Court File No. CV-24-00718083-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ANTIBE THERAPEUTICS INC. (the "Applicant")

FACTUM OF THE CROSS-APPLICANT NUANCE PHARMA LTD.

(**Motion and Cross-Application returnable April 18, 2024**)

April 17, 2024

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TO: THE SERVICE LIST

TABLE OF CONTENTS

PART I: OVERVIEW **1**

PART II: SUMMARY OF FACTS **2**

A. The Parties 3

B. Antibe Fraudulently Induced Nuance into Entering into the License Agreement 3

C. The Arbitration and Arbitral Award 5

D. Nuance's Application for Recognition and Enforcement 7

E. The Trading in the Securities of Antibe was Halted 8

F. Antibe's Current Status - No Viable Business 8

i. Antibe has One *Potentially* Marketable Product 8

ii. The Drug is at the Early Stages of Drug Development 9

iii. The Drug is Not Novel 10

iv. The Drug is Not Safe 11

v. Antibe Has No Viable Source of Funding 12

vi. Antibe Has No Restructuring Plan 13

G. FTI Consents to Act as Receiver 13

PART III: ISSUES **13**

PART IV: LAW & ARGUMENT **14**

A. The Proposed Receiver Should be Appointed 14

i. No Confidence in Antibe's Management 15

ii. Antibe's Business Must be Stabilized and Preserved 16

iii. A Receiver is Appropriate in the Circumstances 16

B. Antibe's Proposed CCAA is Inappropriate 17

i. The *CCAA* was Purely Defensive 17

ii. Antibe's "Wait and Spend" Approach is Neither a Plan nor a Germ of a Plan 18

C. The Comparative Analysis Heavily Favours Appointing a Receiver 19

D. Antibe is Holding Property in Trust for Nuance 21

i. A Constructive Trust Exists at Law 21

ii. The Funds Held in Trust are Not Part of Antibe's Property 23

E. If Necessary, the Stay Should be Lifted to Recognize and Enforce the Arbitral Award 24

PART V: ORDER REQUESTED 25

PART I: OVERVIEW

1. This Court is faced with competing CCAA and receivership applications. On a comeback hearing, Antibe faces the onus on a *de novo* basis to demonstrate to this Court that CCAA relief should be granted. It has failed to do so. Antibe is seeking to use the CCAA for an improper purpose and does not come to Court with clean hands.

2. On the other hand, a receivership is being sought for the purpose of stabilizing Antibe, limiting its spending, and assisting creditors with the recovery of amounts owing and held in trust by Antibe for the benefit of others, particularly Nuance Pharma Ltd. ("**Nuance**"). Nuance is Antibe's largest creditor with a proprietary right over, among other things, Antibe's CAD$19.6 million cash-on-hand.

3. Antibe fraudulently induced Nuance into paying Antibe US$20 million to develop the drug Otenaproxesul (the "**Drug**"). Antibe did so while knowing, but concealing from Nuance, that Health Canada highlighted safety concerns that the Drug presented serious risks to patients, particularly in respect of serious liver-related adverse events.

4. Upon discovering Antibe's fraudulent misrepresentation, Nuance rescinded the applicable agreement and demanded the return of its US$20 million. Antibe refused; arbitration ensued. The arbitrator held, among other things, that Antibe fraudulently induced Nuance to enter into the License Agreement, and Antibe's conduct was specifically found to be "affirmatively and deliberately misleading, evincing conscious misbehavior and recklessness, rather than an intent to be truthful or honest." These findings, made on the basis of a complete evidentiary record, cannot be re-litigated by Antibe.

5. Upon rescission of the agreement based on fraudulent misrepresentation, Antibe became a constructive trustee over the funds, holding them in trust for Nuance as a result of unjust enrichment and wrongful conduct. However, rather than complying with the arbitral award – which Antibe publicly stated it would accept "in good faith" – Antibe instead sought CCAA protection on the eve of a motion in relation to enforcing the Arbitral Award. Antibe's conduct evinces a marked absence of good faith.

6. Antibe has no restructuring plan and its CCAA process has been commenced solely to avoid the outcome of the Arbitral Award. Antibe' CCAA application amounts to a request that this Court permit it to continue depleting Nuance's funds, in breach of trust, on a Drug which meets no unmet medical need, presents a serious safety risk, is highly unlikely to ever be commercialized and, even if commercialized, would be competing with other established non-steroidal anti-inflammatory drugs (such as Aspirin, Advil, Aleve, Celebrex and Voltaren, among many other incumbents).

7. Antibe's request to extend CCAA protection is improper and should be denied. Rather, in these circumstances, including where there can be no confidence in Antibe's management and the nature of Antibe's business focuses solely on the Drug, it is just and convenient to appoint a receiver. Nuance requests that FTI Consulting Canada Inc. ("**FTI**") be appointed as receiver and that Nuance's equitable and proprietary rights are recognized by this Court.

PART II: SUMMARY OF FACTS

8. The facts giving rise to this cross-application are set out in the affidavit of Mark Lotter sworn April 15, 2024, and his prior affidavit sworn March 28, 2024.

A. The Parties

9. Nuance is a Hong Kong incorporated biopharmaceutical company focused on licensing, developing and commercializing medical therapies in the Greater China region.[1]

10. Antibe is an insolvent biotech company registered under Ontario's *Business Corporations Act*, with its registered office in Toronto, Ontario.[2]

B. Antibe Fraudulently Induced Nuance into Entering into the License Agreement

11. On February 9, 2021, Nuance and Antibe entered into a License Agreement,[3] pursuant to which Nuance provided Antibe an upfront payment of US$ 20 million (the "**Prepayment**") for an exclusive license to develop and commercialize Antibe's lead product, the Drug, in China, Hong Kong, Macau, and Taiwan.[4]

12. At the time, Antibe's intention was for the Drug to be used to address chronic pain conditions, including osteoarthritis, rheumatoid arthritis, and ankylosing spondylitis, and Nuance was seeking a chronic pain therapy for its portfolio.[5]

13. However, and unbeknownst to Nuance, prior to the License Agreement being executed, on January 19, 2021, Health Canada expressed "serious concerns" regarding potential risk of liver-related adverse events, and serious adverse events, in connection with the extended use of the Drug.[6] Antibe intentionally withheld these serious concerns from Nuance.

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[1] Affidavit of Mark Lotter, sworn April 15, 2024 ("**April Lotter Affidavit**"), ¶4, Ex "A", Affidavit of Mark Lotter, sworn March 28, 2024, ("**March Lotter Affidavit**"), ¶3, Responding and Cross-Cross-Application Record ("**Cross-Cross-Application Record**"), Tab 2A, p. 53.
[2] March Lotter Affidavit, ¶4, Cross-Application Record, Tab 2A, p. 53.
[3] March Lotter Affidavit, ¶5, Liscense Agreement, Cross-Application Record, Tab 2A, p. 70.
[4] March Lotter Affidavit, ¶5, Cross-Application Record, Tab 2A, p. 53.
[5] March Lotter Affidavit, ¶6, Cross-Application Record, Tab 2A, p. 54; March Lotter Affidavit, ¶7, Arbitral Award – Feb 27, 2024, ("**Arbitral Award**"), ¶86, Cross-Application Record, Tab 2A, p. 133.
[6] March Lotter Affidavit, ¶9, Cross-Application Record, Tab 2A, p. 54; April Lotter Affidavit, ¶13(c), Cross-Application Record, Tab 2, p. 32;

14. Therefore, on February 19, 2021, Nuance paid the Prepayment to Antibe in accordance with the License Agreement.[7]

15. Notwithstanding Health Canada's concerns regarding the extended use of the Drug (which concerns Antibe had withheld from Nuance and the market), Antibe continued to publicly disclose to the market that the Drug was being developed to address chronic pain conditions, including osteoarthritis.[8]

16. Antibe attempted to address Health Canada's safety concerns regarding the extended use of the Drug and failed. On July 30, 2021, an ongoing absorption, metabolism and excretion ("**AME**") study was stopped for safety reasons.[9]

17. Human subjects who had completed the full drug administration period exhibited elevation of liver transaminase elevations (indicative of stress on the liver) exceeding five times the upper limit of normal, triggering the safety stopping criteria for the study.[10]

18. Many months after Health Canada originally expressed concerns regarding extended use of the Drug due to liver-related adverse effects, and after the AME study was stopped for safety reasons, Antibe advised Nuance, and later announced to the market, that daily doses of the Drug for longer treatment durations lead to liver-related harm.[11]

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[7] Arbitral Award, ¶112, Cross-Application Record, Tab 2A, p. 138.
[8] April Lotter Affidavit, ¶63, Cross-Application Record, Tab 2, p. 46; Health Canada raised its concerns on January 19, 2021, however, Antibe continued to issue news releases tying the Drug to osteoarthritis up to November 2021.
[9] Arbitral Award, ¶123, 130, Cross-Application Record, Tab 2A, p. 141.
[10] April Lotter Affidavit, ¶63, Antibe Therapeutics Inc. News releases dated October 2015-November 2021, Ex "K", Cross-Application Record, Tab 2K, p. 46, 482.
[11] Arbitral Award, ¶147-148, Cross-Application Record, Tab 2A, p. 144.

19. Antibe simultaneously announced that it was launching an acute pain program for the Drug.[12] The "pivot" from extended use for chronic pain to temporary acute pain management was significant – the Drug's supposed novelty (and commercial potential) lay with its purported enhanced efficacy and alleged safety for extended use, as compared to other NSAIDs in the market.[13]

20. Furthermore, the use of non-steroidal anti-inflammatories (an "**NSAID**") like the Drug for acute pain management is not novel. Antibe concedes that NSAIDs are "among the most common pain relief medicines in the world."[14]

21. On September 5, 2021, following the revelation that even at low doses the Drug was unsafe for its intended purpose – extended patient use – Nuance informed Antibe that it was rescinding the License Agreement and demanded the immediate return of its US$20 million Prepayment.[15]

22. Antibe refused to return Nuance's funds. Instead, it proceeded to spend and deplete Nuance's funds in breach of trust. It continues to do so.

C. The Arbitration and Arbitral Award

23. Following Antibe's refusal to return the Investment Payment, in January 2022, Nuance filed a Notice of Arbitration alleging, among other things, fraudulent misrepresentation. Catherine Amirfar, a New York-based lawyer at Debevoise & Plimpton, ranked Band 1 for International Arbitration (Global) was appointed as sole arbitrator, by agreement of the Nuance and Antibe.[16]

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[12] Arbitral Award, ¶152-153, Cross-Application Record, Tab 2A, p. 144-145; Affidavit of Scott Curtis affirmed April 8, 2024, ¶10, 76-77 ("**Curtis Affidavit**"), Motion Record, Tab 2, p. 34, 54-55.
[13] April Lotter Affidavit, ¶54, Cross-Application Record, Tab 2, p. 44.
[14] Arbitral Award, ¶62, Cross-Application Record, Tab 2A, p. 129 (Tribunal quoting the testimony from Antibe's CEO, Mr. Legault).
[15] Arbitral Award, ¶150, Cross-Application Record, Tab 2A, p. 144; April Lotter Affidavit, ¶19, Cross-Application Record, Tab 2, p. 36.
[16] April Lotter Affidavit, ¶12, Profile of Catherine Amirfar, Ex "B", Cross-Application Record, Tab 2B, p. 31, 277.

24. On February 27, 2024, after a heavily litigated arbitration on a comprehensive record, the arbitral tribunal (the "**Tribunal**"), rendered its final, binding decision.[17] The Tribunal found that, among other things:

(a) Antibe, and specifically its Chief Executive Officer, Dan Legault, made material misrepresentations and/or omissions leading up to the License Agreement;[18]

(b) Antibe's response to Nuance's due diligence inquiries could "only be characterized as being so incomplete as to be affirmatively and deliberately misleading, evincing conscious misbehavior and recklessness, rather than an intent to be truthful or honest;"[19]

(c) "no amount of due diligence would have enabled [Nuance] to discover that Antibe had omitted/misled it with respect to key regulatory information";[20] and

(d) the License Agreement was "validly rescinded by Nuance."[21]

25. Antibe was ordered to "return to Nuance the sum of US$20 million that represented Nuance's upfront payment to Antibe, plus interest" and specified costs.[22]

26. On March 4, 2024, Antibe publicly disclosed that the Arbitral Award required "Antibe to refund the US$20 million upfront payment and pay interest and costs of approximately US$4

[17] Arbitral Award, Cross-Application Record Tab 2A, p. 116.
[18] Arbitral Award, ¶260, 268, Cross-Application Record, Tab 2A, p. 170, 175-176.
[19] Arbitral Award, ¶268, Cross-Application Record, Tab 2A, p. 175-176.
[20] Arbitral Award, ¶269, Cross-Application Record, Tab 2A, p. 176-177.
[21] Arbitral Award, ¶276, Cross-Application Record, Tab 2A, p. 179.
[22] Arbitral Award, ¶276, Cross-Application Record, Tab 2A, p. 179.

million" and further disclosed that Antibe "respects…the final nature of the award and will accept the decision in good faith."[23]

27. Contrary to its public disclosure, Antibe refused to comply with the Arbitral Award.[24] Instead, it continued spending Nuance's Investment Payment on the Drug, in breach of the Arbitral Award.[25]

D. Nuance's Application for Recognition and Enforcement

28. As a result of Antibe's repeated failure to comply with the Arbitral Award, on March 27, 2024, Nuance issued a Notice of Application seeking an order:

(a) recognizing and making enforceable the Arbitral Award as a judgment of this Court;

(b) restraining Antibe from selling, removing, dissipating, alienating, transferring, assigning, encumbering, or similarly dealing with any of its assets, including, but not limited to, real property, bank accounts, insurance policies, annuities and other assets held by it or any other person or entity on its behalf; and

(c) appointing a receiver over all of the assets, undertakings and properties of Antibe pursuant to section 101 of the *Courts of Justice Act.*[26]

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[23] April Lotter Affidavit, ¶67, Antibe Therapeutics Inc. – News release dated March 4, 2024, Ex "M", Cross-Application Record, Tab 2M, p. 47, 503.
[24] March Lotter Affidavit, ¶20-22, Cross-Application Record, Tab 2A, p. 57.
[25] Curtis Affidavit, ¶19, Motion Record, Tab 2, p. 37 where Antibe states that "[w]ork on the Phase 2 Trial has been ongoing" and was only halted by the FDA on March 28, 2024, despite the Arbitral Award being issued on February 27, 2024.
[26] April Lotter Affidavit, ¶68, Nuance Pharma Ltd., - Notice of Application, Ex "N", Cross-Application Record, Tab 2N, p. 47, 506.

29. On April 9, 2024, at 2:11 a.m., a matter of hours before a 9:45a.m. attendance before Justice Black to set a schedule for the hearing of Nuance's Application, Antibe delivered an application record and other materials seeking CCAA protection.[27]

E. The Trading in the Securities of Antibe was Halted

30. On April 9, 2024, the Canadian Investment Regulatory Organization issued a suspension in trading in the securities of Antibe.[28]

F. Antibe's Current Status - No Viable Business

i. Antibe has One *Potentially* Marketable Product

31. Antibe has one *potentially* marketable product – the Drug. The Drug is an NSAID, which class of drugs are "among the most common pain relief medicines in the world."[29] Common NSAIDs include well-established incumbents such as Aspirin, Advil, Aleve, Celebrex and Voltaren, among many others.[30]

32. A major issue with NSAIDs is that they can cause gastrointestinal ulcers and bleeding, and more rarely can contribute to heart and cardiovascular conditions, as well as kidney and liver symptoms, evidenced elevated liver transaminase elevations ("**LTEs**").[31]

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[27] April Lotter Affidavit, ¶69, Email from Paliare Roland to Bennett Jones dated April 9, 2024, Ex "P", Cross-Application Record, Tab 2O, p. 48, 523.
[28] April Lotter Affidavit, ¶71, Canadian Investment Regulatory Organization Trading Halt, Ex "Q", Cross-Application Record, Tab 2Q, p. 48, 527.
[29] Arbitral Award, ¶62, Cross-Application Record, Tab 2A, p. 129 (Tribunal quoting testimony from Antibe's CEO, Mr. Legault).
[30] April Lotter Affidavit, ¶33, Cross-Application Record, Tab 2A, p. 39.
[31] Arbitral Award, ¶63-64, Cross-Application Record, Tab 2A, p. 129.

33. Antibe originally planned to commercialize the Drug for extended use chronic pain therapy. However, the Drug has been found to present the same liver-related risks as other established NSAIDs.[32]

34. With its long-planned extended use case for the Drug non-viable, Antibe pivoted to seek to commercialize the Drug for acute pain management.[33] Acute pain management is not a novel use of NSAIDs. NSAIDs are the most widely used analgesics to relieve pain, reduce inflammation, and bring down a high temperature.[34]

35. Antibe also claims to also have two "drug candidates" in addition to the Drug, ATB-352 and a "new molecule" to target inflammatory bowel disease, Crohn's disease and ulcerative colitis.[35]

36. Neither ATB-352 nor the "new molecule" are anywhere close to coming to market. As Antibe itself admits, "[e]ssentially all of the CAD$124 million that Antibe has raised so far has been invested in the Drug to date."[36]

ii. The Drug is at the Early Stages of Drug Development

37. The drug development process is a complex, expensive, risky, and time-consuming process.[37] The FDA's drug development process has five stages:

(c) Stage 1 - discovery and development (research for a new drug in a laboratory);

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[32] April Lotter Affidavit, ¶64, Antibe Therapeutics Inc. – News release dated October 14, 2021, Ex "L", Tab 2L, p. 46, 497; April Lotter Affidavit, ¶63, Antibe Therapeutics Inc. News releases dated October 2015-November 2021, Ex "K", Cross-Application Record, Tab 2K, p. 46, 482.
[33] Arbitral Award, ¶152-153, Cross-Application Record, Tab 2A, p. 144-145; Curtis Affidavit, ¶10, 76-77, Motion Record, Tab 2, p. 34, 54-55.
[34] April Lotter Affidavit, ¶31, Cross-Application Record, Tab 2, p. 39.
[35] Curtis Affidavit, ¶55, Motion Record, Tab 2, p. 49.
[36] Curtis Affidavit, ¶98, Motion Record, Tab 2, p. 60.
[37] Arbitral Award, ¶66, Cross-Application Record, Tab 2A, p. 129.

(d) Stage 2 - preclinical research (laboratory and animal testing to address basic questions about safety);

(e) Stage 3 - clinical research (testing on people to assess safety and efficacy);

(f) Stage 4 - FDA review (FDA review teams' thorough examination of all submitted data relating to the relevant drug to make a decision to approve or not approve the relevant drug); and

(g) Stage 5 - FDA post-market safety monitoring (monitoring the safety of the drug after it is made available for use by the public).[38]

38. Approximately 90% of drug candidates fail at Stage 3 – the clinical research stage of the FDA's drug development process.[39] The Drug is currently at Stage 3.

39. Stage 3 itself has four phases. The vast majority of drug fail to progress from Phase 2 to Phase 3.[40] The Drug has yet to begin Phase 2, as detailed below.

iii. The Drug is Not Novel

40. Although Antibe asserts that the Drug meets "significant unmet medical need,"[41] the FDA does not agree. When the FDA determines that a prospective drug is the first available treatment or if the drug has advantages over existing treatments (i.e. it meets a significant unmet medical need) the FDA can grant four distinct expedited approval processes – (i) fast track; (ii) breakthrough therapy; (iii) accelerated approval; or (iv) priority review.[42] The Drug has not been granted any expedited approval process.[43]

[38] April Lotter Affidavit, ¶37, Cross-Application Record, Tab 2, p. 40.
[39] April Lotter Affidavit, ¶40-41, Cross-Application Record, Tab 2, p. 41.
[40] April Lotter Affidavit, ¶39-45, 48, Cross-Application Record, Tab 2, p. 42-43.
[41] Curtis Affidavit, ¶9, Motion Record, Tab 2, p. 34.
[42] April Lotter Affidavit, ¶50-51, Cross-Application Record, Tab 2, p. 43-44.
[43] April Lotter Affidavit, ¶53, Cross-Application Record, Tab 2, p. 44.

iv. The Drug is Not Safe

41. There are serious patient-safety related concerns regarding the use of the Drug, for both extended use (the original intended use for the Drug) and for acute pain management (the current intended use for the Drug). The extended use of the Drug hit the safety stopping criteria in the AME study.

42. The Drug also appears to present patient safety risks for temporary use. Antibe's planned Phase 2 trial of the Drug for acute pain management was placed on clinical hold by the FDA.[44] While the particulars of that clinical hold are not yet available, the general reasons for a clinical hold include that:

(a) human subjects are or would be exposed to an unreasonable and significant risk of illness or injury; and

(b) the materials provided do not contain sufficient information needed to assess the risks to subjects of the proposed studies.[45]

43. As a result, Antibe has yet to commence the Phase 2 clinical trials of the Drug, where the vast majority of drug candidates fail.

44. Even if Antibe was (a) authorized to conduct, and (b) able to successfully complete a Phase 2 clinical trial, there are two more phases of clinical trials to be conducted, followed by additional stages of the FDA drug development process prior to the Drug ever coming to market.

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[44] April Lotter Affidavit, ¶56, Antibe Therapeutics Inc. - News Release dated April 1, 2024, Ex "G", Cross-Application Record, Tab 2G, p. 45, 326; Curtis Affidavit, ¶19, Motion Record, Tab 2, p. 37.

[45] April Lotter Affidavit, ¶49, Cross-Application Record, Tab 2, p. 43.

45. It is, at best, highly speculative that the Drug will ever be commercialized. Even if commercialized, it is unlikely to be a commercial success. The Drug would be competing with highly established NSAIDs already available to treat acute pain.[46]

46. Antibe's assertion that, in effect, the Drug is the panacea to the opioid crisis is nothing more than an aspirational appeal to emotion. There are already short and long-acting non-opioids in the market, which have had limited impact on minimizing the market share of opioid-based therapies in the United States.[47]

v. Antibe Has No Viable Source of Funding

47. Antibe has no reasonable prospect of raising debt or equity. In terms of debt, it is highly unlikely that any reasonable commercial party would lend funds to Antibe in circumstances where:

(a) Antibe has no viable business, as described above;

(b) Antibe has been found to have fraudulently misled a commercial partner in order to obtain funds to develop the Drug; and

(c) Antibe has refused to comply with an Arbitral Award that it publicly disclosed to the market it would accept in good faith.

48. In terms of equity, Antibe has no prospect of raising funds from the market. The trading in the securities of Antibe was suspended on April 9, 2024.[48] Instead, Antibe's CCAA process, if extended, would make Nuance an involuntary DIP lender as its trust property is depleted.

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[46] April Lotter Affidavit, ¶31-33, Cross-Application, Tab 2, p. 39.
[47] April Lotter Affidavit, ¶23, Cross-Application, Tab 2, p. 37.
[48] April Lotter Affidavit, ¶71, Canadian Investment Regulatory Organization Trading Halt, Ex "Q", Cross-Application Record, Tab 2Q, p. 48, 527.

vi. Antibe Has No Restructuring Plan

49. Despite having retained a large team of senior insolvency professionals over a month ago, and expended significant funds on those professionals, Antibe has neither a restructuring plan, nor the germ of a restructuring plan.

50. Antibe instead proposes to wait and see what the details are regarding the FDA's concerns regarding the Drug. During this period, it proposes to spend Nuance's funds, over Nuance's express objections, on a large team of senior insolvency professionals at a high burn rate.

51. In particular, Antibe's already retained restructuring advisor, Black Swan, proposes to continue to charge $1,500 an hour, for a guaranteed minimum of $200,000 (which it has already surpassed), with no incentive whatsoever to complete a successful restructuring.

52. "Wait and spend" is not a restructuring plan. Nuance unequivocally does not agree with such use of Nuance's funds.

G. FTI Consents to Act as Receiver

53. FTI consents to act as the receiver and manager, without security, of the present and after-acquired assets, undertakings, and properties of Antibe.[49]

PART III: ISSUES

54. The issues to be decided in this application are:

(a) Is Antibe holding property in trust for Nuance? (Yes)

(b) Should a receiver be appointed? (Yes)

(c) Should Antibe be granted CCAA protection? (No)

[49] Consent to Act as Receiver (FTI Consulting Canada Inc), Cross-Application Record, Tab 3, p. 533.

(d) If necessary, should the stay of proceedings be lifted to recognize the Arbitral Award? (Yes)

PART IV: LAW & ARGUMENT

A. The Proposed Receiver Should be Appointed

55. Pursuant to s. 101 of the *Courts of Justice Act,* a receiver may be appointed where it appears to the court to be just and convenient to do so.

56. This Court has set out a number of factors, not as a checklist, but as a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: (a) whether irreparable harm might be caused if no order is made; (b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place; (c) the nature of the property; (d) the apprehended or actual waste of the debtor's assets; (e) the preservation and protection of the property pending judicial resolution; (f) the balance of convenience to the parties; (g) the fact that the creditor has a right to appointment under the loan documentation; (h) the enforcement of rights under a security instrument; (i) the principle that the appointment of a receiver should be granted cautiously; (j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently; (k) the effect of the order upon the parties; (l) the conduct of the parties; (m) the length of time that a receiver may be in place; (n) the cost to the parties; (o) the likelihood of maximizing return to the parties; and (p) the goal of facilitating the duties of the receiver.[50] While not all of these factors

[50] *Kingsett Mortgage Corp. v. Mapleview Developments Ltd., et al.*, 2024 ONSC 1983, ¶24-25; See also *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, ¶60-61.

are applicable in the circumstances of this case, as set out herein, viewed wholistically, they demonstrate that the appointment of a receiver is just and convenient.

57. Courts have also held that it is just and convenient to appoint a receiver where: (a) there is a loss of confidence in the debtors' management; (b) there is a need to stabilize and preserve the debtors' business; and (c) the positions and interests of other creditors militate in favour of appointing a receiver.[51] All such factors are present here.

i. No Confidence in Antibe's Management

58. Nuance has no confidence in Antibe's management. Antibe's management, particularly its CEO Dan Legault, who remains actively involved in the operations of Antibe and who is part of the special committee steering its CCAA efforts,[52] has been found to have made fraudulent misrepresentations and concealed material facts regarding the Drug, specifically in respect of the safety of the Drug.[53]

59. There is no reason to believe that Antibe's management has the ability to bring the Drug to market in a manner that provides benefit to Antibe's stakeholders. Given the concerns of Health Canada and the FDA about the Drug's safety, there are compelling reasons to believe that it does not.

60. Antibe has spent upwards of CAD$124 million and over 20 years on the development of the Drug. Yet, the Drug remains in the early stages of the development process, where the vast majority of drug candidates fail.

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[51] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, ¶45.
[52] Curtis Affidavit, ¶38, Motion Record, Tab 2, p. 43.
[53] Arbitral Award, ¶268, Cross-Application Record, Tab 2A, p. 175.

ii. Antibe's Business Must be Stabilized and Preserved

61. Antibe's management continues to "believe" in the viability of the Drug for extended and temporary use and proposes to continue to expend funds (funds that rightfully belong to Nuance) on a sinking ship. The Drug is not viable and Antibe has no other prospective drug products.

62. Antibe's business must be stabilized and preserved, and the circumstances of its insolvency militate in favour of a receivership to provide the necessary stability.

iii. A Receiver is Appropriate in the Circumstances

63. As noted above, Nuance is Antibe's largest creditor and there are no secured creditors.

64. "It is trite law that, in considering whether to appoint a receiver, a court should have regard to all the circumstances of the case but in particular to the nature of the property and the rights and interests of the affected parties in relation thereto."[54]

65. Overall, in the circumstances of this case, it is just and convenient in the circumstances to appoint FTI as receiver, given the conduct of Antibe's management, the fact that Antibe only has one product that is very unlikely to be viable let alone profitable, and the interests of Nuance who is being held hostage by Antibe continuing to spend its funds in breach of the Arbitral Award, and in breach of trust.

66. FTI is an experienced financial advisory firm with deep expertise in receivership matters, and it consents to serve as receiver.

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[54] *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al*., 2018 ONSC 7382, ¶51 (unreported – attached).

B. Antibe's Proposed CCAA is Inappropriate

67. A CCAA comeback hearing is heard *de novo*,[55] during which the intention of the debtor company must also be scrutinized.[56] The onus is on Antibe to satisfy the Court that it is applying for relief under the CCAA in good faith and with due diligence such that the Court should exercise its discretion in its favour.[57] Not only can Antibe not meet that onus, Antibe is attempting to utilize the CCAA for an inappropriate purpose:

(a) its CCAA proceeding has been commenced for purely defensive purposes to try to avoid recognition and enforcement of the Arbitral Award; and

(b) there is no scintilla of restructuring plan.

i. The *CCAA* was Purely Defensive

68. Antibe's application for CCAA protection was transparently defensive. It was filed a matter of hours before a 9:45 a.m. attendance before Justice Black, at which Nuance was seeking to set an expedited schedule for the hearing of its application for recognition of the Arbitral Award, the appointment of a receiver, and injunctive relief. The timeline speaks for itself.

69. "As Farley J. put it in *Re Inducon Development Corp*., "...CCAA is designed to be remedial; it is not however designed to be preventative. CCAA should not be the last gasp of a dying company; it should be implemented if it is to be implemented, at a stage prior to the death throe."[58] Antibe has no viable business; it is a sinking ship.

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[55] *Stelco Inc., Re*, 2004 CanLII 24849 (ON SC), ¶1.
[56] *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, ¶31
[57] *League Assets Corp. (Re)*, 2013 BCSC 2043, ¶18(a).
[58] *Callidus v. Carcap*, 2012 ONSC 163, ¶57.

ii. Antibe's "Wait and Spend" Approach is Neither a Plan nor a Germ of a Plan

70. To qualify for CCAA protection, Antibe must satisfy this Court that it has, among other things and at a bare minimum, a "germ of a plan" presenting a "reasonable possibility of restructuring."[59]

71. Antibe has no scintilla of restructuring plan. Among other things, Antibe:

(a) has no proposed DIP lender;

(b) has no prospect of raising debt;

(c) has no prospect of raising equity;

(d) has no employee, management (or any other) plan or conception of what a restructuring plan could possibly look like in the circumstances; and

(e) has not implemented any cost reduction measures, nor has any plan to do so.

72. Antibe instead asks this Court to extend the stay to "wait and see" if additional details regarding the FDA's safety concerns about the Drug disclose a viable path forward for the Drug. During this uncertain period, Antibe proposes to, among other things:

(a) pay significant employee bonuses;[60] and

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[59] *Royal Bank of Canada v Canwest Aerospace Inc.*, 2023 BCSC 514, ¶15; *Callidus v. Carcap*, 2012 ONSC 163, ¶58.

[60] First Report of Deloitte Restructuring Inc., in its capacity as Monitor, ¶23 "The one significant change in the amounts included in the April 13 Forecast as compared to the April 8 Forecast is the inclusion of an additional US$200,000 in respect an annual contractual employee bonus which had been inadvertently omitted from the April 8 Forecast by the Applicant."

(b) pay significant funds to an extensive team of senior restructuring professionals who are not incentivized to achieve a successful outcome for Antibe or its stakeholders.[61]

73. Antibe's "wait and spend" approach is neither a restructuring plan, nor the germ of a restructuring plan. "The absence of even a 'germ of a plan' militates against granting relief under the CCAA."[62]

74. Antibe's proposed "wait and spend" approach is particularly inappropriate given that, for the reasons set out above, *the funds it proposes to "wait and spend" are not Antibe's funds, but rather Nuance's*.

75. Antibe in effect seeks to have this Court force Nuance to act as an involuntary DIP lender to Antibe, with none of the protections typically afforded to a DIP financier, to enable Antibe to continue to deplete Nuance's funds in breach of trust.

76. That is conduct contrary to the duty of good faith codified in section 18.6 of the CCAA, and is an inappropriate use of the CCAA which should not be countenanced by the Court.

C. The Comparative Analysis Heavily Favours Appointing a Receiver

77. In choosing between a receivership or a CCAA process, the Court must balance the interests of various stakeholder to determine which process is more appropriate. Factors that this Court has preciously considered as part of this exercise include:

(a) *Payment of the Receivership Applicants*: This factor favours a receivership. Antibe has no restructuring plan whatsoever, let alone a plan that proposes paying out

[61] Curtis Affidavit, ¶148, RA Engagement Letter, Ex "F", Motion Record, Tab 2F, p. 73, 247.
[62] *Callidus v. Carcap*, 2012 ONSC 163, ¶60.

Nuance. The very purpose of Antibe's defensive CCAA is to seek to avoid paying Nuance.

(b) *Reputational damage*: Considerations of reputational damage to Antibe are irrelevant. "Any reputational damage to [Antibe] is of its own making."[63]

(c) *Preservation of employment*: Antibe only has 10 employees.[64] There is no evidence about how many, if any, of these 10 employees will lose their jobs as a result of a receivership.[65] Rather than putting forward evidence on this point, Antibe relies on a boilerplate assertion that there is competition for employees in the biotechnology industry.

(d) *Speed of the process*: This factor favours a receivership. Antibe has no restructuring plan, it proposes to "wait and spend". A receivership will proceed more quickly than "waiting and spending."

(e) *Protection of all stakeholders*: This factor favours a receivership. Antibe has no viable business and no scintilla of a restructuring plan. Permitting Antibe to "wait and spend" protects none of Antibe's stakeholders.

(f) *Cost*: This factor favours a receivership. "CCAA proceedings are inherently expensive. They require regular court attendances, probably with greater frequency than a receivership does."[66] In this case, Antibe also seeks the ability to retain an additional restructuring advisor (Black Swan) purportedly to supplement their experienced CCAA legal advisors, adding another professional services firm under the ambit of its proposed Administrative Charge.

Moreover, Antibe's spending is not constrained in any manner by way of a DIP budget or other spending commitment. There is nothing preventing Antibe from spending many times more than the amount reflected in the cash flow forecast, and no consequence would result, other than the depletion of Nuance's funds.

Finally, the costs carried in Antibe's cash flow forecast are excessive and inappropriate having regard to Antibe's current circumstances. These costs include, among other things, travel and meal expenditures associated with attending conferences.

(g) *Nature of the business*: Antibe has no viable business for the reasons described above. It has a single prospective product which has *at least* a 90% chance of never coming to market.[67] Given the actions of Health Canada and FDA, the prospect of the Drug coming to market is likely well south of 10%.

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[63] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, ¶72.
[64] Curtis Affidavit, ¶48, Motion Record, Tab 2, p. 46.
[65] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, ¶77.
[66] *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc.*, 2020 ONSC 1953, ¶91.
[67] In the real estate context, it has been held that although the CCAA can apply to companies whose sole business is a single land development, it is often the case that in considering the nature of that business, such companies would have difficulty proposing a plan more advantageous than the remedies available to its creditors (See *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008

D. Antibe is Holding Property in Trust for Nuance

78. Regardless of whether a Receiver is appointed (it should be), or the CCAA proceeds (it should not), this Court should order and declare that Antibe is holding property in trust for Nuance.

i. A Constructive Trust Exists at Law

79. "There is no question that the remedy of constructive trust is expressly recognized in bankruptcy proceedings…A constructive trust will ordinarily be imposed on property in the hands of a wrongdoer to prevent him or her from being unjustly enriched by profiting from his or her wrongful conduct." [68]

80. "When property has been acquired in such circumstances that the holder of the legal title [i.e. Antibe] may not in good conscience retain the beneficial interest, equity converts him into a trustee."[69]

81. Antibe is a wrongdoer. The Tribunal specifically found that Antibe's fraudulent inducement of Nuance to enter into the License Agreement "can only be characterized as...affirmatively and deliberately misleading, evincing conscious misbehavior and recklessness, rather than an intent to be truthful or honest."[70] A trust should be imposed based on wrongful conduct.

82. In addition, Antibe has been unjustly enriched. There has been an enrichment to Antibe (the Prepayment), a corresponding deprivation to Nuance (the Prepayment), and there is no juristic

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BCCA 327, ¶36; *BCIMC*, ¶98, 100). The same applies here; Antibe has one potentially viable product that is subject to significant uncertainty and it has not even presented the germ of a plan to propose to its creditors.

[68] *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, ¶33.

[69] *Soulos v. Korkontzilas*, [1997] 2 SCR 217, ¶29.

[70] Arbitral Award, ¶268, Cross-Application Record, Tab 2A, p. 175.

reason for Antibe to remain possessed of the funds in question. As held by the Arbitral Award, Antibe "validly rescinded" the License Agreement.[71] Rescission results in the unmaking of a contract; it voids the contract from the beginning.[72] As there is no contract between the parties, there is no juristic basis on which Antibe can hold the funds.[73] Unjust enrichment is met.

83. The Supreme Court has dictated the following four factors for imposition of a constructive trust in these circumstances:

(a) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(b) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(c) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(d) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; e.g., the interests of intervening creditors must be protected.[74]

84. These criteria are satisfied here:

(a) Given the valid rescission of the License Agreement by Nuance, Antibe was under an equitable obligation as a result of its wrongful conduct and unjust enrichment.

(b) Any cash held by Antibe was in breach of this equitable obligation. The CAD$19.6 million currently held by Antibe is a direct result of its wrongful conduct and unjust enrichment, through its refusal to return Nuance's funds following rescission of the License Agreement, and ongoing refusal to comply with the Arbitral Award.

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[71] Arbitral Award, ¶276, Cross-Application Record, Tab 2A, p. 179.

[72] *Mascitti v. Gore Mutual Insurance Co.*, 77 OR (3d) 285 (ON SC), ¶15-17, citing *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 SCR 423, ¶39.

[73] A contract that did not exist at the relevant time, is illegal, unenforceable, or otherwise invalid will not amount to a juristic reason for enrichment (*Curry v Athabasca Resources Inc.*, 2024 SKCA 7, ¶42; *Golden Oaks Enterprises Inc. v. Scott*, 2022 ONCA 509, ¶83)

[74] *Soulos v. Korkontzilas*, [1997] 2 SCR 217, ¶45.

Notably, according to Antibe, it planned to use the Prepayment for Phase 3 clinical trials of the Drug.[75] That phase of clinical trials has not begun.

(c) Nuance has a legitimate reason – the valid rescission of the License Agreement and continued breach of the Arbitral Award by Antibe – to seek a proprietary remedy.

(d) There are no factors which would render imposition of a constructive trust unjust. Nuance is Antibe's largest creditor, and the only one coming forward with a proprietary remedy. A serious injustice will result if a constructive trust is not granted and Antibe is permitted to continue spending Nuance funds with no potential for recovery.

85. Equity therefore converts Antibe into a trustee, and Antibe is holding funds in trust for Nuance: "A constructive trust is the formula through which the conscience of equity finds its expression."[76]

ii. The Funds Held in Trust are Not Part of Antibe's Property

86. Property held in trust for others does not form part of an insolvent estate, and is not otherwise available to an insolvent entity's creditors.[77] Therefore, the cash held by Antibe does not belong to the insolvent entity, it belongs to the beneficial owner, Nuance.

87. If a constructive trust is not recognized here – or, worse yet, if Antibe's CCAA process is permitted to proceed – the Court would be effectively condoning Antibe's misconduct, exacerbating the losses suffered by Nuance, and potentially unjustly enriching Antibe's other creditors, who might benefit from the distribution of trust property: "Enriching creditors with a windfall and depriving another of its interest in property has been held to be an offence to natural justice."[78]

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[75] Arbitral Award, ¶154, Cross-Application Record, Tab 2A, p. 145.
[76] *Redstone Investment Corporation (Re),* 2015 ONSC 533, ¶70, citing *Soulos v. Korkontzilas*, [1997] 2 SCR 217, ¶29.
[77] *Easy Loan Corporation v Wiseman*, 2017 ABCA 58, ¶17-19.
[78] *Credifinance Securities Limited v. DSLC Capital Corp.*, 2011 ONCA 160, ¶33.

E. If Necessary, the Stay Should be Lifted to Recognize and Enforce the Arbitral Award

88. In the alternative, should this Court choose to grant Antibe's application (it should not), and not impose a constructive trust (which it should), the stay of proceedings should be lifted for the narrow purpose of recognizing and enforcing the Arbitral Award.

89. A stay of proceedings is lifted where there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to the parties and, where relevant, the merits of the underlying claim.[79]

90. Lifting a stay is justified where: (a) the plan is likely to fail; (b) the applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors; (c) it is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period; or (d) it is in the interests of justice to do so.[80]

91. Nuance's application for recognition and enforcement of the Arbitral Award is plainly meritorious. The Arbitral Award is final and binding. There is no right of appeal. Antibe has not raised any basis to resist recognition under the limited grounds available under Article V of the *International Commercial Arbitration Act*, because there are no such grounds.

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[79] *Timminco Limited (Re),* 2012 ONSC 2515, ¶17, leave to appeal denied 2012 ONCA 552, citing *Canwest Global Communications Corp. (Re),* 2009 CanLII 70508 (ON SC), ¶32.

[80] *Canwest Global Communications Corp. (Re),* 2009 CanLII 70508 (ON SC), ¶33, where the Court identified a total of nine situations where lifting a stay is justified, including (in addition to those listed above): the applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor); the applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence); it is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time; after the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period; and there is a real risk that a creditor's loan will become unsecured during the stay period.

92. The balance of convenience favours lifting the stay, and Nuance will be materially prejudiced if the Arbitral Award is not recognized. The recognition and enforcement of the Arbitral Award merely formalizes a pre-existing right that Antibe itself has already admitted exists and publicly stated it would accept in "good faith".

93. It is in the interests of justice to recognize and enforce the Arbitral Award. Antibe's continuing "head in the sand" approach to the Arbitral Award should not be condoned by this Court. Based on Antibe's statement to the market that it would accept the Arbitral Award in "good faith", one might have anticipated that Antibe would consent to its recognition.

94. However, Antibe now apparently does not accept the Arbitral Award despite its binding nature and has not put forth any reasons why it should not be recognized. Accordingly, it is in the interests of justice that this Court grant relief accordingly.

PART V: ORDER REQUESTED

95. Nuance seeks an order substantially in the form appended to its responding record, among other things (i) declaring that Antibe's funds are held in trust for Nuance, and (ii) appointing FTI as receiver of the assets, property and undertakings of Antibe.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of April, 2024.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc*., 2020 ONSC 1953.

2. *Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al*., 2018 ONSC 7382.

3. *Soulos v. Korkontzilas*, 1997 CanLII 346 (SCC).

4. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.,* 2008 BCCA 327.

5. *League Assets Corp. (Re),* 2013 BCSC 2043.

6. *Callidus v. Carcap*, 2012 ONSC 163.

7. *Royal Bank of Canada v Canwest Aerospace Inc.,* 2023 BCSC 514.

8. *Kingsett Mortgage Corp. v. Mapleview Developments Ltd., et al*., 2024 ONSC 1983.

9. *Credifinance Securities Limited v. DSLC Capital Corp.,* 2011 ONCA 160.

10. *Mascitti v. Gore Mutual Insurance Co*., 2005 CanLII 30876 (ON SC).

11. *Guarantee Co. of North America v. Gordon Capital Corp.,* 1999 CanLII 664 (SCC).

12. *Curry v Athabasca Resources Inc*., 2024 SKCA 7.

13. *Golden Oaks Enterprises Inc. v. Scott*, 2022 ONCA 509.

14. *Redstone Investment Corporation (Re),* 2015 ONSC 533.

15. *Easy Loan Corporation v Wiseman*, 2017 ABCA 58.

16. *Timminco Limited (Re),* 2012 ONSC 2515.

17. *Canwest Global Communications Corp. (Re),* 2009 CanLII 70508 (ON SC).

SCHEDULE "B"
RELEVANT STATUTES, REGUALTIONS AND BY-LAWS

IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED
AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF ANTIBE THERAPEUTICS INC. (the "Applicant")

Court File No. CV-24-00718083-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF THE CROSS-APPLICANT NUANCE PHARMA LTD.

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CITATION: Romspen Investment Corporation v. Atlas Healthcare (Richmond Hill) Ltd. et al, 2018 ONSC 7382
COURT FILE NO.: CV-18-607303-00CL
COURT FILE NO: CV-18-00609634-00CL
DATE: December 10, 2018

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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 JUJSTICE ACT*, R.S.O. 1990 C. C.43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION ACT*, R.S.O. 1990, C. 30, AS AMENDED

RE: ROMSPEN INVESTMENT CORPORATION, Applicant

AND:

ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS (RICHMOND HILL) LIMITED PARTNERSHIP, ATLAS SHOULDICE HEALTHCARE LTD., ATLAS SHOULDICE HEATHCARE LIMITED PARTNERSHIP, ATLAS HEALTHCARE (BRAMPTON) LTD. and ATLAS BRAMPTON LIMITED PARTNERSHIP, Respondents

AND RE:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ATLAS SHOULDICE HEALTHCARE LTD., ATLAS HEALTHCARE (BRAMPTON) LTD., ATLAS HEALTHCARE (RICHMOND HILL) LTD., ATLAS HEALTHCARE ASSET MANAGEMENT LTD., ATLAS GLOBAL HEALTHCARE LTD., GRIGORAS DEVELOPMENTS LTD. AND ATLAS INVESTMENTS AND SECURITIES COPORATION

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *David Preger* and *Linda Corne*, for Romspen Investment Corporation

Clifton Prophet, for Meridian Credit Union Limited

Marc Wasserman and *Mary Paterson*, for the Atlas Respondents and the Applicants under the *Companies' Creditors Arrangement Act* application

Robert Chadwick and *Andrea Harmes*, for PointNorth Capital Inc., the Proposed DIP Lender

Eric Golden, for Ernst & Young Inc., Proposed Receiver

Mario Forte, for KSV Kofman Inc., the Proposed Monitor

HEARD: November 27, 2018

ENDORSEMENT

[1] There are two applications before the Court.

[2] In the first application (the "Receivership Application"), Romspen Investment Corporation ("Romspen") applies for the appointment of Ernst & Young Inc. as receiver, manager and construction lien trustee of the undertaking, assets and properties of the Respondent, Atlas Healthcare (Richmond Hill) Ltd., and as receiver and manager of the undertakings, assets and properties of the remaining Respondents including Atlas Healthcare (Richmond Hill) Limited Partnership ("Richmond Hill"), Altas Shouldice Healthcare Limited Partnership ("Shouldice") and Altas Brampton Limited Partnership ("Brampton") (collectively, Richmond Hill, Shouldice and Brampton are referred to as the "Debtors").

[3] In the second application (the "CCAA Application"), certain corporations related to the Debtors including the general partners of the Debtors (collectively, the "CCAA Applicants") request certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") including an initial stay of proceedings in respect of the Debtors and approval of a proposed debtor-in possession facility in respect of Richmond Hill (the "DIP Facility").

[4] On December 3, 2018, the Court advised the parties that the CCAA Application was denied and that the Receivership Application was granted for written reasons to follow. This Endorsement sets out the Court's reasons for these determinations.

Factual Background

The Debtors

[5] Richmond Hill is the owner of a 5.59 acre parcel of land that fronts on the west side of Brodie Drive and the east side of Leslie Street in Richmond Hill, Ontario and has a municipal address of 25 Brodie Street (the "Richmond Hill Property").

[6] Richmond Hill is currently building a six-story medical office building on the Richmond Hill Property (the "Project"), which is addressed in greater detail below.

[7] Shouldice owns a 22.467 acre parcel of land at 7750 Bayview Avenue (the "Shouldice Property") in Markham, Ontario. The Shouldice Property is currently improved with a three-storey hospital and is occupied by Shouldice Hospital Limited under a lease (the "Hospital Lease").

[8] Atlas owns a 4.59 acre parcel of land at 241 Queen Street East in Brampton, Ontario (the "Brampton Property"). The Brampton Property is currently improved with a single-storey commercial building. The building is currently vacant.

[9] In this Endorsement, the Richmond Hill Property, the Shouldice Property and the Brampton Property are referred to collectively as the "Properties".

Financing of the Project

[10] The Project has been financed by a combination of loans from third-party lenders and equity contributions of Richmond Hill, representing equity contributed principally by the limited partners of Richmond Hill.

[11] At the present time, the principal financing arrangements in place are the following:

(1) Loans made by Meridian Credit Union Limited ("Meridian") in favour of Richmond Hill (collectively, the "Meridian Loan") secured by a first charge on the Project (the "Meridian Charge") and a first general assignment of rents; and

(2) A loan made by Romspen in favour of the Debtors together with an outstanding loan acquired by Romspen (collectively, the "Loan"), secured by the Bridging Charge (defined below) and the Romspen Third Charge (defined below), both of which rank behind the Meridian Charge.

These financing arrangements are further described below.

The Meridian Loan

[12] Pursuant to a credit agreement dated March 2, 2017 (the "Meridian Credit Arrangement"), Meridian extended a loan in the maximum principal amount of $59 million to Richmond Hill. In addition, pursuant to an agreement dated July 27, 2018, Meridian extended an interim loan of $4.4 million to Richmond Hill. As of November 7, 2018, Richmond Hill owed $43,371,985 under these loan arrangements and certain other facilities extended by Meridian (collectively, the "Meridian Loan"). Interest has not been paid on the Meridian Loan since August 2018 and continues to accrue. As mentioned, the Meridian Loan is secured by a first ranking charge, the Meridian Charge, in the principal amount of $75 million.

The Romspen Loan Arrangements

[13] The Romspen loan arrangements comprise a loan made to the Debtors and an outstanding loan acquired by Romspen, which will be addressed in turn.

The Romspen Loan

[14] Pursuant to a financing commitment dated December 11, 2017, as amended by a supplement dated June 10, 2018 (collectively, the "Commitment"), Romspen loaned the amount of $81.2 million to the Debtors on a joint and several basis (the "Romspen Loan"). The Romspen Loan was evidenced, among other things, by a joint and several promissory note of the

Debtors in the principal amount of $81.2 million. Of this amount, approximately $49 million was loaned to Shouldice and $10 million was loaned to Brampton, in each case to repay all outstanding debt in respect of these properties. In addition, $19.5 million was loaned to Richmond Hill to partially repay the Bridging Finance Loan (defined below) and $3,280,500 was loaned to Richmond Hill for use in respect of the Project.

[15] The Romspen Loan is fully advanced. Interest accrues on the Romspen Loan at the rate of 11.45 percent per annum. As of November 1, 2018, according to a schedule derived from the records of Richmond Hill, $22,382,788 was owed in respect of the monies loaned to Richmond Hill (I note that Romspen calculates a slightly larger amount that is used below but the difference is not material for these proceedings), $49,324,156 was owed in respect of the monies loaned to Shouldice, and $10,071,200 was owed in respect of the monies loaned to Brampton, for a total of $81,778,143 owing on a joint and several basis by the Debtors. Interest has not been paid on the Romspen Loan since August 2018 and is accruing at the rate of slightly less than $1 million per month.

The Bridging Finance Loan and the Bridging Charge

[16] The Bridging Charge secures a loan made by Sprott Bridging Income Fund LP to Richmond Hill pursuant to a commitment letter dated February 9, 2016, as amended. This loan was originally in the principal amount of $15,840,201 but was subsequently increased in stages to $40,850,000 (the "Bridging Finance Loan"). In this Endorsement, the Romspen Loan and the Bridging Finance Loan are collectively referred to as the "Loan".

[17] Pursuant to the Commitment, Romspen loaned Richmond Hill $19.5 million, which was used to reduce the outstanding amount of the Bridging Finance Loan. The outstanding balance of the Bridging Finance Loan and the security therefor, including the Bridging Charge, were then acquired by Romspen by way of a transfer upon payment by Romspen to Bridging Finance Inc. of $19,590,206.47.

[18] At the present time, Romspen says approximately $25 million is owing in respect of monies advanced to Richmond Hill. There is an issue regarding whether the amount secured by the Bridging Charge is limited to the amount outstanding at the time of the transfer of the Bridging Finance Loan to Romspen plus accrued interest or is the principal amount of the Bridging Charge, being $40.85 million. However, this is not an issue to be determined in these proceedings. I have proceeded on the basis that the total amount owing by the Debtors jointly and severally secured against the Properties is the amount of the Romspen Loan and therefore the resolution of this issue does not affect the analysis or the determinations made below.

The Romspen Security in the Properties

[19] As security for the Bridging Finance Loan and the Romspen Loan, Romspen holds the following:

(3) a second charge on the Project in the principal amount of $40,850,000, originally given in favour of Bridging Finance Inc. and transferred to Romspen on May 24, 2018 (the "Bridging Charge");

(4) a third charge against the Project in the principal amount of $5 million (the "Romspen Charge");

(5) a subordinate general assignment of rents of the Project;

(6) a first charge over the Shouldice Property in the principal amount of $81.2 million (the "Shouldice Charge"), together with a general assignment of rents and a specific assignment of the Hospital Lease; and

(7) a first charge over the Brampton Property in the principal amount of $81.2 million (the "Brampton Charge") together with a general assignment of rents in respect of the Brampton Property.

Status of the Project

[20] The Project is over budget. Based on the most recent report dated November 23, 2018 of Pelican Woodcliff Inc. ("Pelican") (the "Pelican Report"), the Project's cost consultant, the net project budget has increased by approximately $39,000,000 from $83,000,000 to $122,000,000 (including holdback and reserves).

[21] Meridian stopped funding the Project under the Meridian Loan in early 2018 due to increases in the construction budget. Since then, the Debtors have funded construction costs, including the costs of certain remediation work required as a result of cracks in the slab-on-grade, which are the subject of a dispute between Richmond Hill and Dineen Construction Corporation ("Dineen"), the former general contractor for the Project.

[22] The Project is also behind schedule. Based upon the latest construction schedule, construction was to have been completed on October 1, 2018. However, at the present time, it is only 80 percent complete. Moreover, construction has effectively ceased, apart from a small amount of work that is proceeding as a result of settlement agreements with three lien claimants, which have enabled these trades to continue to work on the Project.

[23] Richmond Hill originally contracted with Dineen as the general contractor for the Project. In August 2018, Dineen terminated its contract, prompted by Dineen's concern for payment after learning that Meridian was no longer advancing funds to finance the construction and that Meridian had refused to confirm that it would advance the funds necessary to complete the Project.

[24] Between August 3, 2018 and September 28, 2018, Dineen and eleven trades filed construction liens totalling $16,542,335.75 against the Richmond Hill Property (collectively, the "Liens"). The largest Lien was registered by Dineen. Richmond Hill says Dineen's Lien claim duplicates the other claims of the trades with respect to the Project. Richmond Hill says that currently approximately $8 million is required to discharge all the Liens in respect of the Project. Romspen and Meridian acknowledge there is duplication in the Lien claims.

[25] Because the Loan was fully advanced and Meridian had stopped advancing monies under the Meridian Loan, the Debtors, and in particular Richmond Hill, have experienced a liquidity crisis commencing August 2018. Since that time, the Debtors have made serious, but unsuccessful, efforts to enter into a sale or refinancing transaction that would pay out Romspen and Meridian.

[26] Richmond Hill has selected a different general contractor, Greenferd Construction Inc. ("Greenferd"), to manage the interior works to make the Project suitable for the future tenants, referred to as the "Fit-Out Works". Richmond Hill has recently also engaged Greenferd to take over the role of general contractor for the remaining construction of the Project.

[27] Richmond Hill says that it now expects substantial completion of the Project to occur during May 2019. In view of the construction delay, Richmond Hill has sought and obtained signed acknowledgements regarding the new target occupancy date from future tenants who have contracted for 72 percent of the gross leasable space in the Project and who represent 76 percent of the total projected rent roll. These acknowledgements have provisions that permit Richmond Hill to extend the commitments of these tenants to May 30, 2018.

[28] Meridian's consultant on the Project, Glynn Group Incorporated ("Glynn"), has reviewed the Pelican Report and has made a number of comments, including the following.

[29] First, Glynn agrees with Pelican that construction of the Project will only be back up and running in a productive manner by the middle of January 2019. Second, given the volume of construction remaining, the Project requires "extremely intensive" supervisory, scheduling and management oversight" to achieve the timelines contemplated by Pelican and the Debtors. Third, the selection of a new general contractor/construction manager is "pivotal" to the success of the Project going forward. Fourth, the scenario of a new general contractor/construction manager working with the existing trades is the best scenario and is contemplated by the budget reviewed by Pelican. However, Pelican was also of the opinion that it may not be possible to convince these trades to return to the Project given the recent history of non-payment and the existence of the Liens.

Demands under the Loan and the Meridian Loan

[30] The registration of the Liens and the failure of the Debtors (and the other guarantors under the Loan) to remove the Liens from title to the Richmond Hill Property constitutes a default under the Commitment under and each of the Meridian Charge, the Romspen Charge, the Shouldice Charge, the Brampton Charge and the Bridging Charge (collectively, the "Charges").

[31] The existence of the Liens on the Richmond Hill Property also constitutes a serious material adverse change under the Loan. Section 16.16 of the Commitment provides that if, in the opinion of Romspen, an adverse material change occurs in respect of any of the Debtors, its business, a charged property or Romspen's security, the whole balance of the Loan becomes immediately due and payable and becomes enforceable. The Bridging Finance Loan and the Meridian Credit Agreement contain similar provisions.

[32] In addition, the failure to pay municipal taxes when due also constitutes a default under the Commitment and the Charges. It is understood that tax arrears are owing in respect of each of the Properties and that further arrears are being incurred.

[33] On September 12, 2018, Romspen made demand on the Debtors (among others) and issued notices pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). On November 12, 2018, Meridian also made demand on Richmond Hill, among others, and issued similar notices under s. 244 of the BIA. The Debtors do not deny that they are in default under the Commitment, the Bridging Finance Loan, the Meridian Loan and the Charges.

[34] The Debtors also do not dispute that each Charge held by Romspen and Meridian in respect of the Properties provides for the appointment of a receiver in the event of default under the Loan and the Meridian Loan. The Romspen Charge also expressly contemplates the appointment of a construction lien trustee under the *Construction Act*, R.S.O. 1990, C. 30 (the "CA") in the event of default.

The Receivership Application

[35] As mentioned, in the Receivership Application, Romspen seeks the appointment of a receiver over the properties and assets of Richmond Hill having the necessary powers to engage third parties to complete the construction of the Project. Romspen also seeks the appointment of a receiver over the assets of Shouldice and Brampton.

[36] The receivership order sought by Romspen included the power to sell the assets of each of the Debtors. However, the principal purpose of the Romspen application in respect of Richmond Hill is the appointment of a receiver to supervise the completion of construction of the Project. Romspen also says the principal purpose of the appointment of a receiver over the assets of Shouldice and Brampton is to ensure that the priority of funds advanced under the proposed Receivership Financing (defined below) is preserved in respect of these Properties as well as the Richmond Hill Property. Accordingly, Romspen has indicated that it is prepared to exclude the power of sale in respect of the Properties from any order that the Court may grant.

[37] Romspen has filed a report of Ernst & Young Inc., the proposed receiver (the "Proposed Receiver"), which sets out its proposed course of action. The Proposed Receiver states that it intends to engage Elm Development Corp. as the construction manager for the Project.

[38] Meridian supports the Receivership Application of Romspen and has committed to the Receivership Financing (defined below) with Romspen. In this Endorsement, the term "Receivership Applicants" refers to Romspen and Meridian in the circumstances in which they join in making the same submissions in these proceedings.

The Receivership Financing

[39] Romspen and Meridian have provided the Court with a signed term sheet for a joint financing in the amount of $35 million to fund the proposed receivership (the "Receivership Facility"). The following are the principal terms of this Facility.

[40] The principal amount of the Facility of $35 million is available in two tranches – a tranche of $15 million to be provided by Romspen (the "Romspen Tranche") and a tranche of $20 million to be provided by Meridian (the "Meridian Tranche"). The Meridian Tranche is to be available only after specified construction work described in a schedule to the Pelican Report (although the term sheet refers to a prior Pelican report dated October 21, 2018) is completed, in which event the loan/value covenant under the Meridian Credit Agreement would be brought into compliance permitting further advances under that Agreement.

[41] The Receivership Facility would have a one-year term, and would bear interest at a rate of 15 percent under the Romspen Tranche and at the rate provided for under the Meridian Credit Agreement for the Meridian Tranche. The Receivership Applicants say this would result in a blended rate of approximately nine percent.

[42] Advances under the Romspen Tranche of the Receivership Facility are to be secured by a charge ranking behind the Meridian Charge but ahead of all other charges on the Properties, including the Liens. Advances under the Meridian Tranche are to be secured on the Richmond Hill Property in priority to all other charges on that Property.

[43] The Receivership Facility contemplates fees of three percent of the maximum amount of the Romspen Tranche to Romspen and of $170,000 to Meridian.

The CCAA Application

[44] In addition to opposing the Receivership Application, the CCAA Applicants, which effectively includes the Debtors, have brought an application for certain relief under the CCAA, including an initial stay of proceedings and the appointment of KSV Kofman Inc. as the Monitor in respect of the proposed proceedings. The order sought also includes approvals of the DIP Facility and related charge (the "DIP Charge"), of a financial advisor agreement dated October 19, 2018 between Atlas Global Healthcare Ltd., one of the CCAA Applicants, and FTI Capital Advisors – Canada ULC ("FTI") and a related charge (the "FTI Charge"), of a directors' and officers' charge in the aggregate amount of $500,000, and of an administration charge in the aggregate amount of $1.5 million.

The DIP Facility

[45] In the CCAA Application, the CCAA Applicants have included a signed term sheet dated as of November 26, 2018 respecting the DIP Facility between PointNorth Capital (PNG) LP and PointNorth Capital (O) LP (collectively, "PointNorth"), as lenders on behalf of certain funds and accounts (collectively "PointNorth"), on the one hand, and each of the CCAA Applicants, on the other. The following sets out the principal terms of the DIP Facility.

[46] The DIP Facility is a non-revolving facility that accrues interest at 15 percent per annum compounded monthly and has a term of one year, subject to earlier termination under certain circumstances. The total availability under the DIP Facility is $50 million to be funded in two equal tranches – the first upon the issuance of the initial order sought under the CCAA including approval of the DIP Facility and the second on or about February 1, 2019. The DIP Facility also includes provision for an additional loan of up to $2,830,000 to cover overrun construction costs (the "Bulge Facility").

[47] The DIP Loan requires payment of a commitment fee of $750,000, a monthly administration fee of $50,000 and an early exit payment fee on repayment of any portion of the DIP Facility to top up aggregate interest payments to $6,875,000.

[48] The DIP Facility contemplates the following use of proceeds: (1) to pay advisory, consultant and legal fees of the lenders, the CCAA Applicants and the Monitor; (2) to pay interest, fees and other amounts owing under the DIP Facility; (3) to fund the working capital requirements of Richmond Hill and property taxes and insurance of the other Debtors during the CCAA proceedings; and (4) to fund the costs to complete the Project in accordance with the budget for the Project, estimated to be $28.261 million plus certain amounts to address certain Lien claims.

[49] The DIP Facility contemplates a charge over all the property and assets of the CCAA Applicants, including the Richmond Hill Property, ranking prior to all other charges other than the Meridian Charge. Accordingly, the DIP Facility requires a charge ranking behind the security in favour of Meridian on the Richmond Hill Property but ahead of the security in favour of Romspen on each of the Properties. Further, the DIP Facility contemplates subordinate charges over a fourth property (the "Mississauga Property") that is not subject to any security in favour of either Meridian or Romspen.

Applicable Law

[50] The appointment of a receiver and manager is governed by s. 43 of the BIA and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, both of which provide that the Court may appoint a receiver where it is "just or convenient" to do so. Although s. 68 of the CA does not specify that the requirement for the appointment of a construction lien trustee is satisfaction of the "just or convenient" test, Ontario courts have relied on this test in making such an appointment: see, for example, *WestLB AG, Toronto Branch v. Rosseau Resort Developments Inc.*, 2009 CanLII 31188 (Ont. S.C.).

[51] It is trite law that, in considering whether to appoint a receiver, a court should have regard to all the circumstances of the case but in particular to the nature of the property and the rights and interests of the affected parties in relation thereto: see, for example, *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. C.J. (Gen. Div.)), at para. 11.

[52] The granting of a stay of proceedings on an initial application under s. 11.02(1) of the CCAA requires the applicant demonstrate that it is a "debtor company" as defined in s. 2(1) of the CCAA and that circumstances exist that make the order appropriate.

[53] For this purpose, I adopt the following description of the purpose of the CCAA in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at p. 88:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. ... When a company has recourse to the C.C.A.A., the

> Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.

[54] There is no dispute that each of the CCAA Applicants are debtor companies for the purposes of the CCAA. Further, each of the Debtors is insolvent in that, regardless of the values of the Richmond Hill Property on completion of the Project, and of the Shouldice Property after redevelopment of that Property, they are currently unable to meet their respective obligations as they fall due.

[55] In the present case, because the CCAA Application also requires approval of the DIP Facility at this time, the provisions of s. 11.2 of the CCAA governing the approval of any charge to secure debtor-in-possession financing, while not technically applicable unless the CCAA Application is granted, also inform the determinations made in this Endorsement. In this regard, s. 11.2(4) provides that, among other things, in deciding whether to approve such a charge, a court is to consider the following factors:

(a) the period during which the company is expected to be subject to proceedings under the CCAA;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report, if any.

Analysis and Conclusions

[56] There is no obvious priority of consideration of the Receivership Application and the CCAA Application. Moreover, each must be judged independently on its own merits. It is at least theoretically possible that each application could be denied. However, as a practical matter, the parties require that the Court grant the relief sought in one of the applications in order that construction of the Project can restart under the supervision of either a court-appointed receiver or Richmond Hill as a debtor-in-possession. Further, the considerations respecting the merits of each application are broadly similar. Accordingly, I propose to address the considerations raised by the parties first and then to set out my determinations regarding the applications.

[57] The considerations raised by the parties fall broadly into four categories – operational issues, the nature of the property involved, the respective rights and interests of the parties and the respective costs of the prospective proceedings. I will deal with each of these considerations in turn.

Operational Issues Pertaining to the Competing Applications

[58] The CCAA Applicants have raised two considerations that they urge the Court to take into account pertaining to the manner in which it is proposed to conduct the remaining construction of the Project: (1) the comparative feasibility of the respective financial plans of the parties; and (2) the comparative feasibility of the respective construction plans of the parties. I will address each of these considerations separately before addressing whether one of the operational plans is demonstrably superior to the other.

The Competing Financial Plans

[59] The CCAA Applicants argue that their financial plan is more realistic than the Romspen receivership plan, which they suggest is unrealistic in the sense of not feasible.

[60] The financial plan of the CCAA Applicants contemplates an availability of $50 million under the DIP Facility. In the current cash flows provided to the Court, which also form the budget for the purpose of the DIP Facility, Richmond Hill would have a cushion of approximately $5 million to cover cost overruns. In addition, the DIP Facility provides for the possibility of the Bulge Facility to cover further cost overruns.

[61] The financial plan of the proposed receivership is based on the Receivership Facility. It is limited to $35 million, of which the Meridian Tranche of $20 million is available only if the hard construction costs do not materially exceed those contemplated in a schedule to the Pelican Report. The Receivership Facility also does not have any significant amount of cushion for cost overruns. However, each of Romspen and Meridian are of the view that these costs are achievable and that they will deal with any unanticipated cost overruns. They are also of the view that the budget of the CCAA Applicants includes certain costs in amounts that are either unnecessary or larger than necessary.

[62] The principal differences between the two plans pertain to lower interest costs and professional fees of the Receivership Financing as well as a different view of the amounts required to pay the Lien claimants and a larger cushion for contingencies under the DIP Facility.

[63] While there is some benefit in the greater flexibility provided by the DIP Facility, I am not persuaded that, on balance, the financial plan for the receivership is unrealistic, as the CCAA Applicants suggest. It is consistent with the estimate of capital costs to completion of Pelican, Richmond Hill's own quantity surveyor, which the CCAA Applicants also use in their budget. Those capital costs have also been reviewed and approved by Meridian's quantity surveyor. Further, as Romspen acknowledges, the terms of the Receivership Financing, as well as the limited scope of the proposed receivership order in respect of Shouldice and Brampton, effectively require Romspen to fund any cost overruns provided they will translate into increased equity in the Project. In addition, as mentioned, a principal difference between the two plans is a more conservative estimate of certain payments (i.e. involving larger payments) in the financial

plan of the CCAA Applicants. It is not possible to estimate these latter costs with any degree of certainty at the present time.

[64] Based on the foregoing assessment of the considerations raised by the parties, I conclude that the evidence before the Court does not establish that the financing plan of the Receivership Applicants is unrealistic in the sense that it is not feasible or that the financing plan of the CCAA Applicants is materially better than the plan of the Receivership Applicants.

The Competing Construction Plans

[65] The CCAA Applicants also argue that their construction plan is more reliable than that of the proposed receivership. In particular, the CCAA Applicants argue that they are better placed to get the construction restarted because of their prior familiarity with the construction plan and schedule, as well as their relationship with the trades. Romspen and Meridian say that Elm is experienced in workout construction projects and is therefore more than capable of restarting the Project in a reasonable time.

[66] I do not think that the record provides a basis for preferring one construction plan over the other for the following reasons.

[67] First, while Richmond Hill has more experience of, involvement in, and knowledge of, the Project, this cuts both ways. Under its supervision, the capital costs of the Project have increased very significantly. While Richmond Hill disputes the $38 or $39 million figure of Pelican, it acknowledges at least $32 million in cost overruns. There are, therefore, valid grounds for concern regarding the ability of Richmond Hill's management to control construction costs. In addition, under Richmond Hill's supervision, the trades previously working on the Project have ceased working and registered construction liens. A decision will have to be made on an individual trade basis whether to settle with, or to replace, the trade. This may be affected in part by the state of the current relationship between Richmond Hill and each of the affected trades.

[68] Second, Richmond Hill has been forced to engage a new general contractor for the construction, Greenferd. Both Greenferd and Elm appear to have a similar degree of familiarity with the Project and a similar challenge of "getting up to speed". I cannot find that Elm is any more of a risk than Greenferd on the record before the Court.

[69] Third, the more aggressive construction schedule proposed by Richmond Hill in the affidavit of Peter Grigoras, sworn November 14, 2018 (the "Grigoras Affidavit"), is not consistent with the opinion of Pelican, its own quantity surveyor. As noted above, Pelican is of the view that construction would restart in early January and that substantial performance would not be achieved until late June 2019. I see no basis for concluding that there will be no "ramp-up" time under a CCAA proceeding, as the CCAA Applicants suggest.

[70] Fourth, the CCAA Applicants say the Court should be mindful of the specialized nature of the Project as a hospital and the fact that Richmond Hill has engaged specialized employees and consultants to address the complicated issues associated with construction of such a building. However, to the extent that Richmond Hill has engaged any such individuals as employees or consultants, a receiver would also be in a position to engage them to receive the benefit of their

expertise. The real significance of this consideration, if any, lies in the increased costs that would be incurred beyond those currently contemplated by the Receivership Facility but are apparently included in the budget used for the DIP Facility.

[71] Fifth, the CCAA Applicants also suggest that the involvement of OMERS, as an investor in PointNorth, and of Dream Alternatives Lending Services LP, as a participant in the DIP Facility, is a significant advantage. They suggest that the expertise of these organizations will translate into better cost administration and the availability of construction expertise. While such involvement would be desirable, there is nothing to demonstrate that such benefits will accrue to the Project. Moreover, each of PointNorth and Romspen has expertise in the administration of construction projects in a workout situation and an incentive to require careful oversight.

[72] Lastly, while I agree that, in certain circumstances, a debtor-in-possession restructuring may impart greater confidence in the financial stability of the debtor than a receivership, I am not persuaded that this is an important consideration in the present case. The liquidity problems of Richmond Hill have been transparent to all of the trades working on the Project for some time and to the future tenants. It is not clear that a CCAA proceeding would restore confidence in Richmond Hill if the same management continued to be involved with the Project, even with a new general contractor.

Conclusion Regarding Operational Issues Pertaining to the Competing Applications

[73] Each of the proposed plans for completing the Project of the Receivership Applicants and the CCAA Applicants carries its own risks. I have considered whether, when viewed in their entirety, the construction and financing plans of one of these parties is materially superior to the other, or more credible than the other, such that this should be a consideration to be taken into account in the Court's determination. Given the evidence before the Court, I am not persuaded, however, that the plan of either the CCAA Applicants or the Receivership Applicants is materially superior to, or more credible than, the other. In particular, I cannot conclude that either the CCAA Applicants' plan or the Receivership Applicants' plan is more likely to achieve construction completion on time and on budget. Given the number of variables involved, any such determination would be highly speculative at this time. Nor do I think that the CCAA Applicants have demonstrated that the Receivership Application, if granted, will result in the Project failing to be completed, as the CCAA Applicants suggest. Accordingly, I do not consider the operational features of the plans of the parties to be a significant consideration weighing in favour of either the CCAA Application or the Receivership Application.

The Nature of the Property

[74] An important consideration in this proceeding is the nature of the property at issue.

[75] The Receivership Applicants say that each of the Debtors is a single-project real estate development company. Romspen says that courts have generally held that there is no principled basis for granting a stay under the CCAA to prevent real estate lenders from enforcing their security. Meridian submits that courts will generally refuse to grant a stay where CCAA protection would place the value of the security of secured creditors at risk. Both rely on the

decisions in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 83 B.C.L.R. (4th) 214 and in *Dondeb Inc. (Re)*, 2012 ONSC 6087, 97 C.B.R. (5th) 264.

[76] In *Cliffs Over Maple Bay Investments*, Tysoe J.A. stated the following at para. 36:

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

[77] In *Dondeb Inc.*, after referring to the above statement of Tysoe J.A., C. Campbell J. went on to refer with approval to the following comments of Kent J. in *Octagon Properties Group Ltd. (Re)*, 2009 ABQB 500, 486 A.R. 296, at para. 17:

> 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.

[78] The CCAA Applicants do not deny this line of cases but suggest that it is not applicable in the present circumstances. They suggest that the circumstances are much closer to the circumstances in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319, 96 B.C.L.R. (4th) 77 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775, in which courts ordered a stay under the CCAA in preference to the appointment of a receiver.

[79] In *Forest & Marine Financial Corp.*, at para. 26, Newbury J.A. distinguished the circumstances from those in *Cliffs Over Maple Bay Investments* as follows:

> In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself, which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the status quo while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary. If the Partnership is ultimately able to arrange a refinancing in respect of which creditors need not compromise their rights, so much the better. At this point, however, it seems more likely a compromise will be necessary and the Partnership must move promptly to explore all realistic restructuring alternatives.

[80] The same analysis was applied by Fitzpatrick J. in *Pacific Shores Resort & Spa Ltd.*, at para. 39:

> I am of the view that, similar to the facts under consideration in *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319 at para. 26, 273 B.C.A.C. 271, this is a situation where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of the parties. The CCAA proceedings have only begun, and I have no doubt that any plan will evolve over time given the usual negotiations that one would expect to occur between the petitioners and the major stakeholders while the stay is in place.

[81] The CCAA Applicants suggest that Richmond Hill in particular should be treated as a business because it has approximately 20 employees and consultants and because it has contracted with approximately 20 future tenants. They also suggest that the relationships among the CCAA Applicants and the Debtors are complex with the result that a CCAA proceeding is more appropriate.

[82] I do not think that any of the Debtors can properly be characterized as a business in the sense contemplated in the cases relied upon by the CCAA Applicants. There is no demonstrated ongoing business of any of the Debtors. There are only a limited number of employees and consultants of Richmond Hill and these individuals are employed solely for the purpose of building the Project. The fact that approximately 20 entities have executed leases for space in the Project when it is completed also does not establish the existence of a business at the present time. Nor have the CCAA Applicants demonstrated that the relationship between themselves is sufficiently complex to require a CCAA proceeding to properly identify the respective stakeholder interests in the debtor companies and ensure fair treatment of such interests.

[83] More generally, the circumstances in the cases relied upon by the CCAA Applicants are very different from the present circumstances in a number of significant respects. In *Forest & Marine Financial*, the debtor companies were engaged in a very different business from real estate development – that of providing financing and advisory services. The assets of the debtor companies comprised a loan portfolio of many types of assets as well as an office building and the liabilities included both secured debt and "investment receipts" issued to the public. In *Pacific Shores Resort & Spa*, the debtor companies employed approximately 250 persons and were in the business of selling vacation ownership products and deeded ownership products, and the management of such interests, including the management of several resorts. Moreover, and significantly, in both cases, the court concluded that the secured creditors were well covered by the equity in the debtor companies. In my view, therefore, the present circumstances are much closer to those in *Dondeb* and *Cliffs Over Maple Bay Investments* than they are to the circumstances in *Forest & Marine Financial* and *Pacific Shores Resort & Spa*.

[84] The foregoing analysis suggests that there are no features of the business of the Debtors, or of the Properties, that render a CCAA proceeding necessary, or more appropriate than a receivership proceeding, to address the current liquidity difficulties of the Debtors and the need to complete the Project with an additional injection of funds from third parties. The proposed receivership proceeding and the proposed CCAA proceeding should each accomplish the objective of completion of construction of the Project. However, the case law suggests that, in similar circumstances, particularly where the security coverage of secured creditors is in question, courts have given effect to the rights of secured creditors by granting a receivership order. This consideration weighs in favour of a receivership order in the present circumstances. To be clear, however, I think that the judicial preference for a receivership over a CCAA proceeding in the circumstances of a single-project real estate development corporation is not so much a free-standing rule, as Romspen suggests, as it is the outcome of a consideration of the other factors discussed below.

Legal Rights and Interests of Meridian and Romspen

[85] Meridian and Romspen submit that where the contract between a lender and a borrower provides for the appointment of a receiver in the event of a default, a court should not ordinarily interfere. In short, they argue that the Court should give effect to their contractual rights.

[86] As mentioned, the Court is required to assess whether the appointment of a receiver is "just or convenient" having regard to all of the circumstances. In this context, I do not think that the rights of secured creditors who choose to seek the benefits of a court-appointed receiver over a privately-appointed receiver are as unqualified as Romspen suggests. Nevertheless, the legal rights of Meridian and Romspen are an important consideration in making a determination regarding the appropriateness of relief under the CCAA as well as the application of the "just or convenient" test for the appointment of a receiver. In this regard, two considerations are of particular significance.

The Security Position of Meridian and Romspen

[87] First, there is a real possibility that the consequence of the priority to be afforded the DIP Charge, which is a condition of any CCAA proceeding, would be to diminish the security of Romspen and, to a lesser extent, of Meridian. For clarity, it should be noted, however, that the security of these creditors will only be "primed" as a practical matter to the extent that the monies advanced under the DIP Facility exceed the monies that would otherwise be advanced under the Receivership Financing, given that prior-ranking construction financing is required under each plan to complete the Project.

[88] The CCAA Applicants argue that, on the basis of their evidence, both Romspen and Meridian are fully secured with the result that there is no practical significance to this concern. I agree that, given the terms of the DIP Facility, and subject to the resolution of one issue acknowledged by counsel for PointNorth, it is unlikely that Meridian would be adversely affected by the imposition of that Facility in priority to the Meridian Loan. However, the situation in respect of Romspen is not as clear. This requires a consideration of the evidence in the record.

[89] The CCAA Applicants have provided appraisals of the Properties that they say demonstrate that Romspen is very well secured. Conversely, Romspen has provided internal valuations for the Properties that place Romspen's security "on the cusp", in that they suggest that the aggregate value of the equity in the Shouldice Property, the Brampton Property and the completed Project, after deduction of the amount of the Meridian Loan and the DIP Facility, would be no greater than the outstanding amount of the Loan at the present time and could be materially less than such amount. Romspen also notes that, given the interest rate under the Loan, interest continues to accrue at the rate of slightly less than $1 million per month eroding any existing equity. Accordingly, under these valuations, Romspen could suffer a deficiency under a CCAA proceeding using its estimate of the costs of such a proceeding. On the other hand, using more optimistic assumptions, the same valuation models would provide a cushion of coverage for Romspen.

[90] I do not think that the appraisals provided by the CCAA Applicants are sufficiently reliable that the Court can rely on them on a balance of probabilities standard for the following reasons.

[91] With respect to the Project, the appraisal of the CCAA Applicants was conducted on a "fully built" basis. It also assumes 100 percent occupancy at certain projected rental rates. While Richmond Hill has contracted for a large portion of the rental space, there is a real risk until the Project is fully completed that the projected rental stream will not be achieved for a number of reasons. Accordingly, it logically follows that the value of the Project at the present time must be discounted from this appraisal value to reflect such risks. With respect to the Shouldice Property, the appraisal of the CCAA Applicants is based on the assumption that the Shouldice Property can be rezoned for the development contemplated in the appraisal. There is, however, no evidence on the feasibility of such development. Accordingly, neither of these appraisals provides a reliable valuation of these Properties at the present time.

[92] On the other hand, the internal valuations of Romspen make certain assumptions regarding occupancy rates and an appropriate capitalization rate that are likely to be conservative given Romspen's status as a subordinated lender to the Debtors. The sensitivity analysis provided by Romspen demonstrates a range of values as these assumptions are varied that would result in Romspen's security position falling between a material deficiency and a moderate excess of coverage. In the absence of any basis for determining the appropriate assumptions, it is also not possible to rely on these internal valuations.

[93] It is therefore necessary to seek other objective evidence regarding a realistic range of values for the Project.

[94] In this case, the best objective evidence is PointNorth's position, as the lender under the DIP Facility. If PointNorth accepted the Debtor's estimate of value, it would not have required that the DIP Charge prime the Romspen security, much less required that the CCAA Applicants provide the additional security on the Mississauga Property. Given PointNorth's requirement of these terms of the DIP Facility, I think it is a fair inference that PointNorth does not share the Debtor's confidence in the value of the Properties.

[95] In addition, the inability of the Debtors to obtain financing at the indicative values in the term sheets set out in the Grigoras Affidavit is further evidence that the appraisal values put forward by the CCAA Applicants are not reliable indicators of the current values of the Properties. In this respect, the indicative term sheet of PointNorth attached to that Affidavit is of particular relevance.

[96] Similarly, the failure of a proposed sale of the Shouldice Property on the terms, and at the value, set out in the Grigoras Affidavit due to the purchaser's failure to satisfy the financing condition is also evidence that the value ascribed to that Property by the CCAA Applicants is not credible.

[97] The foregoing evidence does not, however, establish a credible value or range of values for the Richmond Hill Property or the Shouldice Property. In these circumstances, I think the Court can find no more than that the equity in the Properties lies somewhere between the

Romspen internal values and values that are materially less than the aggregate value ascribed to them by the Debtors.

[98] The Court must therefore proceed on the basis that there is at least a reasonable possibility that the DIP Facility would adversely affect the Romspen security position. There is, therefore, a real possibility that, under the proposed CCAA proceedings, the Debtors would be "playing with Romspen's money" by virtue of the terms of the DIP Facility, as Romspen suggests. In other words, as in *Octagon Properties Group*, under the proposed CCAA proceedings, Romspen would be paying the cost to permit the Debtors to buy some time. This is also a consideration that weighs in favour of a receivership.

[99] I note, as well, that there is an inherent check and balance on the foregoing value assessment in the CCAA Applicants' favour. The grant of the requested receivership order would not prevent the CCAA Applicants from continuing to market the Properties with a view to a sale or refinancing transaction that would repay Meridian and Romspen. If the values of the Properties do in fact approach the values suggested by the CCAA Applicants, it should be possible to conclude such a transaction and, thereby, to retain the remaining equity in the Properties for the benefit of the subordinated lenders and equity holders.

The Contractual Rights of Meridian and Romspen

[100] Second, the effect of a CCAA proceeding would be to deprive Meridian and Romspen of the right to cause a change in the management of the Project in the very circumstances in which their security contemplates such a right. The Receivership Applicants have lost faith in the Debtors' management and an acknowledged default has occurred. Meridian and Romspen have bargained for the right to have a receiver take over control of, and to complete, the construction of the Project in these circumstances. There must be a good reason to deprive them of that right.

[101] In the present circumstances, however, this right has a particular significance because oversight and control of the construction costs is likely to impact the value of Romspen's security and, in an extreme case, of Meridian's security. A court-appointed receiver must justify its actions to the court and thereby to the creditors. It is exposed to potential liability if it is grossly negligent in the performance of its duties. Accordingly, secured creditors would reasonably expect to have more input into a receiver's actions than they would into the actions of the Debtors' management in a CCAA proceeding. While this might not be significant in a status quo situation, it is an important consideration in the present circumstances in which significant construction activity must take place, and significant additional debt must be incurred, to complete the Project.

[102] Accordingly, I conclude that the assertion by the Receivership Applicants of their contractual rights in the present circumstances, as well as their loss of faith in the management of the Debtors, must be important considerations for the Court.

The Interests of the Other Stakeholders in the Project

[103] Based on the foregoing, the proposed CCAA proceedings would have the two adverse or potentially adverse effects on the Receivership Applicants described above. The CCAA Applicants argue, however, that any such prejudice to the Receivership Applicants is more than

offset by the operational benefits of a CCAA proceeding and the benefits to the other stakeholders in the Project.

[104] I have dealt with the alleged operational benefits of the proposed CCAA proceeding above. I have concluded that the CCAA Applicants have not established that there are material operational benefits that make a CCAA proceeding superior to a receivership proceeding. This is therefore not a factor to be taken into consideration.

[105] The position of the CCAA Applicants that there are other stakeholders who will benefit from a CCAA proceeding and whose interests counterbalance the interests of the Receivership Applicants raises an important issue in these applications. Such stakeholders fall into two categories – future tenants and subordinate creditors and equity owners.

[106] The future tenants are critical to the success of the Project. It is of fundamental importance that the tenancy agreements in place continue and that any unrented space be rented as soon as possible. However, I am not persuaded that the future tenants who have contracted with Richmond Hill are more likely to favour a CCAA proceeding over a receivership. There is no evidence to this effect in the record. The more likely position is that the future tenants are more concerned with satisfaction that the Project, including the Fit-Out Works in respect of their space, will be completed in accordance with the timelines contemplated. In this respect, I think the future tenants are likely to be neutral as between a receivership or CCAA proceedings.

[107] The subordinated creditors of the Project comprise the trade creditors and certain unsecured lenders to the Project. The former include the Lien claimants whose priority has been established and any future trade creditors who will need to be kept current in order to complete the Project. The interests of these parties pertain to operational issues that are not affected by the nature of the proceeding that results in a restart of construction of the Project.

[108] On the other hand, the unsecured creditors and the equity holders in the Project rank junior to Meridian and Romspen. A CCAA proceeding, which entails prejudice or potential prejudice to senior ranking creditors in favour of junior ranking creditors and equity holders can only be justified, if ever, on the basis of larger societal interests.

[109] Meridian and Romspen submit that, as single-project real estate development companies, the insolvency of the Debtors, and in particular of Richmond Hill, does not raise any such interests. They rely on the decisions in *Cliffs Over Maple Bay Investments* and *Dondeb*, and in particular on the statements in those decisions cited above. Three considerations emerge from the case law set out above which are important in the present circumstances.

[110] First, where there is no business but rather a single-project real estate development company having mortgage lenders, it is not realistic to contemplate the possibility of a plan of compromise or arrangement under the CCAA that gives Meridian and Romspen less than a full payout of their indebtedness from the proceeds of any sale or a refinancing. In particular, there can be no justification for transferring value from Meridian and Romspen to more junior creditors or the equity holders.

[111] Second, for the same reason, there is no basis on which subordination of the priority position of Meridian and Romspen to that of a DIP Lender can be justified beyond the

construction costs contemplated by the financing plans of the parties to the extent such costs translate into equity in the Project and therefore do not diminish the security of these creditors.

[112] Third, for the foregoing reasons, it is questionable whether the CCAA proceedings contemplated by the CCAA Application can be said to further the purpose of the CCAA as set out above for the following reasons.

[113] In the present case, the CCAA is not being proposed with a view to "stabilizing" the present circumstances of the Debtors and allowing the Debtors the benefit of the status quo with a view to putting a restructuring plan to the stakeholders. There are two elements to this conclusion.

[114] First, it is not meaningful to talk of the maintenance of the status quo for the reason that, as discussed above, construction of the Project, being the only activity of Richmond Hill, is currently almost completely shut down. The Court is not being asked to grant relief to maintain that status quo. It is being asked to determine which of the two legal procedures – a receivership or a CCAA proceeding – should be ordered with a view to furthering a resumption of the construction of the Project under a new construction general contractor. Moreover, while the DIP Facility provides for some working capital, the DIP Facility is a non-revolving facility whose predominant purpose is to provide construction financing in a material amount which is necessary to permit construction to restart. In effect, the CCAA Applicants ask the Court to impose a third construction lender on the Project in priority to the existing lenders. This is beyond the usual nature and purpose of a DIP loan for working capital purposes. It underscores the fact that mere "stabilization" of the alleged business of the Debtors would serve no useful purpose. In short, the CCAA Applicants do not seek relief under the CCAA for the purpose of maintaining the status quo, or for "stabilizing" the situation, in the sense in which those terms are generally understood in the context of CCAA proceedings.

[115] Second, the CCAA Applicants do not contemplate a plan of compromise or arrangement as understood for the purposes of the CCAA for the reason that, as mentioned, Meridian and Romspen cannot be compelled to accept less than a complete payout of the Meridian Loan and the Loan, respectively, out of the proceeds of a sale or a refinancing. The "plan" of the CCAA Applicants is to seek to repay Meridian and Romspen out of the proceeds of a future sale or refinancing, if possible, after completion of the Project.

[116] Fundamentally, the purpose of the CCAA Application is not to restructure the business of the Debtors with a view to continuing their business but rather to maintain control of the Project by a Court-ordered imposition of new construction financing in the hope of realizing value for the subordinated lenders and equity holders. However, such control comes at the cost of prejudice to the rights, and potentially to the security position, of Romspen and Meridian. In this regard, the circumstances are similar to those in *Callidus Capital Corp. v. Carcap Inc.*, 2012 ONSC 163, 84 C.B.R. (5th) 300.

[117] The Debtors have experienced a liquidity crisis since August 2018. None of the Debtors has any working capital with which to carry on business. The Debtors have explored a number of sales and refinancing options and have been unsuccessful. There is no sale or refinancing

option available to the Debtors at the present time. The CCAA Application is the only means available to them to preserve control over the continued construction of the Project.

[118] The purpose of the CCAA Application is to maximize the value of the Project. In the abstract, this is a desirable objective. However, in the present circumstances, it is not. It is the hope of the CCAA Applicants that sufficient value will be realized upon completion of the Project to make a sale or refinancing transaction feasible. If they are successful in realizing additional value, the subordinate creditors and the equity holders will benefit. However, if they are unsuccessful, Romspen and, in an extreme case, Meridian may well suffer a loss. The proposed CCAA proceeding therefore places the risk of a reduction in the value on Romspen and Meridian.

[119] This is inconsistent with the purpose of the CCAA which is to preserve the status quo in order to facilitate a plan of compromise or arrangement among the creditors of a debtor company, not to transfer risk, and potentially value, from senior creditors to junior creditors and equity holders without the consent of the senior creditors.

[120] Based on the foregoing, I conclude that the CCAA Applicants have failed to establish that the prejudice to the Receivership Applicants is offset by the benefits of the proposed CCAA proceeding.

The Respective Costs of a Receivership Versus a CCAA Proceeding

[121] Romspen alleges that the costs of a receivership will be less than the costs of a CCAA proceeding. While this is acknowledged by the CCAA Applicants, the parties dispute the extent of the difference. Counsel agree that the disputed difference is roughly $5-6 million i.e. between a difference of $5 million and a difference of $11 million. The difference pertains largely to the difference in the estimated costs discussed above in respect of the financing plans of the parties. Romspen says this consideration is important in respect of its position as a secured lender to the extent that the security for the Loan may not exceed, or only minimally exceeds, the current value of the Properties, which it considers to be the case.

[122] However, for the reasons discussed above, the Court is not in a position to make any determination on the likely difference in costs between these two proceedings beyond the agreed difference of $5 million. Any other figure would be speculative based on operational assumptions regarding the Project construction operations that may or may not prove to be appropriate.

[123] The more important cost considerations, which have been addressed above, are the extent to which the CCAA proceeding would result in less control over the financing of the much larger costs of completion of the Project, in a larger advance under the DIP Facility than would otherwise have been made under the Receivership Financing, and in a larger subordination of the security position of Romspen and Meridian.

[124] Accordingly, while the CCAA proceeding appears to entail costs of at least $5 million more than as receivership proceedings, the fact that a receivership proceeding would be less expensive than a CCAA proceeding is, by itself, not a significant factor in the Court's determination in this Endorsement.

Conclusions

[125] Based on the considerations addressed above, I conclude that it would not be appropriate to grant the CCAA Application and that it is instead just and convenient to grant the Receivership Application for the appointment of a receiver without a power of sale in respect of the Properties.

Wilton-Siegel J.

Date: December 10, 2018