Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

DBDC SPADINA LTD. and
THOSE CORPORATIONS LISTED ON SCHEDULE A HERETO

Applicants

- and -

NORMA WALTON, RONAULD WALTON, THE ROSE & THISTLE GROUP LTD. and EGLINTON CASTLE INC.

Respondents

- and -

THOSE CORPORATIONS LISTED ON SCHEDULE B HERETO, TO BE BOUND BY THE RESULT

CASE BRIEF OF 165 BATHURST FINANCIAL INC.

December 17, 2013

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INDEX

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TABLE OF CONTENTS

TAB 1

Court File No. CV-11-9409 CL
Court File No. CV-11-9452 CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

ROMSPEN INVESTMENT CORPORATION

Applicant

- and -

THE RESPONDENTS LISTED IN SCHEDULE "A" HERETO

Respondents

UNOFFICIAL TRANSCRIPTION OF THE ENDORSEMENT OF THE HONOURABLE MR. JUSTICE CAMPBELL DATED DECEMBER 12, 2011

---

12 Dec/11

Two motions were before the Court this day. The first uncontested sought extension of the stay provided for in the Initial Order and approval of the activities of the Monitor. The first relief was unopposed and the form of order to issue as signed.

The second motion by Firm Capital seeks a lifting of the stay to permit judicial sale in Alberta of the property over which it holds first security. Alternatively, Firm Capital seeks a judicially approved sale the supervision to be by this Court.

Mr. Marshall, for Firm Capital, urges that this Court does not have jurisdiction to burden the

property over which his client has first security with the costs of a receiver driven process which at best seeks to expend funds with the hope that a development process may evolve that would attract approval of the Town in which the property lies. Part of the difficulty is that there are two appraisals of quite different value from the 1st and 2nd mortgagees. The Receiver urges that, if further funds could result in an approval of a development plan by the Town, it would likely achieve a greater value than a sale now. Firm Capital does not wish to see its security eroded by further expenditure which at best is only a hope of possible development sometime in the future.

Various other interests support the Receiver's position on the basis that with more time there may be a possibility of greater return for their clients then a judicial sale now. The Receiver submits that bearing in mind the *Soundair* principles of fairness to all interests, a Receiver directed process of waiting until the New Year and having the Receiver conduct the sale gives better assurance of fairness even if the development proposition is not accepted.

I recognized when the Initial Order was made that this would not be a standard CCAA process. I envisioned exactly what has transpired.

The likelihood of a Plan is at best remote and an orderly liquidation much more likely and indeed the Receiver does recommend that several properties be offered for sale immediately.

Since there is no overall Plan for the entire CCAA Group of Companies and the proposal for further expense on Firm Capital is only in context of a possibility or hope of greater recovery from a later rather than earlier sale, I am not satisfied that the balancing of interests favours waiting. There is a distinction between the rights of mortgage creditors and those who may have general property claims to assets other than land within a CCAA order.

I conclude that by permitting the sale process to proceed subject to approval of any sale that may take place with the ability of those creditors which also have some claim to the land being convinced of what is being proposed will give full opportunity to all Creditors to have input before final sale.

I expect co-operation between the Receiver, the Monitor and other parties with Firm Capital to bring forward what may be in the best interests of all Creditors.

I recognize that there may be similar requests from other mortgagees. This was recognized at the time of the Initial Order and should give impetus to all concerned to bring forward a plan that may be acceptable to all creditors by the time of the expiry of the extension granted to February 17, 2012.

Campbell J.

16038602.1

Court File Number: CV-11-9409 CL
CV-11-9452 CL.

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

ROMSPEN INVESTMENTS
Plaintiff(s)

AND

EDGEWORTH PROPERTIES.
Defendant(s)

Case Management ☐ Yes ☐ No by Judge: _____

Counsel	Telephone No:	Facsimile No:
See attached		

☐ Order ☐ Direction for Registrar **(No formal order need be taken out)**
☐ Above action transferred to the Commercial List at Toronto **(No formal order need be taken out)**

☐ Adjourned to: _____
☐ Time Table approved (as follows):

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Dec. 12/11
Date

C.L. Campbell J.
Judge's Signature

☑ Additional Pages 4

Court File Number: CV-11-9409CL
CV-11 9452CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued
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Judges Initials RLC.

Court File Number: CV-11-9405CL
CV-11-9452CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued
expenditure which at best is only a hope of possible development sometime in the ~~future~~ future.
Various other interests support the Receiver's position on the basis that with more time there may be the possibility of greater return for their clients than a judicial sale now.
The Receiver submits that bearing in mind the Soundair principles of fairness to all interests a Receiver directed process of waiting until the New year & having the Receiver conduct the sale serves better assurance of fairness even if the development proposition is not accepted.
I recognized when the Initial Order was made that this would not be a standard CCAA process & envisaged exactly what has happened.
The likelihood of a Plan is at best remote & an orderly liquidation

Judges Initials CLC.

Court File Number: CV-11-9405CL
CV-11-9452CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued
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Judges Initials AECO

Court File Number: CV-11-9409 CL
CV-11-9452 CL

Superior Court of Justice
Commercial List

FILE/DIRECTION/ORDER

Judges Endorsment Continued
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evidence of what is being proposed
will give full opportunity to all
creditors to have input before a
final date.
I expect co-operation between the
Receiver, the monitor & other parties
with Terms Captured to bring forward
what may be in the best interests
of all creditors.
I recognize that there may be similar
requests from other mortgagees. This
was recognized at the time of the
Initial Order & should give impetus
to all concerned to ~~to~~ bring forward
a plan that may be acceptable to
all creditors by the time of the
expiry of the Interim Stay to Feb. 17/12

Judges Initials RLCo.

TAB 2

CITATION: Romspen Investment Corporation v. Edgeworth Properties et al., 2012 ONSC Number 4693
COURT FILE NO.: CV-11-9452 CL
DATE: 20120815

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: ROMSPEN INVESTMENT CORPORATION, Applicant

AND:

EDGEWORTH PROPERTIES - DERRICK VIEW ESTATES INC., 1253122 ALBERTA LTD., EDGEWORTH PROPERTIES - HEARTLAND RIDGE INC., EDGEWORTH PROPERTIES - SOUTHPOINT LANDING INC., EDGEWORTH PLACE AT SPRUCE RIDGE DRIVE INC., EDGEWORTH PROPERTIES – CREEKSIDE ESTATES INC., EDGEWORTH PLACE AT HEARTLAND INC., EDGEWORTH PROPERTIES – WOLF CREEK ESTATES INC., EDGEWORTH ESTATES AT MANNING DRIVE PHASE I INC., EDGEWORTH PROPERTIES – ELLERSLIE RIDGE INC., 1519560 ALBERTA LTD., DERRICK VIEW ESTATES PHASE II INC., 1330433 ALBERTA LTD., Respondents

BEFORE: C. Campbell J.

COUNSEL: *David P. Preger and Lisa S. Corne*, counsel for the Plaintiff, Romspen Investment Corporation

R. Shayne Kukulowicz and Kate Stigler, counsel for the Defendants, Edgeworth Properties Inc. et al.

Katherine McEachern, counsel for the Monitor

Craig A. Mills, Terrence Warner and Lesley Akst, Counsel for the Receiver

Ken Lenz, representative counsel to the Edgeworth Mortgage Investment Corporation, Edgeworth Mortgage Investment II Corporation and Biggs Avenue Mortgage Investment Corporation and the preferred shareholders of same

John Salmas, Canada Mortgage and Housing Corporation

MONITOR: *Daniel Sobel*

HEARD: July 31 and August 3, 2012

ENDORSEMENT

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

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

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

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

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

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

[7] Romspen seeks an order:

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

b) directing MNP Ltd. in its capacity as Court-appointed receiver to distribute to Romspen from the net sale proceeds realized from the

Properties sold by the Receiver, all amounts required to repay the indebtedness of the Respondents to Romspen; and

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

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

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

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

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

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

[13] In response to the Edgeworth Group's application for relief pursuant to the *CCAA*, Romspen sought leave to commence foreclosure proceedings in respect of the Properties. In light of objections raised by the Respondents and certain other stakeholders, and a proposal for a compromise which would avoid seeing Romspen ensnared in a costly, full-blown *CCAA*

proceeding, Romspen sought the appointment of the Receiver, as an alternative to foreclosure, provided that it was on terms which treated all mortgagees equally.

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

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

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

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

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

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

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

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

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

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

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

> 203(1) In this section,
>
> (a) "interest" includes any estate or interest in land;
>
> (b) "owner" means
>
> (i) the owner of an interest in whose name a certificate of title has been granted,
>
> (ii) the owner of any other registered interest in whose name the interest is registered, or
>
> (iii) the caveator or transferee of a caveat in whose name the caveat is registered.
>
> (2) A person contracting or dealing with or taking or proposing to take a transfer, mortgage, encumbrance, lease or other interest from an owner is not, except in the case of fraud by that person,
>
> (a) bound or concerned, for the purpose of obtaining priority over a trust or other interest that is not registered by instrument or caveat, to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the interest acquired the interest or to see to the application of the purchase money or any part of the money, or
>
> (b) affected by any notice, direct, implied or constructive, of any trust or other interest in the land that is not registered by instrument or caveat, any rule of law or equity to the contrary notwithstanding.
>
> (3) The knowledge of the person that any trust or interest that is not registered by instrument or caveat is in existence shall not of itself be imputed as fraud.
>
> (4) This section is deemed to have been in force since the commencement of *The Land Titles Act*, SA 1906 c24, in place of section 135 of that Act and similar sections in successor Acts.

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

> The question is whether there is present an additional element of dishonesty that the cases refer to such that the mortgage of Romspen should be subordinated to the UDI and Lot Purchaser interests. Simply having knowledge of the terms and conditions of the UDI and Lot Purchase agreements, and knowledge that taking

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

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

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

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

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

dishonesty on the part of the mortgagee, it was entitled to rely upon the certainty of title and the protection afforded to mortgagees by the *Act*.

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

[27] There is no evidence before the court to suggest that Romspen itself committed a fraud and in the absence of that finding, Romspen is entitled to have its priority confirmed. I accept the opinion of Alberta counsel for the Receiver that there are no facts before the court that would support an argument for Equitable Subordination of the Romspen debt even assuming the concept were to apply.

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

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

The MICs

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

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

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

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

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

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

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

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

> "161 An instrument or caveat executed by a corporation notwithstanding anything to the contrary in the Act, statute, constating documents, charter or memorandum and articles of association incorporating the corporation, is for the purposes of this Act deemed to be sufficiently executed if the instrument or caveat is
>
> (a) ***sealed with the corporate seal of the corporation and countersigned by at least one officer or director of the corporation***, ..." [emphasis added]

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

Conclusion

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

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

C. Campbell J.

Date: August 15, 2012

TAB 3

CITATION: Dondeb Inc. (Re), 2012 ONSC 6087
COURT FILE NO.: CV-12-00009865-00CL
DATE: 20121122

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

BETWEEN:	
IN THE MATER OF THE *COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED	*David P. Preger, Lisa S. Corne, Michael Weinczok*, for the Applicants
- AND -	
IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO DONDEB INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")	*Jeffrey J. Simpson, A. Ronson*, for Pace Savings & Credit Union Limited *Gary Sugar*, for David Sugar, *et al* *D.R. Rothwell*, for RMG Mortgage/MCAP Financial Corporation *Harry Fogul*, for Regional Financial *Robin Dodokin*, for Empire Life Insurance Co. *Beverly Jusko, M.R. Kestenberg*, for TD Bank Canada Trust *Roger Jaipargas*, for Faithlife Financial *R.B. Bissell*, for Vector Financial Services Limited *Jeffrey Larry*, for First Source Mortgage Corporation *Douglas Langley*, for Virgin Venture Capital Corporation *David Mende*, for Addenda Capital Inc. *J. Dietrich, W. Rabinovitch*, for A. Farber & Partners Inc. *M. Church*, for SEIU (Union)
Applicants	

HEARD: October 11, 15, 17 and 18, 2012

C. CAMPBELL J.

REASONS FOR DECISION

[1] The applicants seeking an Initial Order under the *Companies Creditors Arrangement Act* are a group of companies owned and controlled by or through the main holding company

Dondeb Inc. The proposed relief would include a stay of proceedings in respect of the various companies which own and or operate businesses and real property in Ontario.

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

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

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

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

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

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

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

iii) That in the circumstances individual receivership orders for many of the properties is a more appropriate remedy where the creditors and not the debtor would have control of the process.

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

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

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

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

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

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

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

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

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

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

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

[16] I also accept the general proposition that given the flexibility inherent in the *CCAA* process and the discretion available that that an Initial Order may be made in the situation of "enterprise" insolvency where as a result of a liquidation crisis not all of the individual entities comprising the "enterprise" may be themselves insolvent but a number are and to propose of the restructuring is to restore financial health or maximize benefit to all stakeholders by permitting further financing. Such process can include liquidation. See *First Leaside Wealth Management*

(Re) (2012) (ONSC) 1299 and also *Edgeworth Properties Inc. (Re)* CV-11-9409-CL [Commercial List].

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

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

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

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

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

> arguments to obtain relief under the foreclosure process, it will likely obtain that relief.

[20] A similar result occurred in *Shire International Real Estate Investments Ltd.* (2010) CarswellAlta 234 even after an initial order had been granted.

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

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

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

(i) The application for an Initial Order under the CCAA based on the material filed be dismissed.

(ii) The issue of costs incurred by the proposed Monitor Farber and of counsel to the debtor be reserved for further consideration (if not resolved) basis on material to be provided to counsel for the creditors and their submissions.

(iii) The request for a more limited *CCAA* Initial Order which like the Original Application is opposed by a significant body of creditors is also rejected.

(iv) A Global Receivership Order which is supported by most of the creditors appearing to oppose the application and which has the support of Farber which will become Receiver of those companies and properties covered by the application will issue in a format to be approved by counsel and the court.

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

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

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

1182689 Ontario Inc.	31-1671611
2198392 Ontario Inc.	31-1673260

hereby stayed and suspended pending further order of the court.

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

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

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

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

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

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

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

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

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

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

C. CAMPBELL J.

Released: November 22, 2012

Schedule "A"

1. Dondeb Inc.
2. Ace Self Storage and Business Centre Inc.
3. 1182689 Ontario Inc.
4. King City Holdings Inc.
5. 1267818 Ontario Ltd.
6. 1281515 Ontario Inc.
7. 1711060 Ontario Ltd.
8. 2009031 Ontario Inc.
9. 2198392 Ontario Ltd.
10. 2338067 Ontario Inc.
11. Briarbrook Apartments Inc.
12. Guelph Financial Corporation

CITATION: Dondeb Inc. (Re), 2012 ONSC 6087
COURT FILE NO.: CV-12-00009865-00CL
DATE: 20121122

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL)

BETWEEN:

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

- AND -

IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO DONDEB INC. and the ADDITIONAL APPLICANTS LISTED ON SCHEDULE "A" HERETO (collectively, the "APPLICANTS")

Applicants

REASONS FOR DECISION

C. CAMPBELL J.

Released: November 22, 2012

DBDC SPADINA LTD. et al. - and - **NORMA WALTON et al.**

Applicants

Respondents

Court File No. CV-13-10280-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

CASE BRIEF OF 165 BATHURST FINANCIAL INC.

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