

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ROMSPEN INVESTMENT CORPORATION

Applicant

and

TUNG KEE INVESTMENT CANADA LTD AND TUNK KEE INVESTMENT LIMITED PARTNERSHIP

Respondents

MOTION RECORD OF 2816513 ONTARIO INC.

November 3, 2023

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Lawyers for the Appellant,
2816513 Ontario Inc.

TO: SERVICE LIST

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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and

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Respondents

I N D E X

Tab	Document
1.	Notice of Motion, dated November 3, 2023
2.	Affidavit of Hunter Lam, sworn November 3, 2023

Tab 1

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ROMSPEN INVESTMENT CORPORATION

Applicant

and

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

Respondents

NOTICE OF MOTION

The moving party, 2816513 Ontario Inc. (2816513) will make a Motion to a Justice of the Court of Appeal on Thursday the 9th Day of November 2023 at 10:00 a.m. in the forenoon or as soon as the Motion can be heard.

PROPOSED METHOD OF HEARING: The motion is to be heard:

- ☐ In writing under subrule 37.12.1 (1) because it is *(insert one of on consent, unopposed or made without notice)*;
- ☐ In writing as an opposed motion under subrule 37.12.1 (4);
- ☐ In person;
- ☐ By telephone conference;
- ☒ By video conference.

THE MOTION IS FOR:

- a) Directions as to whether the Notice of Appeal delivered herein is final, pursuant to Section 193 of the *Bankruptcy and Insolvency Act* (BIA), or whether leave is required.
- b) If leave is required, then leave be granted to deliver the Notice of Appeal.
- c) If leave is required, a stay of proceedings, pending disposition of the Appeal.
- d) An Order expediting the hearing of this Appeal.
- e) Costs of this Motion.
- f) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

- 1) The proceeding herein involves the sale of a 66.29-acre parcel of land, located at 3143 19th Avenue, in the City of Markham (the subject premises).
- 2) The owner of the premises are the Respondent's, Tung Kee Investment Canada Ltd., and Tung Kee Investment Limited Partnership. There are five mortgages registered against the subject premises as follows for Order of Registration; 1) Romspen Investment Corporation; 2) Amber Mortgage INV Corp; 3) 2149602 Ontario Inc.; 4) Frank Pa and Stephen Tung; 5) Sow Capital Ontario Limited (Sow).
- 3) Romspen moved for an Order appointing a Receiver on September 29, 2023, returnable October 6, 2023 and to approve the APS that Romspen had entered to with an entity called Times 1010 Inc. (Times).
- 4) As a result of default on the 5th mortgage, Sow issued Notice of Sale May 17, 2023.
- 5) On July 18, 2023, Sow entered not an Agreement of Purchase and Sale (APS), with the moving party, 2816513. The Purchase Price was \$66,000,000.00 and contained a due diligence period for 30 days.

- 6) On August 17, 2023, a due diligence period was extended to August 28, 2023.
- 7) On August 28, 2023, 2816513 waived all conditions contained in the APS and the APS became firm and binding with the schedule closing date of November 30, 2023.
- 8) 2816513 paid all deposits totalling \$3,000,000.00 in accordance with the terms of the APS to Sow.
- 9) By emails dated July 19, 2023, and August 30, 2023, Sow advised the interested parties, including Romspen, that an APS had been entered into.
- 10) Romspen entered into an APS with Times on September 15, 2023, which only became firm and binding on September 29, 2023.
- 11) The matter was heard before the Honourable Justice Osborne, who released his Decision on October 19, 2023. The Learned Application Court Judge found 1) that 2816513 lacked standing; and 2) he approved the appointment of a Receiver and approved the offer Romspen had entered into with Times.
- 12) On October 27, 2023, 2816513 delivered a Notice of Appeal (Schedule A). On October 30, 2023, the owner, Tung Kee, delivered its notice of Appeal.
- 13) It is 2816513's position that 1) it has standing as an interested party to these proceedings and 2) leave to appeal to this Honourable Court is as of right, pursuant to Section 193 of the Bankruptcy and Insolvency Act of the BIA.
- 14) In the alternative, if leave is required, 2816513 seeks leave to appeal the Order of the Honourable Justice Osborne and a stay of proceedings, pending disposition of the appeal.
- 15) 2816513 alleges that the Learned Motions Court Judge erred in law. The Appeal is significant, because it raises issues both to the practice and to the parties. More

particularly, it raises issues as to the rights of a party, under power of sale, particularly in the context of a potential Receivership.

16) The Appeal is seeking to determine whether the APS 2816513 entered into is a valid APS, for which the Court ought not to have interfered with. The issues this Honourable Court need to determine are as more particularly set out in the Notice of Appeal, which has been delivered and annexed as Schedule “A” hereto, and in particular, whether 2816513 as purchaser, has a beneficial interest in the subject premises, at law, whether the court should have interfered with the valid Power of Sale process, and if so, under what circumstances, and whether there was a vesting out of 2816513 proprietary interest.

17) The Appeal is prima facie, has merit, and is not frivolous, or vexatious.

18) 2816513 is ready, willing, and able to complete the APS.

19) 2816513 relies upon Section 293 of the Bankruptcy and Insolvency Act, and such further and other grounds as Counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

1) Affidavit of Hunter Lam

DATED: October 31, 2023

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Lawyers for 2816513 Ontario Inc.

TO: THIS HONOURABLE COURT

AND TO: SERVICE LIST

ROMSPEN INVESTMENT CORPORATION

Applicant

-and-

TUNG KEE INVESTMENT CANADA LTD et al

Respondents

Court of Appeal File No. 23-00703161-00CL

Court File No.: CV-23-00703616-00CL

**ONTARIO
SUPERIOR COURT OF APPEAL**

NOTICE OF MOTION

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Lawyers for 2816513 Ontario Inc.

Tab 2

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ROMSPEN INVESTMENT CORPORATION

Applicant

and

TUNG KEE INVESTMENT CANADA LTD AND TUNG KEE INVESTMENT LIMITED
PARTNERSHIP

Respondents

AFFIDAVIT OF HUNTER LAM

I, **HUNTER LAM**, in the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Vice President of Business Development and Planning for Lee Li Holdings Inc. ("**Lee Li Group**") and its related and associated companies, including the moving party, 2816513 Ontario Inc. ("**2816513**") and have such of knowledge of the matters hereinafter disposed to.
2. The Lee Li Group is a conglomerate encompassing companies across multiple industries, including a subsidiary which is one of the major co-packer of beverages for Coca Cola and Happy Planet in Canada.
3. On September 29, 2023, Romspen Investment Corporation ("**Romspen**") brought a Motion, returnable October 6, 2023 for the Appointment of a Ernst & Yong, as Receiver over the assets property and undertaking of the Respondents, and approval of an Agreement of Purchase and Sale, Romspen had entered into with Times (101) Limited ("**Times**").
4. In response to the Motion Record, 2816513 filed a Responding Record, which included my Affidavit. My affidavit, sworn October 4, 2023, sets out a small snapshot of Lee Li

Group's business enterprise, and the Agreement of Purchase and Sale that had been entered into between 2816513 and Sow Capital Ontario Ltd. ("SOW") to purchase the lands which are the subject of the dispute herein (the "subject lands").

5. Briefly, the property was owed by the Respondents and had 5 mortgages on the property. The mortgages in order of registration priority are; 1) Romspen; 2) Amber Mortgage INV Corp; 3) 2140692 Ontario Inc.; 4) Frank Pa and Stephen Tung; and 5) Sow.
6. My previous affidavit disposes that the Sow mortgage fell into arrears and accordingly, Sow issued Notice of Sale on May 17, 2023. An Agreement of Purchase and Sale ("APS") was entered into between Sow, as Vendor, and 2816513, as Purchaser, on July 18, 2023. The purchase was \$66,000,000.00 and contained a due diligence period for 30 days. On August 17, 2023, the due diligence period was extended to August 28, 2023, and on August 28, 2023, 2816513 waived all conditions in the APS, and the APS became firm and binding with a scheduled closing date of November 30, 2023.
7. 2816513 paid all deposits due under the terms of the APS to Sow in the sum of \$3,000,000.00.
8. Romspen entered into its APS with Times on September 15, 2023, after 2816513's APS became firm and binding. The Times APS only became firm and binding on September 29, 2023.
9. The Motion was heard before the Honourable Justice Osborne on October 6, 2023, and he released his reasons on October 19, 2023. The Learned Motions Court Judge found 1) 2816513 lacked standing; and 2) he approved the appointment of Ernst & Yong, as Receiver and approved the APS Romspen had entered into with Times.
10. SOW supported completion of the Agreement of Purchase and Sale with 2816513.
11. As a result of a Decision of the Honourable Justice Osborne, 2816513 delivered a Notice of Appeal on October 27, 2023. Attached hereto and marked as Exhibit "A" to this my affidavit is a true copy of the notice of Appeal herein. On October 30, 2023, the Respondent, Tung Kee, delivered a Notice of Appeal as well.
12. Following the release of his Decision on October 19, 2023, the parties appeared before the Honourable Justice Osborne on October 25, 2023 to resolve some outstanding issues stemming from his Decision.

13. In addition to dealing with the Receivership Motion, the Motion brought by Sow was dismissed on consent. Attached hereto and marked as Exhibit "B" to this my affidavit is a true copy of.

Intended Use of the Lands

14. Prior to 2816513's involvement in the subject lands, Tung Kee was previously attempting to develop a portion of the subject lands as a film studio and was in discussions with the City of Markham in that regard.
15. The subject lands are located in an area that the City of Markham wishes to develop as a business hub known as Markham Innovation Exchange ("MiX"). Lee Li (by its associated and related company, 2816513) was interested in acquiring the subject lands to develop; 1) a portion of the land (Block 5) for film studio development (Tung Kee had previously been attempting to develop, but was unsuccessful; and 2) to develop an eco-system to support the film studio, such a hotel, long-term accommodations and convention centre; and 3) a potential technologically advanced logistics/warehouse (for the film studio and self-use).
16. For approximately 6 months, Lee Li had been engaged in complex with the City of Markham for the potential acquisition of land across from the subject lands for the development of a new state-of-the-art beverage facility that would fit into the MiX's vision, which would be used to manufacture beverages for Coca Cola, Happy Planet, and products other major brand across Canada and the Eastern seaboard of the United States.
17. Lee Li wants to acquire the subject lands to complete unfinished development of Tung Kee Investments. The City of Markham is in support of the development plan of a film studio/business park, as zoned.
18. In our discussions with the representative from the City of Markham, including the Mayor, they all appeared very supportive of the project and were anxious for it to proceed.
19. If the subject lands are successfully acquired by 2816513, the development of the film studio would create 500 or more full-time employment to support its business operations. The development of the co-packing beverage production facility will create 1,000 or more full-time employment to support its business operations.

20. This was viewed very positively by the City of Markham, both for revenue and employment purposes as a significant benefit to the City. The land is uniquely situated for Lee Li and was desirable for it to acquire the lands for the business purposes as stated above.
21. Attached hereto and marked as Exhibit "C" to this my affidavit is a true copy of some very preliminary drawings, showing the proposed development.
22. I therefore verily believe that 2816513 has a very significant interest in the subject lands.
23. 2816513 is ready, willing, and able to complete the APS if this Appeal is successful and this Honourable Court grants 2816513 the relief it is seeking.
24. An Agreement has been entered into with SOW that if this Appeal is successful, they will complete the APS with 2816513.
25. This affidavit was made in support of the within motion and is not made for any improper purpose.

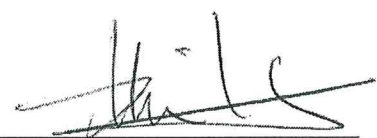
SWORN BEFORE ME at)

The City of Toronto, Province)

Of Ontario, this)

3rd day of November, 2023)


Commissioner for Taking Affidavits


HUNTER LAM

This is **Exhibit "A"** referred to
in the Affidavit of Hunter Lam

3rd Sworn before me this
Day of November, 2023



COURT OF APPEAL FOR ONTARIO
FILED / DÉPOSÉ

31-OCT-2023 S.I.

REGISTRAR / GREFFIER
COUR D'APPEL DE L'ONTARIO

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ROMSPEN INVESTMENT CORPORATION

Applicant

and

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PARTNERSHIP

Respondents

NOTICE OF APPEAL

THE APPELLANT, 2816513 Ontario Inc. ("**281**" or the "**Appellant**"), appeals to the Court of Appeal from the Orders of the Honourable Justice Osborne, dated October 19, 2023, made at Toronto, Ontario.

THE APPELLANT ASKS:

- (a) that the Learned Justice's Orders, (i) appointing Ernst & Young Inc. (the "**Receiver**") as receiver and manager over the assets and property of Tung Kee Investment Canada Ltd. ("**TKIC**") and Tung Key Investment Limited Partnership, including the property municipally known as 3134 19th Avenue, Markham, Ontario (the "**Property**"), and (ii) approving the sale transaction (the "**Times Transaction**") contemplated by an agreement of purchase and sale between Romspen Investment Corporation ("**Romspen**") and Times 1010 Inc. dated September 15, 2023, as amended by a waiver, assignment and amending agreement dated September 29, 2023 between Romspen and Times 1010 Inc., 3143 Holdings Inc., and Times 3143 Limited Partnership, authorizing the Receiver to complete the Times Transaction, and vesting in 3143 Holdings Inc. all rights, title and interests of TKIC in and to the Property, and dismissing the cross motion of Sow Capital Ontario Ltd. ("**Sow**") for an order permitting the completion of its Agreement of Purchase and

Sale between with 281, as purchaser, for the sale of the Property dated July 18, 2023, as amended by an Amending Agreement dated August 17, 2023 and a Waiver and amending Agreement dated August 28, 2023 (the “281 APS”), be set aside and an Order be made permitting the 281 APS to be completed;

- (b) for leave to hear this Appeal on an expediated basis;
- (c) for costs of this Appeal; and
- (d) for such further and other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. The Learned Justice made fundamental errors at law and made palpable and overriding errors, in:
 - (a) failing to grant 281 standing to challenge Romspen’s motion;
 - (b) failing to properly consider and apply the law relating to 281’s interest as a beneficial owner of the Property, through the doctrine of equitable conversion, once the 281 APS was executed;
 - (c) failing to consider and/or apply the law providing that the lawful power of sale process engaged in by Sow should not be interfered with, absent evidence of bad faith, collusion or fraud, which was not present;
 - (d) failing to properly consider and apply the law pertaining to law pertaining to disclaiming 281’s interest in the Property pursuant to the 281 APS;
 - (e) failing to consider and properly apply the law in connection with the vesting out of and extinguishing 281’s proprietary interest in the Property, and particularly, the analysis set out in *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2019 ONCA 508; and
 - (f) Such further and other ground as counsel may advise and this Honourable Court permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION is:

- (a) Sections 193(a) and (c) of the *Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3* ("BIA"), which provides that an appeal to the Court of Appeal of Ontario from any order or decision of a Judge is as of right;
- (b) Leave is not required as the Appellant appeals from an order of a Judge on an issue that involves future rights, and where the property involved in the appeal exceeds ten thousand dollars in value; and
- (c) Rules 31(1) and 32 of the *Bankruptcy Insolvency Act, General Rules, C.R.C., c.368*.

OCTOBER 27, 2023

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TO SERVICE LIST

ROMSPEN INVESTMENT CORPORATION -and-
Applicant

TUNG KEE INVESTMENT CANADA LTD., et al.
Respondents

COA File No. COA-23-CV-1129

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at

TORONTO

NOTICE OF APPEAL

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This is **Exhibit "B"** referred to
in the Affidavit of Hunter Lam

31 Sworn before me this
Day of November, 2023





**SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

COUNSEL/ENDORSEMENT SLIP

COURT FILE NO.: CV-23-00703161-00CL

DATE: October 26, 2023

NO. ON LIST: 2

**TITLE OF PROCEEDING: ROMSPEN INVESTMENT CORPORATION v. TUNG KEE
INVESTMENT CANADA LTD. et al.**

BEFORE: JUSTICE OSBORNE

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party:

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For Defendant, Respondent, Responding Party:

Name of Person Appearing	Name of Party	Contact Info
Maya Poliak	TUNG KEE INVESTMENT CANADA LTD. et al.	maya@chaitons.com

For Other, Self-Represented:

Name of Person Appearing	Name of Party	Contact Info
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Bota McNamara	SOW CAPITAL ONTARIO LTD.	bmcnamara@kmblaw.com
Ian Klaiman	2816513 Ontario Inc.	mklaiman@lzwlaw.com
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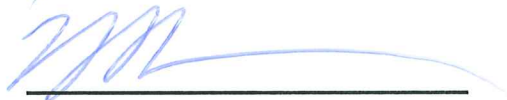
SUPPLEMENTARY ENDORSEMENT OF JUSTICE OSBORNE:

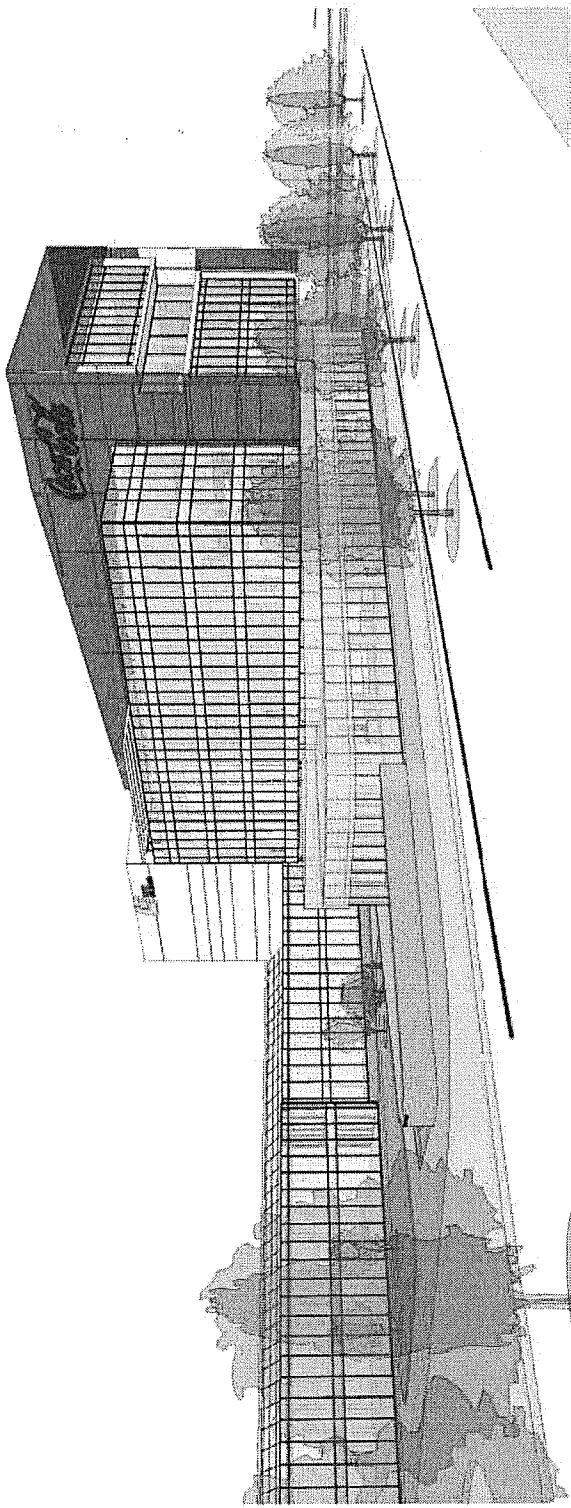
- [1] This Endorsement is supplementary to the Endorsement I released in this proceeding earlier today.
- [2] On October 19, 2023, I approved the appointment of the Receiver and approved the Times Transaction (both as defined in that Endorsement).
- [3] As reflected in the October 19 Endorsement, SOW Capital Ontario Limited had brought a cross motion returnable the same day for an order permitting the completion of the sale of the Property to 2816513 Ontario Inc., which sale I declined to approve.
- [4] Today, SOW requests by way of housekeeping that its motion be dismissed. That dismissal has the consent of all parties, including for greater certainty both SOW and 281.
- [5] The SOW motion is accordingly dismissed on consent.

Osborne, J.

This is **Exhibit "C"** referred to
in the Affidavit of Hunter Lam

Sworn before me this
Day of November, 2023

31




ROMSPEN INVESTMENT CORPORATION

-and-

TUNG KEE INVESTMENT CANADA LTD et al

Applicant

Respondents

Court of Appeal File No. 23-00703161-00CL
Court File No.: CV-23-00703616-00CL

ONTARIO
SUPERIOR COURT OF APPEAL

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Court of Appeal File No. 23-00703161-00CL
Court File No.: CV-23-00703616-00CL

**ONTARIO
SUPERIOR COURT OF APPEAL**

MOTION RECORD

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