Court File No. CV-16-11331-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

ROYAL BANK OF CANADA

Applicant

- and -

2292319 ONTARIO INC.

Respondent

BRIEF OF AUTHORITIES OF THE COURT-APPOINTED RECEIVER
(Motion returnable July 28, 2016)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, Ontario
M5J 2T9

Sanjeev P. Mitra (LSUC No. 37934U)
Tel: (416) 865-3085
Fax: (416) 863-1515
Email: smitra@airdberlis.com

Jeremy Nemers (LSUC # 66410Q)
Tel: (416) 865-7724
Fax: (416) 863-1515
Email: jnemers@airdberlis.com

Lawyers for the Receiver

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I N D E X

1. *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONSC 3648 [Comm. List], [2011] O.J. No. 1163.
2. *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (S.C.J.).
3. E. Patrick Shea, Halsbury's Laws of Canada – Receivers and Other Court Officers (Markham: LexisNexis Canada, 2014) at HRC-70 (authority of court to vest out a lease).

TAB 1

paras. 63-66, 198-200

◈ *Romspen Investment Corp. v. Woods Property Development Inc., [2011] O.J. No. 1163*

Ontario Judgments

Ontario Superior Court of Justice
Commercial List
H.J. Wilton-Siegel J.
Heard: October 25, November 8 and December 2, 2010.
Judgment: March 17, 2011.
Court File No. CV-08-00007543-00CL

[2011] O.J. No. 1163 | 2011 ONSC 3648 | 4 R.P.R. (5th) 53 | 75 C.B.R. (5th) 109 | 2011 CarswellOnt 2380 | 200 A.C.W.S. (3d) 118

IN THE MATTER OF Section 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended RE: Romspen Investment Corporation, Applicant, and Woods Property Development Inc. and TDCI Holdings Inc., Respondents

(202 paras.)

Case Summary

Creditors and debtors law — Receivers — Court appointed receivers — Sales by receiver — Application by a receiver of an insolvent company for approval of a sale agreement of a 43-acre property to an affiliate of the company's secured lender allowed in part — Lender's property interest took priority over interest of retailer that operated store on the property — Retailer was not entitled to a statutory lien — Retailer was entitled to equitable lien that did not take priority over lender's interest — Property would be sold free of retailer's interest — Sale agreement was not approved due to economic improvements that occurred since it was made — Sale process had to be repeated.

Real property law — Mortgages — Priorities — Registration — Application by a receiver of an insolvent company for approval of a sale agreement of a 43-acre property to an affiliate of the company's secured lender allowed in part — Lender's property interest took priority over interest of retailer that operated store on the Property --Retailer was not entitled to a statutory lien — It was entitled to equitable lien that did not take priority over Lender's interest — Property would be sold free of Retailer's interest — Sale Agreement was not approved due to economic improvements that occurred since it was made-- Sale process had to be repeated.

Real property law — Registration of documents — Torrens Land Titles system — Land Titles Act — Overriding interests — Application by a receiver of an insolvent company for approval of a sale agreement of a 43-acre property to an affiliate of the company's secured lender allowed in part — Lender's property interest took priority over interest of retailer that operated store on the Property --Retailer was not entitled to a statutory lien — It was entitled to equitable lien that did not take priority over Lender's interest — Property would be sold free of Retailer's interest — Sale Agreement was not approved due to economic improvements that occurred since it was made-- Sale process had to be repeated.

Application by SF Partners Inc. for approval of a sale agreement dated October 13, 2009 between it, as Receiver of Woods Property Development Inc., and 2204604 Ontario Inc. The Sale Agreement pertained to a 43-acre property owned by Woods. The Receiver also sought an order that the sale would be free of

any claims by Home Depot of Canada Inc. Romspen Investment Corporation was a secured lender to Woods. It owned and controlled the Purchaser. Woods was put into receivership by court order in November 2008. Home operated a store on a portion of the Property. In May 2005 it agreed to purchase eight acres of the Property where its store was located. The sale was conditional upon the Home Land being severed from the Property. The November 2005 Home Depot Agreement with Woods was the version that Home relied upon to assert its property interest. Home would occupy the land pursuant to a ground lease until the severance was granted. Home was aware, before it signed the Lease in April 2006, that the Property was subject to three mortgages in favour of Romspen that totaled $11.1 million. The mortgages were registered in August 2004, in January 2005 and in September 2005. In January 2006 Romspen refinanced the second and third mortgages and replaced them with one new second mortgage. Home did not register the Home Agreement and the Ground Lease on title. Romspen refused to sign anything that would have subordinated its rights as mortgagee. Home did not obtain the severance. In July 2006 Woods obtained refinancing from Romspen. The two existing mortgages were discharged and were replaced by a mortgage for $17 million. Romspen claimed that it had a claim against the Property by way of subrogation under its previous mortgages. Romspen argued that its latter mortgage ranked prior to the Home Agreement by virtue of s. 93(3) of the Land Titles Act, even though it had actual notice of the Agreement when its registered its mortgage. s. 93(3) provided that a registered charge was free from any unregistered interest in the land.

HELD: Application allowed in part.

Romspen never consented to either the Home Agreement, the Ground Lease or to Home having any interest in the Property. It also did not consent to the construction of the Home store. The priority of Romspen's subrogated claim was to be considered regarding funds outstanding as of November 2005. Romspen's subrogated interest in the Property in respect of amounts outstanding under its earlier mortgages had priority over Home's property interest. Even though Romspen had actual knowledge of the Home Agreement the Romspen mortgage ranked prior to the Agreement based on the operation of s. 93(3). s. 93(3) ousted the doctrine of actual notice regarding a registered charge even though the chargee had actual notice of unregistered documents. It provided a mortgagee with an absolute defence to a claim based on actual notice. Home was not entitled to a lien against the Property that ranked in priority to Romspen's interest by virtue of its construction of its store. The lien was based on s. 37(1) of the Conveyancing and Law of Property Act. Even though Home made lasting improvements to the Property, it did not have sufficient ownership interest to be entitled to this lien. Home was entitled to an equitable lien on the Property by the amount that the value of the Property was enhanced by the construction of its store. However, Romspen's interest still had priority. The Receiver was therefore granted an order permitting the sale of the Property free of Home's interest. The Sale Agreement was not approved because economic conditions improved significantly since the time it was signed. It was possible that the Sale Agreement did not represent the current fair market value of the Property. Also, since the Property was no longer subject to the Home Agreement it could be more marketable. The Receiver would have to repeat the sales process.

Statutes, Regulations and Rules Cited

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47(1)

Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 37, s. 37(1)

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 101

Land Titles Act, R.S.O. 1990, c. L.5, s. 71(1.1), s. 93(3), s. 111(1), s. 155

Planning Act, R.S.O. 1990, c. P.13,

Counsel

Harvin Pitch, for the Receiver, SF Partners Inc.

David P. Preger, for Romspen Investment Corporation and 2204604 Ontario Inc.

Craig A. Mills, for Home Depot Canada Inc.

ENDORSEMENT

H.J. WILTON-SIEGEL J.

1 On this motion SF Partners Inc. (the "Receiver") seeks approval of an agreement of purchase and sale dated October 13, 2009 between the Receiver and 2204604 Ontario Inc. (the "Purchaser") (the "Sale Agreement") regarding the sale of a property known municipally as 50 High Street, in the Town of Collingwood, (the "Property") and an order in connection with the completion of such sale vesting in the Purchaser all of the assets of Woods Property Development Inc. ("Woods"), the owner of the Property, free of any claims of Home Depot of Canada Inc. ("Home Depot").

2 By a cross-motion, Home Depot seeks an order that it is entitled to purchase a portion of the Property defined below as the "Home Depot Lands" pursuant to the Home Depot Agreement (as defined below) or to a lease defined below as the "Ground Lease" or, alternatively, that it is entitled to a lien pursuant to section 37 of the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C-34 (the "CLPA") or in equity that ranks prior to the Romspen Mortgage (as defined below) and, accordingly, should not be affected by any court approval of the transaction contemplated by the Sale Agreement.

Background

The Parties

3 Woods is an Ontario corporation that is the owner of the Property.

4 Romspen Investment Corporation ("Romspen") is a secured lender to Woods and a sister corporation, TDCI Holdings Inc. ("TDCI"), which is the owner of another property in the Town of Collingwood (the "Raglan Property"). The lending arrangements between Romspen and Woods/TDCI are described below. Wesley Roitman ("Roitman") is the chief financial officer of Romspen and the person at Romspen principally responsible for the Woods/TDCI loan arrangements.

5 Holborn Property Investments Inc. ("Holborn") was a proposed purchaser of the Property under the Holborn Sale Agreement (as defined below). Holborn no longer claims an interest in the Property and is no longer a party to these proceedings. The priority of its interest under the Holborn Sale Agreement was the subject of earlier litigation. The judgment of the Court in that litigation was reported as *Holborn Property Investments Inc.* v. *Romspen Investment Corp.*, *[2008] O.J. No. 5722* (Sup. Ct. J.) (the "Holborn Judgment").

6 The Receiver was appointed the interim receiver of all assets, undertakings and properties of Woods and TDCI by order of this Court dated November 25, 2008 (the "Receivership Order").

7 The Purchaser is an Ontario corporation that is owned and controlled by Romspen.

8 Landex Holdings Inc. ("Landex") is an Ontario corporation that owns property immediately to the south of the Property. Landex has entered into a joint venture with the Purchaser to develop the Property should the Purchaser acquire the Property pursuant to the Sale Agreement.

The Property

9 The Property consists of approximately 43 acres. An industrial building on the Property is leased to two tenants with whom the Receiver has reached an agreement and who, therefore, do not oppose the motion.

10 A portion of the industrial building was demolished in 2006. Home Depot constructed a store of approximately 85,000 square feet on a part of the Property that includes the demolished portion of the industrial building (defined below as the Home Depot Lands) at a total cost of approximately $14.5 million. Construction was completed in January 2007, and a Home Depot store has been operated on that part of the Property since then.

Home Depot's Interest in the Property

11 On or about May 19, 2005, Home Depot entered into an agreement of purchase and sale with Woods whereby Woods agreed to sell Home Depot 8.67 acres of the Property, which included the acreage on which the new Home Depot store was to be located, (the "Home Depot Lands") for $3,250,000. Among other terms, the sale is conditional upon receipt of a severance of the Home Depot Lands from the Property under the *Planning Act*, R.S.O. 1990, c. P-13.

12 On October 17, 2005, Woods entered into a further agreement for the sale of the rest of the Property to Holborn (the "Holborn Sale Agreement"). The Holborn Sale Agreement provided that Home Depot could purchase the Home Depot Lands from Holborn under the Home Depot Agreement for $3,250,000 when a severance was obtained under the *Planning Act*. It was Woods' expectation that the proceeds of sale of the two transactions with Holborn and Home Depot would repay the indebtedness of Woods and TDCI to Romspen described below and leave a profit for Woods.

The Home Depot Agreement

13 The agreement between Woods and Home Depot was amended on November 30, 2005 (as so amended, the "Home Depot Agreement"). It is this agreement upon which Home Depot relies in asserting that it has an interest in the Property. As mentioned, in order to complete the sale transaction, a severance of the Home Depot Lands is required. The severance is, in turn, conditional on among other things, demolition of the industrial building on the Property in its entirety and, as described below, a plan of subdivision for the Property.

14 The Home Depot Agreement contains the following material provisions:

* First, the portion of the industrial building referred to above was to be demolished to permit construction of a Home Depot store.
* Second, Home Depot was obligated to apply for a consent under the *Planning Act* to sever the Property.
* Third, section 4.5 of the Home Depot Agreement states that it shall be effective to create an interest in land only if the provisions of the *Planning Act* have been complied with.
* Fourth, Home Depot shall be entitled to apply to the Town of Collingwood for approval and a building permit to construct a Home Depot store on the Home Depot Lands.
* Fifth, if within 270 days of the date of execution, Home Depot fulfilled all zoning conditions and obtained all necessary approvals for its proposed store including a building permit, Home Depot would take possession of an area slightly larger than the Home Depot Lands pursuant to a ground lease (the "Ground Lease"). As there does not appear to be any significance to

this slight difference, in this Endorsement the lands subject to the Ground Lease are also referred to as the "Home Depot Lands" to avoid unnecessary complexity.

15 The Home Depot Agreement set out the following terms for the Ground Lease:

* The Ground Lease was to run for a term of 50 years at a rental of $300,000 per year for the first seven years and thereafter at $100 per year.
* The Ground Lease would terminate upon receipt of the severance of the Property under the *Planning Act*, at which point the Home Depot Agreement would be completed by Home Depot's purchase of the Home Depot Lands, and the rental payments already made would be credited against the purchase price.

16 It was a condition of Home Depot's obligation to enter into the Ground Lease that Woods would deliver to Home Depot an acknowledgement of Romspen's agreement to:

(1) permit the demolition of the existing industrial building to occur without acceleration of the Romspen mortgages described below; and

(2) provide a partial discharge of the Romspen mortgages upon payment of the purchase price of $3,250,000 under the Home Depot Agreement, without any restriction that such mortgages shall be in good standing at the time.

17 Section 7.11 of the Home Depot Agreement permitted Home Depot to register a caution in respect of its rights under the Home Depot Agreement pursuant to section 71(1.1) of the *Land Titles Act*, R.S.O., c. L5, as amended (the "Act"). However, Home Depot chose not register the Agreement. It is understood that Home Depot made this decision in order to avoid the payment of land transfer tax. For the purposes of this proceeding, however, the significant fact is that Home Depot bargained for, but did not exercise, a right of registration and not the particular reason it decided to forgo that registration.

The Ground Lease

18 With the exception of delivery of the acknowledgement, which is described below, Home Depot satisfied the conditions entitling it to take a Ground Lease of the Property on the terms set out above within the time period required under the Home Depot Agreement. The Ground Lease was signed by Woods and Home Depot on May 4, 2006.

19 Prior to doing so, on April 19, 2006, solicitors for Home Depot conducted a title search against the Property. Accordingly, Home Depot would have been aware at the time it executed the Ground Lease that the Romspen mortgages on the Property at such time had an aggregate face amount of $11.1 million.

20 On May 2, 2006, two days before the Ground Lease was signed, Woods had its mortgage broker Lee Mondrow ("Mondrow") contact Romspen to obtain the acknowledgment from Romspen contemplated by the Home Depot Agreement. However, Romspen was only willing to provide an acknowledgement that demolition of the industrial building would not accelerate the Romspen mortgages (because such demolition would increase the value of the Property). An acknowledgment to this effect was executed by Romspen on May 5, 2006, one day after the Ground Lease was executed.

21 Roitman says that Mondrow and Clive Figuera, on behalf of Woods, had been pressing him to provide a broader acknowledgment to Home Depot in respect of Home Depot's rights under the Home Depot Agreement and that he was unwilling to do so because he did not wish to compromise the priority or other rights of the two Romspen mortgages on the Property at the time. He says further that he would have refused to sign the acknowledgement if it had expressly or impliedly purported to be a postponement or a subordination of

Romspen's rights as mortgagee. Home Depot did not contradict this evidence, which I have therefore taken to be an undisputed fact.

22 The Ground Lease contains a representation of Woods that the Home Depot Lands are subject to mortgages in favour of Romspen dated August 22, 2004 (for $8.6 million) and January 26, 2006 (for $2.5 million). In the absence of a Romspen acknowledgment in the form contemplated by the Home Depot Agreement, the Ground Lease contains a further representation of Woods to the effect that Romspen had agreed:

(1) to permit the demolition of the portion of the industrial building located on the Home Depot Lands without accelerating the Romspen mortgages on the Property at the time; and

(2) to give partial discharges of the Property from the Romspen mortgages "with the aggregate consideration for all such partial discharges being an amount not in excess of the balance of the purchase price payable by [Home Depot] under the [Home Depot Agreement] upon the completion of the purchase of the [Home Depot Lands] by [Home Depot] pursuant to the [Home Depot Agreement]."

It is unclear on what basis Woods gave the representation in (2), above, as the Romspen mortgages did not contain partial discharge provisions.

23 Section 19.6 of the Ground Lease addressed registration of the Ground Lease. It provides that Home Depot shall not register the Ground Lease but that either party may register a notice of the Ground Lease pursuant to section 111(1) of the *Land Titles Act* by way of a short form of notice providing certain stipulated information. Home Depot also decided not to register a notice of the Ground Lease, again apparently to avoid the payment of land transfer tax.

24 I think it is obvious from all of the circumstances, including the testimony of Sylvain Rivet, a senior real estate manager of Home Depot, the fact that Home Depot was advised by experienced solicitors, Home Depot's experience in real estate law given its extensive real estate operations, and the title subsearch of its solicitors in April 2006, that Home Depot made a conscious decision to execute the Ground Lease without obtaining the form of acknowledgment of Romspen contemplated by the Home Depot Agreement, and to forego registration of the Ground Lease, with full knowledge of the potential risks that such actions could entail.

Construction of the Home Depot Store

25 As mentioned, during 2006, Home Depot commenced construction of a store upon the Home Depot Lands.

26 In connection with such construction, on or about July 25, 2006, Romspen signed a site plan control agreement dated July 20, 2006 to which Woods, Home Depot and the Town of Collingwood were also parties (the "Site Plan Agreement'). The Site Plan Agreement specifically recites the existence of the Home Depot Agreement, although not the Ground Lease. It also recites the proposed demolition of the portion of the existing industrial building and the proposed construction of the Home Depot store.

27 Paragraph 32 of the Site Plan Agreement refers to the existence of Romspen charges on the Property in the respective amounts of $8.6 million and $2.5 million (being the earlier Romspen mortgages, which, by this time, however, had been replaced by the Romspen Mortgage) and contains an express postponement and subordination by Romspen of its interest in the Property to that of the Town of Collingwood under the Site Plan Agreement (but not to that of Home Depot). This is the only express covenant of Romspen in the Site Plan Agreement, which otherwise contains covenants of Woods and Home Depot regarding the construction of the Home Depot store on the Property.

28 Home Depot has applied for severance of the Home Depot Lands. However, it is understood that the Town of Collingwood will not consent to a severance until a comprehensive plan of subdivision is filed and approved

for the entire Property. No plan of subdivision has been filed by Woods or any other party having a present or future interest in the Property. The Receiver is not proposing to file a plan of subdivision on its own.

Romspen's Interest in the Property

Mortgages Prior to July 6, 2006

29 At the time of the first agreement between Woods and Home Depot dated May 19, 2005, there were two mortgages registered against the Property in favour of Romspen. The first mortgage dated August 27, 2004 secured a loan in the principal amount of $8.6 million. The second mortgage dated January 26, 2005 secured a loan in the principal amount of $1,550,000 made to TDCI that was guaranteed by Woods. This second mortgage was also secured against the Raglan Property.

30 In September 2005, Romspen loaned an additional $500,000 to Woods that was secured by a further mortgage on the Property, bringing the total amount secured against the Property to $10,650,000. None of these mortgages contained a right of partial discharge in favour of Woods to allow it to sell the Home Depot Lands, although the mortgage dated January 26, 2005 provided for a discharge of the Property upon repayment of an amount to be determined by Romspen in its discretion up to the full outstanding amount.

31 Accordingly, at the time of the Home Depot Agreement dated November 30, 2005, there were three mortgages registered against the Property in favour of Romspen, securing loans totalling $10.65 million in principal amount.

32 On January 26, 2006, Romspen refinanced the second and third mortgages on the Property and made a further secured advance. This was effected through the issue of a new second mortgage loan dated January 17, 2006 in the principal amount of $2.5 million made to TDCI of which Woods was the guarantor. This new second mortgage was also registered against both the Property and the Raglan Property. The new second mortgage did not contain a partial discharge provision.

33 Accordingly, at the time of execution of the Ground Lease on or about May 4, 2006, there were two mortgages registered against the Property in favour of Romspen securing loans totalling $11.1 million - the mortgage dated August 27, 2004 and the mortgage dated January 17, 2006. Neither mortgage contained a partial discharge provision.

The $17 Million Romspen Mortgage

34 On June 1, 2006, Romspen provided Woods with a commitment letter (the "Commitment Letter") regarding an advance of further funds to discharge the existing Romspen mortgages against the Property, as well as a further mortgage in the principal amount of $3.6 million secured against the Raglan Property only, and to finance improvements on the Raglan Property. All such advances were to be secured against both the Property and the Raglan Property.

35 This transaction was completed on or about July 6, 2006, at which time Romspen advanced a total of approximately $17 million, of which $11,338,090.84 was advanced to discharge the three existing Romspen mortgages secured against the Property and to pay realty taxes on High Street. The total financing was secured against the Property and the Raglan Property by a joint mortgage of Woods and TDCI in the principal amount of $17 million (the "Romspen Mortgage"), which was registered on title on July 6, 2006. Subsequently, the earlier Romspen mortgages were discharged after an appropriate "seasoning period".

36 The Romspen Mortgage contained a provision allowing Woods a partial discharge of the Home Depot Lands upon payment of the purchase price under the Home Depot Agreement, provided that the Romspen Mortgage was not in default and that a loan-to-value covenant was satisfied in Romspen's sole determination after giving effect to the partial discharge.

37 The Romspen Mortgage also incorporated the following provision from the Commitment Letter, which contemplated land lease payments under the Home Depot Agreement without specifically referring to the Ground Lease:

> Monthly principal payments of $130,000 shall be due and payable on the same day each month. In addition, any land lease payments made by Home Depot pursuant to the Home Depot Agreement (both as defined below) which in aggregate exceed $250,000 shall be due and payable on account of principal, upon receipt and the Borrower shall direct Home Depot to make such payments directly to Lender.

Romspen's Knowledge of the Home Depot Agreement and the Ground Lease

Knowledge of the Home Depot Agreement

38 Roitman acknowledges that Romspen received a copy of the Home Depot Agreement in or about November 2005. Accordingly, it had knowledge from that time of the arrangements contemplated in that Agreement in respect of both the sale of the Home Depot Lands and a possible ground lease of the Home Depot Lands.

Knowledge of the Ground Lease

39 Home Depot submits that the Court should infer that Romspen had actual knowledge of the existence of the Ground Lease, if not its actual contents, as of the date of execution and delivery of the Romspen Mortgage or, alternatively, as of the date of execution of the Site Plan Agreement. It relies upon the covenant in the Romspen Mortgage (by incorporation of the terms of the Commitment Letter) requiring payment to Romspen of land lease payments in excess of $250,000 as evidence of such actual knowledge at the time of the Romspen Mortgage. In the alternative, it says that, given the structure of the Home Depot Agreement, Roitman must have known that Woods and Home Depot had executed the Ground Lease when he was presented with the Site Plan Agreement for Romspen's execution.

40 As this is a motion, the Court cannot make findings of fact by way of inference. The Court must make its determinations on the basis of undisputed facts.

41 In this case, there is no evidence that Romspen had actual knowledge of the existence of the Ground Lease prior to receiving a copy of the Ground Lease in 2008, much less that such knowledge is an undisputed fact. At best, and as Home Depot states in its factum, "Romspen was aware that an interim land lease might be entered into at a later date". This falls short of actual knowledge of the existence of the Ground Lease prior to 2008.

42 Even if the Court were able to draw inferences of fact, I do not think that such knowledge could be inferred as of the date of execution of the Romspen Mortgage, even on a balance of probabilities standard, from the facts before the Court. The language of the Romspen Mortgage is hardly unequivocal evidence of knowledge. Moreover, the fact that the Commitment Letter did not refer specifically to the Ground Lease but rather to "any land lease payments made by Home Depot", and the fact that Romspen did not pursue repayment of the Romspen Mortgage due as a result of rental payments under the Ground Lease, are both consistent with an absence of actual knowledge on Romspen's part.

43 Similarly, I do not think that the Court could infer knowledge of the Ground Lease from Romspen's execution of the Site Plan Agreement. While Romspen may have had suspicions that Home Depot had received a Ground Lease when it received the Site Plan Agreement for execution, Home Depot has not established actual knowledge as of that time. As Romspen also points out, execution of the Ground Lease was inconsistent with several conditions of the Home Depot Agreement as Romspen understood them.

Romspen's Alleged Consent to the Home Depot Agreement and the Ground Lease and to the Construction of the Home Depot Store

44 Home Depot also argues that Romspen consented to the Home Depot Agreement and the Ground Lease as well as to the construction of the Home Depot store. I will address each of these issues in turn. Again, as this is a motion, Home Depot must establish any alleged consent as an undisputed fact. In my view, it has failed to satisfy this onus.

Alleged Romspen Consent to the Home Depot Agreement and the Ground Lease

45 Romspen had actual knowledge of the Home Depot Agreement from November 2005. However, such knowledge does not automatically imply or constitute consent to the subordination of Romspen's earlier mortgages to the Home Depot Agreement. After learning of the Home Depot Agreement, Romspen had no obligation to contact Home Depot to inquire as to whether it sought, or assumed that it had received, Romspen's consent to the Agreement. It was entitled to assume that Home Depot would do what it considered necessary to protect itself as a party having a subordinate interest in the Property. That legal position remained unchanged at the time of execution of the Romspen Mortgage notwithstanding that the Romspen Mortgage was executed after the Home Depot Agreement.

46 Home Depot acknowledges that it never sought any form of consent, subordination and postponement of rights, or non-disturbance agreement from Romspen with respect to the Home Depot Agreement. Nor did Romspen ever agree in favour of Woods or Home Depot to a partial discharge of the Property to permit the sale of the Home Depot Lands. There is, therefore, no evidence that Romspen ever consented, orally or in writing, to the sale of the Home Depot Lands pursuant to the Home Depot Agreement or to the subordination of its interest in the Property, whether under the earlier Romspen mortgages or under the Romspen Mortgage, to the interest of Home Depot under the Home Depot Agreement.

47 I have concluded above that Romspen did not have actual knowledge of the Ground Lease prior to 2008. Home Depot never sought the consent of Romspen to the Ground Lease. Nor did it ever seek any form of subordination or non-disturbance agreement from Romspen in respect of the Ground Lease. Collectively, these facts exclude any determination that Romspen consented to the Ground Lease or to the subordination of its interest in the Property to the interest of Home Depot under the Ground Lease.

48 Insofar as it may be argued that Romspen's knowledge of the Home Depot Agreement constituted an implied consent to a lease as described in the Home Depot Agreement, even without actual knowledge of the execution of the Ground Lease, I think the argument must fail for the same reasons as I concluded that knowledge of the Home Depot Agreement did not imply Romspen's consent to that document.

49 Generally, Home Depot relies on the affidavit of Sylvain Rivet, a senior real estate manager of Home Depot, in which he deposed that it was Home Depot's understanding at all times that Romspen had consented to the Home Depot Agreement and the Ground Lease, as well as to Home Depot's interest in the Home Depot Lands. There is, however, no basis in the evidence for this understanding. To the extent that Home Depot says that it relied on Woods' representation in the Ground Lease that Romspen had consented to the Home Depot Agreement and the Ground Lease, such reliance was clearly unreasonable. Neither Woods nor Home Depot has provided any evidence of Romspen's advice or other comfort to Woods or Home Depot that supports this representation.

50 Accordingly, I have proceeded on the basis that Romspen did not consent at any time to either the Home Depot Agreement, the Ground Lease, or to any interest in the Home Depot Lands that Home Depot may have acquired thereunder.

Alleged Romspen Consent to the Construction of the Home Depot Store

51 There is a separate question regarding whether Romspen consented at some point in time to the construction of the Home Depot store. This issue is relevant to the priority of any lien against the Property in

Home Depot's favour in respect of an improvement to the Property as opposed to the priority of the Home Depot Agreement and the Ground Lease in the Property *per se*.

52 There is no evidence of any such consent, and it cannot be inferred from the existence of the Home Depot Agreement. Nor can it be inferred from the existence of the Ground Lease of which, in any event, I have found Romspen had no knowledge prior to 2008. The remaining possibility is that, in some manner, Romspen's execution of the Site Plan Agreement constitutes its consent, or constitutes evidence of its consent given elsewhere, to the construction of the Home Depot store in a manner that is meaningful for this proceeding.

53 Home Depot cannot, however, establish as an undisputed fact that Romspen's execution of the Site Plan Agreement either constituted, or evidenced, its consent to such construction. The reasons for this conclusion are set out below in addressing the priority of any lien of Home Depot against the Property in respect of such improvement.

The Proposed Sale of the Property

54 Woods first defaulted on the Romspen Mortgage in 2007, and payments ceased on the Romspen Mortgage in January 2008, leading to the Receiver's appointment on November 25, 2008. The Receivership Order authorized the Receiver to market the Property.

55 The Receiver listed the Property for sale with Parallel Realty Inc. ("Parallel") for a listing price of $450,000 per acre. In an offering fact sheet prepared by Parallel for distribution to prospective purchasers, the Home Depot Agreement was disclosed in the following terms:

> The developer has agreed to sell 8.67 acres of the property to Home Depot, which has constructed and opened its 85,500 square foot store. Home Depot is currently leasing its portion of the property until a severance can be applied for ...

56 The Receiver's report lists the efforts of Parallel to market the Property. They include listing the property on MLS and a further listing service, advertising in two editions of the Report on Business, and responding to inquiries of numerous interested parties. Parallel has followed up on expressions of interest from more than 25 prospective purchasers. Despite such efforts, no offers have been received.

57 On October 13, 2009, the Receiver and the Purchaser entered into the Sale Agreement. The material terms of the Sale Agreement are:

(1) a purchase price of $14.1 million satisfied by a partial reduction of the current indebtedness to Romspen under the Romspen Mortgage (apart from certain cash expenses to be paid, including outstanding realty taxes and the Receiver's fees and borrowings, if any); and

(2) vacant possession of the Property or arrangements with any remaining tenants on terms satisfactory to the Purchaser in its sole discretion.

58 As no arrangements have been made with Home Depot, as the lessee under the Ground Lease, the Receiver seeks an order vesting the Property free and clear of the Home Depot Sale Agreement, the Ground Lease and any other lien in favour of Home Depot arising in respect of the construction of the Home Depot store.

Applicable Law

59 The factors that a Court should consider in determining whether to approve a sale by a Court-appointed receiver were set out by Galligan J.A. in *Royal Bank* v. *Soundair Corp.* *(1991), 4 O.R. (3d) 1* at para. 16 (C.A.) as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

60 In the present proceeding, there are two specific issues to be considered:

1. whether the Court should vest the Property in the Purchaser free and clear of the interest of Home Depot in the Property, which is a condition of the completion of the transaction contemplated by the Sale Agreement; and
2. whether the Property has been marketed to prospective purchasers on the same basis as is contemplated in the Sale Agreement.

61 The first issue relates to the consideration of the interests of the parties. The second relates to the efficiency and integrity of the sales process. I will deal with each in turn.

Should the Court Order a Vesting of the Property Free and Clear of any Claims of Home Depot?

62 This motion raises four general issues that are addressed below:

1. Does the Court have the authority to grant an order "vesting out" Home Depot's interest in the Property?
2. Does Romspen have an interest in the Property ranking prior to Home Depot's interest?
3. Is Romspen's interest in the Property subordinated to Home Depot's interest by virtue of a consent?
4. Is Home Depot entitled to a lien against the Property ranking in priority to Romspen's interest by virtue of the construction of the Home Depot store?

I propose to address each issue in turn. I will then address the Receiver's request for an order vesting out Home Depot's interest in the Property setting out my assessment of the equities between the parties.

Does the Court Have the Authority to Grant the Requested Relief?

63 The first issue is whether the Court has the authority to issue an order granting the requested relief. Home Depot makes two arguments that it does not. It says that a court-appointed receiver is not entitled to evict a tenant merely because it would be advantageous to do so. It also submits that that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot's interest. I will address each issue in turn.

Authority of the Court to Issue A "Vesting Out" Order in Respect of a Leasehold Interest

64 Home Depot relies on the following cases in support of its position that the Court cannot order the Receiver to sell the Property free and clear of the interest of Home Depot in the Home Depot Lands and, in particular, free and clear of the Ground Lease: *Coast Capital Savings Credit Union v. 482451 B.C. Ltd.*, [2004] B.C.J. No. 46 at paras. 12-14 (S.C.); *Capital Funds (I.A.C.) Ltd. v. Park Marine Apartments Ltd. et al.*, [1967] B.C.J. No. 132 at paras. 9-10 (S.C.); and *Winick v. 1305067 Ontario Ltd.* [2008] O.J. No. 695 at para. 15 (Sup. Ct. J.).

65 These decisions do not articulate an absolute and unqualified rule that the Court lacks the authority to vest out a leasehold interest. Instead, they mandate that a receiver take into consideration the equities of the positions of the various parties involved. The principle is well summarized by Ground J. in *Meridian Credit Union Ltd. v. 984 Bay Street Inc.* [2006] O.J. No. 3169 at para. 19 (Sup. Ct. J.) as follows:

> I think the law is clear that, if Meridian had proceeded by way of power of sale, it could have sold the Property to a purchaser free and clear of the leasehold interest of BW Health and Integrated on the basis that the subordination provision contained in the leases clearly subordinate the rights of the tenants to the rights of Meridian under the Meridian Charge and on the basis that none of the leases was registered on title to the property. This sale is, however, being conducted by a court-appointed receiver and, when seeking to convey title to assets free and clear of the interest of other parties, a receiver must apply to the court for a vesting order. In *New Skeena Products Inc.* v. *Kitwanga Lumber Co.*, *[2005] B.C.J. No. 546*, *251 D.L.R. (4th) 328*, the British Columbia Court of Appeal clearly states that, in determining whether to issue a vesting order terminating in the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties.

The same conclusion was expressed by Gill J. in *Capital Funds, supra* in his reference to the fiduciary obligation of a court-appointed receiver to all the parties involved in a contest.

66 Accordingly, I have proceeded on the basis that the Court has the authority to grant the relief requested provided it is appropriate to do so after reviewing the equitable considerations supporting the respective positions of the parties.

67 I would note, as well, that the cases relied upon by Home Depot do not provide much assistance with respect to the equitable considerations to be taken into account in the present proceeding inasmuch as the circumstances in those decisions were very different.

68 *Coast Capital Savings, supra* involved residential tenancies which were not registrable and for which the tenants had prepaid the rental for the year. It is also unclear from the incomplete recitation of the facts whether the mortgagee seeking the relief was likely to be repaid or not; the references of the trial judge to the obligation of a court-appointed receiver to protect the goodwill of a business suggests that there may have been other subsequent encumbrancers with an interest in the preservation of the existing tenancies.

69 In *Capital Funds*, it was established that the tenant had paid considerable amounts for rent and for renovations to the property in respect of a commercial tenancy.

70 In *Winick, supra*, Pepall J. considered the issue in the context of the requirement in *Soundair, supra* that the Court address whether there has been unfairness in the working out of the sale process. In that case, the purchaser had agreed to acquire the property subject to the relevant lease. There was therefore no suggestion that the sale price would have been affected by the continuation of the lease. In such circumstances, it would have been unconscionable to order a vesting out of the lease.

71 As mentioned above, I propose to consider the equitable considerations between the parties after discussion of the remaining issues outlined above, which will themselves involve a consideration of certain equitable considerations.

The Home Depot Lands Were Previously Conveyed

72 Home Depot also submits that that the Receiver did not receive the equity in the Home Depot Lands upon its appointment and therefore does not have the power to convey the Property free of Home Depot's interest. In making this submission, it relies on the decisions in *2022177 Ontario Inc.* v. *Toronto Hanna Properties Ltd. (2005), 203 O.A.C. 220* (C.A.); *Re Terastar Realty Corp. (2005), 16 C.B.R. (5th) 111* (Ont. Sup. Ct. J.); and *Re 1565397 Ontario Inc.*, *[2009] O.J. No. 2596* (Sup. Ct. J.).

73 The Home Depot argument on this issue is based on the legal consequences of the Home Depot Agreement and the Ground Lease. It submits that the Home Depot Agreement created an equitable interest in the Property in favour of Home Depot that was therefore excluded from the assets subject to the Receivership Order. Similarly, Home Depot has a leasehold interest in the Home Depot Lands under the Ground Lease. Home Depot

submits that these interests were excluded from the assets subject to the Receivership Order and cannot be extinguished by a transfer of the Property by the Receiver.

74 I accept the starting point of Home Depot's analysis. Because the Receiver has been appointed as the receiver of Woods' assets, the effect of the Receivership Order is to transfer possession of the Property to the Receiver, subject to Home Depot's interest in the Property under the Home Depot Agreement and the Ground Lease. Nevertheless, I conclude that Home Depot's submission must fail for two reasons.

75 First, in respect of the Home Depot Agreement, section 4.5 provides that it is effective to create an interest in land only if the provisions of the *Planning Act* have been complied with. This has not yet occurred. It would therefore appear that Home Depot does not presently have an enforceable equitable interest in the land under the Home Depot Agreement and may never have such an interest.

76 Second, and in any event, the issue in the present proceedings is not whether Woods granted Home Depot a lease pursuant to the Ground Lease and an equitable interest pursuant to the Home Depot Agreement to the extent it has such an interest notwithstanding section 4.5. That is conceded by Romspen. At issue are the priorities and the equities between Home Depot and Romspen.

77 In this context, while Home Depot is correct that the Receivership Order did not give the Receiver such authority, its submission ignores the nature of the Court's authority in the present circumstances. The Receiver does not rely on its authority under the Receivership Order in seeking a "vesting out" order. Instead, it relies upon the Court's inherent jurisdiction to order a vesting out of interests in property after a consideration of the equities between the parties.

78 Accordingly, I do not accept Home Depot's argument that the Receiver lacks the power to convey the Property free of Home Depot's interest because it did not receive the equity in the Home Depot Lands upon its appointment. The Court has the authority to authorize the Receiver to sell the Property free and clear of the interest of Home Depot after a consideration of the equities between the parties. Put another way, the Court may refuse to exercise its equitable jurisdiction to enforce Home Depot's equitable interests if it determines that it is appropriate to refrain from doing so after considering the equities between the parties.

Conclusion Regarding Authority of the Court

79 Based on the foregoing, I conclude that the Court has the authority to grant the requested relief if, in the circumstances, after reviewing the applicable equitable considerations relating to the respective positions of the parties, it is appropriate to do so.

Does Romspen Have an Interest in the Property Ranking Prior to Home Depot's Interest?

80 Romspen asserts that its interest in the Romspen Mortgage ranks prior to Home Depot's interest in the Home Depot Lands on two general grounds. First, it submits that the Romspen Mortgage is entitled to priority by virtue of its registration under the *Land Titles Act*, notwithstanding actual notice of the Home Depot Agreement and the Ground Lease, which were executed earlier but never registered under the Act. Second, it argues that it has a subrogated claim under the Romspen Mortgage to the extent of the monies secured under the earlier Romspen mortgages and refinanced by the Romspen Mortgage plus interest thereon at the rates provided under such mortgages.

81 I propose to consider the two submissions of Romspen in reverse order.

Romspen's Assertion of Priority Based on Subrogation

Romspen's Position

82 Romspen submits that it has a claim against the Property under the Romspen Mortgage by way of subrogation in respect of the amounts outstanding under the Romspen mortgages as of either November 30, 2005 (the date of the Home Depot Agreement) or April 26, 2006 (the date Romspen uses as the date of execution of the Ground Lease).

83 On either calculation, the total of the monies outstanding under these mortgages, as of February 1, 2010, appears to substantially exceed the value of the Property. According to Romspen's calculation, as of February 1, 2010, the amount outstanding under the two Romspen mortgages secured against the Property as of the date of the Home Depot Agreement (November 30, 2005) - being the mortgages in the principal amounts of $8.6 million and $1.550 million, respectively - was $17,844,975.38. In addition, as of February 1, 2010, the amount outstanding under the two Romspen mortgages secured against the Property as of the date of the Ground Lease (the date used by Romspen is April 26, 2005) - being the mortgages in the principal amounts of $8.6 million and $2.5 million, respectively - was $18,102,971.09.

84 Romspen acknowledges that the priority of its claim by way of subrogation is limited to the monies paid at the time of the refinancing of the relevant Romspen mortgages to discharge such mortgages plus interest thereon at the rates applicable under such mortgages. It is my understanding that the calculations set out above have been prepared on this basis and are not challenged by Home Depot.

85 Romspen's argument is based on the line of cases that establishes that a mortgagee who pays off prior encumbrances is entitled to be subrogated to the payee's priority position relative to other clients: see, for example, *Re Elias Markets Ltd.*, *(2005) 34 R.P.R. (4th) 127* at para. 43 (Ont. Sup. Ct. J.) per Rady J., aff'd *(2006) 47 R.P.R. (4th) 32* (Ont. C.A.). The principle was applied to a first mortgagee who "renews, replaces, refinances, amends or increases his mortgage": see *Midland Mortgage Corp. v. 784401 Ontario Ltd. (1994), 34 O.R. (3d) 594* at para. 14 (C.A.) per Austin J.A. The doctrine also applies to the extent a mortgagee pays taxes on behalf of a mortgagor: see *Elias Markets, supra,* at para. 50 per Rady J.

86 Romspen argues that it is entitled to rank prior to Home Depot's interest in the Home Depot Lands to the extent of this subrogated claim based on the equities between the parties. In particular, it relies on the fact that Home Depot had knowledge of the Romspen mortgages on the Property at the time it executed the Home Depot Agreement and the Ground Lease based on their registration against title to the Property. It also relies on the fact that Home Depot did not seek either a non-disturbance or priority agreement from Romspen notwithstanding the priority of the Romspen mortgages at the time. Nor did Home Depot receive any consent or other protection from Romspen. Instead, it relied on incorrect representations from Woods in the Ground Lease when it was executed, without seeking confirmation of the validity of these representations. Romspen notes that Home Depot took these decisions without any representation on the part of Romspen. In addition, Romspen relies on its right to control partial discharges of the Property from its security, of which Home Depot had knowledge by virtue of the registration of Romspen's earlier mortgages.

Home Depot's Position

87 Home Depot notes that subrogation is a discretionary remedy for which the foundation is fairness. In reliance on J. McGhee, ed. *Snell's Equity* 31st ed. (Toronto: Thomson, 2005) at p. 869, it argues there are three conditions that must be satisfied before the doctrine can operate: (1) the subsequent encumbrancer is unjustly enriched at the lender's expense; (2) such enrichment is unjust; and (3) there are no policy reasons for denying the prior encumbrancer a remedy. It makes four submissions for denying the remedy of subrogation in the present circumstances, which I will address below.

Analysis and Conclusions

Preliminary Issue

88 Before addressing this issue, it is necessary to consider whether Romspen's subrogated claim should be considered in respect of monies outstanding under the earlier Romspen mortgages at the date of execution of the Home Depot Agreement, the date of execution of the Ground Lease, or both. The Home Depot Agreement and Ground Lease were both granted after the earlier Romspen mortgages described above but before the Romspen Mortgage. Although the parties have distinguished the rights and interests of Home Depot under the Home Depot Agreement and the Ground Lease, I do not think this distinction is meaningful for the purposes of determining against which mortgages Home Depot's priority based on subrogation is to be considered.

89 The Ground Lease was an interim measure to bridge the period until a severance was obtained and the transaction contemplated by the Home Depot Agreement could be completed. The possibility of a ground lease having terms substantially similar to the terms of the Ground Lease was contemplated in the Home Depot Agreement. The rental payments under the Ground Lease were a credit against the purchase price under the Home Depot Agreement. In these circumstances, I think that the priority of Romspen's subrogated claim under the Romspen Mortgage should be considered in respect of the monies outstanding under the earlier Romspen mortgages outstanding as of the date of the Home Depot Agreement.

Validity of Romspen's Claim for Priority By Way of Subrogation

90 On the facts of this case, I do not think that there is any doubt that Romspen has a subrogated claim in the amount of the monies outstanding under the earlier Romspen mortgages at the time of their refinancing by means of the Romspen Mortgage, plus interest at the rates provided under the earlier Romspen mortgages. The principle in *Midland Mortgage, supra* is well established law. There are no facts that exclude the operation of this principle in the present proceeding. The issue for the Court is whether the test for entitlement to the remedy of subrogation is met.

Assessment of the Equitable Considerations

91 In making their submissions on this issue, Home Depot relies on the test for subrogation set out in *Snell,* described above. Romspen relies on the analysis of unjust enrichment. I am not convinced that there is any significant difference between the two approaches, subject to one consideration discussed in the next paragraph. I will, however, consider each of these approaches in turn.

92 It should be noted that, in respect of Romspen's claim of priority for its interest in the Property based on subrogation, the interest of Home Depot at issue is its interest under the Home Depot Agreement and the Ground Lease, not the Home Depot store. In the absence of any evidence that Romspen consented to the construction of the Home Depot store in a manner that was intended to affect its legal rights in the Property, the issue of the Home Depot store must be considered in the context of an improvement on the Property. That is addressed later. In this section, the issue is limited to the right of Home Depot to acquire the Home Depot Lands under the Home Depot Agreement and, possibly, to hold a leasehold interest in the Home Depot Lands under the Ground Lease.

93 The starting point for the analysis of unjust enrichment is whether Home Depot would be enriched if the remedy of subrogation were unavailable to Romspen. I think it is clear that it would be. The Home Depot Agreement and the Ground Lease were executed after the earlier Romspen mortgages. Therefore, they ranked after such mortgages. If subrogation were not granted, Home Depot's interest in the Property would rank in priority to the interest of Romspen in the Property. Accordingly, in the present circumstances, there would be an enrichment of Home Depot and a corresponding deprivation of Romspen if subrogation were not ordered.

94 I am also satisfied that there is an absence of a juristic reason for Home Depot's enrichment. In respect of this issue, the following considerations are relevant.

95 First, insofar as Home Depot seeks to enforce the Home Depot Agreement, it is effectively seeking an order compelling Romspen to discharge the security contained in the earlier Romspen mortgages which has been

continued in the Romspen Mortgage. The Court should not relieve Home Depot of the risk that it knowingly assumed by its own actions.

96 As mentioned, the Romspen mortgage loans were secured against the entire Property and provided Romspen with an absolute control over partial discharges. Even if a severance had been obtained, Home Depot could only have completed the purchase if Romspen had been willing to deliver a partial discharge. Home Depot had full knowledge of that risk. By entering into the Home Depot Agreement without obtaining a non-disturbance or priority agreement with Romspen, Home Depot took the risk that the Home Depot Lands would not be deliverable to it. Home Depot could not have obtained an order of the Court compelling delivery to it of the Home Depot Lands free of the earlier Romspen mortgages. There is no reason why the refinancing of those mortgages should increase its rights in this respect.

97 Second, the evidence before the Court suggests that the present circumstances were not anticipated by either party. However, at the time of execution of the Home Depot Agreement and the Ground Lease, the priority of the Romspen mortgages registered on title to the Property was absolutely clear. Both parties were sophisticated business entities with access to experienced and knowledgeable legal counsel. Romspen did everything that it could to protect itself against unanticipated circumstances. Home Depot did not.

98 To protect itself, Home Depot needed to obtain a consent, a priorities agreement, or a non-disturbance agreement directly from Romspen in respect of the Home Depot Agreement, the Ground Lease, or both. It made a business decision not to require Woods to obtain the form of comfort contemplated by the Home Depot Agreement and to rely instead upon representations from Woods - which proved to be incorrect - without seeking any indication from Romspen regarding the validity of those representations.

99 On the other hand, Romspen chose to protect its security position by retaining absolute control over any partial discharges of the Property under the earlier Romspen mortgages. It was under no obligation to anticipate the situation that subsequently developed. Nor did it have an obligation to advise Home Depot of the risks associated with failure to seek a consent or other comfort from Romspen.

100 Third, Home Depot argues that there is no evidence that it has derived any value or enrichment from Romspen's refinancing of the earlier Romspen mortgages by means of the Romspen Mortgage and that, on the other hand, Romspen has derived real value from Home Depot's construction and operation of its store on the Home Depot Lands. For the same reason, Home Depot says that, if its interest is vested out, Romspen will be unjustly enriched by virtue of the construction of the Home Depot store on the Property.

101 These two amount to a single argument. More importantly, I do not think this argument has any force to the extent that it relates to Home Depot's interest in the Home Depot Lands as opposed to the improvement on those Lands. As mentioned above, the present issue of priorities is a contest between Home Depot's interest in the Home Depot Lands, as a prospective purchaser under the Home Depot Agreement and as a tenant under the Ground Lease, and Romspen's interest in the Property under the Romspen Mortgage by way of subrogation. While there is no evidence that Home Depot derived any value from the refinancing of the earlier Romspen mortgages, there is equally no evidence that Romspen has derived any value from either the Home Depot Agreement or the Ground Lease between Woods and Home Depot.

102 In particular, there is no suggestion that the Ground Lease provided for a market rental. In the absence of any severance of the Home Depot Lands, the Ground Lease reverts to a 21-year term with a nominal annual rent. Further, if the Home Depot Agreement were enforceable against Romspen, the purchase price payable on closing of the sale of the Home Depot Lands would be significantly reduced by the prior rental payments made to Woods, of which it has not been established that Romspen had knowledge.

103 Fourth, as a related matter, while it may be implied in Home Depot's submission that most, if not all, of the value of the Property is attributable in the present economic circumstances to the Home Depot Lands, I do not

think that this is determinative of the equitable considerations. The fact that the remainder of the Property, apart from the Home Depot Lands, if sold separately may have a value significantly less than that at the time of the Romspen mortgage loans to Woods ignores the reality that at all relevant times both Home Depot and Romspen were dealing with a single property. It also ignores the fact that Romspen did address this risk to the extent it could do so by means of the loan-to-value covenant in the Romspen Mortgage.

104 Fifth, I do not accept the Home Depot argument that the issue of fairness does not come into play in the present circumstances because Romspen discharged the earlier mortgages with full knowledge of the Home Depot Agreement rather than as a result of a mistake or inadvertence. This argument may have been made on an erroneous assumption that the earlier Romspen mortgages were discharged prior to the execution and delivery of the Romspen Mortgages. If it is not, this argument is objectionable for two reasons. It casts the fairness consideration in the context of subrogation far too narrowly. It also flies in the face of common sense and well established practice, which reflects the practical reality that there should be no reason to maintain on title mortgages that have been refinanced by a later mortgage from the same lender.

105 Sixth, the present circumstances are not analogous to those in *Armatage Motors Ltd.* v. *Royal Trust Corporation of Canada Ltd.* (1997), 34 O.R. (3d) 599 (C.A.) in which injury to the party against whom subrogation was sought was a relevant consideration. *Armatage Motors* is a curious case in which the Court of Appeal appears to have denied subrogation on the basis that the first mortgagee had other assets against which it could recover the monies owed to it that were not also secured in favour of the second mortgagee, as well as the second mortgagee's reliance on the abstract of title. In the present proceedings, there is no evidence before the Court that Romspen will recover the outstanding loan amount from the remainder of the security under the Romspen Mortgage should subrogation not be granted. Insofar as there is any issue of reliance on the title to the Property, the present facts also favour Romspen.

106 Lastly, I do not accept Home Depot's submission that the doctrine of subrogation has no application in the context of a vesting order motion brought by a court-appointed receiver. Home Depot has offered no reason in principle why subrogation should not operate. I do not see any reason for excluding the operation of subrogation as an equitable consideration in determining whether to vest out a subsequent encumbrancer's interest.

107 On the basis of the foregoing, I conclude that Romspen is entitled to assert a subrogated claim against the Property in priority to that of Home Depot based on the principles of unjust enrichment. If it were necessary to consider the application of the principles in *Snell's Equity* upon which Home Depot relies, I would reach the same conclusion for the following reasons.

108 Turning to the test set out in *Snell's Equity*, satisfaction of the first requirement has already been addressed above. Absent subrogation, Home Depot will be enriched at Romspen's expense.

109 Similarly, for the reasons set out above pertaining to the absence of a juristic reason for such enrichment, I also conclude that such enrichment is unjust.

110 Lastly, I think that the third prong of the test in *Snell*, if in fact it is separate from the issue of a juristic reason for such enrichment, is also satisfied for the following reason. Provided that the issue of the Home Depot store is excluded from this analysis and dealt with below, as I believe is appropriate, there is no remaining policy reason for denying Romspen the remedy of subrogation. Romspen retained control over the discharge of all or any part of the Property from its security. Romspen did not benefit in any respect from the execution or performance of the Home Depot Agreement or the Ground Lease. The loss suffered by Home Depot - being the loss of the rental payments under the Ground Lease totaling $3,210,000 - was directly attributable to Home Depot's own actions in assuming a foreseeable risk.

Conclusion

111 Based on the foregoing, I conclude that Romspen's subrogated interest in the Property in respect of amounts outstanding under the earlier Romspen mortgages at the time of the execution of the Home Depot Agreement ranks prior to Home Depot's interest in the Home Depot Lands under the Home Depot Agreement and the Ground Lease.

Romspen's Assertion of Priority Based on the Romspen Mortgage

112 Romspen's alternative claim is that the Romspen Mortgage has priority over both the Home Depot Agreement and the Ground Lease by virtue of the absence of registration of these documents.

Preliminary Comments

113 Before addressing this submission, I wish to make two observations.

114 First, given the determination above in respect of Romspen's subrogation claim, it is likely that, as a practical matter, it is unnecessary to address this issue. It would appear that the amount of Romspen's subrogated claim is, by itself, substantially in excess of the current value of the Property. I have addressed this issue, however, in case this assumption proves to be incorrect in marketing the Property.

115 Second, the focus of this claim differs in one important respect from that of Romspen's subrogated claim. The subrogated claim is based on the priority of the earlier Romspen mortgages by virtue of their registration at the time of execution of the Home Depot Agreement and the absence of any subsequent consent or other agreement in favour of Home Depot affecting such priority. The claim in respect of the Romspen Mortgage is based principally on the ouster of the doctrine of actual notice in respect of the Home Depot Agreement and the Ground Lease by operation of the registration provisions under the *Land Titles Act* relating to charges.

Positions of the Parties

116 Romspen argues that the Romspen Mortgage, as a registered charge against title to the Property, ranks prior to the Home Depot Agreement and the Ground Lease by virtue of section 93(3) of the *Land Titles Act* notwithstanding actual notice of the Home Depot Agreement at the time of registration of the Romspen Mortgage. Section 93(3) reads as follows:

> The charge, when registered, confers upon the chargee a charge upon the interest of the chargor as appearing in the register subject to the encumbrances and qualifications to which the chargor's interest is subject, but *free from any unregistered interest in the land.* [Emphasis added]

117 Home Depot argues that section 93(3) of the *Land Titles Act* does not displace the operation of the doctrine of actual notice in Ontario and that, by virtue of Romspen's actual knowledge of the Home Depot Agreement at the time of execution of the Romspen Mortgage, the Romspen Mortgage is subordinated to this instrument.

118 Home Depot submits that it is entitled to rely on the doctrine of actual notice by virtue of the principle articulated by the Supreme Court in *United Trust Co.* v. *Dominion Stores Ltd.*, *[1977] 2 S.C.R. 915*. It argues that wording comparable to that in the Alberta legislation referred to by Spence J. in *United Trust* is required in order to exclude the operation of actual notice in Ontario. It says that the wording of section 93(3) is insufficient for this purpose.

119 In making this submission, Home Depot also relies on the more recent decisions of Mesbur J. in *1420111 Ontario Inc. v. Paramount Pictures (Canada) Inc., [2001] O.J. No. 4461* (Sup. Ct. J.), as well as the Court of Appeal in *Manias v. Norwich Financial Inc., [2008] O.J. No. 2612* (C.A.) and *Romspen Investment Corp. v. 2126921 Ontario Inc., [2010] O.J. No. 5405* (C.A.).

Analysis and Conclusions

120 I propose to consider the following two issues in respect of the issue of the priority of the Romspen Mortgage relative to the Home Depot Agreement and the Ground Lease:

(1) does section 93(3) of the *Land Titles Act* oust the operation of the doctrine of actual notice in the present circumstances? and

(2) if not, is the Romspen Mortgage subordinated to the Home Depot Agreement and the Ground Lease by operation of the doctrine of actual notice?

Does Section 93(3) Oust the Doctrine of Actual Notice?

121 There is no dispute that Romspen had actual notice of the Home Depot Agreement at the time of execution and registration of the Romspen Mortgage. Accordingly, the issue in this section is whether the doctrine of actual notice could operate to subordinate the Romspen Mortgage to the interest of Home Depot under the Home Depot Agreement in accordance with the principle in *United Trust, supra*. The issue does not arise in respect of the Ground Lease given the determination above that Romspen did not have actual notice of the Ground Lease at the time of execution of the Romspen Mortgage.

122 The operation of section 93(3) of the *Land Titles Act* was previously addressed in the Holborn Judgment in the context of a contest between a registered mortgage and another unregistered agreement of purchase and sale. For the reasons set out therein, I concluded that section 93(3) operates to oust the doctrine of actual notice in Ontario in respect of a registered charge notwithstanding the chargee's actual notice of an unregistered agreement of purchase and sale.

123 Subsection 93(3) specifically addresses the operation of actual notice in the phrase "free from any unregistered interest in the land". In my view, this wording is sufficiently explicit to satisfy the test in *United Trust*. There is nothing in that decision that requires language substantially similar to the wording in the Alberta legislation to exclude the operation of the doctrine of actual notice. I am not persuaded that the conclusion reached in the Holborn Judgment was in error.

124 I do not think it is necessary to restate the reasons for my conclusion on this issue in this Endorsement. For present purposes, I adopt the reasons in the Holborn Judgment on the operation of section 93(3), with the exception of the alternative reasons of effective subordination, given the absence of any covenant against registration in the present proceedings. Subject to the qualification that section 93(3) has been read subject to section 155, which deals with the invalidity of the registration of fraudulent instruments and is not at issue in this proceeding, I conclude that section 93(3) provides a mortgagee with an absolute defence to a claim based on actual notice.

125 I wish, however, to set out several additional observations regarding this issue in response to Home Depot's submissions.

126 First, in reaching this conclusion, I have also considered the absence of any alternative interpretation of the language of section 93(3). Home Depot's position is that section 93(3) does not operate where a receiver seeks to vest out an equitable interest. It seeks to avoid the priority issue by identifying a different fact situation. It did not, however, provide a meaningful alternative interpretation of section 93(3) that demonstrates a purpose for that provision that does not address the doctrine of actual notice. In the absence of an alternative interpretation of section 93(3), the Court must conclude that the provisions of section 93(3) are directed to the present situation.

127 In addition, I have the following observations regarding the extent to which the additional decisions cited by Home Depot on this motion can be taken as authority for the proposition that the wording of section 93(3) does not exclude the operation of the doctrine of actual notice.

128 First, section 93(3) was not cited in the decisions of either the Court of Appeal in *Manias, supra* or Mesbur J. in *Paramount Pictures, supra.* Second, *Manias* addresses an altogether different situation of a contest of priorities among registered charges, where a mistake was made in the order of registration. That issue did not invoke section 93(3). Third, *Paramount Pictures* addresses a contest between a mortgagee and a tenant in which the tenant wished to resile from its lease, rather than a situation in which a mortgagee sought to vest out a tenant's interest. This dispute therefore also does not involve section 93(3).

129 Fourth, in *Romspen Investment Corporation* v. *2126912 Ontario Inc.*, *[2010] O.J. No. 639* (Sup. Ct. J.), Tucker J. held that section 93(3) did not apply where a party sought to rely on that provision to take advantage of a registration error in respect of a prior mortgage in order to obtain a better position than had been bargained for. Subsequent to the hearing in the present proceeding, the Court of Appeal upheld this decision in *Romspen Investment Corporation* v. *2126912 Ontario Inc.*, *[2010] O.J. No. 5405* (C.A.) by way of an appeal book endorsement.

130 The relevant portion of the appeal book endorsement on the substantive issue reads as follows:

> We are satisfied that the application judge's finding that the appellants had actual notice of the intended priority of the Romspen mortgage necessarily included a finding that the Romspen mortgage was an equitable mortgage in respect of the parking lot. That being so, contrary to the analysis in *Holborne* [*sic*] *Property* v. *Romspen (2008), 77 R.P.R. (4th) 262*, the application judge was correct in holding that section 93(3) of the *Land Titles Act* did not preclude Romspen's equitable mortgage from having priority over the appellants' registered mortgage. (See *United Trust* v. *Dominion Stores et al.*, *[1977] 2 S.C.R. 915* at pp. 956 and 957). To that extent, the appeal must fail.

131 I do not think the decision in *Romspen Investment Corporation* v. *Orvitz* applies to the present circumstances for the following reasons.

132 First, I do not think that the Court of Appeal intended to state, as a general principle, that the doctrine of actual notice continued to operate in all circumstances in Ontario notwithstanding the enactment of section 93(3). The issue of the ambit of section 93(3) was not addressed by Tucker J. The Court of Appeal was also silent on the issue.

133 Second, as Tucker J. expressly noted at para. 25 of her judgment, the facts in this decision are profoundly different from those in the Holborn Judgment. She noted "[t]his is not a case where priorities are in issue; the second mortgagee always knew it was to be a second". I see nothing in the decisions of Tucker J. or of the Court of Appeal that addresses, let alone excludes, the operation of section 93(3) in substantive priority contests.

134 Third, as a related matter, it is not necessary to exclude the operation of section 93(3) in order to reach the result ordered in *Orvitz*. It appears that the solicitor's error in *Orvitz* was a failure to include a legal description - that was included in the second mortgage - of a second parcel of land intended to be charged. As Tucker J. recognized in her judgment, *Orvitz* is essentially an unjust enrichment case based on an implied contractual subordination agreement among the parties, rather than a case of actual notice. It would be unconscionable to allow the second mortgage to retain its priority even if, in the first instance, section 93(3) operated. Moreover, the implication from *Manias* is that section 93(3) does not operate in a priority dispute between charges. Essentially, that is the situation in *Orvitz* - a contest between two mortgagees where one mortgagee seeks rectification of his instrument to reflect the intended security as between the mortgagor and mortgagee in circumstances in which rectification would be ordered notwithstanding its impact on the second mortgagee because of the intended priorities as between the two mortgages.

135 In summary, while I accept that the wording of the endorsement of the Court of Appeal may be read in different ways, I think the intention is clear and the circumstance are entirely different from those in the present case or in the Holborn Judgment.

136 Based on the foregoing, I conclude that, while Romspen had actual knowledge of the Home Depot Agreement, the Romspen Mortgage ranks prior to the Home Depot Agreement based on the operation of section 93(3) of the *Land Titles Act*.

The Operation of the Doctrine of Actual Notice

137 In the event that the doctrine of actual notice is held to operate in the present circumstances, however, I also do not think that it would be applied to subordinate the Romspen Mortgage to either the Ground Lease or the Home Depot Agreement.

138 The Court has previously concluded that Romspen did not have actual knowledge of the Ground Lease at the time that it executed the Romspen Mortgage. This excludes the operation of the doctrine of actual notice in respect of the Ground Lease.

139 With respect to the Home Depot Agreement, the doctrine of actual notice is an equitable doctrine. Its application is not automatic. If it were held that the doctrine of actual knowledge operated with respect to the Home Depot Agreement, the Court must still consider the equities between the parties.

140 In this case, in my opinion, the considerations discussed above in the context of Romspen's claim for priority by way of subrogation are equally applicable to the issue of the operation of the doctrine of actual knowledge. On this basis, I would conclude that the equities between the parties did not favour the application of the doctrine of actual notice to subordinate the Romspen Mortgage to the Home Depot Agreement.

Conclusion Regarding Priority of Romspen's Interest in the Property

141 Based on the foregoing, I conclude that Romspen's interest in the Property under the Romspen Mortgage ranks prior to Home Depot's interests in the Home Depot Lands under the Home Depot Agreement and the Ground Lease.

Is Romspen's Interest in the Property Subordinated to Home Depot's Interest By Virtue of a Consent?

142 As a matter of law, if a lease is executed by a mortgagor after the mortgage has been granted, the mortgagee will be bound by the terms of the lease if it is made with his express or implied consent: see *Goodyear Canada Inc.* v. *Burnhamthorpe Square Inc.* (1998), 41 O.R. (3d) 321 at paras. 54-57 (C.A.). The same principle can operate in respect of an agreement to purchase land.

143 Romspen's claim for subrogation is based on the prior registration of the earlier Romspen mortgages at the time of execution of the Home Depot Agreement. This claim could, however, be defeated by evidence that it consented to the Home Depot Agreement or the Ground Lease at some point thereafter.

144 Similarly, Romspen's claim of priority in respect of its interest under the Romspen Mortgage could also be defeated by evidence of such consent at some point after execution and registration of the Romspen Mortgage notwithstanding an initial priority position for the reasons set forth above.

145 The issue in this section is purely factual - did Romspen consent to the Home Depot Agreement or the Ground Lease? This matter has been addressed above, where I concluded that Home Depot has failed to establish as an undisputed fact that Romspen consented to either the Home Depot Agreement or the Ground Lease such that the Romspen Mortgage is subordinated to either or both of these instruments.

146 I would add only the observation that the issue of actual notice arises in circumstances such as the present precisely because knowledge does not automatically constitute consent. Accordingly, the significance, if any, of Romspen's knowledge of the existence of the Home Depot Agreement at the time of the Romspen Mortgage is properly addressed, not as a matter of consent, but as a matter of actual notice.

Is Home Depot Entitled to a Lien Against the Property Ranking in Priority to Romspen's Interest by Virtue of the Construction of the Home Depot Store?

147 Based on the foregoing, Romspen has an interest in the Property that ranks prior to Home Depot's interest under the Home Depot Agreement and the Ground Lease on two grounds: (1) by way of subrogation to the extent of the monies refinanced under the Romspen Mortgage plus interest; and (2) by operation of section 93(3) of the *Land Titles Act* to the extent of all monies secured under the Romspen Mortgage.

148 In these circumstances, Home Depot claims a lien against the Property under section 37(1) of the CLPA or, alternatively, in equity, in either case in the amount by which the value of the Property has been increased by the construction of the Home Depot store. It should be noted that the claim for lien is asserted against the owner of the Property. To the extent a lien claimant is successful, there is a further issue regarding the priority of any such lien relative to Romspen's interest in the Property. I will first address the validity of Home Depot's lien claims before considering the issue of priority.

The Conveyancing and Law of Property Act

149 Section 37(1) of the CLPA provides as follows:

> Where a person makes lasting improvements on land under the belief that it is the person's own, the person or the person's assigns are entitled to a lien upon it to the extent of the amount by which its value is enhanced by the improvements, or are entitled or may be required to retain the land if the Superior Court of Justice is of opinion or requires that this should be done, according as may under all circumstances of the case be most just, making compensation for the land, if retained, as the court directs.

Home Depot seeks a lien under this provision in the amount of the value by which the Property has been improved as a result of the construction of the Home Depot store on the Home Depot Lands.

150 As set out in *McGuire v. Warren (2006), 46 R.P.R. (4th) 113* at para. 7 (Ont. Sup. Ct. J.) per Wood J., before granting relief under section 37(1) of the CLPA, the Court must apply a three-part test:

> ... First, it must be satisfied that the person making the improvements genuinely believed that he or she owned the land. Secondly, it must be satisfied that the improvements made are of a "lasting" nature. Finally, if the first two parts are met, the court must weigh the equities between the owner of the encroached upon lands and the person who has made the improvements, to determine whether it is appropriate to either grant a lien on the lands for the value of the improvements or to transfer the lands to the person who made the improvements for appropriate compensation.

151 There is no question that Home Depot has made improvements of a lasting value to the Property. The issue is whether Home Depot has satisfied the requirement that it have a sufficient ownership interest in the Property.

152 The Receiver and Romspen make three submissions with respect to the first part of the test.

153 Firstly, they refer to para. 12 of *McGuire*, in which Wood J. observed that section 37(1) was enacted at a time when serious inadequacies or deficiencies in conveyancing practice resulted in disputed property boundaries. They argue the present case does not result from such factors, suggesting that the provision is therefore unavailable. However, I do not think that the purpose of section 37(1) is limited to addressing issues arising from historical conveyancing practice.

154 Second, Romspen argues that demonstration of a genuine belief that the claimant owns the relevant land requires demonstration of not only an honest belief but also a reasonable basis for that belief: *Derro v. Dube, [1948] O.W.N. 287* at paras. 3-4 (H.C.J.) per McRuer C.J.H.C.; and *Halton Hills (Town) v. Row Estate, [1993]*

O.J. No. 1222 (O.C.J. (Gen. Div.)) per MacKenzie J. It argues that Home Depot did not have such a belief at the time it erected its store on the Property.

155 I do not think it can reasonably be suggested that, as between Home Depot and Woods, Home Depot did not believe that it had an interest in the Property that was sufficient for the purposes of claiming relief under section 37(1). It had spent $14.5 million in improvements on the Property. The only reasonable inference is that it did so in the belief that, at a minimum, it had a right to remain on the Property for the remainder of the term of the Ground Lease.

156 Third, Romspen argues that, irrespective of that belief, Home Depot does not have a sufficient ownership interest in the Home Depot Lands to obtain relief under section 37(1). It argues that a purchaser under an unexecuted agreement of purchase and sale, while an equitable owner of the property, does not have a sufficient ownership interest to obtain relief under section 37(1). It relies on *Geldhof v. Bakai (1982), 139 D.L.R. (3d) 527* at para. 8 (Ont. H.C.J.) per Callaghan J. Insofar as it is suggested that this is a general principle of law, I think it is incorrect notwithstanding that this was the result in *Geldhof v. Bakai*. It is clear that Callaghan J. based his decision on a finding of fact in the particular circumstances of that case, including specific advice that neither plaintiff believed that they would own the land in question until the date of the closing of the agreement of purchase and sale entered into with the defendants.

157 However, on the facts of the present case, I conclude that Home Depot does not have a sufficient ownership interest under the Home Depot Agreement or the Ground Lease to seek relief under section 37(1) for the following reasons.

158 As mentioned, at best, Home Depot has an unregistered equitable agreement to purchase the Home Depot Lands. Moreover, that is subject to an important qualification. Section 4.5 of the Home Depot Agreement provides that the Agreement shall only be effective to create an interest in land if the provisions of the *Planning Act* have been complied with. That cannot occur until severance of the Home Depot Lands has occurred. Given the combination of these two factors, I think the Court must conclude that Home Depot does not have a sufficient interest in land under the Home Depot Agreement to assert a claim under section 37(1).

159 I have some sympathy for the argument that Home Depot's leasehold interest under the Ground Lease, which is effective currently, is a sufficient ownership interest in the Home Depot Lands to obtain relief under section 37. Section 3.3(a) of the Ground Lease contains a covenant for quiet possession from Woods. The Ground Lease has a fixed term of 50 years and rental payments fixed for the entire period. In short, Home Depot has security of tenure as between itself and Woods. Such a long-term lease is often a substitute for ownership of the freehold interest. However, the language of section 37(1) appears to require a belief that the lien claimant is an owner of the relevant property. The Court has not been provided with any case law that supports the proposition that a leasehold interest in a property is a sufficient interest to obtain relief under section 37(1). Moreover, there is some authority to the contrary in *Metzger Estate v. Gardner, [2000] O.J. No. 2280* (Sup. Ct. J.).

160 On the basis of the foregoing, I therefore conclude that Home Depot is not entitled to a lien against the Property under section 37(1) of the CLPA.

Claim for Equitable Lien

161 As mentioned, in the alternative, Home Depot claims an equitable lien in the Property equal to the amount by which the value of the Property has been enhanced by the construction of the Home Depot store. It relies on a line of cases in which equitable relief has been granted to parties who make improvements to a property at a time when they mistakenly believe they will be able to acquire the property: see, for example, *Montreuil* v. *Ontario Asphalt Co. and Caldwell Sand and Gravel Co. (1922), 63 S.C.R. 401* at p. 429 per Anglin J.; *Isabelle*

v. *Lahaie*, [2007] O.J. No. 4981 (Sup. Ct. J.); and *Hatoum* v. *Hatoum*, [1988] O.J. No. 1216 at p. 6-8 (H.C.J.) per Southey J., aff'd [1990] O.J. No. 1669 (C.A.).

162 I do not think that this principle is limited in operation to circumstances in which a claimant has an honest belief in his or her right to acquire the subject property. It is framed more broadly in *Chalmers v. Pardoe*, [1963] All E.R. 552 (P.C.) as follows:

> There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended.

163 On this issue, the equities clearly favour Home Depot over Woods. There is no apparent equitable consideration in favour of Woods. Home Depot had a right to purchase the Home Depot Lands as well as a leasehold interest under the Ground Lease having a term of at least 21 years. It appears that, at the time that it constructed the Home Depot store, there was no indication of the onset of Woods' financial difficulties, which later prevented completion of the sale transaction. In addition, the Home Depot store was constructed in accordance with arrangements that were specifically agreed to by Woods. Further, Woods did not appear on this motion and does not oppose a lien in favour of Home Depot. The Receiver effectively does not oppose this relief either as it is more concerned with the issue of the priority of such lien relative to the Romspen mortgages.

164 Based on the breadth of this principle, as well as the equitable considerations set out above, I think Home Depot would satisfy the test for an equitable lien based on its honest belief that, pursuant to the Ground Lease, it had a valid leasehold interest in the Property having a term of at least 21 years.

165 Accordingly, to the extent that Home Depot is not entitled to a lien against the Property under section 37(1) of the CLPA, I am of the opinion that it has satisfied the requirements of an equitable lien in the Property against the interest of Woods in the amount by which the value of the Property has been enhanced by the construction of the Home Depot store.

The Priority Issue

166 The real issue in this proceeding is not, however, whether Home Depot is entitled to a lien against the Property but whether such lien should rank in priority to Romspen's interest under the Romspen Mortgage. This issue appears to be a matter of first impression.

167 The Receiver and Romspen argue that equity cannot permit the priority of Romspen's interest in the Property to be reversed by equitable lien rights on the principle that, where the equities are equal between competing claims in a property, legal title prevails: see *Toronto-Dominion Bank v. Faulkner* (1990), 74 O.R. (2d) 92 at para. 18 (C.A.). However, this submission begs the question of whether the equities between Home Depot and Romspen are equal.

168 Home Depot points to a number of factors that it says should be taken into consideration by the Court. Home Depot's principal argument is that, in its view, Romspen allowed the construction of the Home Depot store on the Home Depot Lands and now seeks to take advantage of that improvement without compensation, which it characterizes as a windfall gain. It also argues that the Court should infer Romspen's consent to the construction of the Home Depot store from its execution of the Site Plan Agreement. Lastly, it says that if Romspen is successful, the Home Depot employees will lose their employment.

169 I have considerable sympathy for Home Depot's position notwithstanding the fact that they have contributed in a significant way to the present situation by deciding not to register the Home Depot Agreement or the Ground Lease. The reality is that, if the order is granted, Romspen will obtain the benefit of an improvement that it did not originally anticipate insofar as the parties did not expect, at the time the Home Depot store was constructed, that Woods would go into default on the Romspen Mortgage prior to completion of the sale of the Home Depot Lands.

170 However, I have concluded that Romspen's interest in the Property should have priority over Home Depot's equitable lien for the following reasons.

171 First, the mere fact that Romspen will obtain the value of the Home Depot store is not, by itself, sufficient to determine the issue of the priority of Home Depot's lien. To succeed in this claim, Home Depot must do more than demonstrate that it has improved the Property and that Romspen, as the mortgagee, will benefit if it is denied a prior equitable lien in respect of the improvement. It must establish either a consent of Romspen to the construction of the Home Depot store in circumstances indicating that the issue of priority was understood to be involved or another equitable consideration that justifies imposition of a prior lien in the absence of such consent.

172 In my opinion, Home Depot has failed to identify any other equitable consideration that justifies imposition of a prior lien in the absence of Romspen's consent to the construction of the store. Home Depot suggests that the Court should consider the possibility that its employees will lose their jobs. This is always an important consideration for courts in a receivership context. However, there is simply no basis in the evidence before me that would support such a conclusion. There are a number of possible outcomes to the present situation depending upon the business decisions of the parties after the release of this Endorsement.

173 Accordingly, the issue turns on whether Romspen consented to the construction of the Home Depot store on the Home Depot Lands in circumstances that it understood, or should reasonably have understood, that Home Depot would have a prior lien over such Lands to the extent of the value of the improvement. I conclude that Home Depot has failed to demonstrate any such consent of Romspen for the following reasons.

174 First, there is no evidence that Romspen ever consented directly to the construction of the Home Depot store. There is no evidence that Home Depot ever approached Romspen for such a consent. Nor is there any evidence of any communication between the parties that Romspen should reasonably have considered constituted a request for such a consent or required a response to protect its security position. Accordingly, there is no evidence that supports Home Depot's suggestion that Romspen "allowed" the construction of the Home Depot store in some manner.

175 Second, it is not suggested that the existence of the Home Depot Agreement implied a consent to the construction of the Home Depot store. Insofar as Home Depot suggests that the execution of the Ground Lease implies such a consent, I reject the submission for two reasons. Home Depot was not a party to the Ground Lease and gave no assurances in respect of Woods' representations therein. In addition, I have concluded that Home Depot did not have actual knowledge of, and did not consent to, the Ground Lease. There is also no basis for implying consent to the construction of the Home Depot store from Romspen's execution of the Romspen Mortgage.

176 The issue therefore turns principally on whether Romspen's execution of the Site Plan Agreement somehow changes this result - that is, whether it constitutes consent to the construction of the Home Depot store or evidence of Romspen's consent given elsewhere to such construction. I do not think it does for four reasons.

177 First, there is nothing in the Site Plan Agreement that constitutes the express or implicit consent of Romspen to the construction of the Home Depot store. There is also nothing in the Site Plan Agreement that

expressly contemplated that Home Depot would require or seek Romspen's consent to the construction of the Home Depot store. Romspen was entitled to assume from the absence of any contractual relationship between it and Woods, as well as the limited scope of the Site Plan Agreement, that Home Depot would approach it separately if it required a consent or other protection from Romspen in respect of the construction of the store on the Property.

178 Moreover, the Site Plan Agreement specifically referred to the earlier Romspen mortgages, which were registered against the Property and which maintained Romspen's control over the Property by the mechanism of Romspen's control over partial discharges of its security. The express subordination set out in the Site Plan Agreement related only to the rights of the Town of Collingwood. While rights of subordination of an interest in the Property are not the same as consent to the construction of the Home Depot store, the absence of any provision in the Site Plan Agreement dealing with Home Depot's rights in respect of the Property in the event of construction of the store is significant. If the Site Plan Agreement had been intended to grant Home Depot rights in respect of Romspen, it had to do so explicitly.

179 Second, more generally, there is no sense in which it can be said that Home Depot "allowed" the construction of the Home Depot store by executing the Site Plan Agreement. As mentioned, the only purpose of its execution of the Site Plan Agreement was to subordinate its interest in the Property to the interest of the Town of Collingwood. The Site Plan Agreement did not set out a timetable for the construction of the Home Depot store. Romspen could not know of Home Depot's intentions in this regard unless Home Depot chose to advise it. There is no evidence that Home Depot ever communicated its intention to construct the Home Depot store to Romspen.

180 Third, the circumstances in July 2006 were not such that Romspen's execution of the Site Plan Agreement can be taken as necessarily implying that Romspen turned its mind to the issue of the priority of any lien in favour of Home Depot in the Property that might arise after construction of the store and, by implication, agreed to subordinate Romspen' interest to any such lien. As mentioned above, the Romspen Mortgage was in good standing in July 2006. There was no reason to expect that Woods would be unable to obtain a partial discharge of the Home Depot Lands, in which case the priority issue would not arise.

181 Fourth, Home Depot has failed to identify any circumstances at the time of execution of the Site Plan Agreement that would have imposed an obligation on Romspen to take positive action to protect its position even if it suspected from the request to sign the Site Plan Agreement that Home Depot intended to construct the Home Depot store on the Home Depot Lands.

182 At all times, Home Depot's contractual relationships were restricted to Woods. The only exception was the Romspen acknowledgement, which addressed only the demolition of a portion of the industrial building on the Property. Home Depot was not required to notify Romspen of the commencement of construction of the Home Depot store or to seek its consent to such construction. Conversely, Romspen was not obligated to inquire as to Home Depot's intentions and to advise Home Depot that it did not consent to the construction of the Home Depot store insofar as it would give rise to a lien in priority to the Romspen Mortgage.

183 Ultimately, Home Depot's position is that Romspen ought to have known from the fact of the demolition of the portion of the industrial building and from the Site Control Agreement that it was proposing to build the Home Depot store on the Home Depot Lands and that Romspen had an obligation to advise Home Depot that it did not consent to such construction. There is no evidence that Romspen actually knew of Home Depot's intentions prior to commencement of construction beyond knowing that it was possible that Home Depot might construct a store on the Property. I do not think that Romspen could reasonably have known of Home Depot's intention to commence construction immediately from the demolition and the Site Control Agreement alone. It certainly could not have known that Home Depot intended to commence construction without obtaining any consent or assurance from Romspen to protect its position in the event of realization proceedings by Romspen. In any event, however, neither actual nor constructive knowledge imposed any obligation on Romspen to approach

Home Depot to protect its security position in the circumstances of unilateral action by Home Depot. There was no contractual relationship between the parties. There was no prior representation from Romspen to Home Depot. I know of no legal principle that would impose such an obligation in the circumstances of this case in the absence of any express communication from Home Depot to Romspen that could ground a claim based on reliance.

184 Accordingly, I conclude that the Romspen Mortgage has priority over any equitable lien in favour of Home Depot arising as a result of the construction of the Home Depot store on the Property.

185 In addition to the equitable considerations addressed above, I would add, if it were necessary to address this issue, that I see no basis for excluding the operation of section 93(3) of the *Land Titles Act* in respect of an equitable lien. There is nothing in the language of section 93(3) that provides that the principles of equity are intended to override the operation of this provision of the *Land Titles Act*. Indeed, an unregistered inequitable lien would appear to be the very type of interest to which section 93(3) is directed.

Conclusion Regarding the Equities Between the Parties Relative to the Receiver's Request for an Order Vesting Out the Interest of Home Depot in the Property

186 The foregoing issues, while they involve a consideration of the equities between the parties in relation to specific issues, are not determinative of the question of whether the Receiver should be granted an order approving the sale of the Property on a basis that vests out the interest of Home Depot. That requires a consideration of the equities between the parties based on the determinations made above and any other applicable considerations.

187 Based on the foregoing, the Court must consider the equities between the parties in the context of findings that

(1) Romspen's interest in the Property ranks ahead of that of Home Depot to the extent of the monies secured under the Romspen Mortgage or, alternatively, to the extent of the monies secured under the earlier Romspen mortgages in existence at the date of the Home Depot Agreement, plus interest at the rates provided for under those mortgages;

(2) Home Depot's equitable lien against the Property arising as a result of the construction of the Home Depot store does not rank prior to the interest of Romspen in the Property; and

(3) Home Depot is unable to establish as an undisputed fact that Romspen consented to the Home Depot Agreement, the Ground Lease or the construction of the Home Depot store in a manner that was intended to affect its rights in the Property.

188 I conclude that the Receiver should be granted an order permitting the sale of the Property free of the interest of Home Depot for the following reasons.

189 The equitable considerations addressed in the context of the determinations of the priorities of the respective interests of Romspen and of Home Depot in the Property are also applicable for the present assessment. In particular, Romspen bargained with Woods for the right to control the discharge of any portion of the Property from its security. Registration of the earlier Romspen mortgages, and of the Romspen Mortgage, was notice to Home Depot of the existence of such right. In addition, Romspen did not in any way provide assurance or comfort to Home Depot with respect to the priority of its interest in the Property or the protection of its interest in the event of realization proceedings.

190 The only other consideration to be addressed by the Court is, therefore, the value of the Property. As suggested in *1565397 Ontario Inc. (Re)*, *[2009] O.J. No. 2596* (Sup. Ct. J.), while a court can sell property free of a contract entered into between a debtor and a third party, the Court cannot do so in circumstances where the effect is to extinguish an interest in property except in limited circumstances. Those circumstances appear to be

limited to those in which the third party has no equity in the subject property given the value of the property and prior encumbrances.

191 While the circumstances in the present proceedings are more complex than other decisions in which this principle has been applied, I think that the facts before the Court establish that there is no equity in Home Depot's interest in the Property.

192 The Sale Agreement contemplates a sale price of $14.1 million. This is substantially below the amount secured under the Romspen Mortgage, which is at least $17,844,975.38 plus interest since February 1, 2010. On this basis, there is no equity value in Home Depot's subordinate interests in the Property. Given the existing priorities, Home Depot's interest would only have value if the Receiver received an offer for the Property that fully satisfied the monies owing to Romspen.

193 Based on the foregoing analysis of the applicable equitable considerations as between Romspen and Home Depot, I conclude that the equities favour Romspen and, accordingly, that the Receiver is entitled to an order permitting the sale of the Property on a basis that vests out the Home Depot interests in the Property under the Home Depot Agreement and the Ground Lease.

Should the Court Approve the Sale Agreement?

194 The remaining issue is whether the Court should also approve the Sale Agreement at this time.

195 As mentioned, the Receiver's report sets out in detail the exposure of the Property to the market. In the usual circumstance, the nature and extent of such activities would be sufficient to satisfy the Court that the proposed sale price for the Property represented the fair market value of the Property.

196 There are, however, two unusual features of the present circumstances.

197 First, the Receiver's effort to market the Property took place principally in the first six months of 2009. While there are legitimate reasons for the delay in bringing on this motion, the stock market and residential real estate market have nevertheless improved significantly since then. There is, therefore, a possibility that the real estate market in Collingwood has improved in a like manner since then. The Court must be concerned that the sale price under the Sale Agreement may not represent the current fair market value of the Property.

198 Second, and more importantly, the Receiver marketed the Property on the basis that a purchaser was bound to sell the Home Depot Lands to Home Depot in accordance with the Home Depot Agreement. It is possible that the Property would be attractive to other potential purchasers as a result of the determination in this Endorsement that the Receiver has the authority to sell the Property free of any claim by Home Depot. This consideration is relevant to the question as to whether the sale price under the Sale Agreement represents the current fair market value of the Property.

199 Further, the Receiver itself suggests that Home Depot is financially able to acquire the Romspen Mortgage and develop the Property itself if this motion is decided against it and it wishes to avoid the loss of its investment in the Home Depot store. I do not suggest that any such action is probable. However, it does raise the possibility that, as a result of the determination in this proceeding, Home Depot may itself wish to participate in the sales process in some manner.

200 Given these circumstances, the Court is of the view that it cannot consider approval of the Sale Agreement until the Receiver has conducted a further sales process in respect of the Property on the basis that a purchaser would be entitled to acquire the Property free and clear of any lien or claim of Home Depot. Rather than address the nature of and length of any such sales process, the Court is of the view that it should leave such details to the Receiver subject, of course, to the Receiver's right to seek the advice and directions of the Court at any time.

Further Order

201 At the request of the Receiver, an appraisal of the Property obtained by the Receiver from High Point Danbury Realty Advisors Corporation is hereby sealed pending completion of the sale of the Property or further order of this Court.

Costs

202 If the parties are unable to agree on costs of this motion, they shall have thirty days to make written submissions to the Court through the Commercial List Office, not to exceed seven pages in length.

H.J. WILTON-SIEGEL J.

TAB 2

paras. 19-20

Meridian Credit Union Ltd. v. 984 Bay Street Inc., [2006] O.J. No. 3169

Ontario Judgments

Ontario Superior Court of Justice
J.D. Ground J.
Heard: July 13, 2006.
Judgment: August 1, 2006.
Court File No. 05-CL-5785

[2006] O.J. No. 3169 | 150 A.C.W.S. (3d) 622 | 2006 CANLII 26476

Between Meridian Credit Union Limited, Plaintiff, and 984 Bay Street Inc. and Devendranauth Misir also known as Devi Misir, Defendants

(25 paras.)

Case Summary

Landlord and tenant law — The lease — Commercial tenancies — Motion by receiver and manager to terminate leases and to approve a sale of real property allowed — Plaintiff had a registered charge against defendants' property — Corporate defendant entered into non-arm's length leases that were subordinate to the charge — Plaintiff delivered notice of sale — Equities of the situation supported a termination of the leases and vesting title in the purchaser free and clear of the leasehold interests.

Real property law — Title — Encumbrances — Motion by receiver and manager to terminate leases and to approve a sale of real property allowed — Plaintiff had a registered charge against defendants' property — Corporate defendant entered into non-arm's length leases that were subordinate to the charge — Plaintiff delivered notice of sale — Equities of the situation supported a termination of the leases and vesting title in the purchaser free and clear of the leasehold interests.

Real property law — Mortgages — Motion by receiver and manager to terminate leases and to approve a sale of real property allowed — Plaintiff had a registered charge against defendants' property — Corporate defendant entered into non-arm's length leases that were subordinate to the charge — Plaintiff delivered notice of sale — Equities of the situation supported a termination of the leases and vesting title in the purchaser free and clear of the leasehold interests.

Motion by the receiver and manager of the corporate defendant to terminate leases and to approve a sale of real property, plus related relief -- The plaintiff, Meridian Credit Union Ltd., had a registered charge against the defendants' property -- The corporate defendant entered into non-arm's length leases with three allegedly related parties, one of which was controlled by the defendant Misir -- The leases were subordinate to the Meridian charge -- Meridian delivered a notice of sale -- The receiver obtained an order that it was entitled to sell the property free and clear of the non-arm's length leases -- An appeal by two of the tenants was allowed on the ground that it was not apparent that the motions judge had considered the equities among the parties -- The receiver found a buyer and brought another motion.

HELD: Motion allowed.

The leases were with companies controlled by Misir and his nephew, and were entered into when the Meridian charge was in default and when the corporate defendant was in serious financial difficulty -- The leases were an impediment to the receiver's ability to market and sell the property -- The equities of the

situation supported a termination of the leases and vesting title in the purchaser free and clear of the leasehold interests.

Statutes, Regulations and Rules Cited

Land Titles Act,

Personal Property Security Act,

Counsel

Paul MacDonald and Jonathan Hood for KPMG Inc., Receiver and Manager of 984 Bay Street Inc.

Scott Venton for Meridian Credit Union Limited.

Ben Salsberg for Bay Wellesley Health Services Inc.

Sean Cumming for Integrated Health Investments Corporation.

Michael T. Chilco for the Bay Wellesley Doctors' Group.

ENDORSEMENT

J.D. GROUND J. (endorsement)

1 By Order dated March 24, 2005 (the "Appointment Order"), KPMG Inc. (the "Receiver") was appointed Receiver and Manager of the property, assets and undertaking of 984 Bay Street Inc. ("984 Bay"), including the property known municipality as 984 Bay Street, Toronto, Ontario (the "Property"). 984 Bay is the registered owner of the Property. At the time of the Receiver's appointment, 984 Bay was controlled by Devendranauth Misir ("Misir"). Misir has admitted that he also controls Integrated Health Investments Corporation ("Integrated"). The controlling shareholder of Bay-Wellesley Health Services Inc. ("BW Health") is Omar Rambhajan ("Rambhajan"), Misir's nephew.

2 As security for a demand loan in the original principal amount of $7,020,000 (the "Meridian Loan"), 984 Bay granted Meridian Credit Union Limited ("Meridian") a debenture dated December 4, 2000 in the principal amount of $7,020,000, which was registered as a security pursuant to the *Personal Property Security Act* and as a charge (the "Meridian Charge") against title to the Property pursuant to the *Land Titles Act*. The Meridian Charge was validly registered in the Land Registry Office Number 66 on December 7, 2000 as Instrument Number CA703105 and provides in part:

> "Whenever the security hereby constituted shall have become enforceable, and so long as it shall remain enforceable the Credit Union may proceed to realize the security hereby constituted and to enforce its rights by entry; or by the appointment by instrument in writing of a receiver or receivers of the subject matter of such security or any part thereof and such receiver or receivers may be any person or persons, whether an officer or officers or employee or employees of the Credit Union or not and the Credit Union may remove any receiver or receivers so appointed and appoint another or others in his or their stead; or by proceedings in any court of competent jurisdiction for the appointment

of a receiver or receivers or for sale of the subject matter of such security or any part thereof; or by any other action, suit, remedy or proceeding authorized or permitted hereby or by law or by equity, and may file such proofs of claim and other documents as may be necessary or advisable in order to have its claim lodged in any bankruptcy, winding-up or other judicial proceedings relative to the Corporation. Any such receiver or receivers so appointed shall have all of the powers conferred on the Credit Union by this debenture and shall have power to take possession of the mortgaged property or any part thereof and to carry on the business of the Corporation, and to borrow money required for the maintenance, preservation or protection of the mortgaged property or any part thereof or the carrying on of the business of the Corporation and to further charge the mortgaged property in priority to the charge of this debenture as security for money so borrowed, and to sell, lease or otherwise dispose of the whole or any part of the mortgaged property on such terms and conditions and in such manner as he shall determine. In exercising any powers any such receiver or receivers shall act as agent or agents for the Corporation and the Credit Union shall not be responsible for his or their actions".

3 On or about January 13, 2005, Meridian delivered a Notice of Sale Under Mortgage with respect to the Meridian Charge. As at February 16, 2005, 984 Bay owed the Plaintiff the sum of $5,616,597.67 which amount was secured by, among other things, the Meridian Charge. The appointment of a court-appointed receiver on March 24, 2005 was not opposed in this receivership. On various dates in 2004 and 2005, 984 Bay entered into Non-Arm's Length leases (the "Non-Arm's Length Leases") with three allegedly related parties, as follows:

(a) lease dated January 1, 2005 of suite 100 (2,400 square feet) to BW Health;

(b) lease dated October 1, 2004 of suites 200 and 300 (5,500 and 1,000 square feet, respectively) to BW Health;

(c) lease dated May 1, 2004 of suite 400 (3,710 square feet) to Physiotherapy Wellness Institute Inc. ("Wellness Institute");

(d) lease dated October 1, 2004 of suite 700 west (2,800 square feet) to Integrated; and

(e) lease dated October 1, 2004 of suite 700 east (3,200 square feet) to Integrated.

4 Each of the Non-Arm's Length Leases, by its terms, provides that it is subordinate to the Meridian Charge, as follows:

ARTICLE 14.00 -- SUBORDINATION AND ATTORNMENT

14.01 It is a condition that this Lease and Tenant's rights granted hereunder that this Lease and all of the rights of the Tenant hereunder are subordinate to any and all mortgages, trust deeds or other instruments of financing, refinancing or collateral financing, from time to tome in existence against the Property. Upon request, the Tenant will subordinate this Lease and all of its rights hereunder in such form as the Landlord requires to any and all mortgages, trust deeds or other instruments of financing, refinancing or collateral financing, as aforesaid, and will, if requested, attorn to the holder thereof or to the registered owner of the Property, as the case may be. If within three (3) days after request by the Landlord to the Tenant to execute the instruments or certificates to give effect to the foregoing the Tenant has not executed same, the Tenant irrevocably appoints the Landlord as the Tenant's attorney with full power and authority to execute and deliver in the name of the Tenant any such instrument or certificate.

5 None of the Non-Arm's Length Leases have been registered pursuant to the *Land Titles Act*.

6 Each of the Non-Arm's Length Leases contains provisions that grant the tenant lengthy rent-free periods (typically 9 or 12 months at the commencement of the lease and a further three rent-free months in each year of the lease and any renewal thereof).

7 Neither Integrated nor BW Health has paid any rent at all since the commencement of the terms of the Non-Arm's Length Leases (either October 1, 2004 or January 1, 2005).

8 It is the Receiver's position that, properly interpreted, BW Health was granted an initial nine-month rent-free period commencing January 1, 2005 (in the case of the First Floor Lease) and a 12-month rent-free period commencing October 1, 2004 (in the case of the Second and Third Floor Lease) followed by a three-month rent-free period to be taken in each subsequent year of the term of the leases. Under this interpretation, BW Health owed arrears of rent as at May 31, 2006 of $34,550 after giving credit for payments received directly by the Bay-Wellesley Doctors Group (the "Doctors") referred to below.

9 In the case of Integrated, it is the Receiver's position that under both the Seventh Floor West Lease and the Seventh Floor East Lease, Integrated was granted an initial 12-month rent-free period commencing October 1, 2004 and a further three rent-free months in each year of the leases and any renewal thereof. Under this interpretation, Integrated owed arrears of rent of $31,877.07 as at May 31, 2006.

10 In August of 2005, the Receiver moved before me for a declaration that the Receiver was entitled to sell the Property free and clear of the Non-Arm's Length Leases on the basis that (a) the Non-Arm's Length Leases were fraudulent conveyances and of no force and effect; and (b) in any event, the Non-Arm's Length Leases were subordinate to the Meridian Charge and the Receiver was entitled to sell the Property free and clear of the Non-Arm's Length Leases as a matter of mortgage law.

11 By Endorsement and Order dated September 6, 2005 (the "September 6 Order") I found that the Receiver had the right to terminate the Non-Arm's Length Leases and to market and sell the Property free and clear of them.

12 BW Health and Integrated appealed my decision. By Endorsement dated April 28, 2006, the Court of Appeal set aside the September 6 Order and remitted the motion to this Court for hearing on the basis that it was not apparent from my Endorsement that I considered the equities among the parties in reaching my decision.

13 Pursuant to paragraphs 3(k) and (l) of the Appointment Order, the Receiver was expressly authorized to market the Property, including advertising and soliciting offers in respect of the Property and negotiating terms and conditions of sale, and, subject to further approval of the Court, to sell the Property. Pursuant to an Order dated June 2, 2005 (the "June 2 Order"), this Court approved the Receiver's proposed marketing plan for the Property, as outlined in the Receiver's First Report to the Court. Pursuant to the June 2, 2005 Order, the Receiver conducted a process to solicit offers to purchase 984 (the "Sales Process"). Offers were due by July 6, 2005. In its Second Report, the Receiver advised the Court of the outcome of the Sales Process. 75 prospects registered by executing a confidentiality agreement and five offers were received, however, none was acceptable to the Receiver. In its Second Report, the Receiver also advised the court that it intended to continue discussions with certain offerors from the Sales Process and to pursue other inquiries that came forward to the Receiver subsequent to the Sales Process. The Receiver subsequently entered into an agreement of purchase and sale on December 20, 2005 (the "Sale Agreement") with Ahmed Baig, in trust. As set out in the Fourth Report, the Receiver recommends that the Court approve the Sale Agreement since:

(a) there are no substantial changes to the standard terms and conditions,

(b) the purchase price was the highest received, notwithstanding a price reduction that was allowed following the purchaser's inspection of the Property;

(c) the Receiver is of the opinion that the equities favour the granting of a vesting order to convey title to 984 Bay free and clear of, among other things, the Non Arm's Length Leases; and

(d) Meridian has advised the Receiver that it is supportive of the Sale Agreement even though the purchase price is substantially less than the amount of the mortgage debt due to Meridian.

14 The Receiver has prepared a supplemental report to this court dated May 31, 2006 (the "Supplemental Report") and has provided a summary of offers received, including purchase prices and a copy of the Sale Agreement, as amended.

15 Pursuant to the Endorsement of the Court of Appeal, the Receiver has now brought the present motion before this court. The relief sought on this motion is:

(a) approval of the Receiver's 4th, 5th, 6th and 7th reports;

(b) approval of the sale of the Property to Ahmed Baig in trust;

(c) termination of the Non-Arm's Length Leases;

(d) an order for vacant possession of the premises leased to BW Health and to integrated;

(e) a vesting order vesting the Property in Ahmed Baig in trust, free and clear of all charges, mortgages, liens and leases other than certain assumed leases;

(f) authority to terminate the Non-Arm's Length Leases;

(g) judgment against BW Health and Integrated for rentals in arrears;

(h) a temporary sealing order with respect to the Sale Agreement.

16 The approval of the Receiver's Reports was not in issue in the motion before this court although BW Health has advised the court that it intends to seek leave to bring action against the Receiver in respect of certain of its activities relating to the premises leased to BW Health and occupied by the Bay-Wellesley Doctors Group. Neither BW Health nor Integrated has any issue with the approval of the sale to Ahmed Baig in trust but submits that the purchaser should take title to the property subject to the leases in favour of BW Health and Integrated and opposes the termination of such leases and the order for vacant possession of the leased premises. The issuance of a vesting order was not contested by BW Health or Integrated except that it should be subject to the leases granted to BW Health and Integrated. The issuance of the sealing order was not contested by BW Health or Integrated.

17 BW Health and Integrated appear to have abandoned their previous position, based upon a rather absurd interpretation of the rent free periods provision in the leases, that no rentals were owing, although on the hearing of this motion at least BW Health seemed to question the calculation of rental arrears made by the Receiver.

18 The real issue between the parties is, therefore, termination of the BW Health and Integrated leases. Counsel for BW Health submits that, on the basis of the material before this court from appraisers retained by the Receiver and by BW Health, there are material issues in dispute as to whether the leases were on commercially reasonable terms and that that determination would require the trial of an issue. Counsel for BW Health also submits that the leases to BW Health, being a company controlled by Misir's nephew, should not be regarded as a non-arm's length lease. I am of the view that neither of these issues precludes me from making a determination on this motion of whether, in view of the equities involved, this court should order the termination of the leases to BW Health and to Integrated.

19 I think the law is clear that, if Meridian had proceeded by way of power of sale, it could have sold the Property to a purchaser free and clear of the leasehold interest of BW Health and Integrated on the basis that the

subordination provision contained in the leases clearly subordinate the rights of the tenants to the rights of Meridian under the Meridian Charge and on the basis that none of the leases was registered on title to the property. This sale is, however, being conducted by a court-appointed receiver and, when seeking to convey title to assets free and clear of the interest of other parties, a receiver must apply to the court for a vesting order. In *New Skeena Products Inc. v. Kitwanga Lumber Co.* (2005), 75 D.L.R. (4th) 328, the British Columbia Court of Appeal clearly states that, in determining whether to issue a vesting order terminating in the interests of parties in a property, the court must review the equitable considerations supporting the respective positions of the parties.

20 In the case at bar, I have considered the following equities. The BW Health leases and the Integrated leases were entered into when the Meridian Charge was in default and when 984 Bay was in serious financial difficulties. The leases were entered into with companies controlled by Misir and by his nephew. The leases contained generous rent-free periods. No rent has been paid by either BW Health or Integrated since the date of commencement of the leases. A number of potential purchasers of the property expressed the view that the leases were at below market terms in rent. Three offers submitted required that the Property be conveyed free and clear of the leasehold interests of BW Health and Integrated. The Sales Process clearly established that the existence of the BW Health leases and the Integrated leases were an impediment to the Receiver's ability to market and sell the Property. The Sale Agreement with Ahmed Baiz, in trust, which the Receiver believes represents the best opportunity to realize maximum value for the Property, contains a condition that the Property be conveyed free and clear of the BW Health leases and the Integrated leases. Meridian supports the sale in spite of the fact that it will realize a substantial shortfall on the amount owing under the Meridian Charge. I am firmly of the view that the equities of the situation support an order terminating the BW Health leases and the Integrated leases and vesting title to the Property in the purchaser free and clear of those leasehold interests.

21 The only other party whose equities should be considered by the court is the Bay-Wellesley Doctors Group (the "Doctors"). The Doctors occupied the premises now leased to BW Health pursuant to a rather odd arrangement with Misir or 984 Bay, or another entity called Bay-Wellesley Medical Services, whereby payments from OHIP and Insurers were directed to Misir or 984 Bay and a certain percentage then remitted to the Doctors. This arrangement was terminated when Misir and 984 Bay failed to pay staff salaries and other expenses of the Doctors' clinic. Subsequently, when the Doctors were advised by a bailiff that the municipal taxes for the building were in arrears, the Doctors began to make arbitrary voluntary payments of $2,500 a month to the bailiff to be applied toward the taxes in arrears. When the Receiver paid the taxes in arrears, these payments were then made to an agent for the Receiver. At no time was there any lease entered into between Misir or 984 Bay and the Doctors or any sublease between BW Health and the Doctors when the premises occupied by the Doctors were subsequently leased to BW Health and at no time was there any agreement with respect to the rental payments for the premises. In my view, the Doctors occupied the premises on some sort of tenancy at will. I also note that BW Health never demanded possession of the premises until a letter of April 2006 and has never brought a motion to have the premises vacated.

22 In any event, the court is advised by counsel for the Doctors that they do not object to the sale of the Property or to the termination of the BW Health leases so long as they are given ample time to vacate the premises and to move their furniture and equipment. In addition, the court is advised that the purchaser is interested in negotiating a new lease with the Doctors for the premises now occupied by them. In my view, the equities of the Doctors' position do not impact upon the issuance of an order by this order terminating the BW Health leases and the Integrated leases.

23 Accordingly, an order will issue granting the relief sought by the Receiver on this motion provided that the determination of the arrears of rentals owed by BW Health and Integrated, if not agreed between the parties, will be determined by reference to a Master and the Receiver may move for judgment upon such determination.

24 The order of Justice Mesbur dated May 19, 2006 is to continue in effect until my order is issued and entered.

25 Any submissions as to costs of this proceeding may be made to me by way of brief written submissions on or before August 31, 2006.

J.D. GROUND J.

TAB 3

HRC-70 Jurisdiction of court to make vesting order.

Halsbury's Laws of Canada - Receivers and Other Court Officers

E. Patrick Shea (Main Title Contributor)
(Updates prepared by LexisNexis Canada Inc.)

HRC-70

I. RECEIVERS

16. Specific Powers of the Receiver

(4) Sale of Property by Receiver

(c) Court-Appointed Receiver

(ii) Vesting Order

Cumulative Supplement - Current to March 15, 2015

Note 1

See also *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, [2014] N.S.J. No. 612, 2014 NSSC 420 (N.S.S.C.).

HRC-70 Jurisdiction of court to make vesting order. Provincial legislation may provide the court with jurisdiction to make an order vesting property in a purchaser.[1]

Purpose and form of vesting order. The purpose of a vesting order is to convey the property to the purchaser free and clear of any and all encumbrances or claims, including future claims, that existed at the time of closing, subject to any exceptions identified in the order.[2] The form of vesting order in common usage provides for the vesting of all interests save and except for permitted encumbrances and provides for the "transfer" of any interests that are "vested out" to the proceeds of the sale. The model form of approval and vesting order approved for use on the Commercial List of the Ontario Superior Court of Justice provides:

> **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as Schedule A hereto (the "Receiver's Certificate"), all of the Debtor's right, title and interest in and to the Purchased Assets described in the Sale Agreement [and listed on Schedule B hereto] shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice [NAME] dated [DATE]; (ii) all charges, security interests or claims evidenced by

registrations pursuant to the Personal Property Security Act (Ontario) or any other personal property registry system; and (iii) those Claims listed on Schedule C hereto (all of which are collectively referred to as the "Encumbrances", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on Schedule D) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

THIS COURT ORDERS that upon the registration in the Land Registry Office for the Land Title Division of Renfrew of an Application to Register a Vesting Order in the form prescribed by the Land Registration Reform Act duly executed by the Receiver, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the "Real Property") in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in Schedule C hereto.

THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

THIS COURT ORDERS AND DIRECTS the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.

Nature of vesting order. A vesting order has a dual character. It is, on the one hand, a court order and, on the other hand, a conveyance of title. Once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent. Any appeal from the vesting order once requested on title is moot.[3] Appeal rights *vis-à-vis* a vesting order may be protected by: (a) an automatic statutory stay that prevents the registration of the vesting order;[4] or (b) obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal.[5]

Authority of court to vest out a lease. The court has the authority to vest out a lease to provide a purchaser with vacant possession of the property provided it is appropriate to do so after reviewing the equitable considerations supporting the respective positions of the parties.[6]

Footnote(s)

1 (AB) *Law of Property Act*, R.S.A. 2000, c. L-7, s. 76

(BC) *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 37

(MB) *Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 37(1)

(ON) *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100; (ON) *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 21(2)

(PE) *Judicature Act*, R.S.P.E.I. 1988, c. J-2.1, s. 43

(SK) *Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, s. 12

(NT) *Judicature Act*, R.S.N.W.T. 1988, c. J-1, s. 13

(NU) *Judicature Act*, S.N.W.T. (Nu.) 1998, c. 34, s. 1, s. 10

(YT) *Judicature Act*, R.S.Y. 2002, c. 128, s. 6.

2 *Credit Union Central of Ontario Ltd. v. Heritage Property Holdings Inc.*, [2008] O.J. No. 890 at para. 26, 40 C.B.R. (5th) 184 (Ont. C.A.). See *Adelaide Capital Corp. v. St. Raphael's Nursing Homes Ltd.*, [1995] O.J. No. 4553, 42 C.B.R. (3d) 17 (Ont. Gen. Div.); *Bank of Montreal v. Scaffold Connection Corp.*, [2002] A.J. No. 959, 36 C.B.R. (4th) 13 (Alta. Q.B.).

3 *Re Regal Constellation Hotel Ltd.*, [2004] O.J. No. 2744 at para. 33, 50 C.B.R. (4th) 258 (Ont. C.A.).

4 (CAN) *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 195.

5 *Re Regal Constellation Hotel Ltd.*, [2004] O.J. No. 2744 at para. 36, 50 C.B.R. (4th) 258 (Ont. C.A.).

6 *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.); *Romspen Investment Corporation v. Woods Property Development Inc.*, [2011] O.J. No. 1163, 75 C.B.R. (5th) 109 (Ont. S.C.J.).

ROYAL BANK OF CANADA - and - **2292319 ONTARIO INC.**

Applicant

Respondent

Court File No. CV-16-11331-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES
OF THE RECEIVER
(Motion returnable July 28, 2016)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

Sanjeev P. Mitra (LSUC No. 37934U)
Tel: (416) 865-3085
Fax: (416) 863-1515
Email: smitra@airdberlis.com

Jeremy Nemers (LSUC # 66410Q)
Tel: (416) 865-7724
Fax: (416) 863-1515
Email: jnemers@airdberlis.com

Lawyers for the Receiver