

CANADA / JUDGMENT

# Alderbridge Way GP Ltd. (Re)

2024 BCSC 1433

## COURT

Supreme Court of British Columbia

## DECIDED

7 August 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 1433 Alderbridge Way GP Ltd. (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Alderbridge Way GP Ltd. (Re),

2024 BCSC 1433

Date: 20240807

Docket: 222758

Registry: Vancouver

In the Matter of Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

- and -

In the Matter of a Plan of Compromise and Arrangement of 0989705 B.C. Ltd., Alderbridge Way GP Ltd. and Alderbridge Way Limited Partnership

- and -

Docket: S228019

Registry: Vancouver

Between:

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

Plaintiffs

And

Romspen Investment Corporation

Defendant

- and -

Docket: S231106

Registry: Vancouver

Between:

Romspen Invesment Corporation

Plaintiff

**And**

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

Defendants

- and -

Docket: S232583

Registry: Vancouver

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

Plaintiffs

**And**

Romspen Investment Corporation

Defendant

Before: The Honourable Justice Majawa

Reasons for Judgment

(re Related Actions)

Counsel for Romspen Investment Corporation:

P. Rubin

P. Bychawski

J. Hutchinson

R. Lou

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

J.P. Sullivan

S.Y. Bhura

K. Alibhai

Counsel for Alderbridge Way Limited Partnership, Alderbridge Way GP Ltd. and 0989705 B.C. Ltd.

H. Shapray, KC

N. Pandey

Place and Dates of Trial:

Vancouver, B.C.

April 29 - May 3, 6-10, 13-17 and 27-31, 2024

Place and Date of Judgment:

Vancouver, B.C.

August 7, 2024

Table of Contents

OVERVIEW.. 6

The Context of these Proceedings. 6

Brief Overview of the Project and the Related Actions. 7

The Issues to be Decided and Summary of Conclusions. 11

BACKGROUND FACTS. 13

The Parties. 13

The Project 15

The Land Loans. 16

Events Leading up to Negotiation of the Construction Loan Agreement 18

The Construction Loan and GEC/Romspen Subordination Agreement 19

Payments Under the Construction Loan Agreement 21

Cessation of Funding under the Construction Loan Agreement and the Eventual Notice of Default 22

CREDIBILITY OF LAY WITNESSES. 23

Mr. Roitman. 24

Mr. Fonseca. 26

Mr. Cassidy. 27

The Developers' Witnesses in General 27

Mr. Thom.. 28

Sam Hanson. 29

Brent Hanson. 29

Mr. Chu. 30

ISSUE 1: WAS ROMSPEN ENTITLED TO TERMINATE ITS FUNDING OF THE PROJECT IN MARCH 2020 UNDER ITS AGREEMENTS WITH THE DEVELOPERS AND GEC?. 31

Relevant Law of Contractual Interpretation. 31

Romspen's Obligation to Fund under the Construction Facility was not Unconditional 37

A Plain Reading of the Construction Loan Agreement does not Provide for Romspen to Advance a Minimum Amount of \$212 Million. 39

The Scope of the Factual Matrix in this Case. 49

Was Romspen Entitled to Terminate Funding for Reasons other than Failure to Meet the Syndication Condition?. 56

Amendment of GEC and the Developers' Pleadings. 56

The Developers' Failure to Meet a Funding Condition is not a Default under the Construction Loan Agreement 58

The Fixed Price Contract Funding Condition. 60

## **Conclusion on Issue 1. 63**

ISSUE 2: DID ROMSPEN MAKE COMMERCIALY REASONABLE EFFORTS TO SYDNICATE THE CONSTRUCTION FACILITY UNDER THE TERMS OF THE CONSTRUCTION LOAN AGREEMENT?. 63

The Applicable Legal Principles. 64

The Relevant Context in this Case. 66

Analysis. 70

Summary of Romspen's Approach and Efforts to Syndicate the Loan. 70

Romspen's Syndication Efforts were Commercially Reasonable. 75

## **Conclusion on Issue 2. 80**

ISSUE 3: TO WHAT EXTENT DID ROMSPEN OWE THE DEVELOPERS AND/OR GEC A DUTY OF GOOD FAITH AND HONESTY IN THE PERFORMANCE OF ITS CONTRACTUAL OBLIGATIONS, INCLUDING IN RELATION TO ITS DECISION TO TERMINATE FUNDING?. 81

Parties' Positions. 81

Romspen's Decision to not Waive the Syndication Condition was not Subject to the Duty of Good Faith in Contractual Performance. 82

Romspen did not Breach its Good Faith Obligations in the March 31 Notice. 86

Romspen did not Breach a Duty of Good Faith or Honest Performance by Continuing to Fund other Projects. 87

The Alleged Dislike or Disdain Romspen had for the Project 89

The Veracity of Romspen's Representations Regarding the Progress of the Syndication Efforts. 95

Intercap's Participation. 98

Conclusion on Issue 3. 98

ISSUE 4: ARE THE GUARANTORS LIABLE TO ROMSPEN?. 99

ISSUE 5: WAS THE THIRD SUBORDINATION AGREEMENT BREACHED BY EITHER ROMSPEN OR GEC?. 99

Is the Construction Loan Agreement Incorporated into the GEC/Romspen Subordination Agreement?. 99

Has GEC Breached the GEC/Romspen Subordination Agreement by Commencing this Action?. 101

The Parties' Positions. 101

## **Analysis. 103**

ISSUE 6: DO ROMSPEN'S ACTIONS IN RELATION TO THE PROJECT JUSTIFY RELIEF UNDER THE DOCTRINE OF EQUITABLE SUBORDINATION, IF SUCH DOCTRINE APPLIES AS A MATTER OF CANADIAN LAW?. 104

ISSUE 7: IS ROMPSEN LIABLE FOR COMMITTING THE TORT OF UNLAWFUL MEANS?. 105

DISPOSITION.. 107

## OVERVIEW

- [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. The lender stopped financing the project on March 31, 2020, while construction was at its early stages but after a significant amount of money had been advanced by the lender and used by the developers in the project. The developers were unable to secure other financing to proceed with the project and, ultimately, faced insolvency and entered into proceedings under the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36 [CCAA], (the "CCAA Proceedings"). In April 2022, Justice Fitzpatrick granted an order in the CCAA Proceedings (the "Initial Order"). Various disputes arose between the parties that crystallized in a number of actions filed in this Court (the "Related Actions") after the Initial Order was granted. These Reasons for Judgment address the liability issues of the various Related Actions.

## The Context of these Proceedings

- [2] The Court's assistance was required to determine the way in which the Related Actions would be adjudicated. On October 3, 2023, following a contested hearing, Fitzpatrick J. ordered that the Related Actions would be tried together on common evidence in the context of the CCAA Proceedings: *Alderbridge Way GP Ltd. (Re)*, 2023 BCSC 1718 [Trial Procedure Reasons]. Given certain exigencies arising from particular aspects of the CCAA Proceedings, in particular the need to facilitate a sales and investment solicitation process in a timely manner, and the fact that priority issues have moved to the foreground in that sales process because of the nature of the Related Actions, Fitzpatrick J. determined that, in these unique circumstances, it was critical to determine who holds debt and security against the development and in what priority. Fitzpatrick J. held that there is a considerable interconnection between the Related Actions and the CCAA Proceedings and that the stakeholders did not have the luxury of the time usually afforded to litigants to bring such matters to trial. Various deadlines were set regarding the filing of pleadings, listing of documents, and examinations for discovery with a goal to having the trial of the Related Actions heard in the spring 2024.
- [3] On March 5, 2024, following another contested hearing, Fitzpatrick J. made further orders with respect to the procedures relevant to the conduct of the trial of the Related Actions: *Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 382 [Further Trial Procedure Reasons]. In the Further Trial Procedure Reasons, Fitzpatrick J. ordered that the trial of the Related Actions would be bifurcated such that this Court would first determine liability commencing on April 29, 2024. The Justice provided further directions with respect to deadlines and the conduct of the trial, including that the parties' evidence in chief would proceed by way of affidavit and that any party could require an affiant to attend the trial for cross-examination.

Fitzpatrick J. ordered that the trial on the issue of damages in each of the Related Actions was to be scheduled to be heard at a date after judgment on the liability issues was rendered.

### **Brief Overview of the Project and the Related Actions**

- [4] The large and ambitious real estate development that is the subject of the Related Actions and the CCAA Proceedings consisted of seven residential and commercial office towers covering an entire city block in Richmond (the "Project"). The Project was developed through a number of corporate entities (the "Developers"). By way of a comprehensive written agreement executed in November 2019 (the "Construction Loan Agreement"), Romspen Investment Corporation ("Romspen") provided construction financing to the Developers for the first phase of the Project. The amounts owed by the Developers to Romspen were secured against the property and guaranteed by a number of individuals and corporate entities connected with the Developers (the "Guarantors"). The amount of the credit facility provided for under the Construction Loan Agreement was in excess of \$400 million.
- [5] Before the Construction Loan Agreement was executed, a corporate entity (unrelated to the Developers or Romspen) agreed with the Developers to pre-purchase a portion of the Project. That corporate entity will be defined as GEC later in these Reasons. GEC provided the Developers with a \$60 million deposit for its pre-purchase and was provided with first ranking security. Concurrent with the later execution of the Construction Loan Agreement, GEC and Romspen entered into a subordination agreement whereby GEC agreed to subordinate its security interest to the funds advanced by Romspen under the Construction Loan Agreement (the "GEC/Romspen Subordination Agreement").
- [6] Beginning in November 2019, Romspen advanced funds to the Developers to construct the Project. Starting in December 2019, Romspen made efforts to syndicate a portion of the loan, as provided for under the Construction Loan Agreement. However, Romspen was unable to assemble a successful syndication. On March 31, 2020, Romspen ceased funding the Project. By this time, Romspen had advanced approximately \$143 million to the Developers for use in the Project. Subsequently, the Developers were unable to secure alternate funding to meaningfully continue with the Project; they ultimately faced insolvency and entered into the CCAA Proceedings.
- [7] Romspen commenced an action on February 15, 2023, in which it seeks judgment against the Developers and Guarantors for the outstanding debt owed to it under the Construction Loan Agreement and pursuant to the various guarantees provided by the Guarantors (Action No S-231106, the "Romspen Action").
- [8] The Developers, Guarantors, and GEC all allege that Romspen's decision to stop funding the Project on March 31, 2020, was a breach of the Construction Loan Agreement and/or was tortious conduct. GEC alleges that Romspen's breach of the Construction Loan Agreement is also a breach of the GEC/Romspen Subordination Agreement. On October 6, 2022, GEC

commenced its action against Romspen (Action No S-228019, the "GEC Action") and Romspen counterclaimed, alleging that GEC breached the GEC/Romspen Subordination Agreement.

- [9] On March 28, 2023, the Developers and Guarantors commenced its action against Romspen (Action No S-232583, the "Developers/Guarantors Action"). The Developers/Guarantors Action was filed as a separate action and not as a defence or counterclaim to the Romspen Action because Romspen's notice of civil claim had not yet been formally served. However, as Fitzpatrick J. notes in the Trial Procedure Reasons, these two actions are essentially two sides of the same coin and join the same issues.
- [10] The Related Actions under consideration in this trial consist of the Romspen Action, the Developers/Guarantors Action, and the GEC Action. At para. 25 of the Trial Procedure Reasons, Fitzpatrick J. explained the interrelated nature of the Related Actions, and I have modified this explanation slightly to accord with the defined terms in these Reasons and to omit references to an action that has been discontinued:
1. each of the parties to the Related Actions has an ownership or security interest in the Project lands and a contractual nexus to the other parties to the Related Actions;
  2. each of the Related Actions involves claims by or against Romspen and concerns the validity and/or priority of Romspen's security;
  3. each of the Related Actions centers on Romspen's rights and obligations under the Construction Loan Agreement;
  4. it is alleged in the GEC Action and the Developers/Guarantors Action that:
    - i. Romspen breached its obligations under the Construction Loan Agreement in suspending draws and advances under that agreement;
    - ii. Romspen elected to fund other projects in preference to the Project during the COVID-19 pandemic notwithstanding its alleged obligations to continue to make draws and advances available to the Developers for the purpose of funding the Project;
    - iii. Romspen's alleged conduct in suspending the Developers' access to draws and advances under the Construction Loan Agreement resulted in the Developers' liquidity crisis and that each of GEC, the Developers, and the Guarantors have suffered as a result; and
    - iv. Romspen's conduct in suspending the Developers' access to draws and advances under the Construction Loan Agreement warrants extraordinary relief.
- [11] In the Romspen Action, Romspen seeks judgment against the Developers and Guarantors for the outstanding debt (and interest) it says it is owed under the terms of the Construction Loan Agreement. In its counterclaim to the GEC Action, Romspen seeks judgment against GEC for breach of GEC/Romspen Subordination Agreement.

[12] At para. 26 of the Trial Procedure Reasons, Fitzpatrick J. succinctly summarized the relief sought against Romspen by the Developers, Guarantors, and GEC in their actions. As with the above, I have modified Fitzpatrick J's summary slightly to accord with the defined terms in these Reasons:

1. In the GEC Action, GEC seeks a declaration of priority over Romspen's security or damages, including aggravated and punitive damages. The stated legal basis for the claim is grounded in: breach of contract (including the duty of good faith), equitable subordination, and the tort of unlawful means.
2. In the Developers/Guarantors Action, the plaintiffs seek: damages for breach of contract (including the duty of good faith and honest performance); a declaration that Romspen's security, including the guarantees provided by the Guarantors, is unenforceable; a declaration that no interest is payable to Romspen; damages for the tort of unlawful means; aggravated and punitive damages; and set off.

### **The Issues to be Decided and Summary of Conclusions**

[13] Pursuant to the Trial Procedure Reasons, this trial addressed only the liability aspect of the Romspen Action, the GEC Action, and the Developers/Guarantors Action. The trial on the issue of damages is to be scheduled at a future date after this judgment has been released and all appeals have been exhausted.

[14] The issues before me, and a summary statement of my conclusion on each issue, are as follows:

1. Was Romspen entitled to terminate its funding of the Project in March 2020 under the Construction Loan Agreement and the GEC/Romspen Subordination Agreement?

Yes, Romspen was entitled to cease funding as it did. Romspen was not obliged to provide a minimum of \$212 million of financing under the Construction Loan Agreement.

2. Did Romspen make commercially reasonable efforts to syndicate the loan under the terms of the Construction Loan Agreement?

Yes, Romspen met its contractual obligation to make commercially reasonable efforts to syndicate the loan.

3. To what extent did Romspen owe the Developers and/or GEC a duty of good faith and honesty in the performance of its contractual obligations, including in relation to its decision to terminate funding of the Project?

Romspen did not owe a duty of good faith in exercising its discretion to not waive the syndication condition because deciding not to waive that condition was akin to insisting on the strict terms of the contract, which a party is entitled to do. The duty of good faith and honest performance applied to other aspects of Romspen's performance of the contract, but Romspen did not breach those duties.

4. Are the Guarantors liable to Romspen?

Yes, the Guarantors are liable to Romspen under their respective Guarantees.

5. Was the GEC/Romspen Subordination Agreement breached by either Romspen or GEC?

Romspen did not breach its agreement with GEC. GEC has breached its agreement with Romspen by commencing the GEC Action.

6. Do Romspen's actions in relation to the Project justify relief under the doctrine of equitable subordination, if such doctrine applies as a matter of Canadian law?

I do not find it necessary to determine whether the doctrine applies as a matter of Canadian Law because I do not find that Romspen's actions engage the doctrine.

7. Is Romspen liable to the Developers and/or GEC for committing the tort of unlawful means?

No. The essential elements of the tort have not been properly pleaded in the Developers/ Guarantors Action; in any event, the evidence does not support the claims in their action or in the GEC Action.

[15] The viva voce trial of the Related Actions took place over the course of four weeks. The evidence in this matter was extensive. It consisted of approximately 20 affidavits, many days of viva voce cross-examinations of affiants, six expert reports tendered by three expert witnesses and viva voce cross-examination of those experts, and a common book of documents consisting of approximately 1000 documents. The following Reasons for Judgment explain the reasons for the conclusions summarized above. Although these Reasons are lengthy, and while I have considered the entirety of the record before me, I have not referred to all of the evidence tendered, nor each and every argument put forward by the parties. I too am mindful of the unique time pressures in this case: liability must be decided so the parties may pursue appeals if they so desire and so the CCAA Proceedings may carry-on.

[16] In the usual course, bringing a matter of this volume and complexity to trial would likely take years. However, the parties were able to bring the Related Actions to trial in a matter of months. While this litigation was hard fought at every turn, all counsel worked diligently and cooperatively to meet the tight timelines and to provide the Court with a comprehensive, well-prepared, and well-argued case. I commend all counsel for their considerable efforts in bringing this matter to trial and am grateful to counsel for their assistance throughout the proceedings.

## BACKGROUND FACTS

[17] The following background facts serve as some context for the issues that are to be decided and provide much of the factual matrix within which the Construction Loan Agreement is to be interpreted.

### The Parties

- [18] Romspen is a private mortgage lender specializing in commercial real estate mortgages. Romspen is not a conventional institutional lender. Rather, Romspen's higher risk tolerance results in it requiring a higher rate of return than institutional lenders. It was accepted that Romspen was, at the relevant times, known as a "10 and 2 lender" (meaning a 10% interest rate and a 2% fee), while an institutional or "conventional" lender at that time might have been referred to as a "5.5 and 1 lender" (meaning a 5.5% interest rate and a 1% fee).
- [19] Wesley Roitman is the Managing General Partner, Chief Executive Officer, and a director of Romspen. He first joined the Romspen management team in the early 2000s and became the Managing General Partner several years later. In his roles, Mr. Roitman participates in the management of Romspen along with the other managing partners and officers. He also participates in Romspen's governance.
- [20] Blake Cassidy joined Romspen in 1995 and became a managing partner in 2007. He is on the "sales side" of the business; one of his primary functions is to originate loans and build relationships in the brokerage and lending communities in Canada. Mr. Cassidy is frequently the primary point of contact for those seeking financing from Romspen. Mr. Cassidy has significant experience in arranging loans of a variety of structures including syndicated loans and construction loans. Mr. Cassidy was Romspen's primary point person with respect to the negotiation of the Construction Loan Agreement with the Developers.
- [21] Vitor Fonseca was an executive at Romspen from 2006 until 2022 when he retired. During his time at Romspen, he held the role of Vice President of Finance and then Vice President and Treasurer. Mr. Fonseca has been involved in billions of dollars of financings throughout his career, including loan syndications. Mr. Fonseca was Romspen's point person on efforts to syndicate the loan facility provided to the Developers.
- [22] Romspen entered into the Construction Loan Agreement dated November 22, 2019, with the Developers. The Developers are comprised of Alderbridge Way Limited Partnership ("Alderbridge LP"), Alderbridge Way GP Ltd., and 0989705 B.C. Ltd. On the same day, the following entities or individuals entered into guarantees with respect to the Construction Loan Agreement: Sam Hanson, Brent Hanson, Gatland Development Corporation ("Gatland"), REV Holdings Ltd., REV Investments Inc. (together, "REV"), South Street Development Managers Ltd. and South Street (Alderbridge) Limited Partnership (together, "South Street"), collectively the "Guarantors".

- [23] Sam Hanson is the principal and a director of South Street. Mr. Hanson has been involved in all aspects of the property development industry since 1981. Through his corporate entities, he has been involved in approximately 40 real estate projects. He describes himself as the principal organizer of the Project. Through his corporate entities, among other things, he was involved in acquiring land for the Project, the rezoning process with the City of Richmond, liaising with Graham Thom with respect to securing financing for the Project, marketing and presale elements of the Project along with the Project's marketing expert, and liaising with the company engaged in construction.
- [24] Brent Hanson is Sam Hanson's son. He is a director of South Street and the president of South Street Development Group. Brent and Sam Hanson, through South Street Alderbridge Management Ltd, were the lead managers for the Project. Among other things, Brent Hanson was involved with the acquisition of the Project lands, shepherding the project through the rezoning process, and communicating with the City of Richmond regarding various approvals and registrations. Brent Hanson was also involved in the negotiation of construction contracts for the Project.
- [25] Graham Thom has worked in the mortgage brokering industry since the late 1980s and has been a registered mortgage broker for 38 years. In 1990, he formed Gatland Capital Corporation through which he conducts his mortgage brokerage business arranging development financing for borrowers involved in the development of a wide variety of commercial, industrial, and residential properties. Mr. Thom has sourced funding and financing for hundreds of development projects, involving loans of many millions of dollars. Mr. Thom is also president, director, and part owner of Gatland.
- [26] Jason Ratzlaff is a director of REV Holdings Ltd., and the director and president of REV Investments Inc. He has over two decades of construction experience through his various roles at Metro-Can Construction ("Metro-Can") and REV.
- [27] The development of the Project was led by a group consisting of: Mr. Thom and Gatland (financing); Sam Hanson, Brent Hanson and South Street (Project management); and Mr. Ratzlaff and REV (construction).
- [28] Global Education Communities Corp. ("GECC") is one of Canada's largest education and student housing investment companies, with a portfolio and development budget of over \$1 billion. GECC provides educational and housing services to over 14,000 students and supports colleges and universities in the Metro Vancouver area with their housing needs through its various subsidiaries. GECC owns GEC (Richmond) GP Inc. ("GEC GP"), which is the general partner of Global Education City (Richmond) Limited Partnership ("GEC LP"). GEC LP and GEC GP are collectively referred to as "GEC". Toby Chu is the president of GECC.

## The Project

- [29] Beginning in or around 2017, the Developers began developing the Project. The Project was also known as the Atmosphere Development. It was a seven-tower, mixed-use development in downtown Richmond. The Project was one of the larger Projects being developed in the Lower Mainland around 2019 to 2020, encompassing an entire city block on lands located at 7928 Alderbridge Way and 5133/5233/5333 No. 3 Road, Richmond, British Columbia ("Project Lands").
- [30] The Project was owned and operated by 0989705 B.C. Ltd. as the nominee legal title holder of the Project Lands; Alderbridge LP, as beneficial owner of the Project Lands through 0989705 B.C. Ltd; and Alderbridge Way GP Ltd. as the general partner of Alderbridge LP. Gatland (led by Graham Thom), REV (led by Jason Ratzlaff), and South Street (led by Sam Hanson and Brent Hanson) each equally held a one-third interest in the Alderbridge Way GP Ltd.
- [31] The Project was large and complex, and the Developers stated it would have a total cost of approximately \$726 million. The Developers planned to develop the Project in two phases. Phase 1 consisted of excavating the entire five-acre site, building three stories of underground parkade for the entire site, a retail podium above ground, completing four towers to full height (buildings D, E, F & G), and the first six floors of the last three towers (buildings A, B & C). Phase 2 would consist of the balance of the development.
- [32] In 2018, GEC pre-purchased towers D and G and some retail office space in the Project for over \$100 million. GEC paid a \$60 million deposit pursuant to a Purchase and Development Agreement with the Developers (the "GEC PDA"). GEC's \$60 million deposit was secured by a mortgage over the Project Lands (the "GEC Mortgage"). The GEC Mortgage and an option to purchase (the "GEC Option") were registered as a third-place mortgage on the Project Lands on May 30, 2018. There were two existing mortgages, discussed below.

## The Land Loans

- [33] In or around January 2019, Mr. Thom, on behalf of the Developers, first approached Romspen about the Project to inquire whether Romspen would be interested in providing land loan mortgage financing for the Project. The Developers required financing to pay out two existing mortgages on the Project Lands that were approaching maturity: an existing first mortgage on the Project Lands in the amount of approximately \$60 million in favour of BCMP Mortgage Investment Corporation and an existing second mortgage in the amount of approximately \$22 million in favour of Highgate Capital Ltd. (together, the "BCMP and Highgate Mortgages").

- [34] On February 15, 2019, Romspen and the Developers entered into a commitment letter pursuant to which Romspen agreed to lend the Developers \$90 million, secured by, among other things, a first ranking mortgage on the Project Lands (the "February 2019 Land Loan"). The February 2019 Land Loan was for a term of eight months. The Developers used this loan to pay out the BCMP and Highgate Mortgages.
- [35] The security provided by the Developers to Romspen for the February 2019 Land Loan included a first-ranking mortgage over the Project Lands (the "Romspen Mortgage") and first-ranking general security agreements charging all personal property of the Developers (the "Developer GSAs"). The February 2019 Land Loan also required that the Developers and Guarantors jointly and severally covenant and agree to satisfy all terms, conditions, and requirements in the February 2019 Land Loan (the "Guarantees"), and provide next ranking general security agreements charging their personal property (the "Guarantor GSAs").
- [36] As a condition to the February 2019 Land Loan, Romspen required that any existing and remaining security registered against the Project Lands - including the GEC Mortgage and GEC Option - be subordinated to the Romspen Mortgage. Accordingly, GEC entered into a Subordination and Standstill Agreement with Romspen dated March 5, 2019.
- [37] Romspen funded \$90 million to the Developers under the February 2019 Land Loan through Romspen Mortgage Limited Partnership ("RMLP"), a mortgage investment entity managed by Romspen. The February 2019 Land Loan bore an interest rate of 10% and the lending fee of \$1.8 million. Half of the funds advanced by RMLP under the February 2019 Land Loan were ultimately provided by InterCap Income Inc. ("InterCap"), a private merchant bank with which Romspen has a business relationship. While the Developers were not aware of InterCap's participation in funding the February 2019 Land Loan, such participation was permitted pursuant to the commitment letter that preceded the February 2019 Land Loan. The Developers agreed that Romspen could, without prior notice to, or consent of, the Developers, invite a third-party to share in the February 2019 Land Loan.
- [38] In July 2019, the Developers and Romspen agreed to increase the financing under the February 2019 Land Loan by \$5.85 million, also at a rate of 10% and an additional lending fee of approximately \$200,000 (the "July 2019 Land Loan"), to \$95.85 million (together, the "Land Loans"). The Romspen Mortgage was amended to reflect the increased loan amount.
- [39] Concurrently with the July 2019 Land Loan, the Developers and the Guarantors executed a Reaffirmation of Security, reaffirming, acknowledging, and agreeing that all security granted to Romspen by the Developers and the Guarantors would continue.
- [40] As Romspen had required with the February 2019 Land Loan, it also required GEC to enter into a Subordination and Standstill Agreement with respect to the increased amount of the Land Loans, which GEC did on July 24, 2019.

- [41] The maturity date of the Land Loans remained the same as the maturity date of the February 2019 Land Loan: December 1, 2019. At the time the parties entered into the Land Loans, neither contemplated Romspen being a longer-term construction financier. The Developers continued to explore more affordable options with other lenders for financing the Project's construction in the long-term.

### **Events Leading up to Negotiation of the Construction Loan Agreement**

- [42] By mid-September 2019, despite extensive efforts, the Developers had been unable to secure construction loan financing for the Project. After explaining this to Romspen and initially proposing that Romspen provide mezzanine funding which Romspen rejected, Mr. Thom, on behalf of the Developers, requested that Romspen consider providing a construction loan for the Project of up to \$422 million. The construction of the Project remained at a very early stage at this time and Romspen, through RMLP, had significant existing financial exposure to the Project through the Land Loans. Around this time, the Project Lands were appraised at approximately \$204.5 million by the Altus Group.
- [43] Negotiations for a construction loan began between Romspen and the Developers. Romspen communicated with the Developers about their requirements regarding GEC's priority. GEC communicated with the Developers about their needs and in response to Romspen's requirements. There were no direct negotiations or communications between Romspen and GEC. During negotiations, Mr. Thom shared information and feedback with Romspen relating to feedback the Developers had received from other construction lenders. Both parties were aware that the Developers had made extensive unsuccessful attempts to obtain construction financing leading up to the fall of 2019.
- [44] Romspen and the Developers understood that any construction loan would need to be syndicated because Romspen could not carry a loan of \$422 million on its own. A key issue in this litigation is whether, and how much of, the funding provided by Romspen was conditional on part of the loan being syndicated. Both parties knew that such a syndication effort would be the largest ever led by Romspen.
- [45] It was known by all parties that the Developers viewed a construction loan financed by Romspen as being a temporary solution so that construction could commence while the Developers continued to source financing from a more conventional lender, given that a conventional lender's loan would be more sustainable for the Developers over the long term.

### **The Construction Loan and GEC/Romspen Subordination Agreement**

- [46] On November 22, 2019, Romspen, the Developers, and the Guarantors entered into a Loan Agreement to Amend and Restate Commitment dated as of November 6, 2019 (i.e. the Construction Loan Agreement). While the Construction Loan Agreement was dated as of November 6, 2019, it was not executed until November 22, 2019. Negotiations continued throughout November and revised versions of the draft Construction Loan Agreement

continued to be exchanged until its execution on November 22, 2019. At its most basic level, the Construction Loan Agreement provided for a credit facility totalling up to \$422 million (the "Construction Facility").

[47] Among other things, the Construction Loan Agreement provided that:

1. Romspen would have until March 31, 2020, to use commercial reasonable efforts to acquire participations in the Construction Facility (i.e. syndication).
2. It would be a condition of any drawdown after March 31, 2020, that Romspen be satisfied that, in the aggregate, commitments of other persons to acquire participations was sufficient to provide for the full amount of the Construction Facility (the "Syndication Condition"). Whether Romspen was committed to provide a minimum of \$212 million of funding regardless of whether the Syndication Condition was met and thus the amount, if any, of the Construction Facility that was not subject to Romspen's successful syndication is the core issue in this litigation.
3. The Developers would pay interest on the facility at a rate of 10% per annum.
4. Romspen would receive a total of \$10.5 million in lender's fees if the entire \$422 million Construction Facility was funded. Of this, \$5.275 million, plus 1.25% of the amount outstanding under the Land Loans, was to be payable to Romspen from the first drawdown of the Construction Facility advanced to the Developers.
5. The amounts previously advanced under the Land Loans would be considered to be advanced and outstanding under the Construction Loan Agreement as part of the Construction Facility.

[48] Concurrently with the Construction Loan Agreement, the Developers and the Guarantors executed a Reaffirmation of Security reaffirming, acknowledging, and agreeing that all security granted to Romspen by the Developers and the Guarantors would continue in full force and effect.

[49] Intercap's participation in the Land Loans (approximately \$47 million) was paid out, and Intercap did not participate in funding the Construction Facility in the Construction Loan Agreement. However, this was not known to the Developers at the time, as was the case with Intercap's original participation in the Land Loans.

[50] Romspen required that the Developers obtain GEC's agreement that GEC's interest and security in the Project be subordinated to amounts advanced to the Developers under the Construction Loan Agreement. Consequently, GEC entered into a Subordination and Standstill Agreement with Romspen dated for reference October 31, 2019, (the "GEC/Romspen Subordination Agreement"), and they executed a registrable postponement of the GEC Mortgage and the GEC Option. No one from Romspen discussed the GEC/Romspen Subordination Agreement with anyone from GEC; the Developers were responsible for obtaining GEC's agreement to the GEC/Romspen Subordination Agreement.

- [51] A second lien holder in the amount of \$60 million against the Project Lands was also subordinated in favour of Romspen's interest.

### **Payments Under the Construction Loan Agreement**

- [52] Romspen, through RMLP, ultimately advanced \$143,616,213.23 to the Developers in four separate draws under the Construction Facility between November 25, 2019, and March 17, 2020. Drawdown requests under the Construction Facility were submitted by the Developers to BTY Group ("BTY"), the Quantity Surveyor retained for the Project, which provided Romspen with recommendations as to each drawdown request.

### **Cessation of Funding under the Construction Loan Agreement and the Eventual Notice of Default**

- [53] Beginning in late November or early December, Romspen made efforts to syndicate the Construction Facility. Despite their efforts, Romspen was unable to obtain any firm commitments by March 2020. Romspen's syndication efforts will be discussed in detail later in these Reasons when considering whether these efforts were commercially reasonable as required by the Construction Loan Agreement.
- [54] On March 31, 2020, Romspen sent a letter (the "March 31 Notice") to the Developers advising that Romspen could not waive conditions and continue funding the Construction Facility; specifically, it referenced the Syndication Condition as not being fulfilled. Romspen advised that it had decided to suspend all further draws and advances under the Construction Loan Agreement. At the time funding stopped on March 31, 2020, excavation of the Project was underway.
- [55] The Developers were able to continue with their development efforts for a period of time; however, they did so under significant financial strain. Ultimately, the Developers were not able to refinance, obtain investment in, or sell their interest in the Project during the approximate one-year period after Romspen ceased funding. Interest continued to accrue at a rate of approximately \$1.5 million per month under the Construction Loan Agreement.
- [56] On February 17, 2021, Romspen sent a default letter to the Developers and the Guarantors (the "Default Notice"). The Default Notice set out a number of defaults including: breach of the Developers obligation to pay interest as provided in the Construction Loan Agreement; the Developers failure to keep realty taxes current; and breach of the Developers obligation to maintain the requisite amount of equity.
- [57] On February 22, 2021, Romspen issued a demand to the Developers and the Guarantors with respect to the Construction Loan Agreement, declaring the entire amount owing under the Construction Loan Agreement as of February 10, 2021, \$157,885,389.55, to be immediately due and owing (the "Demand").

- [58] Concurrently with the Demand, Romspen issued a Notice of Intention to Enforce Security to the Developers and the Guarantors pursuant to s. 244 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
- [59] Despite their efforts to continue with the Project, the Developers were unable to avoid undertaking a formal restructuring of their substantial debt. As mentioned earlier, on April 1, 2022, Fitzpatrick J. entered an Initial Order in favour of the Developers in the CCAA Proceedings: Alderbridge Way GP Ltd. (Re), 2022 BCSC 1436.
- [60] Romspen says that interest has continued to accrue since March 31, 2020. As of approximately one month before this trial commenced, Romspen says that approximately \$72.2 million of interest has accrued and not been paid by the Developers or the Guarantors and that the principal amount is also due and owing.
- [61] Around the time the CCAA Proceedings began in early 2022, the major creditors secured against the Project were in the following amounts and order of priority:
1. Romspen who alleges they are owed approximately \$176 million under the Construction Loan Agreement;
  2. a group of other lenders owed approximately \$76 million; and
  3. GEC owed approximately \$94 million arising from the deposit it placed for the purchase of two towers pursuant to the GEC PDA.

## CREDIBILITY OF LAY WITNESSES

- [62] Each lay witness that provided testimony provided one or more affidavits to stand as their evidence in chief. Each party has made submissions on the credibility of these witnesses. Before I comment on the credibility of these witnesses, I note that I did not find much of the evidence tendered by the parties to be helpful in determining the principal issue, i.e., whether Romspen breached the Construction Loan Agreement by ceasing funding on March 31, 2020. As discussed later in these Reasons, the admissible factual matrix that informs this contractual interpretation exercise is limited to the objective facts known to both parties at the time leading up to the execution of the contract. However, much of the evidence provided by the lay witnesses, particularly the witnesses tendered by the Developers, was based upon their after-the-fact subjective interpretation of the agreement. On the factual matrix as I have determined, there are few credibility findings that need to be made in this case.
- [63] Nonetheless, the witnesses' credibility is relevant to the factual findings to be made with respect to whether Romspen acted honestly and in good faith in its execution of the Construction Loan Agreement and whether Romspen made commercially reasonable efforts to syndicate the loan.

**Mr. Roitman**

- [64] I found Mr. Roitman to be defensive and argumentative at times during his cross-examinations. However, I do not agree with the Developers that he was a "highly uncredible" witness. As will be discussed later, I find it somewhat ironic that the Developers and GEC impugn Mr. Roitman's credibility on the basis of his testimony for being after the fact explanations for Romspen's actions. In this case, all witnesses have engaged in after-the-fact explanations that accord with their subjective interpretation of the contract. Such evidence is illustrative of why the admissible factual matrix is constrained in the way it is.
- [65] That being said, Mr. Roitman's evidence at trial did at times contradict the documents to some extent. For example, he stated that one of the reasons why InterCap was not invited to participate in the Construction Loan Agreement was because of disagreements over deal control; whereas, Romspen's internal documents only reference a disagreement over sharing of fees. However, this inconsistency is not as significant as made out to be. Mr. Roitman did not deny that the sharing of fees was a reason. What he said was that deal control was one of the reasons and that it was discussed verbally and not in writing. I note that the email the Developers rely on to support their argument that Mr. Roitman's credibility was impugned by internal documents is an email dated March 2020 - long after the Construction Loan Agreement was executed. While there are no contemporaneous communications that specifically mentioned deal control as a factor, I do not find it incredible that such discussions might have occurred or that deal control was one of the reasons that InterCap did not participate.
- [66] GEC also calls Mr. Roitman's credibility into question by challenging his statement that the Developers would not be able to repay the Land Loans at maturity on December 1, 2019, in light of an appraisal that valued the land at more than the Land Loans. While I agree that Mr. Roitman was unable to point to any documentary evidence in support of this, he did explain that he did not necessarily put much weight in the land appraisal for a variety of reasons. I do not accept that communications between Mr. Cassidy and Mr. Thom as the Construction Loan Agreement negotiations began, that allegedly "show that Mr. Cassidy was selling the loan to Mr. Thom", impugns Mr. Roitman's credibility with respect to his statement on the inability of the Developers to repay the Land Loans. At most, this is emblematic of the difference of opinion amongst Romspen's management regarding the desirability of entering into the Construction Loan Agreement.
- [67] I do have some difficulty with Mr. Roitman's testimony with respect to what conditions were referred to in the March 31 Notice. While the notice does use the word "conditions", the text only refers to the Syndication Condition. It may be that, as Mr. Roitman explained, Romspen did not mention every condition that was not met because they intended to continue working with the Developers to find solutions. However, his insistence that the plural use of the word condition was meant to refer to other unfilled conditions is suggestive of an after-the-fact attempt to characterize the evidence in a manner consistent with Romspen's legal position. While this hurts Mr. Roitman's credibility to an extent, as mentioned before, all of

the witnesses tendered by the parties suffer from this problem.

- [68] Much of the rest of the credibility points made by GEC and the Developers are not credibility issues, at all. Rather, they are issues upon which the parties disagree and that, when boiled down to their essence, demonstrate the fundamentally different subjective interpretations of the Construction Loan Agreement.
- [69] The fact that Mr. Roitman became defensive and expressed frustration in response to certain questions was not, in my view, harmful to his credibility, as the Developers allege. Rather, his demeanour on the stand seems consistent with the nature of his communications on the record. Moreover, some of the frustration he expressed on the stand can likely be explained, in part, by the nature of counsel's repetitive questions to which Mr. Roitman had already given answers.

### Mr. Fonseca

- [70] In general, I found Mr. Fonseca, the Romspen individual who took the lead in the syndication efforts, to generally be "consistent with the probabilities affecting the case, both as a whole and in existence at the time": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356, 1951 CanLII 252 (B.C.C.A.). However, Mr. Fonseca's credibility was negatively affected to some degree by his reluctance to acknowledge that his initial interpretation of the Construction Loan Agreement, as expressed to a representative of InterCap, referred to Romspen as having made a funding commitment that was not subject to syndication. Again, this reluctance is likely attributable to the witness' desire for his evidence to conform to Romspen current interpretation of the agreement. In any event, the value of Mr. Fonseca's then held subjective interpretation to the issues I must decide is marginal, at best.
- [71] Mr. Fonseca was not involved in negotiating the Construction Loan Agreement. The relevance of his evidence in respect of the syndication efforts, and his credibility in respect of those efforts, was not successfully challenged in my view. While Mr. Fonseca was not able to remember certain things until he was taken to a document, I do not find that to be surprising considering his role in the matter in the amount of time that has passed since then.

### Mr. Cassidy

- [72] Mr. Cassidy was the Romspen individual who took the lead on the relationship with the Developers during negotiations of the Construction Loan Agreement. At times, I found that Mr. Cassidy avoided answering questions directly and that some of his evidence appeared to be contrived to accord with Romspen's position on the interpretation of the Construction Loan Agreement. As will be explained later in these Reasons, I do not find a memo written by Romspen's then counsel, Greg Umbach, to be admissible as part of the factual matrix. However, Mr. Cassidy's explanation as to what that memo addressed was, in my view, disingenuous given the content of his request to Mr. Umbach.

[73] Mr. Cassidy's credibility was also affected by his reluctance to agree to certain propositions. For example, he would not agree that it was a negative factor that Romspen could not tell potential syndicate partners that the full amount of the syndicated loan was covered by presale revenue given that he earlier had said that being able to do so would be a positive factor. Mr. Cassidy was similarly reluctant to acknowledge that Mr. Roitman was uncomfortable in November 2019 because InterCap was not brought into the deal. In general, where contemporaneous evidence contradicted Mr. Cassidy's testimony, to the extent that any such evidence was relevant to the decision I needed to make, I preferred the documentary evidence.

### **The Developers' Witnesses in General**

- [74] All of the witnesses tendered by the Developers had significant problems with their evidence in chief that was tendered by way of affidavit. Each of them swore or affirmed to the truth of the contents of each other's affidavits. However, during cross-examination each one of them eventually conceded that they could not do so, particularly with respect to facts attested to by others for which they had no direct knowledge of. Much of the evidence provided by the Developers in chief would be inadmissible for the truth of its contents as it often contained hearsay or double hearsay. For example, the Developers' witnesses attested to the truth of what was told to them by Mr. Thom, who was relaying conversations he had with Mr. Cassidy. This is simply improper.
- [75] As with the witnesses tendered by Romspen, the Developers' witnesses' testimony - both in chief and on cross-examination - was tainted by their after-the-fact subjectively held interpretations of the contract and a desire for their evidence to conform to their litigation position.

### **Mr. Thom**

- [76] Mr. Thom, the member of the developer group responsible for leading its financing efforts, was generally a credible witness. Despite the fact that his affidavits suffered from the same issues as the other Developers, during cross-examination, he often made reasonable concessions where appropriate. However, like many of the witnesses, there were points where Mr. Thom's desire for the evidence to conform with the parties' litigation position hurt his credibility. For example, in his affidavit, Mr. Thom swore to the truth of certain facts alleged in the Developers' amended notice of civil claim. In particular, he attested that Mr. Cassidy confirmed to him during negotiations that Romspen was unconditionally committed to funding \$212 million in exchange for \$10 million in fees. However, when pressed on this, Mr. Cassidy equivocated and eventually acknowledged, but only after being taken to his examination for discovery, that rather than a recollection of particular words being said, what is stated in his affidavit and the amended notice of civil claim was his subjective understanding of what Mr. Cassidy was saying to him. He eventually acknowledged that he had no recollection of Mr. Cassidy making such a statement.

- [77] Mr. Thom, like other witnesses tendered by the Developers, seemed to downplay statements made in communications to GEC regarding the status of the Project, and the challenges it faced, leading up to the execution of the Construction Loan Agreement. Despite telling GEC that the Project was in financial trouble at the time the Construction Loan Agreement was being negotiated, at trial Mr. Thom would not agree that the Project was in financial trouble at that time. Therefore, either what he said to GEC was not true or what he said in court was not true. My impression of the evidence of Mr. Thom, and also of Sam Hanson as will be discussed momentarily, is that the Developers' view is that it is all right to exaggerate the challenges the Developers were facing at the time the Construction Loan Agreement was being negotiated because doing so was in their interest to re-negotiate the deal they had with GEC.
- [78] In another words, Mr. Thom and Sam Hanson appear to be of the view that it was not necessary to be completely accurate in their communications in this respect because, as Sam Hanson said, "they're all in the real estate business and they all know what is going on". I take this to mean that Sam Hanson is of the view that everyone in the real estate business should know the parties will exaggerate or downplay things to serve their particular interest at a particular time. While this may be the case, it works both ways and should similarly be applied to any statements made by Romspen that are impugned by the Developers.

### Sam Hanson

- [79] I found Sam Hanson to give evidence in a straightforward way and he was generally credible. However, the reliability of his evidence was weakened by his inability to recollect some basic information about the Project even though he described himself as its principal organizer. Like Mr. Thom and the other witnesses, Sam Hanson was very reluctant to acknowledge that the Project faced significant financial challenges as the Construction Loan Agreement was being negotiated despite documentary evidence that clearly showed he held this view at that time. Sam Hanson was also oddly reluctant to acknowledge that the Project was complex despite having used that exact word in email correspondence.

### Brent Hanson

- [80] I found Brent Hanson's evidence to be almost entirely tailored in an effort to be consistent with the Developers' litigation position that there was a \$212 million minimum funding commitment made by Romspen in the Construction Loan Agreement. This led Brent Hanson to provide the rather audacious evidence that the use of the word "limit" in the memorandum written by Mr. Umbach in reference to Romspen's \$212 million funding commitment, had the same meaning as the word "minimum".
- [81] The assertions made by Brent Hanson in his affidavit, that the Developers had fully negotiated fixed-price contracts with Metro-Can and completed the final agreements they planned to execute, were entirely inconsistent with the evidence at trial. That evidence shows that there were a number of outstanding matters regarding these contracts going into

April and May 2020. His assertion that he could have completed negotiations for a fixed-price contract "in half an hour" in March 2020 is completely contradicted by the documents, which show these negotiations ongoing into May 2020.

- [82] Brent Hanson's affidavit evidence that no one at Romspen advised him that the fixed-price condition was an issue is also completely inconsistent with the documentary evidence tendered at trial. It is surprising that he maintained this position in the face of that documentary evidence. I have not relied on Brent Hanson's evidence in my consideration of this matter.

### Mr. Chu

- [83] Toby Chu, the representative of GEC, had no direct involvement in the negotiations of the Construction Loan Agreement with Romspen, with the syndication efforts made by Romspen, or with the Developers' performance of its obligations under the Construction Loan Agreement. Given this, and my determination that Romspen did not breach the Construction Loan Agreement, there is very little relevance to the evidence he has provided. Nonetheless, his evidence, like that of the rest of the witnesses, is replete with his ex post facto subjective beliefs of what the Construction Loan Agreement provided.
- [84] I also found Mr. Chu to be reluctant to make reasonable concessions. For example, Mr. Chu would not acknowledge that GEC received a \$60 million discount on the purchase price of the two towers even though a document he authored used those exact words. At trial, Mr. Chu also would not acknowledge that he knew that the Developers were having financial difficulties in the fall of 2019 despite having used those exact words in his discovery. Similarly, at trial, Mr. Chu would not acknowledge that the Developers had told GEC that there were no other options other than the construction loan with Romspen despite having said that at his discovery.
- [85] The concerns I have with the witnesses' credibility as described above illustrates the need for this Court to restrict a party's reliance on ex post facto explanations and subjective intentions as part of the contractual interpretation exercise. As noted in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva] at para. 59, such evidence is to be excluded from the process of contractual interpretation so parties cannot use artificial or unreliable evidence to attack a written contract.

### ISSUE 1: WAS ROMPSEN ENTITLED TO TERMINATE ITS FUNDING OF THE PROJECT IN MARCH 2020 UNDER ITS AGREEMENTS WITH THE DEVELOPERS AND GEC?

- [86] The fundamental issue to be determined in this matter is whether Romspen was entitled to terminate its funding of the Project as it did in March 2020. Determining this issue is a matter of contractual interpretation. The question is whether Romspen was contractually required to fund a minimum amount of \$212 million under the Construction Loan Agreement regardless of whether its syndication efforts were successful.

## Relevant Law of Contractual Interpretation

- [87] All parties agree that the Supreme Court of Canada's decision in *Sattva* provides the guiding principles to interpreting contracts. While all parties agree that consideration of the factual matrix is part of the proper approach, the parties disagree as to the scope of the admissible evidence of the factual matrix.
- [88] The approach in *Sattva* is well-known. The overriding concern of contractual interpretation is to determine "the intent of the parties and the scope of their understanding": *Sattva* at para. 47. To achieve this objective, the modern approach requires considering the words of the contract in the context of what is referred to as the surrounding circumstances or the factual matrix. The Court explained that interpretation of a contract is a question of mixed fact and law where the legal principles of contractual interpretation are applied to the text of the contract and considered in light of the factual matrix. The interpretive exercise requires the court to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47.
- [89] At paras. 47 and 57 of *Sattva*, the Court explained why considering the surrounding circumstances is useful in interpreting a contract: considering the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own because "words alone do not have an immutable or absolute meaning." A contract should be interpreted within a particular setting to aid in its interpretation. Thus, a court should be cognizant of the commercial purpose of the contract. Understanding the commercial purpose requires knowledge of the genesis of the transaction, its background, and the context and market in which the parties are operating. Proper consideration of the factual matrix provides a deeper understanding of the mutual and objective intentions of the parties as expressed in the words of the contract.
- [90] Although the factual matrix plays an important role in interpreting a contract, the particular text, read in light of the entire agreement, remains the foundation of contractual interpretation: *Sattva* at paras. 47 and 57. The factual matrix cannot be used to overwhelm the words of the agreement. Ultimately, the interpretation of a written agreement must always be grounded in the text and read in light of the entire contract.
- [91] The nature of evidence that can be considered as part of the factual matrix will vary from case to case. However, as stated in *Sattva* at paras. 58-59, the use of the factual matrix to interpret a contract must comply with two fundamental requirements:
1. the factual matrix consists of only objective evidence of the background facts known to, or reasonably ought to have been within the knowledge of, both parties leading up to the execution of the agreement; and

2. the parol evidence rule is still applicable to the extent that evidence of the subjective intentions of the parties is not admissible in the interpretive exercise. Evidence of surrounding circumstances does not offend the parol evidence rule because such evidence is only used as an interpretive aid for determining the meaning of the written words.
- [92] While the parties agree that the two fundamental requirements above are applicable, they disagree as to how they apply. This is particularly so with respect to the use of negotiations and draft agreements as part of the factual matrix. In essence, GEC and the Developers argue that it is an open question as to whether negotiations and draft agreements leading up to the execution of an agreement are properly considered as part of the factual matrix. Romspen submits that such background is not properly considered as part of the admissible factual matrix.
- [93] I agree with counsel for Romspen that the law remains that evidence of what was said and communicated during negotiations or inserted in draft agreements is not admissible as the factual matrix, and thus, should not be considered when interpreting a contract's terms.
- [94] As counsel for GEC submits, in two decisions decided after *Sattva (Resolute FP Canada Inc. v. Ontario (AG))*, 2019 SCC 60 [Resolute] and *Corner Brook (City) v. Bailey*, 2021 SCC 29 [Corner Brook]), the Supreme Court of Canada has commented that the long-standing exclusion of evidence of pre-contractual negotiations "sits uneasily" when considered next to the approach in *Sattva* that requires the court to consider the surrounding circumstances. The Court put it this way in *Corner Brook*:
- [56] However, there is a longstanding, traditional rule that evidence of negotiations is inadmissible when interpreting a contract. Justices Côté and Brown observed in *Resolute* that this rule "sits uneasily" next to the approach from *Sattva* that directs courts to consider the surrounding circumstances in interpreting a contract. Hall and the authors of *Canadian Contract Law* both emphasize the difficulty in drawing a principled distinction between the circumstances surrounding contract formation and negotiations.

[Citations omitted.]

- [95] A number of decisions of our Court of Appeal have since commented on the apparent "unease", for example: *Oswald v. Start Up SRL*, 2021 BCCA 352, and *Huber Estate v. Murphy*, 2022 BCCA 353 [Huber].
- [96] I agree that the distinction between the admissible surrounding circumstances regarding the formation of a contract and the inadmissible negotiations leading up to it may be difficult to draw. As I understand it, the distinction is that negotiations may properly be used for the purposes of establishing a fact that may be known to both parties, but they may not be used for the purposes of drawing inferences about the meaning of the contract or its terms. Despite the difficulty of this distinction, it is my view that the traditional rule excluding the use of negotiations has not been displaced by the authorities relied upon by GEC and the Developers. Although these cases recognize the difficulty of the distinction,

none of them considered negotiations for the purposes of interpreting the contract.

- [97] In *Firestar Custom Home Builders Inc. v. 1099000 B.C. Ltd.*, 2022 BCCA 324 [Firestar], the Court of Appeal stated:
- [40] Of course, the scope for the introduction of extrinsic evidence in contract cases is limited. In *Canada Deposit Insurance Corp. v. Commonwealth Trust Co.* (1997), 1997 CanLII 4028 (BC CA), 97 B.C.A.C 287, Hollinrake J.A. observed, when discussing the principles governing the interpretation of contracts:
- [10] The law is clear that surrounding circumstances must be taken into account and one of those circumstances is the object and purpose the parties were seeking to attain by their agreement. See: *Prenn v. Simmonds*, [1971] 1 W.L.R. 1381 at 1384-5. The law is also clear from *Prenn v. Simmonds* that negotiations leading to an agreement are not admissible in evidence in aid of its interpretation.
- [41] There is a very thorough and helpful discussion of the rule that evidence of pre-contractual negotiations is inadmissible as an aid to contractual interpretation (as described in *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (H.L.), and elsewhere), in *Chartbrook Limited v. Persimmon Homes Limited*, [2009] UKHL 38. In that case, Lord Hoffmann summarized the rule and some exceptions as follows:
- [42] The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it.
- [Emphasis added.]
- [98] In *Huber*, decided one month after *Firestar*, the Court of Appeal again noted the "uneasy juxtaposition" of the traditional approach to contractual interpretation and the approach in *Sattva* but declined to resolve it:
- [34] The Supreme Court of Canada has avoided stating that *Sattva* displaces the "traditional rule that evidence of negotiations is inadmissible when interpreting a contract" but also has recognized the uneasy juxtaposition of these approaches. See *Corner Brook (City) v. Bailey*, 2021 SCC 29 at paras. 56-57.
- [35] This case does not present the appropriate occasion to resolve this issue at the appellate level.

- [99] In my view, the law in British Columbia is as referenced above in *Firestar*. I believe the law is also accurately explained by the Ontario Court of Appeal in *Weyerhaeuser Company Limited v. Ontario (AG)*, 2017 ONCA 1007 [Weyerhaeuser], which was the appellate level decision leading to the Supreme Court of Canada's decision in *Resolute*. In *Weyerhaeuser*, the Court held:
- [112] I do not accept this submission. Canadian common law generally treats evidence of the parties' specific negotiations as inadmissible for purposes of interpreting a contract: *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, 2012 ONCA 862, 115 O.R. (3d) 287, at para. 71. In light of that principle (and until that principle of contract interpretation is changed as a matter of policy), evidence of the factual matrix cannot operate as a kind of alternate means by which an adjudicator constructs a narrative about what the parties must have discussed or intended in their negotiations.
- [100] As Romspen submitted, although this prohibition may sit uneasily next to the Court's direction in *Sattva*, it nonetheless still sits on the same chair. In my view, in light of the relevant authorities, it is not open to me as a judge of this Court to ignore the long-held prohibition against using negotiations as a means of interpreting a contract. Displacing this prohibition from its seat is a matter for a higher court's consideration.
- [101] In any event, in my view, some of the unease regarding the prohibition against the use of negotiations is tempered when one considers the prohibition in light of the unassailable requirement that a party's subjective intentions are not to be considered. That is because subjective intentions are often related to, and at times inextricable from, the contents of negotiations. The Court of Appeal in *Weyerhaeuser* illustrated this in the remainder of para. 112:

In other words, evidence of the factual matrix cannot be used to do indirectly that which the principles of contract interpretation do not permit doing directly. Therefore, contrary to Ontario's submission, it was not open to the motion judge to consider evidence of the parties' specific intentions or negotiations, including whether they discussed the Spills Bill during the negotiations that culminated in the execution of the Ontario Indemnity.

[Emphasis added.]

- [102] What was said and communicated during negotiations may reveal a party's objectives in those negotiations. But one party's objectives do not necessarily equate to a common intention of the parties. Thus, it can be "dangerous" to admit such evidence, as the Court explained in *Cymax Stores Inc. v Coleco Investments Inc.*, 2019 BCSC 492 at para. 85, after citing the "sensible" proposition in *Prenn v. Simmonds*, [1971] 3 All E.R. 237 at 240-241:
- [84] In *Athwal* at para. 45, the court cited *Prenn v. Simmonds*, [1971] 3 All E.R. 237 at 240-241, which describes such evidence as "unhelpful". In *Prenn*, the court made the following sensible observation:

The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get 'agreement' and in the hope that disputes will not arise. The only course then can be to try to ascertain the 'natural' meaning. Far more, and indeed totally, dangerous is to admit evidence of one party's objective -even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in world of give and taken, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised.

[85] In other words, even though a party may express certain intentions to another party, when the agreement is reduced to writing to reflect their mutual and "manifest" intentions, the other party may be entirely satisfied that the document achieves their intentions, and also the objectives of the first party. This is particularly apt where there is an "entire agreement" clause as in Section 10.6 of the Loan Agreement. As stated in *Maxam*, the words chosen by the parties in the Loan Agreement are presumed to have been the means by which the Lenders intended to maximize their return, and the means by which Cymax intended to minimize the cost of the financing.

[Emphasis added.]

[103] In my view, the use of negotiations is limited to establishing facts that are known to both parties and may be relevant as background, such as showing "that the parties were in negotiations and the reasons for those negotiations": *Tai An Holding Company Ltd. v Boyal*, 2022 BCSC 821 at para. 50, citing *Can-West Developments Ltd. v. Parmar*, 2019 BCSC 1573 at para. 23; see also *Firestar* para. 41. Using negotiations in this way may appropriately assist in explaining the genesis of a transaction and the context in which the parties are operating.

## **Romspen's Obligation to Fund under the Construction Facility was not Unconditional**

[104] Throughout the evidence and submissions, the Developers often referred to Romspen's obligation to fund the Project as being unconditional or guaranteed. While they eventually appear to have stepped back from this broad statement and limited it to some extent, I find that it is necessary to comment on the conditional nature of Romspen's funding obligations, in general, before considering whether Romspen's commitment to fund \$212 million was subject to certain conditions.

[105] Pursuant to s. 2.01 of the Construction Loan Agreement, Romspen committed "subject to the terms and conditions hereof" to "make available to the [Developers] the Construction Facility". The "Construction Facility" is defined by reference to the "Construction Loan Commitment Amount".

[106] Specifically, the "Construction Facility" is defined as meaning:

the non-revolving, credit facility up to a maximum principal amount equal to the Construction Loan Commitment Amount, from time to time to be made available hereunder to the Borrower on a several basis by the Lender in accordance with the provisions hereof, subject to any reduction in accordance with the provisions hereof and provided further that the aggregate amount outstanding at any time shall not exceed the Construction Loan Commitment Amount

- [107] The "Construction Loan Commitment Amount" is defined as meaning "\$422,000,000 (inclusive of the amount previously advanced under the Existing Loan Facilities) as reduced from time to time in accordance with the provisions hereof." Pursuant to s. 2.04, these funds were to be used solely for the purpose of the construction of the Project (along with ancillary uses such as paying lender fees).
- [108] Romspen's obligations to fund draws from the Construction Facility were clearly subject to the satisfaction of terms and conditions found in the Construction Loan Agreement, and Romspen had a wide discretion in respect of the decision to advance those funds. In addition to the opening words of section 2.01 referenced above, section 2.07 also states that Romspen's obligations to fund draws under the Construction Facility is "subject to the terms and conditions of this agreement." Section 3.03 sets out or incorporates by reference more than 50 separate conditions to the making of any advances under the Construction Facility. Section 2.03 states that "[n]otwithstanding any provision herein, the Construction Facility shall be funded by way of periodic advances, the timing and amount of which shall remain in the sole discretion of the Lender and on the terms and conditions set out herein."
- [109] Section 2.11 provides that "neither the preparation nor registration of any documents contemplated herein shall bind the Lender to make an advance it being agreed that any advance of the Construction Facility from time to time shall be in the sole absolute unfettered discretion of the Lender." While section 2.11 uses the word "unfettered" and unarguably provides Romspen with a large discretion with respect to the payment of funds, Romspen acknowledges that this discretion must be exercised in a manner consistent with the purpose for which the discretion was conferred and not in bad faith; in essence it acknowledges that this section is subject to the duty of good faith and honest performance discussed in the good faith trilogy: *Bhasin v. Hrynew*, 2014 SCC 71 [Bhasin]; *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 [Callow]; and *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [Wastech]. The extent of the application of the duty of good faith and honest performance in this case will be discussed later in these Reasons.
- [110] While it is in my view indisputable that Romspen's obligations to fund under the Construction Loan Agreement were not unconditional, what is arguable is whether or not Romspen's commitment to provide funding of \$212 million was conditional on a successful syndication of the Construction Facility.

A Plain Reading of the Construction Loan Agreement does not Provide for Romspen to Advance a Minimum Amount of \$212 Million

[111] This litigation's central question is: did the Construction Loan Agreement require Romspen to fund \$212 million even if it did not successfully syndicate the loan? While each party's position is somewhat nuanced they can be summarized as follows.

[112] The Developers and GEC say that Romspen committed a breach of the Construction Loan Agreement when Romspen failed to advance \$212 million and instead terminated funding on March 31, 2020. Romspen says that the \$212 million commitment was conditional upon the satisfaction of certain conditions, including a successful syndication. The Developers and GEC says that the \$212 million commitment was not conditional upon a successful syndication. Romspen also says that any and all advances were always subject to Romspen's discretion in light of s. 2.02(3) and s. 2.11 of the Construction Loan Agreement. As mentioned earlier, there is no dispute that section 2.11 provides considerable discretion to Romspen in respect of funding draws under the Construction Loan Agreement. However, whether the duty of good faith and honest performance applies, and whether those obligations were met, will be discussed later in these reasons.

[113] Romspen notified the Developers that it was ceasing funding of the Project in the March 31 Notice. It references Romspen's unsuccessful efforts to syndicate the loan. The March 31 Notice reads in full:

As you know, the COVID-19 global pandemic has had dramatic and rapid effects on public health policies, the economic outlook and the functioning of the financial markets. The effects rapidly change on a daily basis, particularly in the financial markets, and are unpredictable.

The Lender has not been successful in obtaining commitments from other lenders to participate in the Construction Facility under the Loan Agreement, in part as a result of the dramatic and ongoing effects on the financial markets, especially the credit markets. Therefore, the Lender cannot waive the conditions for continued funding in the Loan Agreement regarding participations in the Construction Facility. As a result, the Lender is concerned that the capital necessary to continue and complete the construction of the Project may not be available. Accordingly, the Lender has decided to suspend all further draws and advances as permitted under the terms of the Loan Agreement.

During these unprecedented events, we want to emphasize that we are prepared to discuss with you ways to manage through the current crisis, including by continuing to look for other lenders or investors to participate in the Construction Facility. While we want to continue discussions with you, we expect it will be necessary for you to raise additional equity or look for other sources of capital as a consequence of the disruptions caused by the pandemic.

[114] The Syndication Condition is found in section 3.03 of the Construction Loan Agreement:  
3.03 Subsequent Drawdowns under the Construction Facility

On or before each Drawdown under the Construction Facility subsequent to the first Drawdown to occur after the date of this Agreement, the following conditions shall be satisfied by the Borrower:

- (a) in respect of any Drawdown after March 31, 2020, the Lender shall be satisfied that in the aggregate, participation of other Persons committed to acquire participations (as set out in Sections 2.02(2) and 16.02) is sufficient to provide the full amount of the Construction Loan Commitment Amount provided that the Lender may choose to waive this request with respect to any one Drawdown without waiving the request for subsequent Drawdowns.

[Emphasis added.]

[115] In support of their position that funding \$212 million was not subject to a successful syndication, the Developers and GEC rely heavily on the word "commitment" in the agreement and in particular in Schedule B and section 2.02(2)(d). Section 2.02(2) reads:

#### 2.02 General Principles Regarding Credit Facilities

- (2) The Lender has no obligation to fund future advances beyond the portion of the Construction Loan Commitment Amount set out in Schedule B. The Borrower hereby requests the Lender to commence seeking Persons to acquire participations in the Construction Facility sufficient to aggregate to the Construction Loan Commitment Amount and the Borrower agrees the following conditions apply:
  - (a) the Lender shall have until March 31, 2020 to use its commercial reasonable efforts to seek Persons to acquire participations in the Construction Facility;
  - (b) the Borrower shall provide such additional information regarding the Borrower, the Guarantors or the Project or facilitate access to the Project as the Lender may require to assist in the efforts of the Lender to seek Persons to acquire participations in the Construction Facility;
  - (c) if the Lender is successful in obtaining commitments from Persons to acquire participations in the Construction Facility sufficient to aggregate the Construction Loan Commitment Amount, the Lender shall give written notice ("Participation Success Notice") to the Borrower and as of the date of the Participation Success Notice:
    - (i) the balance of the loan fee payable in Section 2.09(a) of this Agreement shall be due and payable by the Borrower to the Lender;
    - (ii) commencing on the date that is two (2) months after the Lender delivers notice to the Borrower that the Lender will commence using the participations of other Persons in funding advances under this Agreement (the date of such notice being the "Participation Funding Notice"), any right of the Borrower to repay the Construction Facility under Section 8.04 or otherwise, shall require not less than twelve (12) months' prior notice;

- (d) notwithstanding any provision herein, if the Lender is not successful in obtaining commitments from Persons to acquire participations in the Construction Facility sufficient to aggregate to the Construction Loan Commitment Amount, the Borrower waives any obligation of the Lender to fund any Drawdown or to make any advance in excess of the portion of the Construction Loan Commitment Amount set out in Schedule B and agrees it shall have no claim or right to claim against the Lender for any further advances or to fund any further Drawdowns under this Agreement and the Lender shall continue to have all its rights under this Agreement and the Borrower shall continue to be bound by its obligations under this Agreement;

[Emphasis added.]

[116] Schedule B of the Construction Loan Agreement reads:

#### SCHEDULE B

##### LENDER COMMITMENT

Lender's portion of Construction Loan Commitment Amount:

\$212,000,000 inclusive of the amount advanced under the Existing Loan Facilities

[117] The Developers and GEC say that when the above provisions are considered, and in particular with focus on the following 16 words in s. 2.02(2)(d) - "in excess of the portion of the Construction Loan Commitment Amount set out in Schedule B" - one must conclude that Romspen agreed to fund a minimum of \$212 million, regardless of whether the Syndication Condition was met.

[118] I disagree with the Developers and GEC. When the provisions are read in context, there is no obligation for Romspen to provide a minimum funding of \$212 million. I agree with Romspen that, when properly construed, section 2.02(2) provides that \$212 million is the limit (or maximum amount) of Romspen's commitment in the circumstances described in that section of the Construction Loan Agreement. Section 2.02(2) reinforces that Romspen could have no liability beyond its committed amount. Nowhere in s. 2.02(2) does it say that Romspen has an obligation to fund any amount; rather, section s. 2.02(2) is a negative provision limiting Romspen's funding obligations.

[119] In my view, the plain meaning of the words in s. 2.02 as being a limit on Romspen's funding obligations is illuminated by considering the context of s. 3.03, which provides for the Syndication Condition. I disagree with GEC that s. 3.03 is limited and does not describe a condition that must be met for funding to continue because the Developers are not in control of such a condition. Section 3.03 requires that the Developers (a) satisfy Romspen that sufficient participations are in place or (b) satisfy Romspen that it should waive the Syndication Condition. The condition in s. 3.03(a) is not unique in imposing a requirement that the Developers satisfy Romspen that Romspen be content that advances ought to be made or that a condition should be waived. An analogous condition is present in section

3.01(11).

- [120] Moreover, s. 3.03 is not limited in scope, as the Developers and GEC would suggest, to drawdowns "above the amount in Schedule B" (i.e. amounts above \$212 million). These words do not appear in section s. 3.03 and reading in these words is not required to give effect to both ss. 2.02(2) and 3.03(a).
- [121] When the words are read in context of the agreement, neither s. 2.02 nor the agreement as a whole requires Romspen to fund a minimum amount of \$212 million. Rather s. 2.02 provides the limits of Romspen's commitment of the \$422 million Construction Facility. The agreement does not state that Romspen is obligated to fund "no less than" the amount set out in Schedule B. Rather, s. 2.02(2)(d) clarifies that Romspen's agreement to undertake efforts with respect to syndication must not be taken to mean that Romspen will fund the full amount of the \$422 million facility if the syndication efforts are unsuccessful.
- [122] Moreover, Section 2.02(3) operates notwithstanding any other provision and provides that Romspen has the sole discretion to fund drawdowns under the agreement. Section 2.02(4) provides a further limitation on the credit facility provided for in s. 2.01.
- [123] The Developers and GEC place great reliance on the word "commitment" as it is found in s. 2.02(2)(d) and in Schedule B. They have provided a number of dictionary definitions of the word commitment, but, really, there is no dispute as to what the word commitment means. The dispute is about what the commitment refers to in the agreement, and that is not aided by resorting to dictionary definitions.
- [124] The word commitment is also found in the defined term "Construction Loan Commitment Amount", which, as described above, is the \$422 million Construction Facility. Schedule B states that Romspen's portion of the Construction Loan Commitment Amount is \$212 million. However, that does not create a minimum obligation. Rather s. 2.02 creates limits on Romspen's primary obligation to provide a credit facility in the amount of \$422 million, the obligation for which is created in s. 2.01 of the Construction Loan Agreement. Section 2.02(2)(a) states that Romspen has until March 31, 2020, to seek participations, i.e. the syndication. The reference to March 31, 2020, provides a temporal limit to Romspen syndication obligations that aligns with the Syndication Condition as set out in s. 3.03(a). GEC and the Developers' focus on the word commitment in s. 2.02(2) does not pay heed to the context of the agreement in which the provision is found.
- [125] The amount set out in Schedule B, i.e. the \$212 million "commitment", places a limit on Romspen's obligations in circumstances where Romspen is successful or unsuccessful in its syndication efforts. If Romspen is successful in its syndication efforts, then s. 2.02(2)(c) provides that Romspen's commitment to fund up to \$422 million is crystallized. There is no reference made to Schedule B in that provision because it does not matter to the Developers whether the amount provided comes entirely from Romspen or from other members of the syndicate.

- [126] Section 2.02(2)(d) specifies that if Romspen is not successful with obtaining participations totalling the Construction Loan Commitment Amount by March 31, 2020, then, notwithstanding Romspen's primary obligation to provide a Construction Facility in the Construction Loan Commitment Amount of \$422 million, Romspen cannot be required to fund any drawdown beyond the Schedule B amount of \$212 million. This is the limitation on Romspen's \$422 million commitment relied upon by Romspen in its decision to not waive the Syndication Condition. Two other examples assist in illustrating the operation of the commitment limit, both before and after March 31, 2020.
- [127] First, Romspen's obligation is limited to \$212 million before March 31, 2020, in circumstances where the Syndication Condition has not been met and the Developers submitted a drawdown request prior to that date that exceeded \$212 million. Romspen could point to the opening words of s. 2.02(2) and s. 2.02(2)(d), which incorporates Schedule B, and tell the Developers that, even though we have committed to providing you with access to \$422 million, we are not going to fund beyond \$212 million at this time.
- [128] Second, Romspen's obligation is limited to \$212 million after March 31, 2020, where syndication efforts were unsuccessful, but where Romspen had agreed to extend the Syndication Condition provided for in s. 3.03 beyond March 31, 2020. In those circumstances, Romspen could point to s. 2.02(2)(d) and tell the Developers that, notwithstanding the fact we agreed to extend the Syndication Condition, we are not going to fund beyond \$212 million until the Syndication Condition is met.
- [129] In neither of the above two examples, or in the situation at bar, does the limiting nature of the provision create a minimum funding obligation on Romspen. The interpretation put forward by Romspen, that there is no minimum funding obligation of \$212 million, gives meaning to the entire provision of s. 2.02(2)(d), and in particular to the words following the 16 words pointed to by GEC and the Developers, which state that the Developers agree:
- it shall have no claim or right to claim against [Romspen] for any further advances or to fund any further Drawdowns under this Agreement and [Romspen] shall continue to have all its rights under this Agreement and [Developers] shall continue to be bound by its obligations under this Agreement.
- [130] This interpretation is consistent with the key principle of contractual interpretation being that the words of one provision are not to be read in isolation.
- [131] I do not agree with the Developers and GEC that their interpretation of the funding commitment must prevail in order to avoid a "commercial absurdity" with respect to the fees payable to Romspen under the Construction Loan Agreement.
- [132] The fees payable to Romspen are set out in section s. 2.09 of the Construction Loan Agreement, which provides:

The Borrower shall pay to the Lender the following fees, which unless otherwise indicated, will be deducted and paid from the first Drawdown to occur after the date of this Agreement:

- (a) A loan fee of \$10,550,200, payable as follows:
  - (i) \$5,275,000, plus an additional 1.25% of the amount outstanding under the Existing Loan Facilities and the amount of the first Drawdown to occur after the date of this Agreement, which fee is earned and payable on such Drawdown Date;
  - (ii) 1.25% of the amount of each subsequent Drawdown earned and payable on each subsequent Drawdown provided that, if the Participation Success Notice under Section 2.02(2) is delivered, the full amount remaining of such loan fee that would be paid to the Lender if the Construction Facility were fully advanced to the Borrower, shall be payable to the Lender immediately and may be paid to the Lender by an advance by the Lender as a Drawdown.
- (b) Purely as an accommodation, a broker's fee of \$1,660,000, payable by the Borrower to Gatland Capital Corporation upon approval by the Lender;
- (c) An initial Drawdown Fee of \$2,000;
- (d) A Drawdown fee of \$1,000 for each subsequent Drawdown, payable on the Drawdown Date;

[133] There is no doubt that under s. 2.09, Romspen was entitled to charge extensive lender fees. The total fee payable, if the full amount of the loan was advanced, was \$10,550,200. Of that amount, half (\$5,275,000) was essentially payable at the outset and the other half was payable by means of a 1.25% charge on the amount of each subsequent drawdown and the remainder was payable if the syndication was successful. The evidence shows that \$6,931,494.44, was charged by Romspen on November 25, 2019 - that being the date of the first drawdown.

[134] GEC and the Developers argue that \$5.275 million of the nearly \$7 million charged on November 25, 2019, was directly linked to Romspen's commitment to provide a minimum of \$212 million in financing. They note that \$212 million is half of the \$422 million loan facility and that \$5.275 million in fees is approximately half of the total fees payable. Thus, they say the fees are linked to a binding commitment of \$212 million. In essence, GEC and the Developers say that it would be commercially absurd to interpret the contract in a way that would allow Romspen to collect such a large amount of lender's fees without any commitment to provide a minimum amount of funding tied to those lending fees.

[135] I disagree with GEC and the Developers. While the arithmetic facially appears to support GEC and the Developers' position, nothing in s. 2.09 of the Construction Loan Agreement ties the lender fees to a commitment to advance a minimum of \$212 million. The formula in s. 2.09 does not calculate the fees based on a commitment to advance \$212 million. Had the parties wanted to tie the payment of fees to a minimum amount that Romspen was obligated to provide, they could have said so. However, they did not. This risk was allocated in the contract between sophisticated parties.

- [136] Moreover, the interpretive principle of avoiding a commercial absurdity is not engaged on the facts. I agree with Romspen that this interpretive principle applies where the court is faced with competing interpretations of a contract of which one "allows the contract to function in furtherance of its commercial purpose" and the other does not: *Blackmore Management Inc. v. Carmanah Management Corporation*, 2022 BCCA 117 at para. 42, citing *Resolute* at para. 144; *Felger v. Banov*, 2021 BCSC 1592 at para. 68. In such cases, the former interpretation will prevail. The key to such an outcome is that there be an operative obstacle to the proper functioning of a contract, which is not something that can be taken to "have been intended by rational commercial actors in making their bargain": *Resolute* at para. 144. The principle that commercially absurd interpretations should be avoided does not allow a court to scrutinize whether commercial terms are "undesirable or unusual" let alone not preferable from the perspective of one party to the bargain: *Resolute* at para. 144.
- [137] While the fees payable to Romspen may be high in the Developers and GEC's view, there is nothing absurd about the provision for their payment under the Construction Loan Agreement. The payment of the fees does not prevent the Construction Loan Agreement from functioning in any sense. In terms of the context of the agreement, it must be remembered that Romspen is not a conventional lender and that they generally charged interest and fees at a rate double that of conventional institutional lenders. Romspen was willing to take the risk of financing the Project in circumstances where other lenders were not. The parties negotiated a fee structure that reflected this risk and the risk that the Developers had faced in obtaining other funding. It should also be noted that the Construction Loan Agreement served to restate and re-advance the \$95 million that Romspen had advanced under the Land Loans and that was still owing.
- [138] I also do not accept the position advanced by the Developers and GEC that accepting Romspen's position would necessarily result in a circumstance where Romspen could have taken the substantial fees that were payable at the time of the first draw without advancing a single dollar. While s. 2.11 of the Construction Loan Agreement provides Romspen with considerable discretion to cease funding, that discretion is subject to the duty of good faith and honest performance. A decision to cease funding at such an early stage after collecting a considerable fee would have to have been made in good faith.
- [139] In conclusion, I agree with Romspen that ss. 2.02(2) and 3.03(a) operates to limit Romspen's \$422 million Construction Loan Commitment Amount to \$212 million pending the successful syndication. It does not provide for a minimum commitment. If the parties intended for s. 2.02(2) to mean what the Developers and GEC submit that it means, they could have simply stated so. Rather than saying in s. 2.02(2) that "[t]he Lender has no obligation to fund future advances beyond the portion of the Construction Loan Amount set out in Schedule B", the parties could have said that "the Lender has an obligation to fund no less than \$212 million" if that was their intent.

## The Scope of the Factual Matrix in this Case

- [140] In my view, the admissible factual matrix in this case is consistent with, and buttresses, interpreting the Construction Loan Agreement such that the \$212 million commitment was the maximum (and not the minimum) of Romspen's obligation under the Construction Loan Agreement.
- [141] Much of the evidence that the Developers and GEC wish to rely upon as being part of the factual matrix is evidence of what was said and done during negotiations. I have already explained above why negotiations and draft agreements are not to be considered in the interpretation of the meaning of contractual terms. The evidence that the Developers and GEC urged me to consider in interpreting the agreement reflect the subjective intentions of what or why the Developers might have wanted in the agreement and/or what a particular party or agent of that party subjectively interpreted a draft provision to mean at a particular time during the negotiations. This is not helpful for interpreting the meaning of the contract with any sense of objective certainty.
- [142] In particular, the Developers and GEC pointed to a memo written by Romspen's lawyer and addressed to Romspen, but provided to the Developers during negotiations some three weeks before execution of the contracts and loan agreement (the "Umbach Memo"). They also seek to rely on Romspen's internal communications, and communications between Romspen and a third party, that were unknown to the Developers and GEC during the course of negotiations and did not become known until the discovery process during this litigation. This latter form of communication cannot, in my view, form what was objectively known to both parties, which is a fundamental requirement of the scope of the factual matrix in any case.
- [143] With respect to the former, it is questionable that the Umbach Memo unequivocally supports GEC and the Developers' position. Mr. Umbach's subjective interpretation of the agreement (an opinion drafted some weeks before the agreement was concluded) is unclear. For example, the memo is entitled "Loan Limits" and speaks of the limits of Romspen's obligations to fund until the syndication is met. Nowhere in the memo does Mr. Umbach say that \$212 million was the "minimum" amount of funds that Romspen would make available to the Developers.
- [144] However, it is true that one reading of Mr. Umbach's memo could be said to support the Developers and GEC's position that Romspen was obligated to provide \$212 million of funding regardless of whether the Syndication Condition was met. But even if that reading is accepted, the Umbach Memo is nothing more than one person's subjective interpretation of an obligation, divorced from the context of the entire agreement. Such evidence does not serve to establish an objective fact that would be relevant as background and that was known to both parties. In my view it is a backdoor attempt to admit subjective interpretations as a means of interpreting the text of a contract. Evidence of a party's reasons for wanting or not wanting a particular clause is not admissible for interpreting

contractual term. The Court of Appeal has confirmed that doing so is "a veiled form of argument or wishful thinking": *British Columbia (Technology, Innovation and Citizens' Services) v. Columbus Real Estate Inc.*, 2018 BCCA 340 at paras. 63-64.

[145] Further, I agree with Romspen that inadmissibility of what was said or done during negotiations, including inadmissibility of the Developers and GEC's selective reliance upon certain early drafts of the Construction Loan Agreement, is strengthened where contract includes a "whole agreement clause". Section 17.09 of the Construction Loan Agreement contains such a clause:

[t]his agreement constitutes the whole and entire agreement between the parties hereto and cancels and supersedes any prior agreements, undertakings, declarations, commitments, representations, written or oral, in respect thereof.

[146] While such clauses cannot constrain the court from considering the relevant factual matrix, such clauses do express the objective intent of the parties to exclude evidence of prior agreements and written or oral representations: *Firestar* at para. 38. In my view, such clauses must be given meaning as they represent the objective intent of the parties with respect to the finality and certainty of their written agreement.

[147] In addition to what was said and done during negotiations, much of the rest of the evidence tendered by the Developers and GEC as being part of the factual matrix is also not admissible. Much of this evidence amounts to expressions of their witnesses' subjective interpretations of the agreement. Other statements by these witnesses provide opinion rather than factual evidence. Much of the evidence tendered by the Developers provides their witnesses' subjective belief as to what Romspen's representatives were saying, thinking, or meant in their communications. Many of these opinions or beliefs of the Developers and GEC's witnesses are based on their interpretation of documents reviewed or seen for the first time many years after the contract was negotiated. Finally, much of the evidence tendered by the Developers and GEC speculates as to what their witnesses would have allegedly done four years ago had they been privy to information that they only became aware of years after the fact. None of this is properly part of the factual matrix that informs the interpretation of the written words of a contract. To the contrary; consideration of this type of evidence would detract from the certainty that is sought by the parties and that is provided by reducing an agreement to writing.

[148] I disagree with the Developers and GEC that it was an objective fact known to the Developers and Romspen that the amount of \$212 million set out in Schedule B is a minimum commitment because it is the amount that would have brought the Project to a meaningful state of construction; that being completion of the parking garage. The Developers and GEC note that an earlier draft of the Construction Loan Agreement contained a placeholder amount of \$125 million in Schedule B and submit that the amount was later changed to \$212 million because that is the amount that would have been required to complete the parking garage.

[149] In hindsight, the Developers' witnesses, and Mr. Chu on behalf of GEC, say that they would not have agreed to enter into the Construction Loan Agreement if the \$212 million was not a minimum commitment because that was the amount required to get to the parking garage completion. Anything less would leave them in a precarious state of development, which they would not have agreed to. In my view, the evidence in this respect is nothing more than those witnesses' subjective views of what the contract provides as being consistent with their position at litigation. Accepting this evidence as being of assistance in the interpretive exercise would essentially provide a party's understanding of the agreement as having evidentiary weight in its interpretation.

[150] In any event, the evidence before me does not support a finding that provision of \$212 million was a construction milestone that was an objective fact shared by both parties at the time the contract was entered into. The contemporaneous evidence produced by the Developers and GEC does suggest that neither of them were content with the \$125 million Schedule B amount and that their dissatisfaction was shared with Romspen. However, the evidence does not support a finding that the \$212 million figure was inserted into the agreement because both parties understood that this amount would get the construction Project to the completion of the parking lot.

[151] The only evidence submitted in support of this alleged construction milestone being an objective fact shared by the contracting parties is a text message on November 14, 2019, from Mr. Thom to Mr. Cassidy during the course of negotiations in which he says:

Working on cash flow

1st Draw \$42

Next 5 draws about \$5.5 per month

With deposits 212 gets us to 22nd month podium complete in 24th month

**If you subtract deposits out we get well past completion on the parkade with 212**

[152] There is no evidence that Mr. Cassidy, or anyone else on behalf of Romspen, ever acknowledged or agreed to Mr. Thom's views on this issue. There is no direct response to this message, and I have not been directed to any correspondence in which such a view is acknowledged to be shared by Romspen. While the Developers and GEC's witnesses testified that \$212 million would have achieved the goal of completing the parking lot, Romspen's witnesses expressed the opposite views during their cross examinations. Moreover, in addition to Mr. Chu's views in this respect on behalf of GEC being his subjective views, he was not even involved in the negotiations with Romspen directly. Anything he said to the Developers, or that the Developers said to him, were not necessarily shared with Romspen or came from Romspen.

[153] All of this is illustrative of the problem of using communications made during negotiations for the purposes of interpreting the words of a contract. Something expressed in a text message is often simply one party's view and will often express what that party would like to see in an agreement that is being negotiated. However, it may, and often, only represent that person's subjective intention. In certain circumstances, text messages exchanged between the parties may play a role in establishing a properly considered factual matrix. However, relying on text messages that are not responded to as a pivotal plank in the interpretation of an agreement is particularly dangerous in this day and age of ubiquitous text message communications. Such consideration would not serve to enhance the finality and certainty of written agreements.

[154] Each party may have different reasons for conceding to a point in the agreement. In this particular issue, Romspen says they agreed to increase the Schedule B amount to \$212 million because it would be helpful with their syndication efforts if they were able to represent that the limit of their commitment was 50% of the total amount of the Construction Facility. The Developers and GEC may have had different reasons for wanting its inclusion. However, to quote this Court's decision again from Cymax at para. 85:

even though a party may express certain intentions to the other party, when the agreement is reduced to writing to reflect their mutual and "manifest" intentions, the other party may be entirely satisfied that the document achieves their intentions, and also the objectives of the first party.

[155] As Romspen puts it, this is why, "in [a] world of give and taken", where parties "often have to be satisfied with less than they want," it is "totally dangerous" for a court to pick and choose between competing intentions ("however strongly pursued") rather than focusing on the natural meaning of a written agreement": *Prenn v. Simmonds*, [1971] 3 All E.R. 237 at 240-241, cited in *Cymax* at para. 84. The overall purpose of the Construction Loan Agreement was to provide a construction loan credit facility in the amount of \$422 million for phase I of the Project. There is no reference in the agreement to the completion of a parking garage.

[156] The Developers and GEC also urged me to consider the structure of the payment of lender fees as part of the factual matrix in support of their position. I have already rejected consideration of this position on a plain reading of the contract as described above. In respect of the Developers and GEC's arguments that the fee structure forms part of the factual matrix, they point to Romspen's internal communications regarding that fee structure during the course of negotiations. In my view, these communications are not consistent with the Developers and GEC's interpretation that the fee structure was tied to an obligation to fund a minimum of \$212 million. In any event, these internal communications were not known to the Developers at the time. Furthermore, there are no contemporaneous documents showing that the Developers held a view that the fees were tied to a minimum funding obligation, and there was certainly nothing shared amongst the parties that would indicate this.

[157] Interestingly, if one was to resort to communications that occurred during negotiations with respect to the calculation of lender fees (which in my view one should not), one would need to go back further than the draft pointed to by the Developers and GEC where the amount in schedule B was \$125 million. An even earlier draft showed a placeholder value of zero in Schedule B. However, in that draft the calculation of the lender fees in s. 2.09 was the same as in the executed version where the Schedule B amount was \$212 million. It is difficult to understand how in those circumstances the Developers and GEC could pursue an argument that the amount of lender fees was tied to a minimum obligation to fund \$212 million.

[158] So, what then is the scope of the admissible evidence regarding the factual matrix? In my view, I find the Court of Appeal's explanation in *Penderville Apartments Development Partnership v. Cressey Developments Corp.*, 43 B.C.L.R. (2d) 57, 1990 CanLII 170 (C.A.), cited in *P.C. Devlin Law Corporation v. 403827 B.C. Ltd.*, 2011 BCSC 1255 at para. 28, to be particularly useful in understanding what is meant by the factual matrix: "the [factual] matrix is the genesis, aim and object of the whole transaction - the sort of thing that was once contained in recitals to instruments."

[159] The Construction Loan Agreement does contain recitals. The parties put their minds to what they wanted someone approaching the contract to do in terms of orienting themselves to the "genesis, aim and object of the whole transaction". The recitals state as follows:

WHEREAS the Lender, Borrower and Guarantors entered into the Prior Commitment in respect of the Existing Loan Facilities and granted the Existing Security to the Lender; and

WHEREAS the Borrower has requested, pursuant to a letter agreement among the Lender and the Borrower dated October 11, 2019, the Credit Facilities as an amendment, extension and increase to the Existing Loan Facilities to finance the Hard Costs and Soft Costs associated with the construction and development of the Project and the Lender has agreed to provide the Credit Facilities to the Borrower on the terms and conditions herein set forth;

WHEREAS the Guarantors have agreed to provide certain guarantees in respect of the obligations of the Borrowers hereunder;

[160] From this, one can discern that the genesis of the transaction is the pre-existing Land Loans and that the Developers have requested credit facilities. The aim and object of the transaction is to finance the hard and soft costs of the development of the Project.

[161] I would not go so far as to say that the factual matrix is limited to the above recitals. Certainly, the court can have reference to the market in which the parties were operating, what kind of project it was, the geographic area it was located in, and the market conditions for syndication at the time. At the time, the residential real estate market in the Metro Vancouver area had taken a downturn. The Developers had spent considerable time and effort trying to obtain construction loan financing from more conventional lenders than Romspen, but they were unable to do so. The Developers intended the construction loan

financing provided by Romspen to be a short-term solution because the interest rates and fees were much higher than the Project could bear in the long term. The Developers made it known that they were continuing and would continue to look for alternative financing to pay out Romspen's construction loan at the earliest time.

[162] In my view, what is properly considered from the negotiations as part of the factual matrix is information provided by the Developers to Romspen as part of the due diligence exercise including the Developers' disclosure of its earlier unsuccessful financing attempts. Rather than serving to attempt to interpret the meaning of a contractual term, these facts inform the context within which the agreement was reached.

[163] In addition to the above, I refer to paras. 18, 22, 29-48, and 50-51 as also being part of the relevant factual matrix.

[164] In my view, the admissible factual matrix supports an interpretation that the Construction Loan Agreement did not require Romspen to provide a minimum amount of funding in the amount of \$212 million regardless of whether the Syndication Condition was met.

Was Romspen Entitled to Terminate Funding for Reasons other than Failure to Meet the Syndication Condition?

### **Amendment of GEC and the Developers' Pleadings**

[165] During the course of the trial, I ruled that Romspen had properly pleaded that they were entitled to terminate funding as a result of the Developers' failure to meet other funding conditions, including the failure to meet a condition that they obtain fixed-price contracts covering the cost of all contractors, trades, and suppliers, along with performance, material, and labour bonding in all such contracts for phase 1 of the Project. Consequently, I allowed Romspen to introduce a document relevant to the issue that was produced close to the beginning of trial. That document was a series of email exchanges between representatives of Romspen and the Developers in which the fixed-price contract condition was discussed.

[166] My ruling resulted in applications to amend pleadings by both the Developers and GEC to raise the issues of estoppel, waiver, laches, and acquiescence in respect of Romspen's reliance on the failure of the Developers to meet other funding conditions. In their view, Romspen never gave proper notice of the failure to meet other funding conditions, which the Developers and GEC refer to as a "defaults", and they therefore say that Romspen is precluded from relying on the Developers failure to meet other funding conditions as a reason or justification for stopping funding in March 2020.

- [167] Romspen consented to amendments made by the Developers to their pleadings but opposes the similar amendments made by GEC to their pleadings, mainly on the basis that GEC are strangers to the Construction Loan Agreement. Romspen argues that the concepts of estoppel, waiver, laches, and acquiescence, as pleaded by GEC in their further amended notice of civil claim do not disclose a claim or defence on behalf of GEC because they are pleaded in relation to the Developers.
- [168] While I accept that Romspen has a valid point with respect to privity of contract, I will allow the amendments based upon GEC's argument regarding the incorporation of the Construction Loan Agreement into the GEC/Romspen Subordination Agreement. While I need not comment further on the substance of that argument given my finding that Romspen did not breach the Construction Loan Agreement with the Developers, the amendments are consistent with the approach that GEC has taken to this litigation. Furthermore, as all of these matters are to be heard on common evidence, I see no prejudice to Romspen by allowing GEC's amendments.

#### The Developers' Failure to Meet a Funding Condition is not a Default under the Construction Loan Agreement

- [169] Romspen argues that, under the terms of the Construction Loan Agreement, they were entitled to suspend funding of the Project if the Developers failed to satisfy any one of the approximately 50 funding conditions found in sections ss. 3.01 and 3.03 of the agreement. Romspen says that there were multiple funding conditions that were not met and, therefore, multiple grounds upon which they were authorized to suspend funding of the Project under the agreement.
- [170] There is no dispute that the Syndication Condition was not met. However, the disputes with respect to that funding condition is in respect of whether Romspen made commercially reasonable efforts to syndicate the loan. That issue will be discussed later in these Reasons.
- [171] Before considering the other funding conditions that Romspen relies upon, I will address the nature of those funding conditions, in general. The Developers argue, in part, that Romspen cannot rely on unfulfilled funding conditions that were not specifically referenced in the March 31 Notice or in the Default Notice. The Developers say that by not providing notice of the failure to meet a particular funding condition, which they refer to as an "alleged default", they were denied the opportunity to cure the alleged default pursuant to s. 13.01 of the Construction Loan Agreement. In this manner, the Developers, supported by GEC, characterized the failure to meet funding conditions as a default under the agreement. I disagree with this characterization.
- [172] As Romspen points out, the March 31 Notice was not a notice of default. Rather, it was a notification of the failure to meet a funding condition and that funding was suspended or terminated. Under the Construction Loan Agreement, failure to meet a funding condition is not an event of default. Events of default are a defined term, and the events that qualify are set out in s. 13.01 of the agreement. Failure to meet a funding condition is not a failure of

the developer to observe or perform a covenant or obligation as set out in s. 13.01(c), which failure would give rise to a 10-day notice period under the agreement.

- [173] As Romspen submits, to suggest that funding conditions are "covenants" or "obligations" of the Developers would mean that the Developers were in breach of their "covenants" and "obligations" from the signing of the Construction Loan Agreement, before they submitted any drawdown, entitling Romspen to trigger the default provisions of s. 13.01. This cannot be the case, not as a matter of commercial sense or contractual interpretation.
- [174] The failure to meet a funding condition is not a breach of the agreement; there is no consequence for failing to meet a funding condition other than the cessation of funding. Failure to meet a funding condition does not give rise to a cause of action against the Developers. Pursuant to section s. 3.05, the conditions found in Article 3 of the Construction Loan Agreement are solely for Romspen's benefit and can be waived at Romspen's discretion. There is no provision in the agreement requiring Romspen to give a period of time to cure the Developers' failure to meet a funding condition.
- [175] Moreover, the Construction Loan Agreement has no provision requiring Romspen to give notice of the failure to meet a funding condition or what that notice must contain or what form it must be in. And to the extent that GEC suggests that such a requirement should be read in to the Construction Loan Agreement, I decline to do so. I have been provided with no authority for doing so under any doctrine of contractual interpretation in the circumstances. Doing so would undermine the commercial certainty that is sought and obtained by reducing a contract to writing and would be contrary to the words of the agreement itself.
- [176] Considered in light of the above, the acquiescence, estoppel, and waiver arguments with respect to the unfilled conditions have no merit. As referenced, the parties agreed that the conditions in Article 3 of the Construction Loan Agreement are solely for Romspen's benefit. Romspen has the ability to waive those conditions and there is nothing in the contract that requires Romspen to notify the Developers that they are waving a condition.
- [177] There is no evidence that Romspen provided assurances that they would not require strict compliance with the fixed-price condition or other funding conditions. Moreover, s. 3.05 of the agreement expressly provides that waving preconditions for one drawdown does not waive them for future drawdowns. Section 17.12 provides similarly. Such clauses operate to bar a claim that a party's decision to not insist on strict compliance with a provision in one instance constitutes estoppel: *PD Riverside Ventures Inc. v. Stapleton*, 2023 BCSC 110 at paras. 66-67. Accepting the Developers and GEC's position would, in my view, render s. 3.05 of the Construction Loan Agreement meaningless.

- [178] With respect to the application of laches and acquiescence, those defences only relate to equitable claims. Romspen does not rely on equitable claims in this litigation, and therefore, those defences too must fail: *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at 77, 1992 CanLII 31 (S.C.C.); *Walters v. Talop Estates Ltd.*, 2004 BCSC 879 at para. 29.

### The Fixed Price Contract Funding Condition

- [179] The fixed-price contract funding condition is set out in ss. 3.01(q) and 3.03(d) of the Construction Loan Agreement and requires that the Developers enter into a fixed-price construction agreement with the general contractor for the entirety of phase 1 of the Project.
- [180] In addition to arguments regarding waiver and acquiescence etc. as discussed above, the Developers and GEC argue that this funding condition was in fact met. I disagree. The evidence is clear that at the time the March 31 Notice was sent, the Developers had not entered into a fixed-price contract, as contemplated by the Construction Loan Agreement, with the Developers' general contractor, Metro-Can. The fact that the Developers had reached an agreement on some parts of a fixed-price contract with the general contractor does not meet the requirements of the Construction Loan Agreement with respect to this funding condition.
- [181] The evidence in chief of Mr. Thom, Mr. Ratzlaff and Mr. Sam Hanson was that the Developers and Metro-Can had concluded a fixed-price contract. Brent Hanson takes a slightly different tact in his evidence and qualifies this by saying that the Developers could have entered into a fixed-price contract with the general contractor if Romspen had only given notice that it was required. In an affidavit, Brent Hanson says that prior to the suspension of funding on March 31, 2020, Romspen did not advise the Developers that there were any issues with the status of the fixed-price contracts. However, the documentary evidence shows that the Developers were aware of Romspen's requirement.
- [182] Specifically, in an email dated February 26, 2020, from Genia Ionova of Romspen to Brent Hanson, Ms. Ionova inquired as to how close the Developers were to finalizing their fixed-price contract with the general contractor and putting the required bonding in place. Ms. Ionova specifically advised Brent Hanson that Romspen would "be looking for this all to be in place before the next draw." Mr. Hanson's reply to Ms. Ionova suggested that progress with securing the fixed-price contract was being made and reiterated the request that Romspen fund Draw #4, notwithstanding that this condition was not met. In response, Ms. Ionova advised Brent Hanson on February 28, 2020, that "[w]e will cover #4 but definitely need contracts and bonding resolved prior to the next one." The reference to the next one is generally understood to be a reference to Draw #5.
- [183] It is also clear that the Developers discussed the requirement relayed by Ms. Ionova internally and generally dismissed it as not being consistent with their approach to obtaining fixed-price contracts because it was not in the Developers' financial interest to do

so at that time. At that time, the Developers were still negotiating the details of the entire agreement with the general contractor, and those negotiations continued until at least May 2020 on some substantive issues that remained to be negotiated. I disagree with Brent Hanson's statement that the Developers could have concluded negotiations with the general contractor in "an hour" if only they had been told of the need to do so in March 2020.

- [184] However, I do note that by the time funding stopped on March 31, 2020, while a request for Draw #5 had been made by the Developers, the fifth draw had not yet been provided. As referenced above, Ms. Ionova clearly advised the Developers that Romspen would waive the condition in respect of Draw #4, which was provided to the Developers on March 17, 2020, but that the fixed-price contracts would be required for Draw #5. However, while a fifth drawdown request was submitted by the Developers before the fixed-price contract condition had been met, as will be discussed later, there was no proper fifth drawdown request made under the terms of the agreement.
- [185] Pursuant to s. 2.06 of the Construction Loan Agreement, a drawdown against the Construction Facility "may be made not more than once per month." There is no dispute that Romspen funded a drawdown of approximately \$2.4 million on March 17, 2020. While the fifth draw request may have been submitted to BTY by the Developers in the amount of \$1.7 million prior to March 31, 2020, that would have been the second draw request made that month. Such a request is not in compliance with s. 2.06.
- [186] Thus, in my view, given that Romspen indicated that the fixed-price contracts would not be required until the fifth draw, it cannot now say that the Developers were not in compliance with the funding condition as at March 31, 2020, at a time before it says that the fifth drawdown could have been made.
- [187] On the evidence before me, had a proper drawdown request been made on April 1, 2020, the Developers did not have a fixed-price contract in place and, under the terms of the agreement, Romspen would have been entitled to stop funding if it so chose. However, given the timing, I am not satisfied the lack of a fixed-price contract played a role in Romspen's decision to stop funding as at March 31, 2020. In any event, given my conclusion that Romspen was entitled to stop funding on the basis of the Syndication Condition having not been met, I do not need to determine whether Romspen was entitled to rely on this or any other alleged failure of the developer to meet a funding condition under the agreement.
- [188] Before I conclude this section, I will comment on GEC and the Developers' argument that they were not required to submit any drawdown request after March 31, 2020, because the March 31 Notice was a repudiatory breach of the Construction Loan Agreement by Romspen. I need not consider this argument because I have found that Romspen was entitled to cease funding under the proper interpretation of the agreement and, as will be discussed later in these Reasons, Romspen complied with its contractual duties regarding syndication and did not perform its contract in bad faith.

## Conclusion on Issue 1

[189] Having considered the words of the Construction Loan Agreement in light of the admissible factual matrix, I have concluded that Romspen was entitled to cease funding on March 31, 2020, because the Syndication Condition was not met. Romspen was not obliged to provide a minimum of \$212 million to the Developers regardless of whether the Syndication Condition was met. If the parties had intended for Romspen to have a minimum funding commitment they could have simply said in s. 2.02 that Romspen "has an obligation to fund no less than \$212 million" rather than saying, as they did, that Romspen "has no obligation to fund future advances beyond the portion of the Construction Loan Amount set out in Schedule B". In another words, to stipulate that the limit of something will be X is not to guarantee that the minimum amount of that thing will also be X.

## ISSUE 2: DID ROMSPEN MAKE COMMERCIALLY REASONABLE EFFORTS TO SYDNICATE THE CONSTRUCTION FACILITY UNDER THE TERMS OF THE CONSTRUCTION LOAN AGREEMENT?

[190] Pursuant to the Construction Loan Agreement, Romspen was required to use its commercially reasonable efforts to syndicate the loan. This obligation is set out in s. 2.02(2) of the agreement where the Developers request Romspen to "commence seeking Persons to acquire participations in the Construction Facility sufficient to aggregate to the Construction Loan Commitment Amount". The clause continues in (a) to state that Romspen has "until March 31, 2020 to use its commercial reasonable efforts to seek Persons to acquire participations in the Construction Facility".

[191] There is no dispute that the Syndication Condition was unmet in the sense that Romspen was not satisfied by March 31, 2020, that it had secured sufficient participations to provide for the full Construction Loan Commitment Amount of \$422 million. Given my finding that Romspen did not have an obligation to fund a minimum of \$212 million, and that its obligation to fund draw requests and make advances available to the Developers was subject to the Syndication Condition, the question is whether Romspen complied with its contractual duties regarding the Syndication Condition. And consequently, the question is whether Romspen can rely on the failure to meet the Syndication Condition as a basis for suspending draws and advances to the Project as at March 31, 2020.

[192] Not surprisingly, Romspen's position is that it complied with its duty to make commercially reasonable efforts to syndicate the loan, whereas the Developers and GEC argue that Romspen did not make such efforts and thus cannot rely upon the failure to meet the Syndication Condition as a ground for terminating funding.

## The Applicable Legal Principles

[193] Section 2.02(2)(a) of the Construction Loan Agreement provides:

- (a) the Lender shall have until March 31, 2020 to use its commercial reasonable efforts to seek Persons to acquire participations in the Construction Facility;

[Emphasis Added.]

[194] Courts have interpreted the phrase "commercial reasonable efforts" in other agreements. First, "commercial reasonable efforts" has been interpreted by looking at the ordinary dictionary meaning of the words. In that sense, "reasonable" implies sound judgment, a sensible view, or a view that is not absurd. "Commercial" means having profit or financial gain as opposed to loss as a primary aim or object: 364511 Ontario Ltd. v. Darena Holdings Ltd., 78 A.C.W.S. (3d) 30, 1998 CarswellOnt 670 [Darena] at paras. 59-60, aff'd 1999 CanLII 2422 (C.A.), cited in 0997723 B.C. Ltd. v. Lee, 2022 BCSC 2066 at para. 62. Thus, when determining whether a party made commercial reasonable efforts, the standard is not one of correctness or perfection. Different entities could approach the task in different ways and while one could do a better job than the other, both could still comply with the requirement to have taken commercial reasonable efforts.

[195] This Court has held that there is no difference in standards between the phrases "reasonable commercial efforts" and "all reasonable commercial efforts". The latter phrase does not connote a higher obligation upon the party with the inclusion of the word "all"; the same degree of effort is required: Nelson v. 535945 British Columbia Ltd., 2007 BCSC 1544 at para. 37. The "commercially reasonable" standard permits a party to abandon efforts once the economics of those efforts - from its own perspective - stop making sense: Westmount-Keele Limited v. Royal Host Hotels and Resorts, 2018 ONSC 5170 [Westmount-Keele] at para. 80(c); see also Lee at para. 71. As Our Court of Appeal put it in Sutter Hill Management Corporation v. Mpire Capital Corporation, 2022 BCCA 13 [Sutter Hill] at para. 40, commercially reasonable efforts "[mean] those efforts that would appear to be reasonable from a commercial perspective".

[196] The standard of "commercially reasonable efforts" is lower than "best efforts": Precursor Capital Corporation v. HydRx Farms Ltd., 2018 BCSC 1150 at para. 141; Lee at para. 71. I do not agree with the Developers that "commercially reasonable efforts" meant that Romspen was required to do everything possible in the context of the case stopping only at what was "commercially unreasonable". In making this submission, the Developers rely on Sutter Hill. However, the phrase in question in Sutter Hill was "commercially reasonable best efforts". The use of the word "best" was key in the Court of Appeal's determination that the party in that case was required to take all steps except those that were commercially unreasonable. The Construction Loan Agreement does not include the word best.

[197] The standard of "commercially reasonable efforts" is discussed in Dow Chemical Canada ULC v. NOVA Chemicals Corporation, 2018 ABQB 482, rev'd in part on other grounds 2020 ABCA 3320:

[38] Commercial contracts should be interpreted in accordance with sound commercial principles and good business sense: John D McCamus, The Law of Contracts, 2nd ed (Toronto: Irwin Law, 2012) at 763-766. The standard imposed by a requirement of commercial reasonableness was considered in Hall at 245:

...Clearly it is highly contextual, dependent upon the relevant circumstances and the facts of the case

...What it means is efforts that are reasonable in the circumstances all things considered. What is reasonable in the circumstances will obviously depend on the facts of particular case.

The standard of commercially reasonable efforts does not oblige a party to exhaust all possible means of fulfilling the condition, nor to undertake steps which are expensive, time consuming or commercially irresponsible.

[198] In the circumstances of this case, the phrase "commercial reasonable efforts" should be taken to mean that Romspen was required to make efforts that made sense given the prevailing commercial realities and Romspen's and the Developers' mutual objective of syndicating the loan: Lee at para. 71.

[199] A self-created incapacity to achieve a particular result does not constitute a commercially reasonable effort Westmount-Keele at paras. 80(e) and 86.

[200] It is often appropriate for a court to have regard to expert evidence in assessing whether a party's efforts were "commercially reasonable": HSBC Bank Canada v. Kupritz, 2011 BCSC 788 at paras. 35-36.

### The Relevant Context in this Case

[201] While the jurisprudence may provide some guidance, consistent with the principles of contractual interpretation set out in Sattva, the requirement that Romspen make commercially reasonable efforts to syndicate the loan must be interpreted in light of the agreement as a whole and consistent with the parties' objective intentions existing at the time: Sutter Hill at para. 36.

[202] I had the benefit of six expert reports authored by three experts on this issue. The Developers tendered the report of Martin Glynn. GEC tendered the report, reply report, and supplemental reply report of Gus Stavropoulos. Romspen tendered reply reports of Timothy Royds to Mr. Glynn's and Mr. Stavrapoulos' initial reports. I have found the expert reports to be of assistance, and I consider them all in my determination.

[203] Each of the experts has relevant experience grounding their interpretation of commercially reasonable efforts in the syndication context. I have given Mr. Royds' reports significant weight as he is the only expert with experience on both the lender and borrower side of the syndication process. His experience on the lender side is from the time he spent at a commercial lender, and his experience on the borrower side is for a private real estate development entity.

- [204] Mr. Stavropoulos has extensive experience participating in syndications from the borrower side during his nearly 20 years with a private development company; however, while his experience on the borrower side is extensive, he has never worked for a lender or led a syndication process, so I have given his opinion as to how a lender would perceive certain approaches from a lead lender less weight.
- [205] There is no doubt that Mr. Glynn's experience is extensive. He spent more than 30 years in the financial services industry, including as president of HSBC Bank Canada. He is currently an advisor to a real estate fund manager focusing on office and residential investments. However, I note that Mr. Glynn has not personally worked to syndicate a loan for approximately 30 years. Nonetheless, he has had extensive exposure to the syndication process and is very familiar with it through the various roles he has held throughout his career and I have given his opinion considerable weight.
- [206] As Mr. Royds stated, the syndication of large construction loans is a complex and nuanced process with no set rules of engagement; how one approaches any syndication process is determined by the context in which a particular Project exists. The context in this case include the facts referred to above as being the admissible factual matrix. Of particular relevance is that the Construction Loan Agreement was for a multi-hundred-million-dollar loan for a multi-hundred-million-dollar Project. Also relevant is that Romspen had never previously syndicated a loan amount greater than \$70 million, nor had it syndicated a loan with more than two partners.
- [207] I accept that the following further contextual considerations in relation to the syndication of large construction loans are applicable, as identified by the experts:
1. Syndications are complex processes that can be likened to "herding cats".
  2. The likelihood of success in securing financing is greater for a smaller amount than a larger amount, and the likelihood of success is greater when the lead lender takes more of the loan than when the lead lender takes less of the loan.
  3. Notwithstanding the above, all the experts agree that it is helpful for a lead lender to retain flexibility as to its syndication commitment to assist with a successful syndication, and that a lead lender could take significantly less than 50% of a syndicated loan.
  4. It is easiest for construction Projects to obtain financing before excavation begins. A project is most difficult to finance when a project is partially excavated or construction has stalled.
  5. It is not uncommon for a lead lender to adjust loan pricing depending on the feedback received from prospective syndicate partners.
  6. All the experts agree that the term "soft commitment" is common in the lending industry and is used to indicate that a lender is agreeable in principle to participating in a syndicated loan to some degree, subject to further due diligence and discussions before entering a binding commitment.

[208] Mr. Royds identified the following contextual considerations that impact on the way in which a syndication process is pursued. Not one of these considerations was challenged by the other parties' experts:

1. general market conditions as driven by macroeconomic circumstances;
2. the internal processes of the lead and participant lenders;
3. the lead and participant lenders' views on risk and pricing and hold limits for construction Projects;
4. the experience and financial wherewithal of the lead lender and borrower;
5. the Project fundamentals such as profit margin, presale coverage, construction complexity, size and phasing of the Project;
6. existing financial circumstances of and the relationship between the lead lender and borrower; and
7. the seasonality of the syndication market.

[209] As with the interpretation of Romspen's financing obligations under the Construction Loan Agreement, what was said and communicated during negotiations is not part of the admissible factual matrix for the purposes of interpreting what is meant by commercially reasonable efforts. The only admissible use of what was said during negotiations is to establish objective facts known by both parties. With respect to Romspen's syndication efforts, the relevant contextual factor from the negotiations is that the timing of when Romspen was to commence its syndication efforts changed during the course of the negotiations.

## Analysis

[210] In my view, Romspen's efforts to syndicate the construction loan were commercially reasonable in the circumstances.

## Summary of Romspen's Approach and Efforts to Syndicate the Loan

[211] Romspen assigned two senior and experienced individuals to oversee the syndication process: Mr. Fonseca and Mr. Cassidy. Mr. Fonseca took the lead and has extensive experience in financing real estate developments throughout North America, including about \$750 million in loan syndications. Mr. Cassidy has 30 years in construction financing and also has experience in syndication. Mr. Fonseca and Mr. Cassidy were both provided with staff and resources to assist them in their efforts.

[212] Romspen's syndication strategy was reasonable. It developed a two-tranche strategy which was pursued in light of the structure of the Project. Under this structure, as priority ranking lenders, the A-tranche or "senior" participants, would have less risk and, as a result, earn less in terms of interest and fees. On the other hand, the B-tranche or "junior" participants,

would take more risk and would earn a higher return as the lower priority lenders. I accept that this was intended to allow for a wider variety of potential syndication partners as compared with syndication on a pari passu basis, in which all lenders participate on equal terms. I accept Mr. Royds' opinion that this two-tranche structure is common in syndicated construction loans. The individual responsible for financing from the developer side, Mr. Thom, has attempted to implement the same type of structure both before and after November 2019.

- [213] Given the cost of the Project and its phased structure, it was reasonable, in my view, for Romspen to create an A-tranche roughly sized so that it could be repaid on completion of phase I of the Project, through the sale of towers D, E, F, and G, and a B-tranche representing the balance of the required funds. The B-tranche would become the "stub loan", repaid only after a new financing or completion of phase 2.
- [214] I accept that Romspen's plan was to hold some of the A-tranche and some of the B-tranche and that Mr. Thom was aware of this during the syndication process. I also accept that the syndication approach was structured such that the size of the A-tranche taken by Romspen would depend upon the number of committed senior participants and the amount of the A-tranche held by each. Similarly, the size of the B-tranche taken by Romspen would depend upon what was left over and on the participation level of other junior participants. Maintaining this flexibility was reasonable in the circumstances.
- [215] In my view, Romspen began its preparation of materials and its outreach efforts to potential partners within a reasonable period of time. The evidence before me shows that Romspen began its outreach efforts within two weeks of the Construction Loan Agreement being executed. This is particularly reasonable considering that the timing of when Romspen was to begin its syndication efforts changed through the course of negotiations. I also note that Romspen's syndication efforts were initially impacted by the seasonality of the syndication market and, in particular, the Christmas holiday period, which all experts agree is reasonable. In light of this, I reject the Developers' submission that, to be reasonable, syndication efforts should have begun before the Construction Loan Agreement was concluded.
- [216] Mr. Glynn opined that syndication efforts should "start prior to the construction loan being signed so that there would be a high level of confidence in the syndication". While it may be appropriate to commence syndication efforts before a Construction Loan Agreement is concluded in certain circumstances, I do not agree that the circumstances of this case required such an effort in order to be reasonable. In this case, requiring that Romspen begin syndication efforts before the Construction Loan Agreement was concluded ignores the context in which Romspen was given its mandate to syndicate, as well as the terms of the construction contract agreement itself.

- [217] Romspen's decision to wait to make syndication efforts until the contract was signed was not unreasonable in this case. As mentioned above, the timing of when syndication efforts would start was still a subject of negotiation in the weeks leading up to November 22, 2019. The Developers and Romspen continued to discuss the timing of the commencement of Romspen's syndication efforts, including the possibility that Romspen would not start syndication efforts until it received notice to do so, and this notice may have been as late as June 2020. The objective fact known to both parties (as revealed by the negotiations) is that the time for Romspen to commence syndication efforts was not settled until the contract was signed. In the context of this case, I prefer Mr. Royds' expert opinion that, where a lender with the pre-existing acquisition and development loan is given the mandate to syndicate, it is reasonable for the terms and conditions of the construction loan to be settled between the existing lender and borrower prior to syndication efforts commencing.
- [218] Romspen's preparations of promotional materials in support of the syndication efforts was also, in my view, commercially reasonable. The promotional materials included what the parties referred to as marketing "teasers". These teasers set out, among other things, details about the Project to be financed, the proposed structure of the syndicated loans, terms for prospective lenders to consider, construction cost estimates, forecasted sales projections, and details about the Developers other equity holders and the Guarantors. These materials were prepared with input from the Developers and with the assistance of many members of Romspen. Romspen updated its teasers as it continued the syndication process to address the feedback it received from prospective lenders. Romspen also updated the teasers to reflect the construction work being carried out on the Project by the Developers. In addition to the teasers, Romspen created a data room for prospective syndication partners to review documents related to the Project, the Construction Loan Agreement, and the Construction Facility.
- [219] Romspen commenced its syndication efforts in early December 2019 when representatives discussed the loan with prospective lenders at the Toronto Real Estate Forum. Romspen took a reasonable approach to monitoring its syndication efforts by way of weekly meetings where such efforts were discussed.
- [220] Romspen had a strategy for who to approach as syndication partners that considered existing business relationships, the types of lenders, and their financial capacities. Their strategy was to focus on potential A-tranche or senior participants first. From December 2019 to March 2020, Romspen reached out to different types of lenders, including large and medium-size financial institutions, investment management companies, private investment and private equity firms, real estate investment companies, mortgage lenders, an insurance company, and credit unions. These efforts were led by Mr. Fonseca who reached out to these potential lenders over the phone, provided copies of teasers, and access to the data room for those who signed nondisclosure agreements. It was common for Mr. Fonseca to have further discussions with potential syndicate partners after making the initial contact in which questions were answered and/or soft commitments were

obtained.

- [221] By late January 2020, Romspen had obtained a significant amount of soft commitments from a number of potential syndication partners, including a conditional term sheet for a \$50 million participation from Equitable Bank.
- [222] To the extent that the Developers had any role in Romspen syndication efforts, it was limited to advising Romspen of the potential lenders the Developers had already contacted or were currently in discussions with relating to providing preferred construction financing for the Project that the Developers continued to pursue. Mr. Thom provided such information to Romspen to help prevent Romspen from contacting lenders that the Developers still hoped to obtain construction financing from to pay out funds advanced under the Construction Loan Agreement with Romspen.
- [223] Although Romspen achieved some success in the syndication efforts, I accept that they received consistent feedback from prospective syndicate partners who declined to participate. In my view, it is uncontested on the evidence that such feedback included concerns about: the complexity and cost of the Project; the relative inexperience of the Developers, concerns about the Developers ability to fund cost overruns, the Developers relatively small equity position in the Project; the relatively small profit margins projected for the Project; potential difficulties collecting against the Developers and the Guarantors should a default occur; and the need by some lenders to control their exposure to British Columbia. Both Mr. Glynn and Mr. Royds agreed that these factors could serve to make syndicating the loan more difficult.
- [224] As will be addressed later under Romspen's good faith obligations, the negative feedback Romspen received about the project was not new. Indeed, unknown to Romspen, the feedback it was receiving from certain potential syndicate partners (concerns which Romspen also shared) was consistent with the Developers' concerns about the Project and consistent with the feedback the Developers had received from other lenders during their own unsuccessful attempts to obtain construction financing in 2018 and 2019.
- [225] As Mr. Glynn agreed, by mid-February 2020, financial markets began to feel the effects of the then impending COVID-19 pandemic and lenders were becoming increasingly cautious about deploying capital. Nonetheless, Romspen continued with its efforts to syndicate the loan into March 2020. By this time, Romspen says that it had soft commitments in the A-tranche in excess of \$150 million. However, as Mr. Glynn agreed, by mid-March 2020, capital markets were to some extent "freezing up" and businesses were doing what they could to preserve liquidity. Lenders who had shown some interest in participating in the syndication began to back out. I accept that at least part of the reason for these withdrawals was the uncertainty surrounding COVID-19 at this time.

[226] March 31, 2020, was the deadline upon which the parties had agreed that syndication efforts needed to be completed, unless Romspen decided to waive that condition. By that time, Romspen concluded that there was no commercial prospect of syndicating the Construction Facility and that continuing such efforts would not make economic sense. It issued the March 31 Notice in which it referenced COVID-19 as being a contributing factor in its inability to syndicate the loan.

### **Romspen's Syndication Efforts were Commercially Reasonable**

[227] On a number of instances in my summary above, I have commented on what I view to be the reasonableness of Romspen's syndication efforts. With the above summary in mind, I will address some of the Developers and GEC's specific criticisms of the syndication efforts.

[228] While some of the arguments put forward by the Developers and GEC point to ways in which Romspen might have conducted its syndication efforts differently or better, the submissions do not, in my view, detract from the reasonableness of Romspen's approach or efforts. As mentioned above, commercially reasonable efforts are not assessed on a correctness or perfection standard. Rather, it is what is reasonable in the circumstances.

[229] GEC's argument in respect of the reasonableness of Romspen's syndication efforts focuses on its allegation that it was unreasonable for Romspen to seek to syndicate a larger amount than \$210 million. They say that Romspen should have specifically put \$210 million as the amount sought for syndication. GEC's argument in this respect is similar to the Developers argument that Romspen failed to clearly commit to any amount in its syndication offering or teasers.

[230] Much of the argument in this respect is derived from a comparison of a first draft teaser that was not sent out to prospective syndicate partners and the teasers that were eventually sent out. The Developers and GEC argue that the teasers that went out to prospective partners should have been more like the first draft. They say that, unlike later drafts, the first draft explicitly stated that Romspen would finance the \$212 million B-tranche and that it was seeking partners to invest in the \$210 million A-tranche. They submit that Romspen was not clear on the extent of its financial commitment in the teasers that were sent out to prospective partners. They say that the teasers that were sent out stated that Romspen had committed to fund up to \$212 million of the \$422 million loan prior to confirming commitments in the A-tranche of up to \$270 million. Romspen would continue to participate in a junior position in the B-tranche of approximately \$152 million. The actual balance of the B-tranche junior participation was said to fluctuate as purchaser deposits become available and senior participation A-tranche funds are drawn, but it was stated to be never be less than \$60 million.

- [231] The assumption underlying GEC and the Developers' argument that Romspen should have stated that it was committing \$212 million as opposed to saying it was committing up to \$212 million is premised on their interpretation of the Construction Loan Agreement as providing an obligation that Romspen fund a minimum of \$212 million. As discussed earlier, that is not my interpretation of the agreement.
- [232] Consistent with the Construction Loan Agreement, in my view, the teaser made it clear that Romspen was committed to fund "up to \$212 million" of the \$422 million Construction Facility. As such, Romspen advised prospective lenders that it was prepared to take just slightly over half of the fully syndicated loan which was proposed to be structured as an A-tranche of \$270 million and a B-tranche of \$152 million. The teaser describes that Romspen's commitment of up to \$212 million could be in either the A or B-tranche. And, in my view, the evidence before me supports that the Developers were aware that this was the approach Romspen was taking.
- [233] The evidence does not support GEC's contention that Romspen was trying to reduce its participation in the Construction Facility down to \$60 million. As referenced above, the teaser states that Romspen's participation will be in both the A and that the B-tranche and that participation in the B-tranche would range from \$60 million to \$152 million and its total participation in both tranches would be up to \$212 million. There is no evidence before me that any potential syndication partners declined to participate because they were unclear on Romspen's level of participation or because they were of the view that Romspen was making an insufficient commitment to the Construction Facility.
- [234] In my view, the approach taken by Romspen allows for the flexibility in structuring the syndication that the experts agree is desirable in such a loan. The experts all agreed that, when trying to syndicate a loan successfully, it can be helpful for a lead lender to retain flexibility in its syndication commitment. They also agreed the lead lender could take less than 50% of a syndicated loan. While it may be a significant signal where a lead lender is to hold 50% or more of the loan, they also agreed that the size of the two tranches in the syndication may need to shift to complete syndication given a particular lender's minimum or maximum lending requirements.
- [235] Romspen's approach to describing its commitment in the teasers was, in my view, commercially reasonable. There is nothing nefarious in the change between the first and the second draft. The second draft accurately reflected a syndication structure that Romspen was content to go to market with and that was consistent with the proper interpretation of the Construction Loan Agreement.
- [236] The Developers rely on Mr. Glynn's opinion for its submission that it was unreasonable for Romspen to offer an initial interest rate for the A-tranche participants at 5.5%. However, the Developers have mischaracterized Mr. Glynn's opinion in this respect. As Romspen points out, Mr. Glynn does not say that loan pricing for the A-tranche senior participants of 5.5% was too low and therefore unattractive to prospective partners. Rather, Mr. Glynn says

that the 5.5% interest rate was within the market range albeit "at the lower end of market pricing given normal financing markets." Being within the market range is, in my view, an indicator of the reasonableness of Romspen's approach in this respect, not of its unreasonableness.

- [237] In any event, as its syndication efforts continued, Romspen revised its teaser to propose a floating rate rather than a fixed rate for the senior participants of the A- tranche. That floating rate was almost identical to the fixed rate, but may have been more attractive for some prospective lenders.
- [238] The Developers also argued that the potential partners Romspen reached out to were comprised of lenders whose mandates did not permit them to participate in investments in construction in British Columbia. I disagree. The evidence is that only three lenders of about 30 potential lenders approached by Romspen had some issues with investing in British Columbia. The evidence is that one of those entities could have contributed to the Project through another affiliated lender.
- [239] Both the Developers and GEC say that Romspen should have used a broker to assist in the syndication effort and not doing so was unreasonable. I disagree. There is no consensus from the experts that the use of a broker, or more precisely not using a broker, is an indicator of unreasonable commercial efforts. In fact, Mr. Stavropoulos, the expert tendered by GEC, opined that it is not typical to use a broker in syndication efforts. However, he opined that, in the unusual circumstances of a struggling syndication effort, using a broker could, in his view, assist in a successful syndication effort by exposing the deal to more potential partners.
- [240] Mr. Royds agreed that using a broker in syndication efforts is not typical. In his experience on both sides of attempted syndications, he has never seen a party use a broker. Mr. Royds further opined that, in his experience, brokers are not used by lenders to syndicate construction loans and that his initial reaction upon receiving a potential loan from a broker would raise alarm bells. In his view, from a potential lender's perspective, the use of a broker would infer that there was something wrong with the deal and could devalue the perceived quality of the deal potentially reducing the chances of a successful syndication.
- [241] The expert's divergent views on whether a broker would be useful need not be resolved. I accept that the use of a broker may or may not have assisted in the syndication efforts. However, depending upon the circumstances, both using and not using a broker to syndicate the construction loan may demonstrate sound judgment and a sensible approach. Nothing indicates to me that not using a broker takes Romspen's efforts out of the range of what was commercially reasonable.

- [242] The Developers and GEC submit that Romspen had investors that were willing to participate in the syndication of the Construction Facility, but Romspen unreasonably cut those investors out of the loan. As I understand it, this is a reference to InterCap's participation in the Land Loans as a 50-50 partner with Romspen and the fact that InterCap's interest was paid out and it did not participate in the Construction Loan Facility when the Construction Loan Agreement was executed.
- [243] I do not agree with GEC's characterization that Romspen's first effort in the syndication process was to get rid of a syndication partner that had a \$47 million investment in the Project. However, it is true that Romspen faced a decision to make during the negotiations of the Construction Loan Agreement as to whether to invite InterCap to participate as an equal partner to Romspen in making available the Construction Facility. While Romspen and InterCap had partnered in various loans in the past, they had never partnered on a construction loan before, and it is not clear to me that they would have been able to come to an agreement.
- [244] Nonetheless, it is true that the views amongst Romspen's management differed on whether to include InterCap in the Construction Loan Agreement. Mr. Roitman's preference was to invite InterCap to participate from the outset and have InterCap provide half of the funds that would be advanced by Romspen to reduce Romspen's risk exposure. On the other hand, Mr. Cassidy believed that inviting InterCap to partner on an equal footing at the outset, as opposed to asking InterCap to become a participant in the syndicated loan at a later time, would have been premature, and he was concerned that doing so could make syndication more complicated.
- [245] Ultimately, Romspen's management team exercised its judgment and decided that InterCap would not participate at the outset and instead would be approached to participate in the B-tranche as a syndicated lender after Romspen had entered into the Construction Loan Agreement. I agree with the Developers and GEC that the contemporaneous evidence does not support Romspen's position that the main reason Romspen did not want InterCap to participate from the outset was due to disagreements over the ability to control the deal. In my view, the documents suggest that the main reason was Romspen's unwillingness to share the fees with InterCap on a pro rata basis. However, that does not make the decision to not include InterCap from the outset a commercially unreasonable one. Structuring a syndicated loan can require a significant amount of individual negotiation. If Romspen had an equal partner in the form of InterCap from the outset, its ability to be flexible in structuring the shape of the syndicated loan, the lenders within it, and other matters relevant to the successful completion of the syndication could have been negatively affected. In other words, involving InterCap before entering into the Construction Loan Agreement could have been an impediment to syndication rather than a facilitator. Romspen was entitled to make this business decision.

[246] Finally, the Developers argue that Romspen's syndication efforts were unreasonable because Romspen chose to direct potential syndication investors and partners away from the Project to its most favoured projects, including to another project in White Rock, British Columbia. In my view, the evidence does not support such a finding. Romspen's evidence that it was not attempting to undertake syndication efforts with respect to other projects at the same time as it was attempting to syndicate the Developers and Project is uncontradicted. In fact, syndication of the White Rock project did not occur until November 2020, many months after the March 31 Notice was provided to the Developers. There is no evidence that Romspen was trying to syndicate the White Rock development between December 2019 and March 2020 at the same time it was attempting to syndicate the Project.

## Conclusion on Issue 2

[247] Romspen pursued the syndication of the Construction Facility in a commercially reasonable manner. The fact that Romspen was not successful in its efforts to syndicate was not a result of its failure to act commercially reasonably. The actions it took were within the range of reasonableness, and the expert evidence supports this. I conclude that Romspen did not breach its duty to make commercially reasonable efforts to syndicate the loan as required by s. 2.02(a) of the Construction Loan Agreement.

ISSUE 3: TO WHAT EXTENT DID ROMSPEN OWE THE DEVELOPERS AND/OR GEC A DUTY OF GOOD FAITH AND HONESTY IN THE PERFORMANCE OF ITS CONTRACTUAL OBLIGATIONS, INCLUDING IN RELATION TO ITS DECISION TO TERMINATE FUNDING?

## Parties' Positions

[248] In the event that the Syndication Condition did not require Romspen to fund a minimum amount (as I have found), the Developers and GEC nonetheless rely on Bhasin, Callow, and Wastech to argue that Romspen breached its good faith obligations at various points throughout the Construction Loan Agreement. As I understand their positions, the Developers and GEC (either individually or together) argue that Romspen breached its good faith obligations (1) by providing a dishonest reason for terminating funding: Romspen blamed COVID-19 and a lack of capital while the Developers and GEC say Romspen ultimately wanted to preserve liquidity, preferred to fund other projects, and had disdain for the Project; (2) related to the previous point, by continuing to fund other projects, generally; (3) by dishonestly performing the Construction Loan Agreement because upper management, specifically Mr. Roitman, showed "disdain" for the Project and various individuals lied about the progress of the syndication effort; and (4) by misleading the Developers and GEC by not telling them, before signing the Construction Loan Agreement, that Intercap would not be participating in the deal.

- [249] Romspen submits that only certain aspects of the discretion it is afforded under the Construction Loan Agreement were subject to the duty of good faith and honest performance. Where such discretion is subject to that duty, Romspen says it was met in this case.
- [250] With respect to (1) above, it is not entirely clear to me if the Developers and GEC are saying that Romspen breached its good faith obligations by deciding not to waive the Syndication Condition for an improper reason, or if they are arguing that Romspen breached its good faith obligations by lying in the reasons it gave. In any event, an implication of either argument is that Romspen exercised its contractual discretion to not waive the Syndication Condition in a way that is disconnected to the purposes of the agreement and the afforded discretion. To the extent that the Developers say that Romspen breached its good faith obligations by deciding not to waive the Syndication Condition for the wrong reasons, that position is untenable. I agree with Romspen: in determining whether to waive the Syndication Condition, which was inserted for Romspen's sole benefit, Romspen did not owe any good faith duties. This will be discussed first.

#### Romspen's Decision to not Waive the Syndication Condition was not Subject to the Duty of Good Faith in Contractual Performance

- [251] To the extent that the Developers argue that Romspen's decision to terminate funding by not waiving the Syndication Condition was a breach of its duties of good faith, I disagree. In exercising its discretion to waive the Syndication Condition, which was inserted for Romspen's sole benefit, Romspen did not owe any good faith duties.
- [252] Neither Callow nor Bhasin involved a situation where a party relied on good faith to compel the opposing party to do something (waive a condition). Rather, in those cases, the duty of good faith and honest performance limited how a contracting party could exercise a unilateral, positive right. Bhasin dealt with dishonest performance in the exercise of a non-renewal provision, and Callow dealt with dishonesty in exercising a right of termination. Cases of exercising contractual rights dishonestly and/or misleading a counterparty must be distinguished from cases where a party simply exercised its contractual rights in its interest, something which a party is still entitled to do after Bhasin: Bhasin at para. 70.
- [253] The discretionary termination clauses at issue in Bhasin and Callow are more like s. 2.11 of the Construction Loan Agreement than they are to the discretion afforded to Romspen as to whether the Syndication Condition should be waived under s. 3.03(a) and 3.05. Section 2.11 of the Construction Loan Agreement reads:

#### 2.11 No Obligation to Advance

The Borrower agrees that neither the preparation nor registration of any documents contemplated herein shall bind the Lender to make an advance it being agreed that any advance of the Construction Facility from time to time shall be in the sole absolute unfettered discretion of the Lender.

[254] It is clear, and Romspen does not dispute, that since Bhasin, the duty of good faith applies to the exercise of Romspen's discretion under s. 2.11. But that is different than the discretion Romspen was afforded under ss. 3.03(a), 3.05 and 17.12. For ease of reference, I have reproduced these sections below.

### 3.03 Subsequent Drawdowns under the Construction Facility

On or before each Drawdown under the Construction Facility subsequent to the first Drawdown to occur after the date of this Agreement, the following conditions shall be satisfied by the Borrower:

- (a) in respect of any Drawdown after March 31, 2020, the Lender shall be satisfied that in the aggregate, participation of other Persons committed to acquire participations (as set out in Sections 2.02(2) and 16.02) is sufficient to provide the full amount of the Construction Loan Commitment Amount provided that the Lender may choose to waive this request with respect to any one Drawdown without waiving the request for subsequent Drawdowns.

### 3.05 Conditions and Waiver

The conditions set forth in Sections 3.01, 3.02 and 3.03 are inserted for the sole benefit of the Lender and if any of such conditions are not fulfilled by the Borrower the Lender may refuse to make any advance and terminate its obligations hereunder or any of such conditions may be waived by the Lender, in whole or in part (with or without terms or conditions), in respect of any Drawdown without prejudicing the right of the Lender at any time to assert such conditions in respect of any subsequent Drawdown.

### 17.12 Waiver

Any term or condition contained in this Agreement for the benefit of the Lender may be waived in whole or in part by the Lender at any time. No advance, either singularly or collectively, shall constitute a waiver of any of the Borrower's obligations nor obligate the Lender to make further advances under the Construction Facility.

The Lender's failure to insist upon a strict performance of any obligation or covenant of this Agreement by the Borrower or to exercise any option or right herein shall not be a waiver, or relinquishment for the future of such obligation or covenant, option or right, but the same shall remain in full force and effect and the Lender shall have the right to insist upon the strict performance by the Borrower of any and all of the terms and provisions of this Agreement and the Security.

[255] The ability for a party to waive a condition that was inserted solely for its benefit is common. Parties can agree that one of them may waive the contractual right to an almost unlimited number of obligations. A party's decision to waive such a condition is a party's decision to not rely on its strict contractual rights. In Bhasin, reaffirmed by Callow, the Supreme Court of Canada held that even when principles of good faith are applied, a party is entitled to exercise their strict contractual rights in their own best interests: Bhasin at

para. 70; Callow at para. 82. The duty of good faith is not to be used to second-guess or scrutinize a party's motives for doing so.

- [256] The way I see it, a contractual term that is inserted for one party's benefit that can be waived by that same party make up two sides of the same coin. The first side is the term of the contract itself, and, as referenced above, a party is entitled to insist on strict compliance with it; doing so is not a breach of the duty of good faith. I do not take the Developers or GEC to quarrel with this conclusion. The other side of the coin is the party's ability to waive strict compliance with that same term. To the extent that the Developers submit that the duty of good faith applies only to this side of the coin, I disagree. In my view, the duty of good faith does not apply to only one side of the coin; it applies to neither. In other words, as one cannot use the duty of good faith to scrutinize a party's reasons for enforcing their strict contractual rights, the duty of good faith cannot be used to scrutinize a party's reasons for not waiving that strict contractual right. The Supreme Court of Canada's decision in *Wastech* supports this conclusion.
- [257] In *Wastech*, the Court provided guidance as to the limits of the duty of good faith as described in its earlier decisions in *Bhasin* and *Callow*. Those limits are directly applicable to the case at hand. The starting point is that the duty of good faith in exercising discretion under a contract is tied to the purposes for which the discretion was granted by the contract: *Wastech* at para. 111. The Syndication Condition was inserted solely for the benefit of Romspen. It alone had the ability to waive that condition. The parties agreed that Romspen could determine whether it wanted to subordinate its interests by continuing funding despite the Developers inability to meet a particular condition at a particular time. At para. 113 of *Wastech*, the Court held that the duty of good faith does not require a party to confer a benefit on the other party that was not part of their original agreement, nor does the duty require a party to subordinate its interest to those of the other party.
- [258] Similarly, in my view, no doctrine under the organizing principle of good faith compelled Romspen to advise the Developers that it would not rely upon, or not continue to waive, unfulfilled funding conditions, which were inserted for Romspen's benefit, to justify ceasing funding.
- [259] The duty of good faith must be considered with reference to what the parties agreed to, and I found that the parties objectively agreed that Romspen would fund up to \$212 million, not a minimum of \$212 million. The pages and pages of conditions in Article 3 of the agreement, including the Syndication Condition and the ability of Romspen to waive it, are inserted solely for the benefit of Romspen as per s. 3.05.
- [260] Applied to the case at hand, Romspen was not required to put the interests of the Developers ahead of its own interests, nor rely on any particular reason, when considering whether to exercise its discretion to waive the Syndication Condition. The parties negotiated the application of certain funding conditions, including the Syndication Condition, and agreed that they were for the sole benefit of Romspen. Requiring Romspen

to exercise its discretion by waiving the Syndication Condition would, in essence, provide a benefit to the Developers that was not part of their original agreement with Romspen.

- [261] In *Callow* at para. 71, the Court recalled and affirmed the "fundamental commitments of the common law of contract" to be the "freedom of contracting parties to pursue their individual self-interest". The duty of good faith and honest performance is not to be used as a pretext for scrutinizing the motives of contracting parties. As Romspen submits, considered in its proper bounds, the duty of good faith cannot be construed as having required Romspen to waive the Syndication Condition and to advance funds to the Developers in circumstances where Romspen, in its business judgment, did not consider that to be in its economic interest.

### **Romspen did not Breach its Good Faith Obligations in the March 31 Notice**

- [262] As the Supreme Court explained in *Wastech* and *Callow*, a party may breach its overarching duty of honest performance by "lying or knowingly misleading" the other party about a matter that is directly linked to the performance of the contract.
- [263] The Developers and GEC argue that Romspen breached its duty of good faith and honest performance by dishonestly blaming COVID-19 and a lack of capital for its decision to stop funding when, in reality, Romspen stopped funding because they "disliked" or had "disdain" for the Project, and it wanted to conserve liquidity and divert funds to other projects that it preferred. I will address the argument with respect to Romspen's dislike or distain for the Project later in these Reasons.
- [264] As an initial point, I appreciate that there is a somewhat fine distinction between stating that Romspen owed no good faith obligations when exercising its discretion on whether to waive the Syndication Condition and entertaining an argument that Romspen may have breached good faith obligations by communicating a dishonest reason for exercising that discretion. However, in my view, the former applies to the doctrine of exercising contractual discretion in good faith. The latter applies to honest performance of the contract.
- [265] A plain reading of the March 31 Notice does not support a conclusion that Romspen terminated funding because it could not afford to meet its obligations under the Construction Loan Agreement. As Romspen points out, the notice states that Romspen "cannot" waive "conditions" for continued funding under the Construction Loan Agreement. Romspen did not allege that it did not have sufficient liquidity to continue to fund the Project. Importantly, Romspen does not now allege that it either lacked sufficient liquidity to fund up to \$212 million or the lack of liquidity would have been a defence to the claims of failing to fund if there had been clear contractual obligations to fund a minimum of \$212 million.

- [266] The Developers, and GEC to a lesser extent, take issue with the fact that the COVID-19 pandemic had any effect on this construction Project. I must admit that I am perplexed by this argument. It may be that construction sites were not subject to the same extensive restrictions as other industries were after mid to late March 2020. However, that does not mean that capital markets and credit facilities were not affected by the pandemic. While I have no doubt that some of the impacts of COVID-19 might be subject to judicial notice, I need not resort to such notice in this case because, on the evidence before me, the COVID-19 pandemic had significant adverse effects on the willingness of lenders to participate in financing the Project. I refer to my discussion of Romspen's evidence and the evidence of Mr. Glynn as discussed in my analysis of Romspen's syndication efforts.
- [267] While I find that COVID-19 was in fact a reason for funding to stop, I agree with GEC that Romspen's internal contemporaneous communications indicate that liquidity concerns at the beginning of the pandemic were likely a factor in Romspen's decision to stop financing. However, this should come as no surprise given the state of the economy in the capital markets at the time. Certainly, Romspen would have considered the effect on its liquidity that continuing to fund the Project would have had in light of its inability to syndicate and the worsening capital markets. Romspen understandably would have considered liquidity and the market landscape (because of COVID-19) in determining not to waive the Syndication Condition. These considerations are not surprising and are not evidence of bad faith or Romspen misleading or being dishonest about the reasons for ceasing funding.
- [268] There was no requirement that the March 31 Notice refer to each and every funding condition that was not satisfied. I do not find that Romspen's decision to not include each and every one is an indication of bad faith or dishonesty.

Romspen did not Breach a Duty of Good Faith or Honest Performance by Continuing to Fund other Projects

- [269] I do not find that Romspen's continued funding of other projects in March 2020 and afterwards as evidence of bad faith or dishonest performance. First, I do not accept GEC's suggestion that Romspen should have told the Developers that it had decided to continue to fund other projects in the March 31 Notice. There is no formula in the Construction Loan Agreement as to the content of a notice of Romspen's decision to cease spending under s. 3.03. The March 31 Notice was a business communication, not a legal one. As stated, there was no requirement for the March 31 Notice to refer to each and every funding condition that was not satisfied.
- [270] Moreover, Romspen's decision to continue to fund some other projects is not contrary to, or somehow puts the lie to, what Romspen stated in the March 31 Notice, which is that it had decided not to waive the Syndication Condition. Again, the Developers and GEC are suggesting that Romspen ought to have exercised its discretion to waive terms and conditions to benefit the Developers and GEC in circumstances where Romspen's business judgment determined that such a waiver would cause it economic prejudice. It bears

repeating that the duty of good faith and honest performance does not require a party to a contract to confer a benefit on the other party by subordinating its interest to those of the other party.

- [271] The only relevance I can see to Romspen's decision to continue funding other projects is if Romspen had made attempts to syndicate other loans at the same time it was attempting to syndicate the Construction Facility because doing so might have impacted the reasonableness of Romspen's efforts to syndicate this facility. However, as discussed above, there is no evidence that Romspen was undertaking any such action.
- [272] Given my conclusion with respect to the conditional nature of Romspen's obligation to fund \$212 million, and that Romspen had the contractual right to cease funding when it did, I do not see the relevance of Romspen's continued funding of other projects to which neither the Developers nor GEC were privy to. GEC has provided no explanation as to the content or source of what it says was Romspen's "duty of loyalty to the venture and the bargain" that Romspen breached by "favouring" other projects.
- [273] In my view, the March 31 Notice achieved its objective, which was to advise the Developers that, in the context of (a) the spreading COVID-19 pandemic, (b) the inability of Romspen to secure commitments to participate in the Construction Facility, (c) Romspen's unwillingness to waive the Syndication Condition for continued funding, and (d) the lack of the capital necessary to continue and complete the construction of the Project, Romspen was deciding to suspend all further draws and advances as permitted under the terms of the Construction Loan Agreement. The March 31 Notice does not breach any of Romspen's duties of good faith or honest performance.

### **The Alleged Dislike or Disdain Romspen had for the Project**

- [274] The Developers submit that Romspen also breached its duty of good faith and honest performance by failing to disclose that senior members of its management (in particular, Mr. Roitman) had a "disdain" for the Project as early as November 28 or 29, 2019. As I understand it, GEC joins the Developers in this submission.
- [275] This submission is based mainly on internal Romspen communications authored by Mr. Roitman that neither GEC nor the Developers had before the document discovery occurred in this litigation. In an email dated November 29, 2019, one week after the Construction Loan Agreement was executed, Mr. Roitman expressed some concerns he had with the Construction Loan Agreement. The November 29 email reads in its entirety:

I think this deal has been somewhat oversold internally and that as a group we are not fully appreciating the risks. Please look at this simplified funding projection. The last line here is essentially a measure of the equity shortfall by phase, for a properly funded project (ie. institutional only), and that is assuming they were to finance out the [GEC] sale for their balance of sale (which is eminently do-able but ill advised unless there is enough equity replacing it).

What this shows is that even after selling the next two buildings, there is still an equity shortfall of some \$15m. Much more manageable, but still not out of the woods. And, as I explain below, that number will probably turn out to be much higher than \$15m by the time we get there.

It also shows that the project will suffer a terminal loss - of about \$20m - because the [GEC] sale produces \$71m and the stub loan balance at the end of the project is \$30m, so only \$41m comes back to the sponsors despite \$60m invested. Of course, [GEC] will have a profit of some \$30m baked into their bargain purchase, so overall, I guess it is marginally profitable, just not evenly so. Many of the sponsors are taking large fees and commissions or profits as well so that will help offset some of these losses. There is no escaping the fact that some of this sponsorship group will be winners, others will be losers.

This is also using THEIR rosy numbers. The CTC does not assume expensive debt, cost overruns, delays, etc. It assumes every unit sells at a good price. All in all, these numbers are very biased to the plus side.

While we can manage through this keeping our loan relatively safe, it is going to be rough sailing at times, and risk of conflict with [GEC] and partnership disputes is high. It could require a formal restructuring and/or court action between them to sort it all out. Unless we can syndicate down to a more bite size investment, we will have a big asset on our balance sheet and lots of rumours flying during all this. The syndication is critical. We cannot waive that condition unless we have lots of committed partners, especially on the B side. Without it, we must bail on this one. I'm already regretting that we let Jason go. That will likely turn out to be a mistake.

A massive project like this is out of their league really. This is the domain of Concord Pacific and its ilk who can lean into a big front end heavy deal like this with a monstrous balance sheet and finance it properly.

[276] There is no doubt that Mr. Roitman's language is blunt. However, I do not see it as showing his contempt or scorn for the Project. Mr. Roitman's comment that "[w]ithout it [i.e., a successful syndication] we must bail on this one", is Mr. Roitman's rather colourful and blunt way of expressing his opinion that Romspen should not continue to fund if Romspen is unable to syndicate because Romspen's risk would increase.

[277] I also do not see how Mr. Roitman's email shows disdain on behalf of Romspen as an entity. As with InterCap's participation, there was a difference of opinion between the members of Romspen's management team with respect to the viability of the Project. There is no doubt that Mr. Cassidy had a much more optimistic view than Mr. Roitman.

[278] As previously mentioned, many of Mr. Roitman's concerns were consistent with the views of others that were expressed at the time around and leading up to Mr. Roitman's November 29 email, even though Mr. Roitman was unaware of this at the time he authored the email. For example, Mr. Roitman's concern that Romspen had not fully appreciated the risks appears to be consistent with views expressed by potential lenders to Mr. Thom in July and September 2019 when Mr. Thom was searching for construction lenders to replace the

Land Loans.

- [279] Perhaps even more interesting is that Mr. Roitman's concerns are consistent with the Developers own internal communications, and communications the Developers shared with GEC, around that same time. These too were unknown to Mr. Roitman at the time he authored the November 29 email. For example, in an email from Mr. Thom to Mr. Chu dated October 11, 2019, Mr. Thom expressed significant concerns about the interest rate being negotiated with Romspen and with respect the profitability of the Project given increased costs, among other things. Similarly, in an email from Sam Hanson to GEC dated October 28, 2019, Mr. Hanson lists numerous reasons why he was of the view that the GEC PDA needed to be restructured and stated that without restructuring, given rising costs and drops in Project revenue, the Project would be unsuccessful.
- [280] Sam Hanson, Mr. Thom and Mr. Ratzlaff had only \$1.5 million of cash equity in the Project through their corporate entities, and the Project as a whole had only \$8.5 million in cash equity. Mr. Roitman's concerns about the Project's equity shortfall are consistent with concerns communicated to Mr. Thom by other lenders. Mr. Roitman's concerns in this respect also appear to be consistent with the Developers views themselves. In an email exchange between Sam Hanson and his son Brent Hanson in December 2020, the two echo Mr. Roitman's concerns of a year earlier respecting the lack of equity in the Project when Sam Hanson says "fees and interest have' killed this deal". Brent Hanson writes back: "Yes. But that's what we get for only putting in \$500k. Like New West. All financing, no equity."
- [281] GEC's chief financial officer also had concerns with respect to the Project's fundamentals, which he expressed in internal emails shortly before the Construction Loan Agreement was entered into. His concerns were significant enough that he muses as to whether there might be some sort of insurance or derivative market available to mitigate or hedge the risks as they may be experienced by GEC in respect of its \$60 million deposit.
- [282] The Developers and GEC also point to internal Romspen communications in March 2020 in support of their position that Romspen had disdain for the Project and was looking to bail on it beginning shortly after the Construction Loan Agreement was signed. On March 4, 2020, Mr. Roitman wrote:

Guys, the little light in my head is starting to flash red here. We are less than 4 weeks from waiver date and pregnant to the tune of over \$140m. We still don't have any A syndication commitments in writing, and our soft circle is still only about \$120m. I was told to back off approaching Dakotis [sic] family companies like Onni or Pinnacle - and to back off Jason - because we had Dynamic funds in for a large chunk of B - and then JD comes by to tell me that they may NOT be in given new concerns.

This deal is moving like a slow motion train wreck. Overly hopeful and patience is not a recipe for success with this file. Someone needs to grab the bull by the horns and either rustle the money down - or we need to have a plan to pull the rip cord. Do not let this crash.

- [283] Mark Hilson, one of Romspen's senior executives, expressed a different, more positive view, in reply. Later, on March 4, Mr. Roitman wrote "[w]e also need a plan to bail out. There is a very reasonable probability at this point we will not find enough money to make this viable." Again, Mr. Roitman has used colourful language to express his concerns, but his concerns did come to fruition. Despite their commercially reasonable efforts, Romspen was unable to syndicate the Construction Facility and determined not to waive the Syndication Condition.
- [284] In any event, the evidence, including Mr. Roitman's colourful emails, do not support a conclusion that Romspen was looking for any opportunity to pull out of the contract since shortly after the agreement was executed. As Romspen points out, in the period between Mr. Roitman's November 29, 2019, email and the March 31 Notice, Romspen waived its right to not fund draws and advances to the Project on three separate occasions, totaling more than \$10 million of advances in circumstances where there is no dispute that the Developers had not met certain funding conditions. If Romspen had been looking to "bail" on the Project from as early as November 2019 as alleged by the Developers, then they could have done so under the terms of the agreement. Yet, they did not.
- [285] Similarly, the blunt language used in Romspen's email discussions on March 28, 2020, shortly before the March 31 Notice was sent, should not be surprising and, in my view, is not indicative of bad faith. In that email, Romspen's management was engaged in discussions regarding the status of its sizeable investment in the Project in the face of the unsuccessful syndication and the global COVID-19 pandemic. Mr. Roitman identifies the Project as being at the top of the list of his concerns, which concerns are Romspen's balance sheet and liquidity given the developing COVID-19 pandemic. It is not surprising that given the circumstances at the time, Mr. Roitman expresses significant regret for not having brought InterCap into the construction loan from the outset. Having done so would have spread the risk of the \$143 million that, at that point, had been advanced by Romspen to the Developers. Mr. Roitman's consideration of options with respect to the Construction Loan Agreement in light of the surrounding circumstances is not, in my view, an indication of bad faith.
- [286] In any event, I am not persuaded that, even if Mr. Roitman held a disdainful view of the Project, such a view would be a breach of the duty of honesty. The duty of honest performance is tied to the performance of a contract. The view of one member of a contracting party's management team cannot ground such a finding in the absence of some dishonest conduct in the performance of the contract itself. It is likely not uncommon for the members of a management team to disagree on the relative merits of a particular deal but for that company to nonetheless carry out the deal in compliance with its obligations. That is what happened here.

- [287] The final plank of the Developers argument with respect to Mr. Roitman's alleged disdainful view of the Project is that the Developers each say that they would not have signed the Construction Loan Agreement had they known of Mr. Roitman's contempt for the Project. Rather, they say they would have immediately sought other financing if they knew that Mr. Roitman intended to "bail" on the Project as early as late November 2019. This runs throughout the submissions of both the developer and GEC.
- [288] The argument is essentially that if we had known then what we know now about Mr. Roitman's view of the Project, or that InterCap was not going to be part of the Construction Loan Agreement as it had been with the Land Loans, or that if the \$212 million commitment was not a minimum commitment, things would be different. On the Developers' part, they say that had they known these things they would not have entered into the Construction Loan Agreement. Rather, they would have searched for, and found, other financing options. For GEC's part, it says it would not have signed the GEC/Romspen Subordination Agreement. As I understand the argument, they all rely on this evidence in an effort to establish a basis for damages for Romspen's alleged breach of the duty of good faith and honest performance.
- [289] There are a number of significant issues with this ex post facto application of hindsight to a hypothetical situation. First, it does not create some sort of obligation for Romspen to tell the Developers and GEC of all of their concerns or share InterCap's status in the funding, nor does it create an action in bad faith.
- [290] Second, even if it did establish such, the evidence before me does not support a conclusion that the Developers had any other financing options in the fall of 2019. In fact, the evidence demonstrates the opposite. The evidence is that the Developers had been trying to source construction financing unsuccessfully beginning in 2017 with one lender. Those efforts expanded to seeking financing from approximately half a dozen other sources in 2018, also unsuccessfully. And those efforts continued in 2019 while the Land Loans were in place. These financing efforts were primarily undertaken by Mr. Thom on behalf of the Developers. The feedback he received from prospective lenders during this process was, as mentioned above, very similar to the concerns expressed by Mr. Roitman in his internal emails.
- [291] The Developers' efforts to find construction financing did not stop when they were in negotiations with Romspen respecting the Construction Loan Agreement. That is not surprising given the high interest rate and the Developers' intention to find more affordable financing and pay out Romspen as soon as possible. That was the Developers' intention despite the fact that the term of the Construction Loan Agreement provided for funding up to April 30, 2022. It is clear that the Developers knew the Project could not sustain the interest rate provided for in the Construction Loan Agreement for that period of time.

[292] The Developers' assertion that they would have immediately sought other financing had they only known then what they know now - and, consequently, that they were deprived of an opportunity to find alternative lenders in the period between November 2019 and March 2020 - is simply inconsistent with the evidence. They were continuously seeking out alternative financing and were unsuccessful in doing so.

### **The Veracity of Romspen's Representations Regarding the Progress of the Syndication Efforts**

[293] The next aspect of the Developers argument that Romspen breached the duty of good faith and honest performance is centred around numerous allegations that Romspen's representatives lied to the Developers on a number of occasions. In their submissions, the Developers allege that Mr. Cassidy told "blatant" and "bald-faced" lies to Mr. Thom about the success of the syndication efforts. Given that Romspen's syndication efforts are directly linked to the performance of the Construction Loan Agreement, lying or knowingly misleading the Developers about these efforts could form the basis of a claim for the breach of the duty of honest performance.

[294] In particular, the Developers allege that Mr. Cassidy told Mr. Thom that Romspen had commitments from lenders in the amounts of \$100 million as at January 16, 2020; \$172 million as at February 7, 2020; and \$210 million as at March 12, 2020. The Developers allege that, in the updates he provided to Mr. Thom, Mr. Cassidy told him that the syndication offerings were "oversubscribed" or "fully subscribed". The Developers allege that any representations Mr. Cassidy made about the success of the syndication offerings were "completely dishonest", "blatant lies", or "falsehoods".

[295] In my view, the rather serious allegations made by the Developers in this respect are unfounded on the evidence. First, none of the statements that the Developers attribute as quotes of Mr. Cassidy regarding the status of Romspen syndication efforts are actually Mr. Cassidy's words. Rather, the "quotes" are taken from emails authored by Mr. Thom and sent to other members of the Developers in which Mr. Thom suggests that Mr. Cassidy made certain statements to him. Mr. Cassidy is not included on any of these emails, and there is no evidence from him that he made those particular statements.

[296] Second, during cross-examination, Mr. Thom acknowledged that when Mr. Cassidy used the term "oversubscribed" (if he did in fact use that word), Mr. Thom understood that Mr. Cassidy was referring to soft commitments and not firm commitments. Mr. Thom acknowledged that, in his experience, he knew that prospective lenders would often give soft commitments before obtaining final sign off from their respective credit committees. I also refer to the experts' opinions that the term soft commitments is common in the industry. Mr. Thom also acknowledged that he was fully aware that Romspen did not have any signed participation agreements from prospective syndication partners at any time and that Mr. Cassidy made no representations to the contrary.

- [297] In support of their allegations that the amount of soft commitments referred to by Mr. Thom on the dates referenced above were inaccurate or, in their words, "blatant lies", the Developers point to internal spreadsheets created by Mr. Fonseca. They then point to certain email exchanges between Mr. Fonseca and potential syndication partners as being supportive of their position. It is important to note that, consistent with the purpose for which Mr. Fonseca made the spreadsheets, the evidence is that those spreadsheets only provide a snapshot of Romspen's syndication outreach efforts. Those spreadsheets were not necessarily updated on a regular basis. In any event, when trying to determine the extent of Romspen's syndication efforts at any given time, one must also consider that as Mr. Fonseca testified the syndication efforts he spearheaded consisted of contemporaneous oral negotiations via telephone, in addition to email correspondence. Therefore, cherry picking a few emails does not tell the whole story.
- [298] Nonetheless, as Romspen points out, even if one was to ignore the fact that some of the syndication efforts were done by way of oral negotiations, the spreadsheets themselves, when viewed in the context and understanding of what a soft commitment is, support the statements attributed to Mr. Cassidy with respect to the amount of soft commitments provided at those particular dates.
- [299] During oral submissions by the Developers, and also in their written submissions, it became clear that the Developers took the view that statements attributed to Romspen about what would happen in the future should be characterized as lies, at least partially, if not entirely, if those statements did not come true. For example, this logic was applied to statements made by Mr. Cassidy during negotiations with respect to his confidence of the likely success of the syndication. It was also applied with respect to representations made by Mr. Cassidy shortly after funding ceased where Mr. Cassidy suggested to the Developers that the syndication efforts may resume shortly, and they did not.
- [300] The fact that a statement made about a future event that does not come to fruition does not mean that the maker of that statement was lying at the time statement was made. There is no evidence that Mr. Cassidy knew that any of the representations he made were not true at the time he said them. Similarly, the fact that soft commitments secured by Romspen did not materialize into firm commitments after prospective lenders expressed concerns regarding the Projects' fundamentals and the emerging COVID-19 pandemic does not mean that Mr. Cassidy was lying about the progress of the syndication efforts. To the extent that the Developers advanced these arguments, I reject them in their entirety.

## Intercap's Participation

- [301] I have already commented on Intercap's lack of participation in funding the Construction Facility as not having been unreasonable in terms of Romspen's syndication efforts. The Developers also suggest that it was somehow dishonest to not have advised them that Intercap was no longer a partner in the construction loan as it was in the Land Loans at the time the Construction Loan Agreement was executed. However, there was no contractual

obligation whatsoever on Romspen to notify the Developers of Intercap's participation in the Land Loans, or its lack of participation in the Construction Facility. Pursuant to s. 16.02 of the Construction Loan Agreement, Romspen was permitted to syndicate any part of the loan without notifying, and without the consent of, the Developers. Good faith obligations must be grounded in the terms of the contract: 1026238 B.C. Ltd. v. Pastula, 2016 BCSC 1812 at para. 59, aff'd 2017 BCCA 118. Requiring Romspen to notify the Developers of its decision to not include Intercap (or to include them if they had decided to do so), under the guise of the duty of good faith and honest performance would render s. 16.02 meaningless.

### Conclusion on Issue 3

- [302] The duty of good faith and honest performance does not apply to Romspen's discretionary decision to waive or not waive the Syndication Condition that was inserted in the Construction Loan Agreement solely for its benefit. Its decision to not waive the Syndication Condition is akin to relying on its strict contractual rights, which Romspen is entitled to do. Romspen did not mislead the Developers with respect to the reasons it decided to stop funding the Project. The evidence does not support an allegation that Romspen had disdain for the Project and was looking for ways to "bail". Rather, the concerns expressed by Mr. Roitman were consistent with those of other lenders, the Developers themselves, and at least one member of GEC's senior executive team. Romspen did not mislead the Developers with respect to the success of its syndication efforts.
- [303] To the extent that it applied, Romspen met its duty of good faith and honest performance in its performance of the Construction Loan Agreement.

### ISSUE 4: ARE THE GUARANTORS LIABLE TO ROMSPEN?

- [304] The Developers argue that the Guarantors should be released from their liability under their respective guarantees because Romspen materially altered the risk that the Guarantors assumed by breaching the Construction Loan Agreement: Pax Management Ltd v. Canadian Imperial Bank of Commerce, [1992] 2 S.C.R. 998, 1992 CanLII 27 (S.C.C.); Manulife Bank of Canada v. Conlin, [1996] 3 S.C.R. 415, 1996 CanLII 182 (S.C.C.). They say that the Guarantors did not waive their rights to assert the defence of material change of risk. Finally, they also suggest that they should be relieved from their Guarantees because of Romspen's failure to meet its duty of good faith and honest performance.
- [305] The Developers' arguments rely upon a conclusion that Romspen breached the Construction Loan Agreement by ceasing to fund the Project before advancing \$212 million and/or that Romspen breached its duty of good faith and honest performance. Given my conclusions that Romspen did not breach the Construction Loan Agreement and that it did not breach its duty of good faith and honest performance, I need not consider the Developers arguments in this respect.

[306] The Developers provided no submissions in respect of why they should be relieved of their Guarantees in the event that the Court has found as it has. The Guarantors are jointly and severally liable under their respective guarantees.

#### ISSUE 5: WAS THE THIRD SUBORDINATION AGREEMENT BREACHED BY EITHER ROMSPEN OR GEC?

Is the Construction Loan Agreement Incorporated into the GEC/Romspen Subordination Agreement?

[307] In the GEC/Romspen Subordination Agreement, GEC agreed with Romspen to subordinate its interest and security in the Project to the amounts advanced by Romspen to the Developers under the Construction Loan Agreement.

[308] GEC says that Romspen breached the GEC/Romspen Subordination Agreement by virtue of its alleged breach of the Construction Loan Agreement, which GEC says is incorporated into the GEC/Romspen Subordination Agreement. In essence, they argue that a tripartite contractual relationship has been created between Romspen, the Developers, and GEC despite the fact that GEC is not a party to the Construction Loan Agreement and was not involved in negotiations with Romspen directly in any manner.

[309] In support of their argument that they were privy to the Construction Loan Agreement, GEC relies heavily on the recitals to the GEC/Romspen Subordination Agreement and the many references made in the recitals to the amounts advanced to the Developers under the Construction Loan Agreement. They say that the \$212 million minimum funding commitment is the foundation and bedrock of the GEC/Romspen Subordination Agreement and that it underlies the entire contract. GEC points to what they call the "key wording" of the GEC/Romspen Subordination Agreement as being the statement that "the Prior Lender has agreed to make or extend a loan or credit facility (the 'Loan') to the Borrower", being the Construction Loan Agreement. Thus, they argue, the entire GEC/Romspen Subordination Agreement is based upon Romspen having made the commitment to provide \$212 million of funding by means of the Construction Loan Agreement.

[310] With respect to the tripartite relationship, GEC says that: Romspen agreed to provide funding according to the terms of the Construction Loan Agreement; GEC had agreed to buy, and the Developers had agreed to sell two towers in the Project for which GEC had paid a \$60 million deposit; and GEC had agreed to give up its priority position and to forego its right to complete on its option to purchase on the basis that Romspen had agreed to provide funding according to the terms of the Construction Loan Agreement. Thus, the three-way relationship is based upon the Developers having the land and the development ability; GEC having priority; and Romspen having the money. Through the series of agreements in this "tripartite" relationship, GEC says the parties reached the terms to move forward. In other words, GEC says that the individual agreements formed components of a larger transaction (secure financing from Romspen in exchange for interest and security from the Developers, and priority and forbearance on GEC's option to purchase) where

each agreement was entered into on the faith of the others being executed.

- [311] Alternatively, GEC argues that if the Construction Loan Agreement is not incorporated into the GEC/Romspen Subordination Agreement, then it is an implied term that Romspen shall comply with, and not breach, the Construction Loan Agreement.
- [312] GEC's arguments are premised on the proposition that GEC was induced to enter into the GEC/Romspen Subordination Agreement by Romspen's alleged promise to fund in a specific amount for a specific period of time; i.e. GEC submits that it would not have entered into the GEC/Romspen Subordination Agreement but for Romspen's alleged promise to fund a minimum of \$212 million. Much of the evidence tendered by GEC in support of this proposition comes from Mr. Chu. In my view, this evidence is little more than his currently held subjective belief about what the Construction Loan Agreement provides for and is not relevant for purposes of interpreting the GEC/Romspen Subordination Agreement.
- [313] In any event, GEC's arguments depend upon a finding that Romspen breached the Construction Loan Agreement with the Developers: a conclusion I have not come to. While I am somewhat skeptical that GEC's position would be supportable even if Romspen had breached the Construction Loan Agreement, given my findings that it did not, it is not necessary for me to consider GEC's rather creative arguments in respect of the alleged tripartite relationship. Thus, I find that Romspen has not breached the GEC/Romspen Subordination Agreement.

Has GEC Breached the GEC/Romspen Subordination Agreement by Commencing this Action?

### The Parties' Positions

- [314] Romspen alleges that GEC has breached s. 7 of the GEC/Romspen Subordination Agreement by commencing the GEC Action. Section 7 is a standstill clause in which GEC "agrees that at any time while any Prior Indebtedness remains outstanding, it shall not challenge, contest, or bring into question the validity, priority or perfection of the Prior Security". The prior indebtedness referred to in s. 7 is the amounts owed by the Developers to Romspen under the Construction Loan Agreement, and the prior security refers to Romspen's mortgage against the Project Lands.
- [315] Romspen alleges that, as a result of GEC's breach of s. 7, Romspen has suffered, will suffer in the future, or may suffer loss and damages. They say that these losses and damages include, but are not limited to, (a) any loss of priority which might have resulted directly or indirectly from GEC's wrongful actions; (b) delay of and interference with the CCAA Proceedings, including, but not limited to, delayed recovery pursuant to the its mortgage over the Project Lands and increased legal and other costs associated with the proceedings; and (c) costs incurred in defending against the GEC Action.

- [316] GEC says that s. 7 of the third subordination agreement is unenforceable to the extent that it prohibits GEC from bringing its claim. GEC says that the only steps it has taken is to put this dispute before the Supreme Court of British Columbia, and that a provision that penalizes or prohibits a party from enforcing the terms of their agreement directly undermines the administration of justice and is against public policy: *Melek v. Conservative Party of Canada*, 2021 ONSC 1959; *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (per Brown J., concurring).
- [317] To the extent that s. 7 is enforceable, GEC says that the prohibition in it relates to some sort of extrajudicial challenges, other than proceedings brought in the Superior Court. Since there have been no extrajudicial challenges, GEC says there has been no breach of s. 7. GEC also puts forward a number of other arguments that I need not consider in light of my finding that Romspen did not breach the Construction Loan Agreement.
- [318] In the legal basis section of the response to Romspen's counterclaim, GEC says that s. 7 fails to create a binding agreement because there is no consideration or because it is not sufficiently certain in its terms. It also states that Romspen's claim for breach of the third subordination agreement does not disclose a cause of action as it is only a claim for costs. None of these positions was pursued in GEC's closing written or oral submissions, and, thus, I need not consider them.

## Analysis

- [319] I disagree with GEC that s. 7 is unenforceable as being against public policy. GEC's reliance on *Uber* and *Malek* is misplaced. The proper statement of the principle derived from those cases is that a contractual provision will be found unenforceable as being against public policy if that provision purports to oust all access to the courts: *Melek* at para. 14; *Uber* at paras. 105-112.
- [320] The wording of the standstill clause found in s. 7 does not purport to oust this Court's jurisdiction to adjudicate disputes between Romspen and GEC. Rather, in s. 7 GEC has agreed that, at any time while any amounts owing by the Developers to Romspen under the Construction Loan Agreement remain outstanding, it will not challenge, contest, or bring into question the validity, priority, or perfection of Romspen's security position. Section 7 makes no distinction between judicial and extrajudicial challenges, and counsel for GEC provided no examples of what extrajudicial challenges he was referring to.
- [321] No party is challenging this Court's jurisdiction to adjudicate the dispute. Nor does s. 7 purport to do that either. Section 7 does not prevent GEC from bringing an action to this Court for adjudication, and Romspen does not argue that GEC is prohibited from doing so. However, having agreed not to challenge Romspen's security, there may be consequences for deciding not to abide by its agreement, as GEC has done by filing the GEC Action. Section 7 is fundamentally different than what was at issue in *Malek* and *Uber*. I have not been provided with any authority in support of a conclusion that entering into a standstill

agreement such as that found in s. 7 is contrary to public policy.

[322] Given my conclusion that Romspen did not breach the Construction Loan Agreement, there is no doubt that amounts owing by the Developers to Romspen remained outstanding when GEC commenced its action. By bringing the GEC Action, GEC has breached s. 7 of the GEC/Romspen Subordination Agreement and is liable for the damages that Romspen has suffered as a result of that breach. The quantum of those damages is to be determined at the damages portion of these proceedings.

ISSUE 6: DO ROMSPEN'S ACTIONS IN RELATION TO THE PROJECT JUSTIFY RELIEF UNDER THE DOCTRINE OF EQUITABLE SUBORDINATION, IF SUCH DOCTRINE APPLIES AS A MATTER OF CANADIAN LAW?

[323] In support of its attempt to displace Romspen's priority, which Romspen has pursuant to the GEC/Romspen Subordination Agreement, GEC argues that the doctrine of equitable subordination is part of the law of Canada and that Romspen's actions in relation to the Project justify relief under the doctrine in favour of GEC.

[324] The doctrine of equitable subordination allows a court to subordinate a creditor's otherwise valid claim where that claim arises from, or is connected to, conduct of that creditor that is prejudicial to the interest of other creditors: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 at 608, 1992 CanLII 49 (S.C.C.) [CDIC]. Equitable subordination is a concept from the United States and the Supreme Court of Canada has expressly refrained from deciding whether it is available in Canada: CDIC at 612; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para. 77 [Indalex]. In both of those cases, the Court held it was not necessary for it to determine the question because the facts did not disclose inequitable conduct. I find myself in the same position.

[325] In CDIC at 608, without endorsing equitable subordination's application in Canada, the Court explained that, in the United States, engaging relief under the doctrine of equitable subordination requires:

- a) the claimant to have engaged in some type of inequitable conduct;
- b) that misconduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and
- c) the equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy statute.

[326] GEC's argument that Romspen's actions justify relief under the doctrine is fundamentally based on its position that Romspen made a commitment to fund a minimum of \$212 million in the Construction Loan Agreement. GEC says that Romspen knew that ceasing its committed funding at a vulnerable time of the Project's construction would have a devastating impact on the Project and its stakeholders, including GEC; nonetheless, it ceased funding anyway. GEC points to Romspen's decision to fund other developments in

preference to the Project as being inequitable conduct.

[327] However, as discussed in detail throughout these Reasons, I have found that Romspen was entitled to cease funding when it did and that Romspen did not breach the Construction Loan Agreement by doing so. Also, as discussed above, I have found that Romspen's actions in continuing to fund other projects did not breach its duty of good faith or honest performance.

[328] In my view, Romspen has not engaged in any inequitable conduct. Therefore, like the Supreme Court of Canada in *CDIC and Indalex*, I too decline to opine on whether the doctrine of equitable subordination is part of Canadian law. That is a decision better left for a case with different facts.

#### ISSUE 7: IS ROMPSEN LIABLE FOR COMMITTING THE TORT OF UNLAWFUL MEANS?

[329] Both the Developers and GEC claim against Romspen under the tort of unlawful means, which is also known as the tort of unlawful interference with economic relations: *Muldoe v. Derzak*, 2021 BCCA 199. The three elements of these torts are set out in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12 [Bram]:

- a) an unlawful act committed against a third party;
- b) intended to cause economic harm to the plaintiff (in the sense of being deliberately aimed at or "targeted" at the plaintiff); and
- c) resulting in economic harm to the plaintiff.

[330] In the Developers/Guarantors Action, while it is pleaded that Romspen is liable for committing the tort of unlawful means, the Developers have not pleaded that Romspen committed a wrongful act against a third party, nor have they identified such a wrongful act or third party in their written or oral submissions. Rather, the wrongful act that they have identified is the same breach of the Construction Loan Agreement that forms the basis of their breach of contract claim. The Developers do plead facts in support of the remaining two elements of the tort of unlawful means, the substance of which amounts to their breach of contract claim, but framed as a tort.

[331] The failure to plead or identify the third party is fatal: *Muldoe* at paras: 38-39. Moreover, there is no basis for the claim made out in the evidence. The Developers' claim for committing the tort of unlawful means is dismissed.

[332] GEC has properly pleaded its claim against Romspen for the tort of unlawful means. With respect to the unlawful act committed against third-party, GEC identifies the unlawful act as being the breach of the Construction Loan Agreement and the third party as being the Developers. They properly plead that this unlawful act was targeted specifically at GEC and that GEC suffered damages. However, despite the fact they have properly pleaded the claim, their claim against Romspen with respect to this tort fails.

[333] First, as I have found that Romspen did not breach the Construction Loan Agreement, there is no unlawful act. Second, and in any event, even if Romspen had breached Construction Loan Agreement, GEC points to no evidence that such a breach was targeted at GEC by Romspen. On the evidence before me, any harm done to GEC as a result of a breach would have been merely consequential. The intention component of the tort of unlawful means requires much more than foreseeability or even certain knowledge that the act in question will result in harm; it must be deliberate. Incidental harm is simply part of market competition: Bram at para. 95. Consequently, GEC's claim against Romspen for the tort of unlawful means is also dismissed.

## DISPOSITION

[334] Romspen was entitled, under the terms of the Construction Loan Agreement, to suspend further draws and advances to the Project when it did on March 31, 2020. Romspen did not breach any of its duties of good faith or honest performance, and it met its obligations to use reasonable commercial efforts to syndicate the loan. On the other hand, the Developers have breached the Construction Loan Agreement by failing to repay the amounts advanced and by failing to pay interest and other fees. The Developers and Guarantors are jointly and severally liable to Romspen for the losses it has suffered from its breaches of the Construction Loan Agreement.

[335] GEC has breached the GEC/Romspen Subordination Agreement by commencing the GEC Action and is liable for losses suffered by Romspen as a result.

[336] The quantum of the damages and costs for which the Developers, the Guarantors, and GEC are liable for will be the subject matter of the damages portion of these actions.

[337] I make the following orders with respect to the relevant actions:

1. With respect to the Romspen Action,
  - i. on consent, leave is granted for the Developers and Guarantors to file its further amended response to civil claim;
  - ii. this Court declares that the Developers and Guarantors are in default of their obligations to repay the amounts advanced under the Construction Loan Agreement;
  - iii. judgment is granted against the Developers and Guarantors, jointly and severally, in an amount to be assessed by this Court; and
  - iv. Romspen is entitled to its costs to be assessed.
2. With respect to the Developers/Guarantors Action:
  - i. on consent, leave is granted for the Developers and Guarantors to file its further amended notice of civil claim;

- ii. the claim is dismissed in its entirety; and
- iii. Romspen is entitled to its costs to be assessed.
- 3. With respect to the GEC Action, and Romspen's counterclaim in the GEC Action:
  - i. GEC is granted leave to file its further amended notice of civil claim;
  - ii. GEC's claim is dismissed in its entirety;
  - iii. judgment is granted against GEC for breach of contract in an amount to be assessed by this Court; and
  - iv. Romspen is entitled to its costs to be assessed.

[338] I am grateful to counsel for their very helpful submissions in this matter.

"Majawa J."

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.bccourts.ca/jdb-txt/sc/24/14/2024BCSC1433.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/alderbridge-way-gp-ltd-re-2024-bcsc-1433>

Prepared on 28 October 2026 · Esheria