COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *GEC (Richmond) GP Inc. v. Romspen Investment Corporation,* 2025 BCCA 9

Date: 20250109
Dockets: CA50095; CA50098

Docket: CA50095

Between:

GEC (Richmond) GP Inc. and Global Education City (Richmond) Limited Partnership

Appellants (Plaintiffs)

And

Romspen Investment Corporation

Respondent (Defendant)

- and -

Docket: CA50098

Between:

0989705 B.C. Ltd., Alderbridge Way GP Ltd., Alderbridge Way Limited Partnership, Gatland Development Corporation, REV Holdings Ltd., REV Investments Inc., South Street Development Managers Ltd., South Street (Alderbridge) Limited Partnership, Samuel David Hanson and Brent Taylor Hanson

Appellants (Plaintiffs)

And

Romspen Investment Corporation

Respondent (Defendant)

Before: The Honourable Madam Justice Bennett
The Honourable Mr. Justice Grauer
The Honourable Justice Winteringham

On an application to vary: An order of the Court of Appeal for British Columbia, dated September 27, 2024 (*GEC (Richmond) GP Inc. v. Romspen Investment Corporation*, 2024 BCCA 343, Vancouver Dockets CA50095; CA50098).

Counsel for the Appellants in CA50095:	J.P. Sullivan S.Y. Bhura
Counsel for the Appellants in CA50098:	S.D. Coblin M. Hashmi
Counsel for the Respondent:	P. Bychawski J. Hutchinson
Place and Date of Hearing:	Vancouver, British Columbia December 11, 2024
Place and Date of Judgment:	Vancouver, British Columbia January 9, 2025

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Justice Winteringham

Summary:

The respondent Romspen applies for an order cancelling the direction of the chambers judge that the appellants did not require leave to appeal orders made after the trial of three interrelated civil actions. Those civil actions were ordered to be tried together, and were case managed, by the judge managing separate CCAA proceedings concerning a construction project in which the parties to the civil actions were involved, and in which Romspen was the primary secured creditor.

Held: Application dismissed. Romspen failed to establish any error on the part of the chambers judge. In the circumstances of this case, notwithstanding that the CCAA judge ordered the civil actions to be tried together "in the context of" the CCAA proceedings, the trial judge's orders were not "made under" the CCAA within the meaning of s. 13 of the CCAA, and the CCAA judge specifically ordered that adjudication of the civil actions in the context of the CCAA proceedings "does not preclude any … appeal rights". The parties are encouraged to apply for an expedited appeal.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

[1] This review concerns whether, in the specific circumstances of this litigation, section 13 of the *Companies' Creditors Arrangements Act*, RSC 1985, c C-36 [*CCAA*], obliges the appellants to seek leave to appeal. The intended appeal is from orders pronounced by Justice Majawa on August 7, 2024, in three interrelated civil actions (the "Related Actions") tried together "in the context of" proceedings brought within the *CCAA* (the "*CCAA* proceedings"). Accordingly, there is a significant amount of interplay between the Related Actions, which are the subject of this appeal, and the *CCAA* proceedings, which are not.

[2] By section 13 of the *CCAA*:

> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> [Emphasis added.]

[3] The judge overseeing the *CCAA* proceedings, Justice Fitzpatrick, had ordered that the Related Actions be tried together "in the context of" the *CCCA* proceedings (the "procedural order").

[4] Were Majawa J.'s orders therefore "made under" the *CCAA*?

[5] In making the procedural order, Fitzpatrick J. ordered in term 6 that "[a]djudication within the context of these *CCAA* proceedings does not preclude any pre-trial procedural rights or appeal rights in the Related Actions" (emphasis added).

[6] Does this term of the order preserve civil appeal rights, overriding section 13 should that section be applicable?

[7] In this Court, the chambers judge, Justice DeWitt-Van Oosten, concluded that section 13 had no application because the orders of Majawa J. were not "made under" the *CCAA*, and that, in any event, Fitzpatrick J. had expressly reserved the appellants' appeal rights in her procedural order. It followed that leave was not required to appeal from the orders of Majawa J. Justice DeWitt-Van Oosten's reasons for judgment are indexed at 2024 BCCA 343.

[8] The respondent, Romspen Investment Corporation, now seeks an order cancelling the order of DeWitt-Van Oosten JA. It submits that the orders of Majawa J. in the Related Actions were orders made under the *CCAA* within the meaning of section 13 of that Act, and that term 6 of Fitzpatrick J.'s procedural order either cannot, or, when properly interpreted, does not, override section 13's requirement that leave to appeal be obtained.

[9] For the reasons that follow, I would dismiss Romspen's application.

2. THE PARTIES AND THE LITIGATION

2.1 Who's who

[10] In the Related Actions, from which this appeal is taken, Justice Majawa began his reasons for judgment as follows:

> [1] This is primarily a contractual interpretation case about the obligations between a lender, a group of real estate developers, and a third party, in respect of the financing of a large and complex construction development project in Richmond, British Columbia.

His reasons are indexed at 2024 BCSC 1433.

[11] The project comprises seven residential and commercial office towers being developed over an entire city block in Richmond, BC.

[12] The developers and debtors are the Alderbridge group of appellants.

[13] The developers obtained an injection of capital from the third party GEC group of appellants consisting of a deposit of $60 million for a pre-purchase. In return, the developers provided GEC with first-ranking security.

[14] The lender is the respondent/applicant, Romspen.

[15] The developers entered into a construction loan agreement with Romspen that provided for a credit facility in excess of $400 million.

[16] Amounts owed by the developers to Romspen were secured against the property and were guaranteed by a number of individuals and corporate entities connected with the developers—the guarantors.

[17] With the execution of the construction loan agreement, GEC entered into a subordination agreement with Romspen by which it agreed to subordinate its security interest to funds advanced by Romspen under the construction loan agreement.

2.2 The *CCAA* proceedings

[18] Romspen began advancing funds to the developers for the construction of the project in November 2019. It made efforts to syndicate a portion of the loan as contemplated by the construction loan agreement, but was unsuccessful. On March 31, 2020, after advancing some $143 million, Romspen ceased any further funding of the project. This, of course, occurred shortly after the COVID-19 lockdown.

[19] The developers were unable to secure alternative financing and faced insolvency. On April 1, 2022, by order of Fitzpatrick J., they entered into *CCAA* protection, and the *CCAA* proceedings began. At a very high level, the developers sought to continue a sales and investment solicitation process to test the market and see whether any third party might be interested in becoming an equity participant, purchasing the limited partnership, or simply purchasing the assets: see Fitzpatrick J.'s reasons for judgment, 2022 BCSC 1436 at para 5. A monitor was appointed to oversee the process, and was authorized, among other things, to implement a sales and investment solicitation process. The object, of course, was to obtain further investment or complete a sale as soon as possible given the carrying costs for priority secured creditor debt of approximately $3 million per month.

[20] That hoped-for resolution did not materialize, and matters were not assisted by the commencement the Related Actions in later 2022 and early 2023. The monitor proposed to restart the sales and investment solicitation process and expressed the view that it would be preferable if the outstanding claims in the Related Actions were resolved by spring 2024.

2.3 The Related Actions

[21] The first Related Action, BCSC No. S228019, was commenced on October 6, 2022, by GEC against Romspen (the "GEC action"). GEC sought a declaration of priority over the Romspen security, alleging (among other things) breach of contract

and the tort of unlawful means. Romspen counterclaimed. At issue were various priority or subordination agreements between the two parties as well as the construction loan agreement.

[22] The second Related Action, BCSC No. S231106, was commenced by Romspen on February 15, 2023, against the debtors and the guarantors, seeking judgment for the outstanding debt under the construction loan agreement (the "Romspen action").

[23] The third Related Action, BCSC No. S232583, was commenced on March 28, 2023, by the debtors and guarantors against Romspen and is essentially a counterclaim to the Romspen action alleging breach of the construction loan agreement (the "debtors and guarantors action").

[24] All three actions, then, bring into focus Romspen's rights and obligations under the construction loan agreement, including whether it breached its obligations when it suspended advances at the end of March 2020.

[25] In these circumstances, Romspen applied before Fitzpatrick J. in the *CCAA* proceedings for an order that the Related Actions be tried together "in the context of" the *CCAA* proceedings, and setting various case planning deadlines. The result was the procedural order, pronounced October 3, 2023. Justice Fitzpatrick's reasons for judgment are indexed at 2023 BCSC 1718 (the "procedural reasons").

2.4 The procedural order

[26] It is this order that resulted in the Related Actions being tried "in the context of" the *CCAA* proceedings. As a result, it is the foundation of Romspen's arguments that the orders in the Related Actions were "made under" the *CCAA* so that leave to appeal must be obtained pursuant to section 13 of that Act.

[27] Before Fitzpatrick J., the debtors, guarantors and GEC all objected to Romspen's application. They argued that the *CCAA* court had no jurisdiction to grant the relief sought, or alternatively, that any such order would be "inappropriate" (within the meaning of section 11 of the *CCAA*, discussed further below). They took the position that the Related Actions should all be resolved in the usual civil trial process outside of the *CCAA* proceeding, without the *CCAA* court imposing any case management deadlines.

[28] After finding that the Related Actions "are interrelated and significantly overlap in many, if not most, respects" (at para 25), Fitzpatrick J. turned to the question of jurisdiction, noting that Romspen relied on section 20 and section 11 of the *CCAA*, and that section 20 mandated that the Romspen claim against the *CCAA* debtors be determined in the *CCAA* proceedings:

> [28] The jurisdictional basis for the relief sought by Romspen is two-fold: ss. 20 and 11 of the *CCAA*.
>
> [29] Section 20 of the *CCAA* is a specific provision for the determination of claims, including secured claims, in *CCAA* proceedings:
>
> > 20(1) For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:
> >
> > (a) the amount of an unsecured claim is the amount
> >
> > (i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,
> >
> > (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or
> >
> > (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be determined by the court on summary application by the company or by the creditor; and

> (b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.
>
> [30] Accordingly, the *CCAA* specifically mandates that Romspen's secured claim against the *CCAA* Debtors *must* be determined by the Court in these proceedings and on a summary basis.
>
> [31] In addition, to the extent that the relief is not specifically provided for in s. 20, s. 11 of the *CCAA* endows the *CCAA* court with broad jurisdiction to advance the purposes of the statute by making any order that it considers "appropriate."
>
> [Emphasis by underlining added; emphasis in italics original.]

[29] Justice Fitzpatrick then turned to discuss section 11, noting that Romspen conceded that section 20 did not apply to the issues relating to the guarantors and GEC. Section 11 provides as follows:

> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, … make any order that it considers appropriate in the circumstances.
>
> [Emphasis added.]

[30] Relying in part on the judgment of Justice Wilton-Siegel of the Ontario Superior Court of Justice in *US Steel (Canada) Inc (Re)* (an unreported endorsement indexed at 2015 ONSC 5103), Fitzpatrick J. concluded that section 11 provided the necessary jurisdiction to bring the other claims under the umbrella of the *CCAA* proceedings where that would assist in the restructuring process and further the remedial purposes of the *CCAA*:

> [56] I agree that it will not always be the case that other claims are appropriately brought into the *CCAA* umbrella for adjudication. However, I adopt the reasoning and result in *U.S. Steel SC* in concluding that, if the

> circumstances are such that bringing other claims into the *CCAA* proceeding will assist in the restructuring process and further the remedial purposes of the *CCAA*, that may ground the exercise of the court's jurisdiction to grant such an order under s. 11 of the *CCAA*.
>
> [57] I conclude that this Court in these *CCAA* proceedings does have the jurisdiction to grant the order sought by Romspen pursuant to s. 11 of the *CCAA*. It remains to be determined whether it is appropriate to exercise that jurisdiction in these circumstances, as I will discuss below.
>
> [Emphasis added.]

[31] Justice Fitzpatrick concluded that it was indeed appropriate to exercise the jurisdiction. She considered first the impact of the Related Actions on the *CCAA* proceedings, noting the "manifest relationship" between the Related Actions and their parties, and the *CCAA* proceedings:

> [69] I would emphasize again the Monitor's comments in the Report at paras. 9 and 15, which I have summarized above, about how the priority issue is expected to negatively impact the Monitor's ability to arrange a sale of the Development if the disputes in the Related Actions are not resolved beforehand. The Monitor does not describe the resolution of the Related Actions as merely "desirable"; rather it is described as "important" and "essential" to achieving the objectives that are before the stakeholders in this insolvency proceeding.
>
> [70] It cannot be seriously questioned that, in these unique circumstances, it is critical and necessary to determine who holds debt and security against the Development and, if security is held, what is its priority.
>
> …
>
> [72] I am not persuaded by the respondent's arguments that attempt to distance themselves and their claims from this *CCAA* proceeding. There is a manifest relationship between the Related Actions, GEC, Romspen, the *CCAA* Debtors/Guarantors and these *CCAA* proceedings. None of GEC, Romspen or the *CCAA* Debtors/Guarantors can be characterized as "strangers" to these *CCAA* proceedings.
>
> [73] These *CCAA* proceedings are an insolvency proceeding involving the *CCAA* Debtors and each of the Related Actions concerns the *CCAA* Debtors. The Guarantors are in each case either the economic stakeholders of the *CCAA* Debtors, their controlling minds, or were otherwise involved in their business operations leading up to the commencement of these *CCAA* proceedings.
>
> [74] The Romspen Action is a claim against the *CCAA* Debtors/Guarantors. It is a claim that is required to be resolved pursuant to s. 20 of the *CCAA*. The *CCAA* Debtors/Guarantors Action is in substance a cross claim to, and a denial of, the claims asserted in the Romspen Action. The Romspen Action cannot be adjudicated in accordance with s. 20 of the *CCAA* apart from the *CCAA* Debtors/Guarantors Action.

> [75] The GEC Action also concerns the *CCAA* Debtors. GEC's claims against Romspen in the GEC Action relate to and arise from the affairs of the *CCAA* Debtors and their insolvency. GEC is a major secured creditor of the *CCAA* Debtors. The contractual relationship between GEC and Romspen pertains solely to the *CCAA* Debtors. GEC hopes, through the GEC Action, to elevate its secured claim against the Development in relation to the Romspen Security.
>
> [76] I conclude that there is considerable interconnection between the Related Actions and the conduct of these *CCAA* proceedings, as the Monitor notes in its Report.
>
> [Emphasis added.]

[32] Next, Fitzpatrick J. turned to the arguments raised by the appellants centered on perceived prejudice, concluding that the order she intended to make would sufficiently preserve their rights:

> [80] GEC and the *CCAA* Debtors/Guarantors say that Romspen is seeking to "impose an arbitrary, 'fast track' schedule" that is "impossible to meet without compromising [their] full rights to gather evidence" in defence of Romspen's claims. They say that Romspen is hoping to benefit from an "unreasonably truncated schedule". They say that Romspen is attempting to deny their rights to natural justice and a fair hearing of their claims on the merits. Finally, they say that Romspen is attempting to have its "preferred judge appointed case management and trial judge".
>
> [81] GEC's initial objection to the Procedural Order was that it was entitled to the "full panoply of procedural rights that an action entails". Similarly, the *CCAA* Debtors/Guarantors stressed the importance of their rights to "discovery and other procedural rights".
>
> [82] However, notwithstanding s. 20 of the *CCAA*, by which there is a statutory presumption that the Romspen Action and certain defences raised in the *CCAA* Debtors/Guarantors Action be determined on a summary basis, Romspen does not seek an order from this Court that these actions be determined summarily.
>
> [83] Counsel for the *CCAA* Debtors/Guarantors suggests that document discovery will be fraught with issues and that significant time and "intense investigations" will be required even before the parties could consider proceeding to examinations for discovery. Graham Thom, a representative of the *CCAA* Debtors, says that he is searching for documents and he is aware that there are more than 10,000 pages of documents relevant to the issues. His counsel says that he expects "vast amounts" of expert evidence, suggestive of lengthy delays. He suggests that his client's action would not be ready for trial in less than 18 months. Finally, he suggests that the granting of the Procedural Order, to bring the Related Actions into the *CCAA* proceedings, could entail "chaos" that will delay the proceeding for years.

> [84] The Procedural Order sought allows for the usual civil litigation process with which counsel are very much aware. It includes the filing of the outstanding pleadings, delivery of lists of documents, potential demands for further documents, potential applications to the court to resolve document issues, examinations for discovery and case planning conferences. The Procedural Order does not address the question of the process for determining the claims asserted in the Related Actions after those pre-trial procedures are completed. Romspen states that this approach is intended to fully preserve the parties' rights to argue that the proper procedure for the determination should be a summary trial, a full trial, or a hybrid hearing. Romspen's counsel also states that this defers the determination of the appropriate mode of dispute resolution procedure to a time when there is a proper basis for assessing what procedure is both just and appropriate in the circumstances, including the ongoing dynamics of this *CCAA* proceedings.
>
> [85] In my view, this approach fully preserves the rights asserted by GEC and the *CCAA* Debtors/Guarantors and also allows the parties to have time after the pre-trial procedures to formulate next steps: see *U.S. Steel SC* at paras. 87 and 101.

[33] In a passage of significance to this application, Fitzpatrick J. referred again to the *US Steel* case, noting that adjudication within the ambit of the *CCAA* proceedings would not "preclude any procedural rights, such as appeal rights":

> [86] Further, as stated in *U.S. Steel SC* at para. 102, adjudication within the ambit of these *CCAA* proceedings does not do away with the need to assert claims based on recognized legal or equitable principles, or avoid a costs award or preclude any procedural rights, such as appeal rights. On this point, I do not agree with the *CCAA* Debtors/Guarantors' counsel that their Action involves, "new and still evolving legal theories"; in any event, even assuming that is the case, I see no difficulty in resolving those in the context of the *CCAA* proceeding.
>
> [87] In addition, Romspen is not seeking to formally consolidate the Related Actions. The Procedural Order sought by Romspen is not substantively different than what could have been sought outside of the *CCAA* proceedings.
>
> [Emphasis added.]

[34] In these circumstances, Fitzpatrick J. pronounced the procedural order, which set out a litigation timeline applying to each of the Related Actions, and included the following terms:

> 1. Supreme Court of British Columbia Actions Nos. S-228019, S-231106 and S-232583 (the "Related Actions") shall be tried together, subject to the

> direction of the trial judge, in the context of the within *CCAA* proceedings.
> …
> 4. Nothing in this order abrogates the right of any party to the Related Actions to file such other interlocutory applications in the *CCAA* proceedings in connection with the Related Actions, or take any other steps in the Related Actions, as are permissible under the Rules or the *CCAA*, subject to any direction from this Court as may be required.
> …
> 6. Further Court applications in the Related Actions are stayed save and except as are brought forward for determination in this proceeding. Adjudication within the context of these *CCAA* proceedings does not preclude any pre-trial procedural rights or appeal rights in the Related Actions, subject to any directions from this Court as may be required.
> 7. THIS COURT REQUESTS the aid and recognition of the justices and officers of the Supreme Court of British Columbia to act in aid of and to be complementary to this Court in carrying out the terms of this order where required.
>
> [Emphasis added.]

[35] When it came to settling the terms of the procedural order, there was a dispute concerning whether term 6 should include the reference to adjudication within the context of the *CCAA* proceedings not precluding any pre-trial procedural rights or appeal rights in the Related Actions. Romspen thought not. The other parties thought it should. Justice Fitzpatrick included it.

[36] No party sought to appeal the procedural order.

2.5 Further proceedings

[37] Justice Fitzpatrick issued a further procedural order on March 5, 2024, directing, among other things, that the trial of the Related Actions be bifurcated, with the trial on the issues of liability proceeding for three weeks commencing April 29, 2024.

[38] That trial led to the orders of Majawa J., which are the subject of this appeal.

[39] Justice Majawa found in favour of Romspen. His reasons for judgment are indexed at 2024 BCSC 382. In the Romspen action, he granted judgment against

the developers and guarantors in an amount to be assessed. He dismissed the developers and guarantors action with costs to Romspen. Justice Majawa also dismissed the GEC action and, with respect to Romspen's counterclaim, granted judgment to Romspen against GEC for breach of contract in an amount to be assessed.

[40] GEC and the debtors and guarantors both filed notices of appeal and concurrent applications for leave to appeal. After a hearing on September 27, 2024, the chambers judge concluded that leave was not necessary, bringing us to this application to cancel that order.

3. SHOULD THE CHAMBERS ORDER BE CANCELLED?

3.1 Standard of review

[41] In *JP v KS,* 2024 BCCA 78, this Court confirmed that the standard of review on an application to vary the order of a single justice is highly deferential, and is not a rehearing of the original application:

> [11] The authority to apply to vary an order of a justice is found in s. 29 of the *Court of Appeal Act,* S.B.C. 2021, c. 6. However, a review application is not a re-hearing of the original application. Rather, it is a review of what the chambers judge did with the applicable test. This is a highly deferential standard of review. The Court will ask whether the judge was wrong in law, wrong in principle, or if they misconceived the facts. Absent any of these errors, a division will not change the order: *Haldorson v. Coquitlam (City),* 2000 BCCA 672 at para. 7; see also: *Gill v. Gill Estate,* 2023 BCCA 427 at para. 13.
>
> [12] In other words, on a review application, the applicant cannot simply argue that the justice should have reached a different result or exercised her discretion differently. There must be a legal error: *Ashraf v. Jazz Aviation LP,* 2024 BCCA 45 at para. 3.

See also *Cowichan Valley (Regional District) v Cobble Hill Holdings Ltd*, 2016 BCCA 215 at para 23:

> [23] The standard of review of an application to vary an order of a single justice is highly deferential. A review hearing is not a rehearing of the original application: *De Fehr v. De Fehr,* 2002 BCCA 139 at para. 6. It is not enough to allege the incorrect exercise of discretion. The Court will interfere only if

> there has been an "error in principle", the justice was "wrong in the legal sense", the justice misconceived the facts, or the relevant information was not brought to the justice's attention: *Haldorson v. Coquitlam (City),* 2000 BCCA 672 at paras. 6-7; *Animal Welfare International Inc. v. W3 International Media Ltd.,* 2015 BCCA 148 at para. 9.

3.2 The chambers judge's reasons and the issues

[42] Justice DeWitt-Van Oosten began by setting out the background of this matter, including a detailed discussion of the scope and effect of Justice Fitzpatrick's procedural order, and referring to term 6 of the procedural order as entered. She then began her analysis (at para 25), disagreeing with Romspen that the procedural order substantially narrowed the appeal rights that would otherwise be available to the parties in the Related Actions.

[43] Justice DeWitt-Van Oosten came to this conclusion because, first, she saw nothing in Fitzpatrick J.'s procedural reasons that compelled her to conclude that Majawa J.'s orders were "made under" the *CCAA*. In arriving at this conclusion, she reviewed and applied the decisions of *Redfern Resources Ltd (Re)*, 2011 BCCA 333 (Tysoe JA in Chambers), and *Essar Steel Algoma Inc (Re)*, 2016 ONCA 138 (Brown JA in Chambers).

[44] Romspen argues that the chambers judge erred in assuming that the "appeal rights" referred to in the procedural order were the normal civil appeal rights that would otherwise have been available to the parties in the Related Actions had they not been tried in the context of the *CCAA* proceedings. Romspen further asserts that the judge erred in law in her application of the relevant authorities, particularly *Essar Steel,* and misconceived the statutory basis upon which Fitzpatrick J. was acting.

[45] Second, DeWitt-Van Oosten JA considered that the predominant objective of the procedural order was not to alter the parties' otherwise-existing procedural rights

substantially, but rather to facilitate the timely resolution of the Related Actions through trial management under the umbrella of the *CCAA* proceedings.

[46] In Romspen's submission, this predominant purpose is precisely why the orders made in the Related Actions must be considered to have been "made under" the *CCAA*, and the judge erred in failing properly to undertake and apply a purpose-focused inquiry.

[47] Third, and "most significantly" (at para 32), DeWitt-Van Oosten JA observed that Fitzpatrick J.:

> … was explicit in her reasons about her intention to preserve the procedural rights that GEC and Alderbridge—as parties to the Related Actions—would "otherwise have" in the civil litigation process: at para. 120(i), emphasis added. This included appeal rights: at para. 86.

[48] In the chambers judge's view, it was evident from a plain reading of Fitzpatrick J.'s procedural reasons that she intended to preserve the full appeal rights for GEC and the debtors and guarantors in the Related Actions, noting this at para 37:

> Furthermore, the type of order she crafted clearly requires an individualized determination that occurs case-by-case and is contextually informed. The powers conferred to judges under the *CCAA*, including s. 11, are meant to be flexible: *Canada v Canada North Group Inc.*, 2021 SCC 30 at paras. 21, 138. The fact that full appeal rights were preserved in this case does not mean they will be preserved in every case. That is a matter for argument and determination as the issue arises.

[49] Romspen answers this by contending that the appeal rights that Fitzpatrick J. intended to preserve were of necessity no more than those arising under the *CCAA*, given that the order was intended to bring the Related Actions within the *CCAA* proceedings, and that at least the bulk of the Romspen action was obliged to be resolved under the *CCAA*. Romspen submits that, in any event, Fitzpatrick J.'s discretionary powers under section 11 could not extend to overriding the mandatory

requirement in section 13 that orders "made under" the *CCAA* could be appealed only with leave.

3.3 Were Majawa J.'s orders "made under" the *CCAA*?

[50] In my view, Romspen has failed to demonstrate error in the chambers judge's conclusion that the orders were not "made under" the *CCAA*.

[51] Romspen argues that the judge failed to understand that the procedural order was based largely on the mandatory provisions of section 20 of the *CCAA*, not just on the discretion granted by section 11. In Romspen's submission, Fitzpatrick J. was quite clear in her procedural reasons that, by section 20, the amount of Romspen's secured claim against the *CCAA* debtors, which was substantially the basis of the Romspen action, "*must* be determined in [the *CCAA*] proceedings and on a summary basis" (at para 30, emphasis original).

[52] When that is taken into account, Romspen asserts, together with the predominant underlying purpose of the procedural order, it becomes evident that the orders pronounced in the Related Actions were "made under" section 13. This is because, in Romspen's submission, the purpose of Fitzpatrick J.'s procedural order directing that the Related Actions be tried together "within the context of" the *CCAA* proceedings was to further the purposes of the *CCAA* by minimizing any delay in the monitor's ability to proceed with the sales and investment solicitation that was the focus of the *CCAA* proceedings. In this regard, Romspen relies heavily on *Essar Steel*.

[53] In my respectful view, Romspen fails to distinguish properly between Fitzpatrick J.'s procedural order, which was clearly "made under" the *CCAA*, and Majawa J.'s trial orders, which were made within the context of the *CCAA* proceedings, but not necessarily under the *CCAA* (see *Redfern* at para 9).

[54] Much of Fitzpatrick J.'s procedural reasons were concerned with the question of whether she had jurisdiction to bring the Related Actions under the *CCAA* proceedings umbrella so that they could be case managed. As I understand Fitzpatrick J.'s reasons, her order that the Related Actions be managed and tried "within the context" of the *CCAA* related to the management of the litigation, not the character of the issues.

[55] I accept that in doing so, Fitzpatrick J. was furthering the purposes of the *CCAA*. But while that clearly applies to her order, it does not necessarily apply to Majawa J.'s orders. Justice Fitzpatrick concluded that she had that jurisdiction because of section 20 and section 11. But those sections were irrelevant to the decisions made by Majawa J. As DeWitt-Van Oosten JA pointed out, his orders were pronounced on the basis of the common law and his interpretation of the relevant contracts.

[56] In commencing the Romspen action outside of the *CCAA* proceedings, Romspen was seeking to protect its rights, including the status of its construction loan agreement, challenged by GEC in the GEC action, and its claim against the guarantors, neither of which was governed by section 20.

[57] As I see it, Romspen's ability to have its secured claim determined under section 20 would depend on the status of its construction loan agreement, and whether one side or the other had breached it. If Romspen were found in breach, the money would be going the other way. If not, then Romspen's claim could proceed to be determined under section 20 at the appropriate time. Either way, the monitor could proceed with the *CCAA* sales and investment solicitation process in the *CCAA* proceedings without further delay.

[58] Thus, while section 20 gave Fitzpatrick J. jurisdiction to make the procedural order insofar as the Romspen action was concerned, it did not by itself make Majawa J.'s order resolving that action an order "made under" the *CCAA*. And, of course, neither section 20 nor any other provision of the *CCAA* had anything to do with the claims against Romspen of GEC and the guarantors, notwithstanding the obvious intertwining of issues.

[59] Romspen's complaint that DeWitt-Van Oosten JA considered only section 11 as the statutory basis of the procedural order is, in my view, misplaced. As I read her reasons, her reference to section 11 was specifically in response to Romspen's argument that "GEC misstates the statutory context in which the trial judge dismissed GEC's arguments" and asserting that the court held that it had jurisdiction "under section 11 of the *CCAA*" (see para 23).

[60] With respect to DeWitt-Van Oosten JA's analysis of the purpose of the order, I observe that she paid careful attention to the authorities upon which Romspen relies. Reviewing *Essar Steel*, the judge said this:

> [29] In *Essar Steel Algoma Inc. (Re)*, 2016 ONCA 138, the chambers judge suggested that when requested to determine whether a particular order is caught by s. 13 of the *CCAA* and requires leave to appeal, the appeal court should ask whether the "… order was made in a *CCAA* proceeding in which the judge was exercising his or her discretion in furtherance of the purposes of the *CCAA* by supervising an attempt to reorganize the financial affairs of the debtor company, either by way of a plan or arrangement or compromise, sale, or liquidation …": at para. 33, emphasis added, citation removed.
>
> [30] In my view, that is not what Justice Majawa did. Rather, he determined liability issues in civil actions. Because of their relationship to matters at stake in the *CCAA* Proceedings, those findings will, in turn, logically inform the work of the supervising judge in exercising her discretion for purposes of the *CCAA.* The civil actions before Justice Majawa were grounded in pleadings that originated independent of the *CCAA* Proceedings, to my understanding did not require an interpretation of substantive orders made under the *CCAA*, and his liability findings were not informed by *CCAA* considerations. For a helpful discussion of factors to consider in deciding whether an order is made "under" the *CCAA*, see para. 34 of *Essar*.

[61] As DeWitt-Van Oosten JA observed, para 34 of *Essar Steel* is indeed helpful:

> [34] To aid that purpose-focused inquiry, the case law has identified some indicia about when an order is "made under" the *CCAA*. In Sandvik Mining [*Redfern*], Tysoe J.A. stated a court should ask whether the order was "necessarily incidental to the proceedings under the *CCAA*" or "incidental to any order made under the *CCAA*": at paras. 9 and 10. In *Monarch Land*, O'Brien J.A. looked at whether the order required the interpretation of a previous order made in the *CCAA* proceeding or involved an issue that impacted on the restructuring organization of the insolvent companies: at paras. 8 and 15. As mentioned, in *Concrete Equities*, Paperny J.A. stated that s. 13 of the *CCAA* would apply if "*CCAA* considerations informed the decision of and the exercise of discretion by the chambers judge" or "if a claim is being prosecuted by virtue of or as a result of the *CCAA*": at paras. 16 and 17. Finally, additional indicia were identified by this court in *Re Hemosol Corp.*, 2007 ONCA 124, at para. 3:
>
> > In our view, the proceeding before the motion judge and the decision under appeal were conducted and rendered under the *CCAA* within the meaning of s.13 and therefore leave to appeal is required. The notice of motion and the reasons of the motion judge explicitly state that the matter is a *CCAA* proceeding. Directions were sought, amongst other things, to determine rights and requirements of voting in relation to the proposed plan of arrangement. There was no independent originating process to justify any other conclusion. The order determined rights arising under an agreement that arose out of and that was related entirely to the *CCAA* proceeding.

[62] Here, of course, the Related Actions were all commenced as independent originating processes outside of the *CCAA* proceedings; they were not prosecuted by virtue of the *CCAA* and their pronouncement did not depend upon any aspect of the *CCAA*. While *CCAA* considerations determined the process by which the Related Actions were managed, no *CCAA* considerations informed the conclusions reached by Majawa J. or governed any exercise of discretion on his part. And while Majawa J.'s orders were helpful to the timely conduct of the *CCAA* proceedings, they were not incidental to any order made under those proceedings (see *Redfern* at paras 9–10). As noted above, for instance, they did not produce a determination under section 20 of the *CCAA* of the amount of Romspen's secured claim. Rather, they provided a basis upon which Romspen could pursue a determination of its secured claim under section 20 once the *CCAA* sales and investment solicitation process had borne fruit.

[63] In these circumstances, I see no legal error in DeWitt-Van Oosten JA's conclusion that Majawa J.'s orders in the Related Actions were not "made under" the *CCAA* within the meaning of section 13.

[64] Like DeWitt-Van Oosten JA, I consider this conclusion to be fortified by the specific provision in term 6 of Fitzpatrick J.'s procedural order that "[a]djudication within the context of these *CCAA* proceedings does not preclude any … appeal rights in the Related Actions…".

3.4 What appeal rights were preserved?

[65] Term 6 was deliberately included (notwithstanding Romspen's position that it should not be) as part of what is, in my respectful view, a carefully considered and thoughtfully nuanced order that balanced the need for expediency with the rights of the parties to the Related Actions. Throughout her reasons, Fitzpatrick J. made it clear that her focus was on avoiding paralysis of the *CCAA* proceedings by facilitating the resolution of the claims in the Related Actions as soon as reasonably possible, in a manner "fair to all of the litigants" (at para 117)—that is, without depriving the parties opposing the order from the benefit of the "usual civil litigation process with which counsel are very much aware" (at para 84). This could include a full trial, rather than the summary trial required by section 20 of the *CCAA*, depending on how pretrial procedures developed (see paras 84–85). It is in that context that Fitzpatrick J. made the statement quoted above at para 86 of her reasons:

> Further, as stated in *U.S. Steel SC* at para. 102, adjudication within the ambit of these *CCAA* proceedings does not … preclude any procedural rights, such as appeal rights.

[66] With respect, it is difficult to understand the statement to mean anything other than this: the order requiring the Related Actions to be tried together "in the context

of" the *CCAA* proceedings would not result in the ensuing orders being "made under" the *CCAA* so as to invoke the leave requirement in section 13.

[67] On the premise that the orders were in fact "made under" the *CCAA*, Romspen argues, as noted above, that the judge had no jurisdiction to 'waive' the application of section 13, and so that aspect of term 6 should be ignored. Even if the premise were correct, it would remain possible that Fitzpatrick J. was exercising her discretionary jurisdiction under section 11 to preserve civil appeal rights notwithstanding section 13 of the *CCAA*. Romspen submits that, as a matter of law, the discretion provided by section 11 does not extend so far. It is not, however, necessary to determine whether that approach was open to Fitzpatrick J.; the fact remains that the order was made and Romspen did not seek to appeal it. It is not part of this appeal, and, accordingly, it stands.

[68] Romspen further contends that in stating and ordering that adjudication within the context of the *CCAA* proceedings would not preclude appeal rights, Fitzpatrick J. meant only to refer to whatever appeal rights in fact existed: in this case, the appeal rights under section 13 of the *CCAA*. If that were the case, it is difficult to imagine why Fitzpatrick J. would have included so redundant a term in her order. If it was her expectation that section 13 of the *CCAA* would be applicable because the orders made in the Related Actions would be orders "made under" the *CCAA*, then there would have been no need to speak of 'not precluding appeal rights'. The appeal rights provided by the *CCAA* could not possibly have been precluded by her order. The only question was whether, in making her order, Fitzpatrick J. intended to preclude appeal rights outside of the *CCAA*: she indicated that she did not.

[69] Accordingly, I see no legal error in DeWitt-Van Oosten JA's conclusion that Fitzpatrick J. intended to, and did, preserve the full civil appeal rights of the appellants.

4. DISPOSITION

[70] As Romspen has demonstrated no error in DeWitt-Van Oosten JA's direction that the appellants do not require leave to appeal Majawa J.'s order of August 7, 2024, I would dismiss the application to cancel that direction.

[71] In the circumstances of this case, I consider that these appeals ought to be expedited, and I would encourage one or more of the parties to apply under Rule 31 of the *Court of Appeal Rules*.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Winteringham"