

In the Court of Appeal of Alberta

**Citation: Romspen Mortgage Limited Partnership v 3443 Zen Garden Limited Partnership,
2024 ABCA 333**

**Date: 20241025
Docket: 2403-0020AC
Registry: Edmonton**

Between:

**Romspen Mortgage Limited Partnership, Romspen Investment Corporation,
Richard Weldon and Wesley Roitman**

Respondents

- and -

**3443 Zen Garden Limited Partnership, Lot 11 GP Ltd,
Lot 11 Limited Partnership, Eco-Industrial Business Park Inc,
Absolute Energy Resources Inc, Absolute Environmental Waste Management Inc
and Daniel Alexander White**

Appellants

The Court:

**The Honourable Justice Dawn Pentelchuk
The Honourable Justice William T. de Wit
The Honourable Justice April Grosse**

Memorandum of Judgment

Appeal from the Decision by
The Honourable Justice K. Feth
Dated the 20th day of December, 2023
(2023 ABKB 730, Docket: 2003 06728)

Memorandum of Judgment

I. Introduction:

[1] In 2016, the respondent Romspen Mortgage Limited Partnership loaned 3443 Zen Garden Limited Partnership \$125 million USD for the development of lands in Austin, Texas. The loan was guaranteed and further secured by the appellants Daniel White and various Alberta corporations¹ (the White Group).

[2] After Zen Garden defaulted on the loan, Romspen Mortgage petitioned Zen Garden into involuntary Chapter 11 bankruptcy in a Texas bankruptcy court in June 2020. Zen Garden's indebtedness to Romspen Mortgage was determined at not less than \$96,495,021.72 USD (plus other costs, expenses, and interest to be determined). Through a court approved credit bid, Romspen Mortgage purchased the Austin lands for \$45 million USD in October 2020.

[3] Following conclusion of the bankruptcy proceedings in Texas, Romspen Mortgage was granted an order in Alberta appointing a Receiver over the assets of the corporate appellants. The Receiver later assigned one of the appellants, Eco-Industrial Business Park Inc, into bankruptcy. In the course of the receivership proceedings, Romspen applied for summary judgment against the White Group based on their guarantees of Zen Garden's loan and the orders obtained in Texas. The chambers judge awarded Romspen Mortgage partial summary judgment against the White Group for \$51,495,021.72 USD (the minimum amount declared owing by the Texas bankruptcy court, less Romspen Mortgage's credit bid of \$45 million USD for the purchase of the Austin lands): *Romspen Mortgage Ltd Partnership v 3443 Zen Garden Ltd Partnership*, 2023 ABKB 730 (the "Decision").

[4] The White Group raises one discrete ground of appeal alleging the chambers judge erred in valuing the Austin lands based on the credit bid amount by:

1. overlooking a May 2019 appraisal valuing the lands at as much as \$159,430,000 USD; and,
2. failing to apply s 283 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA], aimed at ensuring some level of parity is achieved for unsecured creditors in international insolvencies.

¹ Lot 11 GP Ltd, Lot 11 Limited Partnership, Eco-Industrial Business Park Inc, Absolute Energy Resources Inc, Absolute Environmental Waste Management Inc

[5] The White Group argues these errors resulted in Romspen Mortgage receiving a windfall. They seek a declaration that the Austin lands are valued at \$159,430,000 USD and that no amount remains payable under the loan or guarantees. Before discussing these issues, we address a preliminary point of whether the issues now raised on appeal were argued before the chambers judge.

Are these new issues on appeal?

[6] Appellate counsel for the White Group was not counsel before the chambers judge. The appraisal was in evidence and s 283 of the *BIA* was mentioned in one of the White Group's written briefs when arguing the chambers judge should not pre-approve the respondents as a stalking horse credit bidder in the future sale of the White Group's assets, an issue adjourned by the chambers judge and not before us. However, it is clear the s 283 arguments raised on appeal were not raised before the chambers judge in oral argument. Generally, where a ground of appeal was not raised in the pleadings or considered by the trial judge, it cannot be a ground of appeal: *681210 Alberta Ltd v Hunter*, 2012 ABCA 83 at para 26. However, given the murky state of the record and that the respondents have been able to refine and present their arguments and allege no prejudice, we will consider the issues raised on appeal.

1. Did the chambers judge err in failing to consider the May 2019 appraisal?

[7] Appended to the April 28, 2020, affidavit of Daniel White is an appraisal of the Austin lands dated May 9, 2019. The appraisal was apparently commissioned to facilitate Zen Garden's application for "PACE" (Property Assessed Clean Energy) financing. On an "as is" basis, the land was appraised at \$80,040,000 USD. The prospective market value "upon completion/stabilization" was \$159,430,000 USD. The higher value assumed the lands had been fully developed and leased. As the record does not disclose the extent to which the lands had been developed when Zen Garden was petitioned into bankruptcy in 2020, the White Group fairly suggested at the appeal hearing that the "as is" value might be more appropriate.

[8] Even so, the appraisal was completed approximately 18 months before the land was sold through the credit bid process and was based on market value as opposed to a forced sale value garnered through bankruptcy proceedings.

[9] The credit bid of Romspen Mortgage to purchase the Austin lands for \$45 million USD was approved by a Texas bankruptcy court in October 2020. The order confirms that Romspen Mortgage's bid was determined by the Trustee to be the highest and best bid, in accordance with predetermined bid procedures. There is no indication that the May 2019 appraisal was before the

Texas court or that Daniel White contested the credit bid as being artificially low. To the contrary, only one competing bid for \$13 million USD was received from 2289946 Alberta Ltd, a company in which Daniel White is a director.

[10] Determining the appropriate value of an asset, like the assessment of damages, is a question of fact reviewable for palpable and overriding error: *Musqueam Indian Band v Glass*, 2000 SCC 52 at paras 52-53, [2000] 2 SCR 633; *RFG Private Equity Limited Partnership No 1B v Value Creation Inc*, 2018 ABCA 85 at para 42.

[11] While the Decision does not reference the appraisal, the chambers judge did not err by valuing the land at the amount it sold for through the court approved credit bid procedure. It was the best and most current evidence of what the land was worth.

[12] While this is dispositive of the appeal, we nevertheless conclude that s 283 of the *BIA* has no application and does not assist the White Group.

2. Does section 283 of the *BIA* apply?

[13] In 2005, the *BIA* was amended to add section 283.² The amendment was among provisions passed to adopt the principles set out in the “United Nations Commission on International Trade Laws (UNCITRAL) model law on cross-border insolvency” (*Model Law*): *Hy Bloom inc v Banque Nationale du Canada*, 2010 QCCS 737 at para 108. Commentary to the *Model Law* suggests that the corresponding provision of the *Model Law* (Article 32) is intended to avoid situations in which a creditor might obtain more favourable treatment than other creditors of the same class by obtaining payment of the same claim in insolvency proceedings in different jurisdictions. Section 283 of the *BIA* states:

Credit for recovery in other jurisdictions

283 (1) If a bankruptcy order, a proposal or an assignment is made in respect of a debtor under this Act, the following shall be taken into account in the distribution of dividends to the debtor’s creditors in Canada as if they were a part of that distribution:

² Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess, 38th Parl, 2005 (assented to 25 November 2005), SC 2005, c 47.

(a) the amount that a creditor receives or is entitled to receive outside Canada by way of a dividend in a foreign proceeding in respect of the debtor; and

(b) the value of any property of the debtor that the creditor acquires outside Canada on account of a provable claim of the creditor or that the creditor acquires outside Canada by way of a transfer that, if the transfer were subject to this Act, would be a preference over other creditors or a transfer at undervalue.

Restriction

(2) Despite subsection (1), the creditor is not entitled to receive a dividend from the distribution in Canada until every other creditor who has a claim of equal rank in the order of priority established under this Act has received a dividend whose amount is the same percentage of that other creditor's claim as the aggregate of the amount referred to in paragraph (1)(a) and the value referred to in paragraph (1)(b) is of that creditor's claim. [Emphasis added]

[14] This section, described as the “hotchpot rule”, is aimed at ensuring fairness and parity in recovery efforts amongst creditors in international insolvencies where not all creditors attempt to or are able to recover in all the same countries against the debtor. As noted in Lloyd W Holden et al, *The 2023-2024 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2023) at 831:

The purpose of the “hotchpot rule”. . . is to ensure that the assets of a bankrupt are, subject to payment of preferred claims, divided *pari passu* among the unsecured creditors. If any of them obtains a share of the assets of a Canadian bankrupt estate by participating in a distribution of assets in a foreign bankruptcy or liquidation, that share must be brought into account before a dividend can be claimed in the Canadian bankruptcy. . . .

[15] The White Group submits this section is aimed at protecting Canadians in international insolvencies and urges an expansive interpretation such that they would fall within its protection. The clear wording of the section suggests the rule is engaged in international insolvencies involving a debtor and ensures fairness in distribution as between the various creditors of that debtor. Leaving aside there are no Canadian bankruptcy proceedings against Zen Garden, only the appointment of a Receiver over the assets of the corporate appellants and the bankruptcy of one guarantor, Eco-Industrial, there was no “distribution of dividends” before the chambers judge. The application was for summary judgment against the White Group.

[16] The chambers judge *did* credit the White Group with the value of the lands acquired by Romspen Mortgage in the Texas proceedings. It follows that Romspen Mortgage did not benefit from a “windfall”. The White Group suggests that the value of property the creditor acquires outside of Canada does not crystalize at the time of the acquisition and should be re-valued during subsequent insolvency proceedings in Canada. At least in this case, for the reasons set out above, we do not agree.

Conclusion

[17] The appeal is dismissed.

Appeal heard on October 2, 2024

Memorandum filed at Edmonton, Alberta
this 25th day of October, 2024

Pentelechuk J.A.

Authorized to sign for: de Wit J.A.

Authorized to sign for: Grosse J.A.

Appearances:

R. Baker
for the Appellants

K.E. Barr
F. Ahmad (no appearance)
for the Respondents