Court of King's Bench of Alberta

Citation: Romspen Mortgage Ltd Partnership v 3443 Zen Garden Ltd Partnership, 2023 ABKB 730

Date: 20231220
Docket: 2003 06728
Registry: Edmonton

Between:

Romspen Mortgage Limited Partnership and Romspen Investment Corporation

Plaintiffs

- and -

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

Defendants (Plaintiffs by Counterclaim)

- and -

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

Defendants by Counterclaim

Reasons for Judgment
of the
Honourable Justice Kevin Feth

I. Overview

[1] Romspen Investment Corporation ("RIC") and Romspen Mortgage Limited Partnership ("RMLP") - collectively "Romspen" – assert that 3443 Zen Garden Limited Partnership ("Zen Garden") owes USD $108,825,570.69 to RMLP as of June 30, 2023, with interest accruing at the rate of 17% per annum, calculated and compounded monthly. The debt consists of advances under an April 27, 2018 loan agreement between RMLP and Zen Garden (the "Loan Agreement") plus interest, legal fees, and other fees and charges accruing over time.

[2] The debt is guaranteed and secured by Lot 11 GP Ltd., Lot 11 Limited Partnership, Eco-Industrial Business Park Inc., Absolute Energy Resources Inc., and Absolute Environmental Waste Management Inc. (together, the "Guarantor Entities"), and Daniel Alexander White ("Mr. White"), jointly and severally. Mr. White, an Alberta resident, legally or beneficially owns Zen Garden and each of the Guarantor Entities.

[3] Wesley Roitman is the managing general partner, a director and an officer of RIC. Richard Weldon is an employee of RIC and described as an "indirect shareholder" of that corporation.

[4] Zen Garden incurred the debt to acquire and redevelop a commercial property in Austin, Texas (the "Austin Lands"). The Guarantor Entities and Mr. White (together the "White Group") contend that Romspen, Mr. Weldon, and Mr. Roitman (collectively "the Romspen Parties") are predatory lenders and orchestrated a "loan to own" scheme by which they undermined the financing for and the redevelopment of the project, with the ulterior motive of foreclosing on the Austin Lands and other properties the White Group provided as security for the loan. These allegations ground a cross-claim and set-off advanced through the Counterclaim in this action. The Romspen Parties deny any predatory lending and "loan to own" scheme.

[5] The Romspen Parties apply for an order:

> (a) granting summary judgment in favour of Romspen against the White Group, jointly and severally, for the amounts due under the Loan Agreement, plus interest, legal fees, and other chargeable costs;
>
> (b) declaring that the White Group entities, jointly and severally, owe Romspen the amount of USD $108,825,570.69 as of June 30, 2023, with interest accruing at the rate of 17% per annum, calculated and compounded monthly; and
>
> (c) summarily dismissing the Counterclaim.

[6] In support of the application, the Romspen Parties also seek an order recognizing certain Court Orders made in the United States of America, specifically by:

> (a) the United States Bankruptcy Court for the Western District of Texas in the proceeding bearing Case No. 20-10410-HCM (the "U.S. Bankruptcy Proceeding"); and
>
> (b) the United States District Court for the Western District of Texas (Austin Division) in the proceeding bearing Civil Action No. 1:21-cv-00517-RP (the "District Court Action").

[7] The parties have engaged in multiple proceedings in Texas and Alberta. While the history of the legal proceedings is complex, the fundamental facts of the underlying claims are not.

[8] For the reasons to follow, I conclude that RMLP is entitled to partial summary judgment. The White Group entities are liable, through their guarantees, for Zen Garden's debt under the Loan Agreement. Zen Garden's liability for the debt has been finally determined in foreign courts of competent jurisdiction.

[9] The full amount owing to RMLP cannot be determined on the evidence submitted here, but the allowed claim in the U.S. Bankruptcy Proceeding (USD $96,495.021.72) less a credit of USD $45,000,000 raises no genuine issue for trial. I therefore grant partial summary judgment for the net amount of USD $51,495,021.72, which shall be converted into Canadian currency.

[10] Subject to one exception, I refer the determination of the balance of the debt amount to a referee who will have the benefit of additional evidence. The exception is a claim for a settlement payment of USD $600,000, which cannot be resolved on the evidence before me, but is preserved as a contested claim in the action.

[11] I dismiss the Counterclaim and therefore the claimed set-off.

[12] Given my findings, I decline to grant any declarations.

II. Issues

[13] The application raises the following issues:

(a) Are the U.S. Bankruptcy Court and the District Court in Texas foreign courts of competent jurisdiction?

(b) Has Zen Garden's liability for the debt been finally determined by a foreign court of competent jurisdiction?

(c) Is the White Group liable for the debt?

(d) Has the amount of the debt been proven by the evidence before me?

(e) Is the amount of the debt ascertainable in Canadian funds?

(f) Have the allegations in the Counterclaim been finally determined by a foreign court of competent jurisdiction?

(g) Should this Court recognize and enforce the foreign court orders? Is a "public policy" exception engaged?

(h) Should this Court grant any declaratory relief?

[14] Romspen also sought the Court's permission to submit a stalking horse credit bid in a receivership process currently before this Court involving the Guarantor Entities. That part of the application was adjourned *sine die* and is therefore not addressed in these Reasons.

III. Background

A. Relationships between the parties, the Loan Agreement, and the guarantees

[15] RIC provides real estate financing to commercial borrowers in Canada and the United States. RMLP is the vehicle through which RIC extends commercial mortgage loans to those borrowers.

[16] In 2015, Romspen recommended to Mr. White that he invest in the acquisition and redevelopment of a retired semiconductor plant on the Austin Lands. Zen Garden was formed as a limited partnership under the laws of Texas to acquire the property from an entity called MOS8, which was associated with Romspen and affiliates of Mr. White.

[17] In 2016, MOS8 transferred its interest in the Austin Lands to Zen Garden. Romspen provided financing to Zen Garden for the acquisition.

[18] In 2017, Mr. White teamed with a Texas real estate developer to advance a redevelopment plan for the Austin Lands.

[19] In 2018, RMLP and Zen Garden entered into the Loan Agreement through which RMLP agreed to advance up to USD $125,000,000 for the development of the Austin Lands.

[20] The Loan Agreement also consolidated and extinguished amounts owing under previous financing agreements and supplements between the parties, described as the "Acquisition Loan".

[21] In conjunction with the Loan Agreement, Zen Garden granted to RMLP a Promissory Note in the principal sum of USD $125,000,000, together with interest accruing at the rate of 12% per annum or, upon default, at the rate of 17% per annum, calculated and compounded monthly (the "Promissory Note").

[22] Repayment of all advances under the Loan Agreement was guaranteed by Mr. White personally and by the Guarantor Entities through guarantees in favour of Romspen (the "Alberta Guarantees").

[23] As security for the Alberta Guarantees, Romspen was given General Security Agreements by each of the Guarantor Entities and Mr. White, and mortgages in the amount of USD $40,000,000 by each of Lot 11 GP Ltd., Lot 11 Limited Partnership, and Eco-Industrial Business Park Inc. (collectively the "Alberta Security").

[24] The terms of the Alberta Guarantees provide:

> (a) the White Group unconditionally and irrevocably guarantees to Romspen:
>
> > (i) the due and punctual payment of all amounts owing under the Loan Agreement; and
> >
> > (ii) observance of all obligations of Zen Garden and every other person who has pledged security for the amounts owing under the Loan Agreement;
>
> (b) the obligations of the White Group are continuing, binding and absolute obligations, and are direct, unconditional, irrevocable and independent of all past, present or future obligations of Zen Garden to Romspen, and action may be brought for the enforcement of the Alberta Guarantees without the necessity of joining, proceeding against, or exhausting any remedy against Zen Garden or any other person (clause 1.2(1));
>
> (c) the White Group are and shall continue to be liable under the Alberta Security notwithstanding the bankruptcy, insolvency, or going into liquidation of Zen Garden or any other party to the Alberta Security; and

(d) the White Group specifically waive all defences to any action brought to enforce the Alberta Guarantees, including, without limitation, any defence, equity, set-off or counterclaim which Zen Garden, the Guarantor Entities or Mr. White may have or assert.

[25] The White Group does not contest that the Alberta Guarantees are valid and enforceable.

[26] RMLP advanced money to Zen Garden pursuant to the terms of the Loan Agreement.

B. Breakdown in the business relationship

[27] In late 2018 and throughout 2019, Zen Garden and Romspen disagreed about (i) the support required for and timing of draws under the Loan Agreement, (ii) the interest reserve account and related interest payments under the loan, and (iii) approval of a loan under the Property Assessed Clean Energy (PACE) program from another lender (the "PACE loan"). These disagreements escalated and prevented the closing of the PACE loan and depleted available funding for the redevelopment project.

[28] By October 4, 2019, Romspen threatened Zen Garden with default under the Loan Agreement and presented forbearance terms, which Zen Garden rejected.

[29] On October 9, 2019, Zen Garden countered by serving notice alleging RMLP defaulted under the Loan Agreement.

[30] On October 11, 2019, Romspen sent demand letters seeking repayment by Zen Garden, the Guarantor Entities, and Mr. White of all amounts due and owing under the Loan Agreement, the Alberta Security, and the Alberta Guarantees (the "Demand"). Romspen's position was that default under the Loan Agreement triggered defaults under the Alberta Security and the Alberta Guarantees. At the time, the amount owing under the Loan Agreement totalled USD $87,865,453.79. On the same date, Rompsen delivered a Notice of Intention to Enforce Security (the "Notice") pursuant to s 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, (the "*BIA*").

[31] After Romspen issued the Demand and the Notice, the White Group brought an application in this Court seeking to prevent Romspen from taking any enforcement steps under the *BIA*. An Order was granted preventing enforcement, but not the prosecution of this action.

C. U.S. Bankruptcy Proceeding

[32] On March 22, 2020 (the "Petition Date"), Zen Garden was petitioned into involuntary Chapter 11 bankruptcy in the U.S. Bankruptcy Proceeding by some of its creditors. Romspen submitted a proof of claim for an amount not less than USD $96,495,021.72 plus all other costs, fees, and obligations owing, including all costs and expenses of administration, collection, and enforcement incurred by Romspen.

[33] As the redevelopment of the Austin Lands was incomplete, Zen Garden was generating no cash flow to fund the maintenance of the property and its improvements, to administer the bankrupt estate, and to otherwise preserve value. Post-petition funding was sought from Romspen for that purpose.

[34] The Bankruptcy Court issued four key orders, which may be described as: the Financing Order, the Sale Order, the Dismissal Order, and the Confirmation Order. The Orders were not appealed and the time to appeal has expired.

1. Financing Order

[35] On June 19, 2020, the Bankruptcy Court granted a final order authorizing the Bankruptcy Trustee and the bankrupt estate of Zen Garden to receive post-petition funding from RMLP through the Loan Agreement (the "Financing Order"). The Financing Order also confirmed an agreement between the Bankruptcy Trustee (on behalf of Zen Garden) and Romspen by which certain "stipulations" were approved by the Court, including the settlement of liabilities accruing before the Petition Date. In particular, the Bankruptcy Court "determined" and "adjudged":

a) Romspen is the "due and lawful owner of an allowed claim" against Zen Garden of "not less than $96,495,021.72, as of the Petition Date, plus all other costs, fees and obligations owing, including, without limitation, all costs and expenses of administration, collection and enforcement";

b) the debt is fully matured (by acceleration) and "absolutely and unconditionally due and payable to [Romspen], without defense, offset or counterclaim, and [Romspen] is hereby released from (i) any and all objections to the allowance of, and any defense with respect to, the Pre-Petition Indebtedness, and (ii) any right to contest the priority, perfection or validity the liens, mortgages and/or security granted and/or pledged to or in favour of [Romspen]";

c) the preceding release is binding on Zen Garden and "all parties in interest having the process notice"; and

d) these rulings could only be questioned if "a party with standing" filed an "adversary proceeding" by no later than July 20, 2020 (the "Challenge Period").

[36] RMLP advanced at least USD $4,085,470 of post-petition funding, as contemplated by the Financing Order.

2. Sale Order

[37] On August 7, 2020, the Bankruptcy Trustee filed a motion seeking authority to sell Zen Garden's property to satisfy allowed claims. Romspen sought to credit bid its secured claim in the sale of the property. The Bankruptcy Trustee was aware of and investigating Mr. White's allegation that Romspen had engaged in a "loan to own" scheme prejudicial to Zen Garden. Consequently, the Bankruptcy Court faced a justiciable issue about whether Romspen would be allowed to credit bid its secured claim.

[38] On October 7, 2020, the Bankruptcy Court granted a final order approving a credit bid by Romspen in the amount of USD $45,000,000.00 to purchase the Austin Lands and transferring title to Romspen free and clear of all liens, claims, interests, and encumbrances ("Sale Order"). The Sale Order reduced the total indebtedness owed to Romspen by the amount of the credit bid.

[39] The Sale Order expressly preserved the White Group's ability to claim a set-off, which the Financing Order contemplated would be advanced through an adversary proceeding in Texas. Mr. White's evidence and submissions before me confirm the White Group's intention was to litigate the set-off claims in Texas.

3. Adversary Proceeding and the Dismissal Order

[40] On August 20, 2020, one month after the Challenge Period expired, the White Group, the Dan White Family Trust ("Family Trust"), being a family trust under Mr. White's control and the beneficial owner of the Guarantor Entities, and other corporations (collectively the "Adversary Parties"), filed a Complaint commencing an adversary proceeding against Romspen and others in the U.S. Bankruptcy Proceeding (the "Adversary Proceeding"). An "adversary proceeding" is a civil lawsuit filed with the U.S. Bankruptcy Court related to a pending bankruptcy case and allows contested facts to be adjudicated in certain circumstances.

[41] The Complaint challenged the validity of the Loan Agreement and Romspen's debt claim, and alleged misconduct on the part of Romspen. The misconduct included that Romspen was a predatory lender engaged in a "loan-to-own" scheme. The Complaint advanced numerous causes of action against Romspen including breach of fiduciary duty, fraud, misrepresentation, and negligence.

[42] The Adversary Complaint, as subsequently amended, included 26 causes of action against Romspen and other entities, including causes of action related to: a) facts and events that took place before Zen Garden existed; b) facts and events that took place after Zen Garden came into existence and related to Zen Garden; and c) provisions of the *US Bankruptcy Code* related to the determination of whether Romspen's claims were secured and allowable.

[43] On October 29, 2020, Romspen filed a Motion to Dismiss the Adversary Complaint on the grounds that the Adversary Parties lacked standing to challenge Romspen's claims against Zen Garden. In response, the Adversary Parties twice amended the Adversary Complaint. Romspen thereafter re-applied to dismiss the Second Amended Complaint.

[44] On December 3, 2021, the Bankruptcy Court dismissed the Second Amended Complaint, with the consent of the Adversary Parties. By then, similar claims were being advanced by Mr. White in the District Court Action (discussed below).

[45] Any claims made by the Adversary Parties, including the White Group, regarding matters occurring or taking place after Zen Garden came into legal existence or otherwise involving, relating to or arising from Zen Garden in any way were dismissed "with prejudice" for lack of standing. The Bankruptcy Court directed that its Order (the "Dismissal Order"):

> ... completely disposes on a final basis [of] any and all claims, causes of action and all relief sought by any and all parties to this Adversary Proceeding. This is a final order subject to appeal.

[46] The Dismissal Order was marked as a Final Judgment and closed the Adversary Proceeding.

4. Confirmation Order

[47] While the Adversary Proceeding was unfolding, the Bankruptcy Trustee was investigating the "loan to own" scheme allegations, as Zen Garden had its own claim against Romspen. The Bankruptcy Trustee settled Zen Garden's claim against Romspen for USD $600,000 and those funds were apparently used to satisfy claims made by Zen Garden's unsecured creditors.

[48] The settlement was incorporated into a liquidating plan and submitted to the Bankruptcy Court for approval. The settlement included releases in favour of Romspen and its "current and

former officers, principals, shareholders, members, partners, managers, employees, subcontractors, agents." The releasing parties included Zen Garden and "all other entities that may purport to assert any cause of action derivatively."

[49] On January 27, 2021, the liquidating plan, including the Romspen settlement, were confirmed by the Bankruptcy Court in a final order (the "Confirmation Order").

D. District Court Action

[50] On June 21, 2021, while the Adversary Proceeding was pending, Mr. White commenced the District Court Action, which contained the same substantive allegations found in the Adversary Proceeding. The action alleged that through conspiratorial and collusive conduct, Romspen and others utilized a "fraudulent 'loan to own' scheme intended and calculated ... to rob Mr. White and his entities."

[51] On July 1, 2021, the District Court Action was amended, adding Mr. Roitman and Mr. Weldon as Defendants. The District Court Action, as amended, continued to allege that the Romspen Parties and others conspired to engineer a fraudulent loan scheme to force Mr. White and Zen Garden to default on payments on the Austin Lands with the intent to purchase the property at a discounted foreclosure rate.

[52] On December 20, 2021, the District Court Action was amended to add the Family Trust as a Plaintiff.

[53] On March 14, 2022, Mr. White and the Family Trust executed a Third Amended Complaint in the District Court Action.

[54] On April 4, 2022, the Romspen Parties brought a motion to dismiss the District Court Action arguing that Mr. White and the Family Trust did not have standing because their claims had been released either through the Loan Agreement or by Zen Garden's Bankruptcy Trustee.

[55] On December 7, 2022, Magistrate Judge Howell issued a Report and Recommendations (the "Howell Report and Recommendations") concluding that the District Court should grant the Romspen Parties' motion to dismiss.

[56] On January 17, 2023, Judge Pitman of the District Court adopted the Magistrate Judge's recommendations and dismissed the Third Amended Complaint. As nothing remained to be resolved, the District Court Order and Final Judgment rendered on that date directed that "the case is CLOSED."

E. Canadian Proceedings

[57] On March 31, 2020, Romspen filed the Statement of Claim in this action and an application for the appointment of a receiver and manager over the assets of the White Group. On April 26, 2021, Romspen filed a second receivership application. Thereafter, Romspen filed a third receivership application.

[58] When the Statement of Claim and the first receivership application were filed, the total amount sought by Romspen under the Loan Agreement was USD $96,760,975.69 with interest continuing to accrue at the rate of USD $44,384 per diem.

[59] The White Group opposed the first receivership application, and the White Group and Zen Garden filed a Counterclaim against the Romspen Parties in this action making similar

claims to those asserted in the District Court Action. The Romspen Parties filed a Statement of Defence to Counterclaim.

[60] On November 4, 2021, this Court granted a Receivership Order appointing MNP Ltd. as the Receiver of the Guarantor Entities.

[61] As of February 8, 2023, the amount of the indebtedness owing to RMLP under the Loan Agreement was calculated by Romspen to be USD $99,514,219.86, inclusive of interest at the contractual rate of 17% per annum, legal fees, disbursements, outstanding property taxes, and other charges. The amount also included advances for post-petition funding.

IV. Positions of the Parties

[62] The Romspen Parties submit that all issues concerning the validity of the Loan Agreement, the liability for the debt, and the "loan to own" allegations in the Counterclaim have been finally determined in Texas. The amount of the debt was provisionally determined in the U.S. Bankruptcy Court as of June 19, 2020, but that quantum has increased since then because of additional advances, interest, legal fees, and other charges, less credits benefiting Zen Garden.

[63] The Romspen Parties argue the Bankruptcy Orders and the District Court Orders are final and binding orders granted by courts of competent jurisdiction, and the liability findings should be recognized in Alberta. The foreign Court Orders resolve the issues in this action by operation of the doctrine of *res judicata*, except for the updated calculation of the indebtedness. To the extent the amount of the debt has increased since the Financing Order was granted, the updated amount is supported by evidence filed in this action.

[64] The White Group acknowledges that the parties' competing claims and defences, including misrepresentation, breach of trust, breach of fiduciary duties, unjust enrichment and equitable set-off, have been pleaded in two jurisdictions, but asks this Court not to recognize the U.S. Court Orders because of the "public policy" exception to comity. In particular, the White Group contends that the allegations of predatory lending, breach of trust, conflict of interest, and self-serving, bad faith dealings offend Canadian public policy, have not been determined on the merits, and require a full trial with *viva voce* evidence. If liability is established, no objection is raised about the recoverable debt increasing since the Financing Order was granted.

V. Preliminary Matters

[65] When this application was heard, Zen Garden and the Guarantor Entities were controlled by a trustee in bankruptcy or receiver. However, the parties agreed that Zen Garden and the Guarantor Entities would be represented by their own counsel for this application to avoid any conflict of interest. The hearing proceeded on that basis.

[66] In support of this application, the Romspen Parties rely upon an expert report and a supplemental expert report of John Kane, an experienced bankruptcy attorney who practices in Texas. Mr. Kane provided evidence about United States bankruptcy law, the U.S. Bankruptcy Court and the District Court in Texas, and the legal effect of the Court Orders granted in Texas.

[67] Mr. Kane's evidence was affirmed, but not tendered through an Affidavit. He was cross-examined by counsel for Zen Garden and the White Group about the contents of his reports. The

parties agreed that his reports should be treated as admissible evidence, as if tendered through Affidavits. I proceeded on that basis.

[68] I find that Mr. Kane is qualified to opine about United States bankruptcy law and the effect of the Orders rendered in the U.S. Bankruptcy Proceeding and the District Court Action. I have accepted his evidence, which was not challenged by Zen Garden and the White Group.

VI. Test for Summary Judgment

[69] Rule 7.3(1)(a) of the *Alberta Rules of Court*, Alta Reg 124/2010 permits Romspen to apply for summary judgment if "there is no defence to a claim." Similarly, under Rule 7.3(1)(b), the Romspen Parties may apply for summary dismissal of the Counterclaim for having no merit.

[70] Summary judgment is available where the moving party establishes the facts at issue on a balance of probabilities and demonstrates that no genuine issue remains for a trial: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47 [***Weir-Jones***]; ***Hannam v Medicine Hat School District No 76***, 2020 ABCA 343 at para 5 [***Hannam***].

[71] Merely establishing the facts on a balance of probabilities is not a proxy for summary adjudication: ***Weir-Jones*** at paras 33 and 47(b). The evidence must be sufficient so that the judge is confident the dispute can be fairly resolved without a trial: ***Weir-Jones*** at para 36; ***Hannam*** at para 12.

[72] As explained in ***Weir-Jones***, at para 35, if the moving party meets the initial burden of showing "no merit" or "no defence" based on facts proven on a balance of probabilities, the resisting party must then put its best foot forward to demonstrate that a triable issue remains.

[73] The application "does not contemplate summary adjudication on difficult factual questions, requiring a tough call on contested facts": ***Weir-Jones*** at para 30. However, summary judgment is "not limited to cases where the facts are not in dispute": ***Weir-Jones*** at para 21. The Court can "make contested findings of material facts" and "should not be reluctant to make material fact findings": ***Hannam*** at paras 147-148, 175.

[74] The proper approach "should follow the core principles relating to summary dispositions, the standard of proof, the record, and fairness. The procedure and the outcome must be just, appropriate, and reasonable": ***Weir-Jones*** at para 47.

[75] The record must enable the Court to make the necessary findings of fact and determine the law applicable to those facts. The Court must also reflect on whether the claim or part of it may be fairly and justly resolved at this stage of the litigation, including whether summary disposition is a proportionate, more expeditious, and less expensive means to achieve a just result: ***Hryniak v Mauldin***, 2014 SCC 7 at para 49; ***Weir-Jones*** at para 48.

[76] The facts pleaded in the Statement of Claim and the Counterclaim are not assumed to be true. Evidence is necessary. A party cannot resist summary disposition or create a genuine issue for trial by "speculation about what might turn up in the future": ***Weir-Jones*** at para 37.

VII. Analysis of the Issues

A. Foreign Courts of Competent Jurisdiction

[77] A court of competent jurisdiction has jurisdiction over the parties, the subject matter of the dispute, and the remedies sought: ***Weber v Ontario Hydro***, [1995] 2 SCR 929 at para 63.

[78] The foreign court's jurisdiction can be established by showing a "real and substantial connection" with the subject matter of the dispute or the defendants: ***Pro Swing Inc v Elta Golf Inc***, 2006 SCC 52 at para 21 [***Pro-Swing***]; ***Chevron Corp v Yaiguaje***, 2015 SCC 42 at para 20. A real and substantial connection is the overriding factor. The presence of "more of the traditional *indicia* of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or the parties": ***Beals v Saldanha***, 2003 SCC 72 at para 37 [***Beals***]. The connection is "not necessarily the most real and substantial connection of all possible jurisdictions that might have a connection to the dispute": ***Dead End Survival, LLC v Marhasin***, 2019 ONSC 3569 at para 23.

[79] I am satisfied that the U.S. Bankruptcy Court and the District Court of Texas are foreign courts of competent jurisdiction, as explained by Mr. Kane's evidence.

[80] In regard to the jurisdiction of the Bankruptcy Court, I find the following (referring to Mr. Kane's opinion and extracts from his reports):

(a) The *Bankruptcy Reform Act of 1978* established Bankruptcy Courts in each federal district.

(b) Bankruptcy Courts in the United States derive their authority from Article 1, Section 8 of the *United States Constitution* through congressional action. Their purpose is to effectuate bankruptcy laws.

(c) United States Bankruptcy Courts have broad subject matter jurisdiction over all civil proceedings "arising under title 11, or arising in or related to cases under title 11." Here, some of Zen Garden's creditors initiated the Chapter 11 proceeding by filing an involuntary Chapter 11 petition in the U.S. Bankruptcy Court for the Western District of Texas on March 22, 2020.

(d) United States Bankruptcy Courts have authority to enter orders and adjudicate bankruptcy matters to final judgment. They can determine by final order substantially all matters involving a debtor and its estate in bankruptcy and can make final orders in adversary proceedings.

(e) Romspen became a party-in-interest to the U.S. Bankrupt Proceeding when it reached a settlement with the court-appointed Chapter 11 Trustee and eventual bankruptcy trustee, which was documented in the Chapter 11 bankruptcy plan and filed in the U.S. Bankruptcy Proceeding for the Bankruptcy Court's approval.

(f) The Bankruptcy Court was referred jurisdiction and authority over the U.S. Bankruptcy Proceeding and the Adversary Proceeding by the District Court pursuant to ss 157 and 1334 of Title 28 of the United States Code and the District Court's *Order of Reference of Bankruptcy Cases and Proceedings* dated October 4, 2013.

[81] In regard to the District Court, I find the following (again relying on Mr. Kane's opinion and reports):

(a) Federal District Courts are established by Article 3 of the *United States Constitution* and have authority over Bankruptcy Courts.

(b) The United States District Court for the Western District of Texas, Austin Division, has statutory jurisdiction over bankruptcy cases and related adversary proceedings. Section 1334 of Title 28 of the United States Code states: "the district courts shall have original and exclusive jurisdiction of all cases under title 11."

(c) District Courts have "original but not exclusive jurisdiction of all civil proceedings "arising under title 11, or arising in or related to cases under title 11."

[82] The White Group expressly attorned to the jurisdiction of the U.S. Bankruptcy Court when commencing the Adversary Proceeding. The subject matter of that dispute, including the allegations concerning the "loan to own" scheme, are substantively identical to the allegations in the Counterclaim. Both the Financing Order and the Sale Order specifically acknowledge that the Bankruptcy Court has jurisdiction to hear and determine the motions before the Court and to grant the relief requested pursuant to ss 157 and 1334 of Title 28 of the United States Code.

[83] Mr. White expressly attorned to the jurisdiction of the District Court of Texas when he commenced the District Court Action. Again, the subject matter of that dispute is substantively identical to the allegations in the Counterclaim.

[84] In this action, the White Group has repeatedly taken the position that the Alberta proceedings should be stayed, or this Court's determination delayed, pending the outcome of the litigation in Texas.

[85] I conclude that a real and substantial connection is established between the U.S Bankruptcy Court and both the subject matter of the dispute and the White Group. I also find that a real and substantial connection is established between the District Court and both the subject matter of that dispute and Mr. White. Finally, relying on Mr. Kane's evidence and the contents of the Court Orders, I conclude that each Court had the jurisdiction to grant the remedies it did. In particular, the U.S. Bankruptcy Court had jurisdiction to grant the Financing Order, the Sale Order, the Dismissal Order, and the Confirmation Order. The District Court had the jurisdiction to grant the District Court Order and Final Judgment dismissing the Third Amended Complaint.

B. Zen Garden is liable for the debt

[86] The Statement of Defence in this action denies that the Loan Agreement was ever formed, the debt incurred, or that interest on the debt was payable. However, these denials were not pursued during the hearing before me.

[87] The Bankruptcy Trustee settled the claims between Romspen and Zen Garden, including the "stipulations" about the debt owing under the Loan Agreement. The stipulations about the liability for the debt were confirmed by paragraph 4 of the Financing Order which "determined, ordered and adjudged" the following, subject only to a narrow challenge provision contained in paragraph 18 of the Financing Order:

> [RMLP] is the due and lawful owner and holder of an allowed claim under the [Loan Agreement] against the Debtor [Zen Garden] in the amount not less than [USD] $96,495,021.72, as of the Petition Date, plus all other costs, fees and obligations owing…
>
> ... [RMLP] is also entitled to interest accruing at the default rate on and after the Petition Date, together with and in addition to the reasonable fees (including legal fees), costs and charges referred to in §506(b) [of the Bankruptcy Code] and expressly permitted by the terms of the [Loan Agreement].
>
> ... Payment of the Pre-Petition Indebtedness is fully matured (by acceleration duly noticed to the Lender prior to the Petition Date) ...

[88] The Bankruptcy Court found that RMLP's claim was evidenced by, among other things, the Loan Agreement and the Promissory Note.

[89] The Bankruptcy Court also held that RMLP's claim was absolutely and unconditionally due and payable to RMLP, without defence, offset or counterclaim, and that RMLP was released from all objections and defences respecting the claim against Zen Garden under the Loan Agreement.

[90] The Financing Order added that the stipulations "shall be binding on and carry preclusive effect against all parties having due process notice and an opportunity to participate in this Case...". I find that the White Group, as Adversary Parties, had due process notice.

[91] Pursuant to paragraph 18 of the Financing Order, the stipulations could only be contested by a "party in interest with standing" or "any party granted standing by the Court" filing an adversary proceeding or contested matter within the Challenge Period. A challenge by a party without standing would not invalidate the stipulations.

[92] Here, the White Group did not seek standing to assert any derivative claims on behalf of Zen Garden in the U.S. Bankruptcy Proceeding or file an adversary proceeding in response to the Financing Order within the Challenge Period. The White Group's Adversary Proceeding was filed on August 20, 2020, a month late.

[93] On December 3, 2021, the Bankruptcy Court dismissed the Adversary Proceeding "with prejudice", finding the Adversary Parties lacked standing to advance those claims. The resulting Dismissal Order expressly and completely disposed of "any and all claims, causes of action and all relief sought by any and all parties to this Adversary Proceeding" on a "final basis".

[94] The Dismissal Order was marked as a Final Judgment and closed the Adversary Proceeding. No appeal was filed. As explained by Mr. Kane, the time to do so has expired and the Order is final.

[95] Accordingly, the exception in paragraph 18 of the Financing Order was not engaged and the liability finding in that Order is therefore unqualified. The Financing Order was also not appealed. Mr. Kane confirms that the time to appeal has expired and the Financing Order is final.

[96] I conclude that Zen Garden's liability for the debt under the Loan Agreement was fully and finally determined by the Bankruptcy Court. That final decision was pronounced by a court of competent jurisdiction over the parties and the subject matter of the dispute.

C. The liability of the White Group is established

[97] The White Group does not challenge the validity of the Alberta Guarantees.

[98] If the liability findings against Zen Garden in the U.S. Bankruptcy Proceeding are recognized in Alberta, the White Group entities, as guarantors, are bound by those findings against the principal debtor: ***Bank of Montreal v Tassone***, 1998 CarswellOnt 3915 at para 6, affirmed 1999 CanLII 18682 (ON CA).

D. The only real issue to be tried is the current amount of the debt

[99] The Financing Order determined that the amount owed by Zen Garden to Rompsen under the Loan Agreement was not less than USD $96,495.021.72 as of the Petition Date, plus all other costs, fees and obligations owing, including, without limitation, all costs and expenses of administration, collection and enforcement. The Sale Order reduced the indebtedness owed to Romspen by the value of the credit bid, being USD $45,000,000. However, post-petition financing, interest, legal fees, and other charges and fees continued to accumulate.

[100] The Financing Order confirmed that the amount owing was also subject to reduction for any successful claim in the Adversary Proceeding or the District Court Action. However, those proceedings were dismissed.

[101] The Financing Order and the Sale Order did not crystalize the final calculation of the debt, allowing for additional interest charges, legal fees, post-petition advances, and other charges to be added.

[102] At the hearing before me, Rompsen's counsel candidly acknowledged that more evidence might be required to calculate some of the debt.

[103] Following the hearing before me, and with the consent of the White Group and Zen Garden, Romspen provided an updated loan statement showing that the outstanding debt was USD $108,825,570.69 as of June 30, 2023. Interest has continued to accrue since that time at a rate of 17% per annum, calculated and compounded monthly.

[104] The allowed claim under the Financing Order as of the Petition Date and the credit bid approved under the Sale Order are not in dispute. However, evidentiary issues arise for the balance of Romspen's claim.

[105] The loan statement identifies several additional charges forming the debt including:

(a) Legal fees paid to four law firms exceeding $1,155,567;

(b) a net Bankruptcy Trustee payment of $600,000;

(c) disbursements totalling $279,990.51;

(d) unbilled disbursements totalling $1,477,102.85;

(e) administration fee for insurance payment of $350;

(f) property taxes totalling $3,685,425.67; and

(g) DIP Loan balance of $4,536,760.96.

[106] Most of these expenses are not verified by receipts or statements of account. The reasonableness of the legal fees and disbursements cannot be ascertained on the existing evidence. No updated property tax statements were submitted to substantiate the $3,685,425.67

being claimed as outstanding property taxes, nor any evidence that these outstanding property taxes were actually paid by Romspen rather than continuing to accrue. The DIP loan balance and the administration fee for the insurance payment are not explained. The evidence for these charges is inadequate.

[107] Romspen also seeks recovery for receiver fees and interest charges concerning the Alberta receivership proceedings, which are at least $1,957,637.32 in Canadian dollars. These fees and interest charges are recoverable under the Loan Agreement, but no receipts are before me attesting to the quantum of the fees and the payments made by Romspen.

[108] The loan statement contains substantial interest charges for three discrete time periods, totalling USD $852,635.27, USD $18,183,735.20, and $33,221,077.06, respectively. However, the loan statement does not explain whether the calculations include interest for the additional charges described above, which are not adequately proven. The interest calculations are therefore also inadequate.

[109] The loan statement also recognizes partial refunds from the Bankruptcy Court of USD $865,039.12 and USD $416.29, which are credits to the benefit of Zen Garden. However, the credits are not explained.

[110] Finally, the loan statement acknowledges an advance to the Bankruptcy Trustee of USD $7,000,000 and a refund from the settlement escrow of USD $6,400,000 for a net loss of USD $600,000, which was the settlement amount paid to Zen Garden by Romspen and apparently used to satisfy claims by Zen Graden's unsecured creditors. The evidence does not sufficiently address whether Romspen is entitled to recover that settlement payment as part of the other charges contemplated by the debt claim. I decline to grant summary judgment for that part of the claim, although Romspen's right to pursue that part of the action is preserved.

[111] The interest calculation provided by Romspen does not explain whether interest was claimed on the USD $600,000.

[112] I am prepared to grant partial summary judgment for the allowed claim under the Financing Order of USD $96,495,021.72 less the credit bid under the Sale Order of USD $45,000,000 for a net figure of USD $51,495,021.72. More evidence is required before this Court can determine the balance of the debt owing to Romspen

[113] The outstanding debt issues (with the exception of the USD $600,000 settlement payment) only require sufficient evidence to establish the liquidated amounts claimed and corresponding calculation of the interest obligations. No weighing of competing evidence is anticipated. Consequently, pursuant to Rule 7.3(3), I refer the determination of the remaining debt amount to a referee. Romspen is directed to contact the Acting Chief Justice to arrange for the referee's appointment.

[114] In accordance with Rule 6.46, the referee shall make a report to the Court on the assessment of the debt amount. A copy of the report must be filed and served on the parties. After the referee's report has been served, a party may apply to adopt the report in whole or in part, vary the report, require an explanation from the referee, remit the whole or part of the assessment to the referee for further consideration, or decide the assessment on the evidence taken before the referee either with or without additional evidence. Given my elevation to the Court of Appeal, the Acting Chief Justice will determine whether that application should be assigned to another judge of this Court.

E. The amount of the debt shall be expressed in Canadian funds

[115] Judgments following Canadian lawsuits usually must be expressed in Canadian currency: ***SRG Takamiya Co Ltd v Sprung Instant Structures Ltd***, 2017 ABQB 118 and 2017 ABQB 668 [***SRG Takamiya***].

[116] ***SRG Takamiya*** also involved an application for summary judgment. The funds were in US currency. Master Robertson referred to section 12 of the *Currency Act*, RSC 1985 c C-52, which states:

> 12 All public accounts established or maintained in Canada shall be in the currency of Canada, and any reference to money or monetary value in any indictment or other legal proceedings shall be stated in the currency of Canada.

[117] Master Robertson acknowledged that examples exist of judgments granted in Alberta in U.S. dollars, but found that they were the exception and, in his view, did not comply with the *Currency Act*. As the plaintiff had presented evidence in accordance with his earlier instructions, the Court was prepared to grant judgment in an amount in Canadian dollars.

[118] The conversion date is usually either the date of breach or the date of judgment. In ***Stevenson Estate v Siewert***, 2001 ABCA 180 the Court of Appeal noted at para 15:

> The Court's task is to select the most fair and equitable of the two possible conversion dates. It cannot be expected that either of these will allow perfect justice to be rendered. Given this, if any equities must fall unequally on the parties, they should fall more heavily on the wrongdoer than on the victim.

[119] Romspen proposes a conversion date generally aligned with the date of judgment rather than the date of the breach.

[120] Exchange rates fluctuate over time. In these circumstances, I find that the date of judgment is the most fair and equitable of the possible conversion dates because it most closely reflects the value of the judgment expressed in Canadian currency. That approach generally aligns with Romspen's position, which was not challenged by Zen Garden and the White Group.

[121] For the partial judgment of USD $51,495,021.72, the best evidence before me of the conversion rate is the Bank of Canada's exchange rate of 1:1.3273 as of July 5, 2023. Public information about the Bank of Canada's conversion rate indicates that the current daily rate is similar. I therefore provisionally apply the rate of 1:1.3273 for a total of $68,349,341.96 in Canadian dollars. However, if Romspen wishes to update the conversion rate evidence to reflect the date of this judgment, that evidence about the current Bank of Canada daily rate is to be filed forthwith, along with the revised calculation, which can be incorporated into the Formal Judgment for my approval.

[122] For the balance of Romspen's claim, the date of the judgment shall be the date the debt is determined in accordance with Rule 6.46(2). Romspen is given permission to file an update affidavit at that time to address the conversion rates utilized by the Bank of Canada.

F. The Counterclaim allegations have been finally determined by courts of competent jurisdiction

[123] The Counterclaim contains allegations pre-dating and post-dating the formation of the Loan Agreement based on the alleged "loan to own" scheme.

1. Pre-loan allegations

[124] The Counterclaim's "pre-loan" allegations generally involve the following:

(a) Romspen, Mr. Weldon, and Mr. Roitman misrepresented to Mr. White that acquisition of the Austin Lands was a "perfect" and "advisable" investment for him, that the lands could be acquired for $5,000,000 to $7,000,000, and that the undertaking would be a "valet investment" managed by Romspen and Mr. Weldon through which Mr. White would earn "a significant profit in a short period of time."

(b) Romspen, Mr. Weldon, and Mr. Roitman, or any of them, were negligent in the selection of the manager for the Texas entity that initially acquired and developed the Austin Lands.

(c) Romspen, Mr. Weldon, and Mr. Roitman, or any of them, knew or ought to have known that the manager was conducting his affairs as manager negligently, in bad faith, or in breach of fiduciary and other duties, and allowed that conduct to continue to the detriment of Mr. White.

(d) Romspen acted in bad faith in connection with the negotiation of the Loan Agreement including demands for "excessive amounts of collateral" to secure the Loan Agreement.

[125] These same allegations were litigated and determined in Texas, initially through the Adversary Proceeding in the U.S. Bankruptcy Proceeding, which was dismissed by consent, and then in the District Court Action, where the claims were also dismissed.

[126] In the Adversary Proceeding, the allegations were advanced by the Adversary Parties, including the White Group. The Dismissal Order completely disposed of the pre-loan allegations on a final basis for all Adversary Parties, including the White Group. Re-litigation in Alberta is prohibited by operation of *res judicata* if the Dismissal Order is recognized in Alberta.

[127] Notwithstanding the Dismissal Order, Mr. White pursued the same claims in the District Court Action through the Third Amended Complaint. The Romspen Parties applied to dismiss this part of the amended complaint because the claims were extinguished by a release in the Loan Agreement.

[128] Under the Loan Agreement, all "Borrower Parties" expressly released and discharged all claims against "Lender Parties". Schedule 1.1 of the Loan Agreement defines the Borrower Parties to include Zen Garden and the guarantors of the Loan Agreement, which includes each of member of the White Group. The Lender Parties include Romspen and their "directors, officers, employees and agents." I find that Mr. Weldon and Mr. Roitman were directors, officers or agents of Romspen at all relevant times and within the scope of the Lender Parties.

[129] Magistrate Judge Howell concluded that the claims were released and waived, and had already been adjudicated and dismissed with prejudice.

[130] Reports and recommendations issued by a magistrate judge are not binding and enforceable if an affected party objects. Mr. White objected. Accordingly, those findings and objections were referred to Judge Pittman of the District Court for a *de novo* determination.

[131] Following a *de novo* review, Judge Pittman wholly adopted the Howell Report and Recommendations, granted the Romspen Parties' motion to dismiss, and ruled in favour of the Romspen Parties on all the claims against them. The effect of Judge Pitman's ruling was that the releasors, including the White Group and Zen Garden, extinguished all pre-loan claims against the Romspen Parties.

[132] Judge Pitman's District Court Order and Final Judgment dismissed Mr. White's claims "without prejudice." As explained by Mr. Kane, whose evidence I accept, the term "without prejudice" in this context means "without prejudice to re-filing." Dismissal without prejudice in a District Court case can afford a claimant the opportunity to re-file a suit, or re-file a new amended complaint asserting more facts or new claims and causes of action. Here, however, Mr. White had already entered into a consent order preventing any further re-pleading. Judge Pitman's District Court Order and Final Judgment confirmed that the "Plaintiffs may not file further amended complaints." Consequently, as Mr. Kane explained, Mr. White is precluded, by his own agreement, from re-filing or amending the Complaint. The dismissal is therefore akin to a dismissal *with* prejudice.

[133] Judge Pittman's District Court Order and Final Judgment were not appealed, and the appeal period has expired.

[134] If the District Court Order and Final Judgment are recognized in Alberta, Mr. White is prevented from re-litigating the pre-loan allegations because the release in the Loan Agreement extinguished those claims. Moreover, I conclude that the Guarantor Entities and Zen Garden were in privity with Mr. White because of his legal or beneficial ownership of them and his identification with them in the Texas proceedings. As "privies", they were bound by the District Court Order and Final Judgment in the District Court Action: ***Toronto-Dominion Bank v Hutchinson***, 1985 CanLII 1492 at paras 5-6, 61 AR 81 (Master). Consequently, the findings in the District Court Action about the effect of the release bind those entities as well.

2. Post-loan allegations

[135] The Counterclaim's "post-loan" allegations generally concern the following:

(a) Romspen breached the terms of the Loan Agreement by delaying funding draws, refusing to disperse all amounts as required, withholding consent to Zen Garden receiving a substantial government loan, registering excessive encumbrances against properties, charging excessive fees, and alleging without justification that Zen Garden was in breach of the Loan Agreement.

(b) Romspen inserted itself into the business operations of Zen Garden and detrimentally interfered with Zen Garden's business operations.

(c) Romspen failed to act honesty and in good faith in its dealings with the White Group, earned unauthorized profits at the expense of the White Group, and failed to disclose information about the financial interests of the White Group.

(d) Through the preceding conduct, Romspen caused the Guarantor Entities and Mr. White, or any of them, to suffer a loss of capital investment, loss of profit, loss of corporate opportunity, and a diminution in the value of assets.

[136] These same allegations were settled by the Bankruptcy Trustee on behalf of Zen Garden for USD $600,000. The settlement included releases in favor of Romspen and its current and former "officers, principals, shareholders, members, partners, managers, employees, subcontractors, agents," which I find included Mr. Roitman and Mr. Weldon. The releasors included Zen Garden and any entities asserting a cause of action derivatively.

[137] The settlement was approved by the Bankruptcy Court through the Confirmation Order. However, the Bankruptcy Court's Dismissal Order contemplated a carve out for claims that did not belong to Zen Garden.

[138] The post-loan claims formed part of the Adversary Proceeding but were dismissed with prejudice through the Dismissal Order. If the Dismissal Order is recognized in Alberta, re-litigation by the White Group is prohibited by operation of *res judicata*.

[139] Mr. White nevertheless advanced similar claims in the District Court Action.

[140] Magistrate Judge Howell dismissed the post-loan claims after concluding that they belonged to Zen Garden, not Mr. White or the Family Trust. Mr. White and the Family Trust therefore lacked the capacity to bring them. Further, the claims vested in the Bankruptcy Trustee and the trustee released Zen Garden's claims against the Romspen Parties.

[141] Mr. White argued that any damages he might recover belonged to him, not to the Zen Garden bankruptcy estate, because of his personal liability under the guarantee. However, the Magistrate Judge observed that the harm pleaded involved the loss of the Austin Lands, the loss of investment in the property, and the loss of income from the property. Those harms were suffered by Zen Garden as the owner of the property. The guarantors did not have standing to bring claims for breach of contract on behalf of the principal debtor; the shareholders did not have direct standing to assert a claim based on an injury suffered by Zen Garden.

[142] Accordingly, the carve out contemplated by the Dismissal Order was inapplicable and *res judicata* applied to defeat the post-loan claims.

[143] Judge Pitman's *de novo* review reached the same conclusion. The allegations post-dating the formation of the Loan Agreement vested in the bankrupt estate of Zen Garden and were resolved by the Bankruptcy Trustee. Accordingly, the claims were already contractually released and waived. Mr. White and the Family Trust lacked standing to advance the post-loan claims and re-litigating the claims was barred by *res judicata*.

[144] In summary, the post-loan allegations were settled and released, the settlement was confirmed by the Bankruptcy Court, and the carve out in the Dismissal Order was not engaged. The Adversary Parties consented to the dismissal of the Adversary Proceeding on a with prejudice basis. The District Court Action raised no justiciable issues outside the scope of the Dismissal Order. Further, as Zen Garden is a privy of Mr. White, the finding in the District Court Action that the release extinguished the post-loan claims is binding on that entity as well.

[145] If the findings in the U.S. Bankruptcy Proceeding and the District Court Action dismissing the post-loan allegations are recognized in Alberta, I conclude that the allegations contained in the Counterclaim have been fully and finally determined.

G. Should these orders and judgments of the U.S. Courts be recognized and enforced?

[146] Texas is not a jurisdiction of reciprocal enforcement under the *Reciprocal Enforcement of Judgments Act*, RSA 2000, c R-6 and no multilateral treaties allow for the recognition and enforcement of Texas court orders in Canada. As a result, the common law applies.

[147] The common law relating to the enforcement of foreign judgments in Canada was described in ***Pro Swing*** at paras 10-12. To be recognized and enforced, a foreign monetary judgment must be: a) a final order; b) for a definite sum of money; and c) issued by a court of competent jurisdiction.

[148] In ***Pro-Swing***, the Supreme Court of Canada confirmed that Canadian courts may also enforce foreign judgments concerning non-monetary relief. For a foreign non-monetary judgment to be recognized and enforced, it must be: a) rendered by a court of competent jurisdiction; b) final; and c) of a nature that the principle of comity requires the domestic court's enforcement: ***Pro-Swing*** at para 31.

[149] In considering whether comity requires enforcement, the Court examines various factors, including:

> a) whether the terms of the Order are clear and specific enough to ensure that the defendant will know what is expected;
>
> b) whether the Order is limited in its scope; and whether the originating court retained the power to issue further orders;
>
> c) whether the enforcement is the least burdensome remedy for the Canadian justice system;
>
> d) whether the Canadian litigant is exposed to unforeseen obligations;
>
> e) whether there are any third parties affected by the Order; and
>
> f) whether the use of judicial resources is consistent with what would be allowed for domestic litigants.
>
> See: ***Dish v Shava***, 2018 ONSC 2867 at para 11, aff'd, 2019 ONCA 411.

[150] The U.S. Court Orders are final orders, rendered by courts of competent jurisdiction. The terms are clear and specific. The White Group and Zen Garden participated directly in the Bankruptcy Proceeding and Mr. White participate fully in the District Court Action. The White Group previously asked this Court to defer to the outcome in Texas. Enforcement of the findings is the least burdensome remedy for the Canadian justice system and does not expose the White Group and Zen Garden to any unforeseen obligations. No third party is adversely affected.

[151] The Court also considers any defences available to a domestic defendant in contesting the recognition and enforcement of the foreign judgment, including fraud, lack of natural justice, and public policy. These defences guard against the risk of unfairness but are to be narrowly applied: ***Beals*** at paras 40-42; ***SHN Grundstuecksverwaltungsgesellschaft MBH & Co Seniorenresidenz Hoppegarten-Neuenhagen KG v Hanne***, 2014 ABCA 168 at para 12 [***SHN***].

[152] Canadian courts do not have the jurisdiction to re-litigate foreign claims unless clear, cogent evidence is presented of fraud, a breach of natural justice or a violation of public policy:

Minnesota Valley Alfalfa Producers Cooperative v Baloun, 2006 ABCA 210 at para 3; ***Dingwall v Foster***, 2014 ABCA 89 at para 16 [***Dingwall***].

1. Defence of Fraud

[153] Generally, neither foreign nor domestic judgments will be enforced if they were obtained by fraud: ***Beals*** at para 43. The defence is to be construed narrowly: ***Beals*** at para 44; ***SHN*** at para 34. The scope of the defence of fraud includes fraud going to the jurisdiction of the Court that granted the judgment, the kind of fraud that misleads the Court, foreign or domestic, into believing it had jurisdiction over the cause of action, or where new material facts, that were not previously discoverable, arise that potentially challenge the evidence that was before the foreign Court: ***Beal*** at paras 45, 51, 55 and 58; ***SHN*** at para 30; ***Dingwall*** at para 35.

[154] Here the Plaintiffs by Counterclaim are not suggesting that the foreign Court Orders were obtained by fraud. Rather they are suggesting that this Court should not recognize those Orders because the White Group raised claims of fraud against the Applicants in the Texas proceedings. This argument is not within the scope of the defence of fraud relating to foreign judgments and therefore does not form the basis of a valid challenge to the enforcement of the foreign Court Orders.

2. Lack of Natural Justice

[155] A condition precedent to the defence of lack of natural justice is that the party seeking to impugn the foreign judgment must prove, on a balance of probabilities, that the foreign proceedings were contrary to Canadian notions of fundamental justice. The domestic court must be satisfied that minimum standards of fairness have been applied to the parties raising the defence, by the foreign court: ***Beals*** at paras 59 and 60; ***SHN*** at paras 15 and 17; ***Dingwall*** at para 26.

[156] This Court must be satisfied that the U.S. Bankruptcy Court and the District Court each granted the White Group a fair process. As noted by Major J speaking for the majority of the Supreme Court of Canada at para 62 of ***Beals***, a "fair process":

> is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system.

[157] In Canada, natural justice includes the requirement that the defendant be given adequate notice of the claim, a reasonable chance to defend, and a fair opportunity to make arguments. Natural justice encompasses the notion of the right to be heard: ***Dingwall*** at par 28; ***Cassar v Anderson***, 2017 ABQB 229 at para 30 [***Cassar***].

[158] Importantly, the defence of natural justice is restricted to the form of the foreign procedure, including due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment: ***Beals*** at para 64; ***Cassar*** at para 31. The onus is on the White Group and Zen Garden to establish a reasonable apprehension of unfairness. Based on my review of the history of the litigation in Texas, the White Group and Zen Garden have not discharged their burden of demonstrating that the U.S. Courts acted contrary to the principles of natural justice. Indeed, no specific allegations of unfairness were advanced before me.

[159] To the contrary, the White Group received adequate notice of Romspen's debt claim against Zen Garden. They were given a fair opportunity to be heard in the Texas litigation even when they did not necessarily have standing to participate or make the claims that they did. The White Group fully participated, either directly or indirectly, in both Texas proceedings. The White Group commenced the Adversary Proceeding in the U.S. Bankruptcy Court against Romspen and Mr. White commenced the District Court Action. They were represented by counsel at all relevant times. Their complaints were heard and considered by the two U.S. Courts. The defence of natural justice raises no genuine issue for trial.

3. The Defence of Public Policy

[160] Public policy may prevent the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign *law* on which the judgment is based is contrary to the fundamental morality of the Canadian legal system. The policy is not directed at repugnant facts. See: ***Beals*** at paras 71, 72 and 75; ***SHN*** at paras 35, 62 and 83; ***Dingwall*** at para 32.

[161] The public policy defence also guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased: ***Beals*** at para 72; ***SHN*** at para 62.

[162] The Supreme Court of Canada in ***Beals*** confirmed the defence of public policy should not be used lightly. The threshold is high: ***Cassar*** at para 37.

[163] Here, the White Group and Zen Garden rely upon repugnant facts but not a repugnant law to raise the defence of public policy. Nothing before this Court suggests the laws applied by the U.S. Bankruptcy Court or the District Court offend the morality of the Canadian system, nor is any evidence presented that the two Courts were corrupt or biased.

[164] The White Group and Zen Garden argue that public policy is offended because the issues raised in the Counterclaim were not "adjudicated on the merits" in the Bankruptcy Court Proceeding and the District Court Action, suggesting that a full trial was necessary. I disagree.

[165] The summary procedures utilized in the U.S. Bankruptcy Proceeding and the District Court Action to arrive at the various court orders were much like the summary judgment and striking procedures available under Rules 3.68 and 7.3 of the *Alberta Rules of Court.* These summary disposition procedures neither offend public policy nor principles of natural justice. A full trial was not required.

[166] The public policy defence therefore must fail. No genuine issue for trial is present.

[167] Comity supports recognition of the liability findings made in the U.S. Courts. I conclude that those findings are recognized and enforceable in Alberta. Consequently, the allegations in the Counterclaim have been decided in Texas and are dismissed by operation of *res judicata*.

H. Declaratory relief should not be granted

[168] Declaratory judgments are discretionary. In ***Alberta (Attorney General) v Edmonton Police Service***, 2017 ABQB 74 at para 15, Wittmann CJ set out the test for courts to use in

determining whether declaratory relief is appropriate (relying on ***Daniels v Canada (Minister of Indian Affairs and Northern Development)***, 2016 SCC 12 at para 11):

> The applicant "must establish that the court has jurisdiction to hear the issue, that the question is real and not theoretical, and that the party raising the issue has a genuine interest in its resolution." Additionally, a declaration can only be granted "if it will have practical utility, that is, if it will settle a 'live controversy' between the parties."

[169] Moreover, declaratory relief is not appropriate where adequate alternative remedies to a dispute are available: ***Anderson v Canada (Employment, Workforce and Labour)***, 2019 ABQB 579 at para 14; ***Nova Scotia (Securities Commission) v Potter***, 2012 NSCA 12 at para 19; ***Shuswap Lake Utilities Ltd v British Columbia (Comptroller of Water Rights)***, 2008 BCCA 176 at para 51.

[170] Given my findings, the declaratory relief sought by Romspen will have no practical utility. As well, there is no "live controversy" between the parties that requires settlement.

[171] I therefore decline to grant any declarations.

I. Full Indemnity Costs

[172] The Loan Agreement, the Promissory Note, and the Alberta Guarantees contemplate that Romspen is entitled to all fees and expenses incurred as a result of default under the Loan Agreement, including costs calculated on a solicitor-and-own-client, full indemnity basis.

[173] The White Group did not contest Romspen's entitlement to full indemnity costs before me, although little evidence was provided about the legal expenses incurred so that the reasonableness of the amounts claimed could be assessed.

[174] I award Romspen reasonable solicitor-and-own client, full indemnity costs and reasonable disbursements, subject to assessment by the referee.

VIII. Conclusion

[175] The White Group is jointly and severally liable for the debt.

[176] RMLP shall have partial summary judgment against the White Group, jointly and severally, for the allowed claim under the Financing Order as of the Petition Date, less the credit bid, for a total of USD $51,495,021.72. That amount shall be converted into Canadian dollars. The converted figure is $68,349,341.96, unless Romspen provides me with updated evidence about the conversion rate as of the date of judgment and I approve a revised figure.

[177] The calculation of the balance of the debt, including the calculation of reasonable solicitor-and-own-client (full indemnity) legal costs, reasonable disbursements, property taxes, DIP loan balance, insurance administration fee, receivership charges, and interest (but excluding the USD $600,000 settlement payment) is referred to a referee. Romspen may contact the Acting Chief Justice for the appointment of the referee.

[178] The amount of the balance of the debt (excluding the USD $600,000 settlement payment) shall be converted to Canadian dollars as of the date of that judgment.

[179] In accordance with Rule 6.46, the referee shall make a report to the Court on the assessment of the debt amount. The Acting Chief Justice will determine whether receipt of that report shall be assigned to another judge of this Court.

[180] The Counterclaim is dismissed.

[181] Romspen's request for declaratory relief is dismissed.

[182] If the parties cannot settle the terms of the Formal Judgment, either group of parties may write to me within 30 days to settle the terms.

Heard on the 21st and 22nd days of June, 2023.

Additional written materials received July 12 and 28, 2023.

Dated at the City of Edmonton, Alberta this 20th day of December, 2023.

Kevin Feth
J.C.K.B.A.

Appearances:

Kevin E. Barr and Tiffany Bennett
for the Plaintiffs/Defendants by Counterclaim

Timothy Froese
for the Defendants/Plaintiffs by Counterclaim