

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
(IN BANKRUPTCY AND INSOLVENCY)

**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**

BETWEEN:

ROMSPEN INVESTMENT CORPORATION

Applicant

-and-

HORSESHOE VALLEY LANDS LTD.

Respondent

FACTUM OF LOTCO
(Regarding Lotco Conducting Examinations and Cross-Examinations)
Court Appearance: Friday, January 13, 2017 at 9:00 a.m.

PART I - FACTS

1. The following Affidavits have been filed in the within Application and contain evidence relevant to the pending Motions of the Receiver (“Rosen”) to complete the First View APS and of Lotco to complete the Lotco APS (the “Motions”):

- (i) Affidavit of Jim Cooper (“Cooper”), for Horseshoe, sworn November 16, 2016;

- (ii) Affidavits of Mark Hilson (“Hilson”), for Romspen, sworn July 22, 2016 and November 15, 2016; and
 - (iii) Affidavit of Bill Ulicki (“Ulicki”), for Romspen, sworn November 21, 2016.
- (the “Affidavits”)

2. The Affidavits confirm that Brendon Bissell (“Bissell”), lawyer for Romspen Investment Corporation (“Romspen”) and William Friedman (“Friedman”) lawyer for Horseshoe Valley Lands Ltd. (“Horseshoe”), were present at the Settlement Meeting held on July 28, 2016 (the “Settlement Meeting”) and that they negotiated and agreed on the terms contained in the Forbearance Agreement (dated August 1, 2016) that was signed in September 2016 (the “Forbearance Agreement”). Their evidence is necessary for determination of the Motions and specifically whether Horseshoe was entitled to complete the Lotco APS - for the sale of the 29 lots (the “Lots”) - in September 2016.

3. The central issue on the Motions relates to the timing of Romspen’s knowledge with respect to the Lotco APS before the Forbearance Agreement was signed and whether, at the time that the Forbearance Agreement was signed in September 2016, Horseshoe could complete the Lotco APS.

4. Lotco wants to cross examine Cooper, Hilson and Ulicki on their Affidavits. Lotco want to examine Friedman and Bissell to obtain evidence to be used on the Motions.

Issues to be addressed during Examinations and Cross-Examinations

1. The knowledge, information and belief of Romspen as at the time when the Forbearance Agreement was signed and whether it should have been entitled to refuse to allow the Lotco APS to be completed.
2. Do paragraphs #3 and #4 of the Forbearance Agreement refer to and/or contemplate completion of the Lotco APS?
3. When the Forbearance Agreement was signed, what did Romspen know, understand or believe would be the source of the \$3,200,000.00 payment that was to be made by Horseshoe on September 30, 2016?
4. What information was made available regarding the amount of the Lotco APS, who was in possession of this information, when did they have the information and what was directly or indirectly communicated to First View?
5. Are/were Horseshoe's assets sufficient to satisfy its obligations to Romspen?

Undisputed Facts

1. On July 19, 2016 Romspen received a copy of the first Lotco APS and knew Horseshoe intended to sell the Lots to Lotco for \$3,250,000.00.
2. On July 19, 2016, Friedman requested the Settlement Meeting.
3. On July 22, 2016, Romspen appointed Rosen as the Private Receiver of Horseshoe's assets.
4. On July 26, 2016, Romspen received a copy of the actual Lotco APS (dated July 21, 2016) which was to close on September 22, 2016. At this time it was still conditional.
5. On July 28, 2016, the Settlement Meeting was held. Ulicki, Cooper, Friedman and Bissell were in attendance.
6. By August 1, 2016, Romspen and Horseshoe agreed to a Forbearance Agreement although the terms were still being negotiated into September 2016, when it was signed.
7. In mid-August, 2016, Romspen was aware that other Offer(s) had been made for the Lots, which Offers could not be accepted by Horseshoe because of the Lotco APS.

8. On or about September 9, 2016, the terms of the Forbearance Agreement were finalized and the Forbearance Agreement (dated August 1, 2016) was signed.
9. On November 29, 2016, Rosen was appointed by the Court as the Receiver of Horseshoe's assets.

Evidence related to Assets and Liabilities of Horseshoe

1. In mid-November, 2016, Horseshoe owed Romspen slightly in excess of \$23,000,000.00.
2. Real estate values have been "sky-rocketing".
3. Romspen's collateral declining.

Cross-Examination of Ulicki and/or Hilson

1. Related to the intent of the Forbearance Agreement and whether that intention changed in any material respects between July 28, 2016 (the Settlement Meeting) and September 9, 2016 (signing the Forbearance Agreement).
2. What was the basis for Hilson's evidence that the value of Romspen's collateral was declining?
3. On July 22, 2016, what did each know, understand or believe with respect to the Lotco APS?
4. To understand the involvement of Carmen Fruci ("Fruci") and obtain details regarding the other Offers for the Lots received in August 2016 and the First View Offer that Rosen is seeking to complete.
5. To obtain all of their evidence related to Romspen's knowledge, understanding and belief with respect to the Lotco APS and other Offers to Purchase Horseshoe properties from prior to the Settlement Meeting until the Forbearance Agreement was signed.
6. When and how did Ulicki conclude that the Lotco APS was for below fair market value?

7. What was their respective involvements in negotiating the terms of the Forbearance Agreement – particularly paragraphs #3 and #4 and which transaction required Rosen's written consent?
8. To determine what steps were taken (and when) by Romspen related to its refusal to close the Lotco APS and how these are reflected in the Forbearance Agreement?
9. To obtain Romspen's knowledge, understanding and belief as to where the money for the September 30, 2016 payment (\$3,200,000.00) would come.
10. To understand to what extent (and why) the terms being negotiated for the Forbearance Agreement changed between the Settlement Meeting and when the Forbearance Agreement was signed in September, 2016.
11. To review the extent Rosen's involvement prior to the signing of the Forbearance Agreement and in the refusal to close the Lotco APS.

Cross-Examination of Cooper

1. To obtain all of Cooper's evidence related to the Lotco APS and other Offers to Purchase Horseshoe properties from prior to the Settlement Meeting.
2. To confirm what information and documentation was provided to Romspen related to the Lotco APS and how that impacted on the terms of the Forbearance Agreement.
3. To understand Horseshoe's involvement with Fruci and the other Offers for the Lots that were received in August 2016.
4. To determine what Romspen was communicating to Horseshoe throughout related to its ultimate refusal to allow the Lotco APS to be completed.

Examinations of Bissell and/or Friedman

1. To determine the meaning of the terms of the Forbearance Agreement as negotiated - as they relate to the Lotco APS.
2. To obtain evidence with respect to the discussions and agreements included in the Forbearance Agreement related to the Lotco APS. (What do terms mean)

3. After receiving the other Offers in August, 2016, what discussions did they have related to the Lotco APS?
4. To determine what steps were taken by Romspen indicating its refusal to close the Lotco APS?
5. What do paragraphs #3 and #4 of the Forbearance Agreement refer to – meaning what sale of property was being contemplated?
6. What did Bissell communicate to Friedman regarding Romspen’s intention to refuse to discharge the mortgage over the Lots?
7. When did Bissell become aware that the Lotco APS was firm?
8. What discussions or communication did Bissell and Friedman have regarding the Lotco APS after knowing that it was firm?
9. When did Romspen inform Horseshoe that it would not allow the Lotco APS to close?
10. What information (and when) did Bissell and Friedman have regarding the Confidential APS referred to in the Forbearance Agreement?
11. To obtain copies of any notes or records of Bissell and Friedman related to the Lotco APS - from the settlement meeting until the Forbearance Agreement was signed.
12. Who decided, how/why was it decided and when was it decided that Romspen would not allow the Lotco APS to close?
13. What involvement did Rosen have in negotiating the terms of the Forbearance Agreement?
14. Did the Forbearance Agreement require Rosen’s written consent for completion of the Lotco APS?
15. From August 31, 2016 until the Forbearance Agreement was signed, what did Romspen do after learning that Cooper understood the sale of the Lots to Lotco was in the Forbearance Agreement as a pay down.

PART II – RELIEF REQUESTED

Through the examinations and cross-examinations, Lotco wants to obtain evidence to show that Horseshoe was authorized by Romspen to complete the Lotco APS and that, as at the time when the Forbearance Agreement was signed, Romspen did not require Horseshoe to obtain the written consent of Rosen to do so. This can only be done by Lotco conducting the requested examinations to obtain all the relevant information and details leading up to the signing of the Forbearance Agreement. Only with this evidence Lotco will be in a position to fully advance its cross-motion - that the Lotco APS should have closed in September 2016, that Romspen cannot thereafter have Rosen appointed as Receiver to avoid completing the Lotco APS and preferring a subsequently obtained APS at a higher selling price and that the Court ought to Order the Lotco APS to be completed.

Accordingly, Lotco seek an Order allowing the five (5) examinations to be conducted, the estimated time of each examination is not expected to exceed two (2) hours.

All of which is respectfully submitted this 10th day of January, 2017.



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Court File No.: CV-16-11468-00CL

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