38.
[25] *Reasons* at paras 42-45.
[26] *Reasons* at paras 46-49.
[27] *Reasons* at para 63.

- the Property had been openly available for approximately two years, including on MLS for over 160 days commencing on April 4, 2023;[28]
- the potential reward to be realized in a further sales process was outweighed by the risk of lower recovery for stakeholders weighed heavily in favour of a realization of proceeds as soon as possible;[29]
- the lack of a large number of offers generally and the prices under those offers as against the very significant encumbrances against the Property, with interest accruing at a rate of approximately $709,000 per month, combined with the additional professional fees reasonably expected to be incurred to conduct a sales and marketing process;[30]
- the Debtors themselves had attempted to sell or refinance the Property since January 2022 and had failed;[31]
- the sale and marketing process undertaken by Romspen was robust, thorough, extensive and fair to all stakeholders;[32]
- the Receiver in its pre-filing report did not believe that a further marketing of the Property would result in superior offers;[33] and
- the public disclosure by SOW in its motion of the purchase price under the 281 APS and the appraisals of the Property would likely have a negative effect on future realizations if a further marketing process was ordered.[34]

33. In approving the Times APS over the 281 APS, His Honour applied the *Soundair* principles. He carefully considered the terms of each agreement in assessing which transaction would maximize recoveries to the estate and reasonably concluded that the Times APS would achieve greater net recoveries. He also assessed the execution risk associated with each transaction and concluded that Times APS was less risky.[35]

---

[28] *Reasons* at paras 24 and 51; Affidavit of Philip Wong sworn September 26, 2023 ("**Wong Affidavit**") at paras 26-27, Appendix H to the First Report, MR, pp. 1237-1238; Second Roitman Affidavit at para 6, Appendix F to the First Report, MR, p. 834.
[29] *Reasons* at paras 52 and 60.
[30] Reasons at paras 60 and 84.
[31] *Reasons* at para 52.
[32] *Reasons* at para 53 and 55; Second Roitman Affidavit at para 8, Appendix F to the First Report, MR, p. 835.
[33] *Reasons* at para 58; Pre-Filing Report of the then proposed Receiver dated October 4, 2023 at para 57, Appendix A to the First Report, MR, p. 57.
[34] *Reasons* at para 61.
[35] *Reasons* at paras 47 and 64-80.

34. In regards to 281, Justice Osborne held that 281 had no standing to make submissions, but heard 281 in any event. His Honour rejected 281's argument that 281's status as owner of a beneficial interest in the Property under the 281 APS through equitable conversion precluded the relief sought by Romspen from being granted.[36]

PART III - ISSUES

35. The following issues are raised on this motion:

- Whether 281 has standing to appeal?
- Whether there is an automatic right to appeal the Orders?
- If there is no automatic right to appeal, whether leave to appeal the Orders should be granted?
- If the Orders, or any one of them, are stayed, whether the stay should be cancelled?

PART IV - LAW AND ARGUMENT

A. Issue 1: 281 Has No Standing to Appeal the Orders

36. Justice Osborne held that 281 did not have standing to challenge approval of the Times APS:[37]

> 89. As a preliminary matter, I accept the general proposition urged by counsel for Times, that unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. As stated by Farley, J. in Skyepharma PLC and Hyal Pharmaceutical Corporation, 1999 CarswellOnt 3641 at para. 8:
>
>> Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interest of the parties directly involved. See Crown Trust Co. v. Rosenberg at pp. 114-119 and British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 1977 CanLII 251 (BC SC), 26 C.B.R. (N.S.) 28 (B.C. S.C.) at pp. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor qua creditor as to its offer to purchase the assets.

[36] *Reasons* at paras 88-101.
[37] *Reasons* at paras 89-91.

> 90. 281 argues here that the prohibition expressed in Skyepharma does not apply here since 281 does not come to Court as an unsuccessful purchaser, but rather as a successful purchaser under a power of sale proceeding who is entitled at law to have its agreement approved.
>
> 91. In the circumstances, and without granting standing, I agreed to hear brief submissions from 281, and, in fairness, therefore from Times. **I remain of the view that an unsuccessful bidder has no standing to challenge a sale approval motion in respect of that sale to another purchaser. In my view, the fact that in this case the sale agreement was entered into before the Receiver was appointed, does not change that analysis.**

37. In *Skyepharma*, this Court explained that 'bitter' bidders do not have standing on sale approval motions because they have no interest in the subject-matter of the sale approval motion or a legal or proprietary right that would be adversely affected by the proposed sale approval order.[38]

38. The 281 APS contains the following provision:[39]

> **8.16** **No Registration**
>
> The Purchaser covenants and agrees with the Vendor and acknowledges that it will at no time prior to the Closing Date register or permit to be registered on title to the Property this Agreement or any notice of this Agreement. This Section shall survive any termination of this Agreement.

39. Courts have consistently held that the effect of such a provision precludes a buyer from acquiring an interest in land until a sale transaction has been completed.[40] Separately, SOW's right as fifth mortgagee was limited to an equity of redemption of the prior-ranking mortgage.[41] Having failed to redeem Romspen's mortgage prior to the expiry of the redemption period, or at all, SOW had no interest in the Property which it could transfer to 281. For both of these reasons, 281 had no interest in the Property at

---

[38] *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, 2000 CanLII 5650 (ON CA) at para 21.
[39] Agreement of Purchase and Sale dated July 18, 2023 at s. 8.16, Ex. C to Wong Affidavit, Appendix H to First Report, MR, p. 1275.
[40] *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816 at para 26; *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONCA 817 at para 15; *1357202 Ontario Ltd. v. 1326046 Ontario Limited (Green Acres)*, 2007 CanLII 34165 (ON SC) at para 16.
[41] Falconbridge on Mortgages, 5th Edition Falconbridge on Mortgages, Part IV. Persons Claiming under the Mortgagor, Transferee of the Equity of Redemption § 14:1. Mortgage of the Equity of Redemption.

the hearing before Justice Osborne. It follows that 281 did not have a right that was finally disposed of by the Approval and Vesting Order.[42] As it had no legal right or proprietary interest in the Property, it had no interest in the subject-matter of the Orders and no standing to challenge them.

B. Issue 2: There is No Automatic Right to Appeal the Orders

i. Jurisprudence Under Section 193 of the BIA

(1) General Interpretive Approach

40. Time and time again this Court has confirmed that there is no automatic right to appeal orders appointing a receiver under the BIA[43] or orders approving sales by a receiver appointed under the BIA.[44]

41. Sections 193(a) through (d) of the BIA provide for limited automatic rights of appeal. In all other cases, leave to appeal is required under section 193(e).

42. Section 193 of the BIA is narrowly construed in order to ensure that bankruptcy proceedings are administered in an efficient and expeditious manner. In *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd*. ("***Bending Lake***"), Brown J.A. expressed the gatekeeping function which the statute reposes in appellate courts as follows:[45]

> Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient

[42] *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, 2000 CanLII 5650 (ON CA) at para 24.
[43] *KingSett Mortgage Corporation v. 30 Roe Investments Corp*., 2022 ONCA 479 at para 16(ii); *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364 at para 38; *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at para 12; and *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, 2019 ONCA 588 at para 12.
[44] *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation*, 2021 ONCA 581 at para 35; *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 69; *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364 at paras 42-45.
[45] *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd*., 2016 ONCA 225 at para 47.

and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation.

43. Moreover, Brown J.A. was of the view that the appeal as of right provisions in the BIA should be read harmoniously with the *Companies' Creditors Arrangement Act*, which requires leave for all appeals from orders made under the statute. He noted that reading section 193 narrowly avoids disharmony between the two insolvency regimes.[46]

(2) Section 193(a): "Future Rights" Analysis

44. In *Bending Lake*, this Court 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 aboriginal communities. In determining that the approval and vesting order did not fall within subsection 193(a), Brown J.A. noted that for an order to involve future rights, it must involve the future rights of those with an economic interest in the debtor company – i.e. its creditors or shareholders, and there was no evidence of such an interest by the aboriginal communities. Brown J.A. further observed 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.

45. Brown J.A. explained that "future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.[47]

[46] *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at paras 47-53.
[47] *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at para 23.

46. In *Athabasca Workforce Solutions Inc. v Greenfire Oil & Gas Ltd*, the Court of Appeal of Alberta followed Bending Lake, and held that investors in a debtor company did not have an automatic right to appeal an approval and vesting order of the debtor's assets under section 193(a) where the investors argued that their future rights because the order extinguished their claim against the assets sold. The Court held that the investors were asserting present rights, not future rights, and required leave to appeal.[48]

(3) Section 193(c): Property Involved Exceeds $10,000

47. In *Bending Lake*, this Court considered whether subsection 193(c) applied to an approval and vesting order where the debtor argued that the sale price achieved by the receiver was less than what it should have been, resulting in a significant loss for the debtor's shareholders. In determining that section 193(c) did not apply, Brown, J.A. noted that the allegations of improvident sale were procedural – it was a challenge to the method by which assets were sold, and did not call into play the value of the debtor's property. Brown J.A. considered that sufficient evidence needed to be adduced to call into play the value of the debtor's property. Moreover, the mere fact that a stakeholder stood to suffer a loss, was not a sufficient bases for concluding that the sale would result in a loss exceeding $10,000.[49]

48. Brown J.A. identified from three types of order which would not qualify for an automatic right of appeal under section 193(c): (a) orders that are procedural in nature; (b) orders that do not bring into play the value of the debtor's property; and (c) orders that do not result in a loss. Brown J.A. explained that for an order to "result in a loss" in

---

[48] *Athabasca Workforce Solutions Inc. v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at paras 10-14.
[49] *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at paras 52-70.

the relevant sense, "the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor."[50]

(4) An Order Appointing a Receiver Does Not Engage Section 193(a) or (c)

49. In *KingSett Mortgage Corporation v. 30 Roe Investments Corp*. ("***Kingsett***"), Brown J.A., writing for a panel of this Court on a motion to quash, confirmed that no appeal as of right exists under sections 193(a) or (c) of the BIA from an order appointing a receiver. An order appointing a receiver merely appoints an officer of the court to preserve and monetize those assets subject to court approval. It does not engage future rights or bring into play the value of a debtor's property.[51]

50. Therefore neither the Debtors nor 281 have an automatic right to appeal Justice Osborne's appointment of the Receiver in this case.

ii. The Proposed Appeals of the Approval and Vesting Order Do Not Engage Section 193(a) or (c)

(1) The Debtors' Proposed Appeal

51. In opposing approval of the Times APS, the Debtors relied upon an appraisal appended to its witness' affidavit sworn the day prior to the hearing, which suggested that the purchase price payable by Times was $60 million less than the market value of the Property.

52. In their notice of appeal, the Debtors complain that Justice Osborne failed to consider their appraisal. Romspen submits that it is clear that Justice Osborne weighed the totality of the evidence before him, and considered that the actual results of

---

[50] *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at paras 53 and 61. See also *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.,* 2017 ONCA 611 at paras 22-23.
[51] *KingSett Mortgage Corporation v. 30 Roe Investments Corp*., 2022 ONCA 479 at paras 16(ii) and 20.

Romspen's lengthy and thorough marketing and sale efforts and the Debtors' efforts to refinance or sell the Property supported approval of the Times APS.

53. Regarding section 193(a), the Debtors' right to sue for improvident sale is a procedural *and existing* right that does not fall within the ambit of section 193(a).[52]

(2) 281's Proposed Appeal

54. Putting aside the issue of standing, Romspen submits that 281 has no automatic right to appeal the Approval Vesting Order pursuant to section 193(a) or (c) of the BIA.

55. Regarding section 193(a), 281 has no economic interest in the Debtors or in the Property. Therefore, it has no existing rights, let alone future rights, that could be affected by the Orders.[53]

56. Moreover, insofar as it has no rights in the Debtor or the Property, it cannot suffer a loss greater than $10,000 as a result of the Times Transaction being completed pursuant to the Approval and Vesting Order.[54]

C. Issue 3: Leave to Appeal Should Be Denied

i. The Test for Leave to Appeal Under Section 193(e) of the BIA

57. The test for leave to appeal under BIA s. 193(e) is well-established:[55]

- Does the proposed appeal raise an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole and therefore is one that an appellate court should consider and address?

---

[52] *Athabasca Workforce Solutions Inc. v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 at para 10.
[53] *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225 at paras 21, 25 and 27.
[54] *First National Financial GP Corporation v. Golden Dragon HO 10 Inc*., 2019 ONCA 873 at para 17.
[55] *KingSett Mortgage Corporation v. 30 Roe Investments Corp*., 2022 ONCA 479 at para 26.

- Is the proposed appeal prima facie meritorious and does it involve a point that is of significance to the proceeding?
- Would the proposed appeal unduly hinder the progress of the bankruptcy/insolvency proceedings?

ii. The Debtors Should be Denied Leave to Appeal

(1) No Issue of General Importance

58. The Debtors' appeal does not raise an issue of general importance to insolvency practice or to the administration of justice as a whole.

59. Justice Osborne's approval of the Times APS was a fact-driven decision specific to this proceeding only, and has no general importance to the insolvency practice or the administration of justice as a whole.

(2) No Merit

60. The Debtors' proposed appeal is not *prima facie* meritorious.

61. At its core, the Debtors' appeal rests on the argument that Justice Osborne erred in depriving them the chance of a theoretical upside through a further marketing and sales process. Romspen submits that Justice Osborne carefully weighed the evidence in concluding that the potential reward that might be achieved in a further marketing and sales process was outweighed by the risk of lower recovery for stakeholders. There is no basis to interfere with Justice Osborne's exercise of discretion on this point in view of the applicable standard of review.[56]

---

[56] *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 at paras 33 and 35.

(3) Hindrance of the Receivership Proceeding

62. Finally, it is incontrovertible that granting leave to appeal would hinder the progress of the receivership proceeding. There is no assurance that Times will extend the closing date past November 15, 2023. The extraordinary interest that accrues on a *per diem* basis will erode realizations. Permitting the appeal to proceed would imperil the Times Transaction and leave the estate in a state of uncertainty until the appeal has been disposed of. During that time, the Debtors must not be permitted to gamble with the mortgagees' recoveries.

iii. 281 Should be Denied Leave to Appeal

(1) No Issue of General Importance

63. 281's appeal does not raise an issue of general importance to insolvency practice or to the administration of justice as a whole.

64. At its core, 281 appeals on the basis that Justice Osborne erred by failing to conclude that 281's interest arising from the 281 APS should trump Romspen's interests, as first-ranking mortgagee of the Property. This question has no importance to bankruptcy/insolvency matters beyond the parties.

(2) No Merit

65. 281's appeal is not *prima facie* meritorious. To the contrary, the grounds of appeal rest on fundamentally incorrect principles of law.

66. There is no principled basis in which a subordinate ranking mortgagee can trump a prior ranking mortgagees enforcement rights without redeeming the prior mortgagee's mortgage. 281 can be in no better position than SOW.[57]

(3) Hindrance of Receivership Proceeding

67. For the same reasons described above, 281's proposed appeal would unduly hinder the progress of the receivership proceeding.

D. Issue 4: If a Stay Applies, the Stay Should be Cancelled

68. If this Court decides that the Appointment Order or Approval and Vesting Order are stayed under the *BIA*, then Romspen supports the Receiver's requests that the stay be cancelled so that the Receiver can proceed with completing the Times Transaction.

69. The principal factor in determining whether to lift a stay under the BIA is the relative prejudice to the parties. The applicable test is similar to the test for an injunction as set out in *RJR-MacDonald Inc. v. Canada*: [58]

- whether there is a serious issue to be appealed;
- whether compliance with the order under appeal would cause irreparable harm; and
- the balance of convenience.

70. In *Matco Capital Limited v. Interex Oil Field Services Ltd.*, the Court of Appeal of Alberta dismissed an application for a stay of court-approved receivership sale:[59]

> No one has challenged the propriety or efficacy of the receiver's sale process. In other words, there has been a broad canvassing of the

[57] *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONCA 817 at para 20.
[58] *After Eight Interiors Inc. v. Glenwood Homes Inc.*, 2006 ABCA 121 at paras 5 and 6; *Matco Capital Limited v. Interex Oil Field Services Ltd.*, 2007 ABCA 317 at para 4.
[59] *Matco Capital Limited v. Interex Oil Field Services Ltd.*, 2007 ABCA 317 at para 11.

> available market with a view to maximizing the return to all stakeholders. The process undertaken by the receiver is not impugned. Nor are its conclusions that the sale agreement represent the best offers available for the assets. In assessing the balance of convenience, I am obliged to consider the impact of a stay on the sale process and on the stakeholders as a whole. The real prospect that the sale will not proceed and that the market will be negatively affected with no assurance that there will be any other comparable offer forthcoming tips the balance of convenience in favor of the respondents. The potential harm to the entire estate from granting a stay far outweighs any benefit to the appellants.

71. Similarly, in the case at bar, a stay of the Appointment Order or the Approval and Vesting Order, and the loss of the sale to Times is likely to result in a "tainting of the market", such that the value of the Property will be diminished in the eyes of prospective purchasers, and result in harm to all of the stakeholders.

PART V - ORDER REQUESTED

72. Romspen respectfully requests an order in accordance with paragraphs 1-10 of the Receiver's Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of November, 2023.

Per: ______________________

David P. Preger

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Romspen Investment Corporation v. Tung Kee Investment Canada Ltd. et al.*, 2023 ONSC 5911

2. *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, 2000 CanLII 5650 (ON CA)

3. *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816

4. *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 ONCA 817

5. *1357202 Ontario Ltd. v. 1326046 Ontario Limited (Green Acres)*, 2007 CanLII 34165 (ON SC)

6. Falconbridge on Mortgages, 5th Edition Falconbridge on Mortgages, Part IV. Persons Claiming under the Mortgagor, Transferee of the Equity of Redemption § 14:1. Mortgage of the Equity of Redemption

7. *KingSett Mortgage Corporation v. 30 Roe Investments Corp*., 2022 ONCA 479

8. *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364

9. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282

10. *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, 2019 ONCA 588

11. *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation*, 2021 ONCA 581

12. *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225

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

14. *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.,* 2017 ONCA 611

15. *First National Financial GP Corporation v. Golden Dragon HO 10 Inc*., 2019 ONCA 873

16. *After Eight Interiors Inc. v. Glenwood Homes Inc.*, 2006 ABCA 121

17. *Matco Capital Limited v. Interex Oil Field Services Ltd.*, 2007 ABCA 317

SCHEDULE "B"
RELEVANT STATUTES

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

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.

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.

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

Leave to appeal required

133 No appeal lies without leave of the court to which the appeal is to be taken,

(a) from an order made with the consent of the parties; or

(b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs.

ROMSPEN INVESTMENT CORPORATION -and- TUNG KEE INVESTMENT CANADA LTD. et al.
Applicant Respondents

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF ROMSPEN INVESTMENT CORPORATION

DICKINSON WRIGHT LLP
Barristers & Solicitors
199 Bay Street
Suite 2200, Box 447
Commerce Court Postal Station
Toronto, ON M5L 1G4

DAVID PREGER (36870L)
Email: dpreger@dickinsonwright.com
Tel: 416-646-4606

LISA S. CORNE (27974M)
Email: lcorne@dickinsonwright.com
Tel: 416-646-4608

DAVID SEIFER (77474F)
Email: dseifer@dickinsonwright.com
Tel: 416-646-6867

Lawyers for the Applicant and Respondent on Appeal, Romspen Investment Corporation