

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Alderbridge Way Limited Partnership v.
MNP Ltd.,
2026 BCCA 301*

Date: 20260625
Docket: CA51533

Between:

**Alderbridge Way Limited Partnership, Alderbridge Way
GP Ltd., 0989705 B.C. Ltd., 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**

Applicants/Appellants
(Petitioners)

And

**MNP Ltd., in its capacity as Monitor of the Petitioners
(Alderbridge Way Limited Partnership, Alderbridge Way GP Ltd.,
and 0989705 B.C. Ltd.) and Romspen Investment Corporation**

Respondents
(Respondents)

And

Onni Group Holdings Ltd.

Respondent

File Sealed in Part

Before: The Honourable Justice Winteringham
The Honourable Mr. Justice Riley
The Honourable Justice Francis

On an application to vary: An order of the Court of Appeal for British Columbia,
dated June 2, 2026 (*GEC (Richmond) GP Inc. v. MNP Ltd.*, 2026 BCCA 240,
Vancouver Dockets CA51529 and CA51533).

Oral Reasons for Judgment

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Place and Date of Hearing:

Vancouver, British Columbia
June 23, 2026

Place and Date of Judgment:

Vancouver, British Columbia
June 25, 2026

Summary:

The applicants apply to vary the order of a chambers judge, refusing leave to appeal an approval and vesting order made by the assigned judge under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. They argue that their triable and arguable claim in equitable set-off in a related case prevents the approval of the sale of a property based on a credit bid by the first-priority creditor. Held: application dismissed. Reading the reasons as a whole, the chambers judge did not misapprehend the applicants' arguments about equitable set-off nor did he confuse the effects of equitable set-off with procedural set-off. Nothing in the authorities invoked by the applicants establishes that the existence of a set-off claim bars realization, in the manner asserted by the applicants, as an interim step in insolvency proceedings.

WINTERINGHAM J.A.:**Overview**

[1] This is an application under s. 29 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, to vary an order of a judge in chambers. The chambers judge denied leave to appeal an approval and vesting order ("AVO") made by Justice Fitzpatrick on April 28, 2026, acting as the assigned judge under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 [CCAA]. Justice Fitzpatrick's reasons for issuing the AVO are indexed as *0989705 B.C. Ltd. (Re)*, 2026 BCSC 761 ("RFJ"). The chambers judge's reasons for denying leave to appeal are indexed as *GEC (Richmond) GP Inc. v. MNP Ltd.*, 2026 BCCA 240 (Chambers) ("Leave Decision").

[2] The applicants assert the chambers judge made two legal errors: (1) he misconceived or misapprehended the appeal that was before him; and (2) he misapprehended the nature of the equitable set-off defence. The respondents take the position that the chambers judge made neither error advanced. The respondents submit that the distinction the applicants now seek to draw—between a "mere plea" and a "triable" equitable set-off defence—is immaterial because in either case, set-off was not an absolute bar but merely a matter to be considered by the chambers judge in deciding whether to grant the AVO. Second, the respondents submit it is evident in the reasons that the chambers judge understood the substance of the applicants' position and rejected the notion that the assertion of set-off, before adjudication, bars the Court from approving a credit bid sale under the CCAA.

Background

[3] The history of the proceedings is long but it is useful to provide some background to contextualize the issues raised in this application. This summary is intended to be just that—a summary. Nothing stated in this part of the reasons is determinative of the matters properly before the trial court, the CCAA judge, or in other related proceedings.

[4] The underlying issue in the CCAA proceedings is about the future development of a project comprised of seven residential and commercial towers that were proposed to take up a city block at 7960 Alderbridge Way and 5333 and 5411 No. 3 Road in Richmond, British Columbia (the “Property”). The developers, Alderbridge Way GP Ltd. and Alderbridge Way Limited Partnership, and nominee, 0989705 B.C. Ltd. (collectively, the “Developers”) entered into a \$422 million construction loan agreement (the “CLA”) financed by Romspen Investment Corporation (“Romspen”). The guarantors under the CLA, 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 (collectively, the “Guarantors”) provided both general security agreements and secured guarantees for the loan.

[5] After excavation but before any construction, a dispute arose in March 2020—about Romspen’s obligations under the CLA to advance funds. On April 1, 2022, the Developers sought protection under the CCAA. Justice Fitzpatrick has been case managing the proceedings since that time. She has made numerous orders related to the proceedings.

[6] The first-priority creditor, Romspen, as well as the Developers and Court-appointed monitor, MNP Ltd. (the “Monitor”), sought the AVO to allow Romspen to take control of the Property, then assign it to a third party, RIC (No. 3 Road) Holdings Inc. (“RIC”). The respondent, Onni Group Holdings Ltd. (“Onni”) became involved in the purchase of the Property in May 2025 as a potential development partner of Romspen and RIC. Onni’s interests in this application are aligned

with Romspen and the Monitor—they seek to have the proposal approved. GEC (Richmond) GP Inc. and Global Education City (Richmond) Limited Partnership (collectively, “GEC”) have not filed an application to vary the chambers judge’s order with respect to their proposed appeal.

[7] The underlying application was for the approval and vesting of title for the Property from the Monitor, as vendor, to Romspen (or its assignee) as purchaser, under a Purchase and Sale Agreement (the “PSA”). The PSA is expected to close at the end of July. In addition to other key terms of the PSA not expressed here, is the notion that the credit bid is in a fixed amount; it is not an entirely open-ended form of consideration.

[8] Concurrently with the execution of the PSA, Romspen intends to assign the PSA to RIC.

[9] The Developers oppose the PSA largely on the basis that they want a cash-only bid, rather than a credit bid. The Developers’ position is connected to other litigation (at least in part) arising out of the creditor protection proceedings. As noted, the CCAA proceedings commenced following a dispute between Romspen and the Developers about Romspen’s obligations under the CLA. By March 2020, Romspen advanced \$143.6 million to the Developers under the CLA. On March 31, 2020, Romspen refused to advance additional funds on the basis that it was not obligated to do so under the CLA. The result was a stalling of the work on the Property and two years later, the Developers filed the CCAA proceedings.

[10] The Developers and Guarantors say that Romspen failed to advance funds as required under the CLA and failed to use commercially reasonable efforts to syndicate the non-cash portion of the loan under the CLA. They argue that, as a result, Romspen is liable for some or all of the losses, such that under the law of equitable set-off, it would be unconscionable to allow Romspen to obtain judgment against them.

[11] That liability question remains unsettled. The parties proceeded to trial in April and May 2024, in which Romspen was found to have acted in good faith and to have not breached the CLA: see generally *Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 1433. The Developers and GEC both appealed. Reasons on appeal were issued in September 2025, indexed as *GEC (Richmond) GP Inc. v. Romspen Investment Corporation*, 2025 BCCA 332. Romspen sought clarification and supplementary reasons were provided to the parties, indexed as *GEC (Richmond) GP Inc. v. Romspen Investment Corporation*, 2026 BCCA 23.

[12] The Court of Appeal allowed the appeal and the case remitted back to the trial court. Romspen has sought leave to appeal those orders to the Supreme Court of Canada. A decision on leave has not yet been issued. In the meantime, the parties have set down a 10-day trial in mid-October to resolve the issues surrounding liability.

The AVO Reasons for Judgment

[13] On April 28, 2026, Justice Fitzpatrick released her decision and approved the PSA. In her reasons, she addressed the issue of whether the PSA could be the subject of an AVO at all because Romspen's ability to pay on credit was undecided based on the related litigation: RFJ at paras. 55–83. She agreed that there was not yet a final determination about whether Romspen breached its obligations to the Developers under the CLA: RFJ at para. 68. She also agreed that if there was a breach, there was no final determination on what damages the Developers suffered or whether those equitable damages could be set-off against Romspen's claim for its secured debt: RFJ at para. 68.

[14] She reasoned that there was sufficient certainty that the Developers owed Romspen in debt to ground a credit transaction. Romspen's outstanding advance of \$143.6 million (with a net present value of \$270 million, including interest) was not disputed. Even if the debt, indebtedness, or amount owed remained to be finally determined, that argument is founded on a yet unproven equitable set-off claim: RFJ at para. 75. Further, Romspen is the first-ranking mortgagee and has made

undisputed credit advances which are less than the amount in the credit bid: RFJ at para. 77.

[15] The judge then turned to address the Developers' argument that, until the defence of equitable set-off is determined on its merits, it cannot be said that Romspen is owed any amount: RFJ at para. 84. She wrote that, because the claims against Romspen have not been determined, "they are essentially arguing that by simply raising the spectre of equitable set-off, Romspen has no rights in respect of its present position as a secured debtor with admitted advances pending that determination": RFJ at para. 85. She reviewed several cases, including *Cactus Restaurants Ltd. v. Morison*, 2010 BCCA 458 [*Cactus*], and concluded that "where a party asserts equitable set-off, the result is not the elimination of the other party's claim (or the invalidation of their security). Both claims continue to exist as a matter of law until such time as judgment is rendered and equitable set-off granted": RFJ at para. 90 (italics in original, underlining added). She agreed with the Monitor that the Developers' claim for equitable set-off had not extinguished Romspen's debt claim nor invalidated Romspen's underlying security: RFJ at para. 94.

Leave Decision

[16] Pursuant to s. 13 of the CCAA, GEC, as well as the Developers and Guarantors, required leave to appeal the AVO. They sought both leave and a stay of the AVO pending appeal. Among other issues that are not relevant to this application, they assert Justice Fitzpatrick misapprehended their submission and misapprehended the nature of the equitable set-off defence.

[17] The chambers judge addressed the criteria for leave to appeal, as set out at para. 10 of *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (Chambers) [*Goldman*]: Leave Decision at paras. 19–20. He noted the particularly high degree of deference owed to discretionary decisions of judges supervising CCAA proceedings, due to their being "steeped in the intricacies of the CCAA proceedings they oversee": Leave Decision at para. 22, citing *Southern Star Developments Ltd. v. Quest University of Canada*, 2020 BCCA 364 at para. 24 (Chambers), which

in turn cites 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 54.

[18] In relevant part, the chambers judge held as follows.

[19] The appeal was not significant to the practice, largely because Justice Fitzpatrick was merely applying “the well-established framework” under ss. 11 and 36 of the CCAA and not grappling with a new issue: Leave Decision at paras. 29–32.

[20] The appeal was not significant to the action because, relying upon Justice Fitzpatrick’s reasoning at paras. 226–231 of the RFJ, success on the appeal would not necessarily result in the Developers being in a better position: Leave Decision at paras. 38, 40. In the Monitor’s view, there was very little prospect of receiving a cash offer, and even so, it would only reduce Romspen’s debt by a very diminished amount: Leave Decision at para. 38, citing RFJ at paras. 227–228. However, the prejudice to Romspen from granting leave was conversely high, due to the risk of “catastrophic” diminution in the Property value: Leave Decision at para. 38, citing RFJ at para. 229.

[21] He held that the merits of the claim about equitable set-off being taken away by the AVO did not warrant scrutiny by a division: Leave Decision at para. 49. He wrote that, “[i]n essence, the Developers contend a plea of equitable set-off prevents the use of a credit bid when a debtors’ property is to be sold, as the amount of the credit bid is not finally determined”: Leave Decision at para. 45. Per *Cactus*, the millions in amounts owing are ostensibly separate and distinct from an equitable set-off and remain in existence until any judgment for an equitable set-off takes effect: Leave Decision at paras. 47, 49. He made this conclusion with reference to the deference he owed to the CCAA judge: Leave Decision at para. 68.

[22] With respect to hinderance of the proceedings, he held that it was “exceedingly unlikely”, even given expedited hearing dates, that the proposed appeals could be heard and judgment rendered prior to the July 2026 completion date for the sale of the Property: Leave Decision at para. 73.

[23] With respect to the interests of justice, the chambers judge acknowledged this was analyzed by Justice Fitzpatrick in favour of the respondents and her analysis is owed deference on appeal: Leave Decision at para. 75.

The Variation Application

[24] The applicants argue the chambers judge erred in principle in his analysis of the proposed equitable set-off issue, in two ways:

- a) by misapprehending their argument to be about a “spectre” or “plea” of equitable set-off rather than about a case in equitable set-off that had been found by the Court of Appeal to be triable and arguable; and
- b) by confusing equitable set-off and procedural set-off in his reliance upon *Cactus* and therefore failing to properly engage with the actual proposed ground of appeal.

[25] They say that *Cactus* stands for the proposition that equitable set-off is a true defence and therefore operates “not merely as a means of preventing that other person from obtaining judgment, but also as an immediate answer to his liability to pay the debt otherwise due”: Rory Derham, *Set-Off*, 2nd ed. (Oxford: Clarendon Press, 1996) at 57.

[26] The applicants say that these flaws in the set-off analysis permeated the remainder of the Leave Decision. While Justice Fitzpatrick may have followed a well-established framework in exercising her discretion, the applicants argue the equitable set-off claim was novel and warrants appellate scrutiny. They say no appellate court has heard an argument that a CCAA judge lacks jurisdiction to

approve a credit bid in these circumstances, based on the right to argue set-off that has been statutorily preserved by s. 20 of the CCAA.

[27] They argue the chambers judge erred in his analysis of significance to the action by finding that the Developers would not be in a better position were the AVO allowed. This is an error, they say, because it rested entirely on the erroneous finding that the equitable set-off defence would still exist after the PSA was approved (which the applicants say it would not).

[28] They contend that the issues with appeal dates are minimal because the transaction is between the Monitor and Romspen, who “can simply extend the closing date of their own transaction”. They add that the chambers judge erred in assessing the risk of continuing to maintain the Property and also erred in reasoning that the Property and its value would continue to deteriorate. Lastly, they contend that the chambers judge erred by not considering the recovery rights of the second-ranked creditors (“2ML”), who take no position on this appeal and took no position below.

Analysis

Standard of review

[29] The standard of review on an application under s. 29 of the *Court of Appeal Act* is highly deferential: *Maxfine International Limited v. Grant Thornton Limited*, 2024 BCCA 389 at para. 47. The review is not to be treated as a re-hearing nor is it a chance to argue that the chambers judge should have exercised their discretion differently: *Li v. Chao Yin Canada Group Inc.*, 2024 BCCA 217 at para. 29 (Chambers). For a review division to interfere with the order of a justice in chambers, an applicant must demonstrate that the justice was wrong in law, wrong in principle, or misconceived the facts: *Seattle Environmental Consulting Ltd. v. Workers' Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 5–7. Absent any of these errors, a division will not change the order: *Gill v. Gill Estate*, 2023 BCCA 427 at para. 13, citing *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at para. 7.

[30] In other words, on a review application, the applicant cannot simply argue that the justice should have reached a different result or exercised their discretion differently. There must be a legal error: *Ashraf v. Jazz Aviation LP*, 2024 BCCA 45 at para. 3.

[31] Here, the chambers judge set out the considerations that apply to a leave application: Leave Decision at paras. 19–20, citing para. 10 of *Goldman*. With the interests of justice being an overriding consideration, the four factors to be taken into account are as follows:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

[32] The chambers judge also noted that the standard test for leave applies to orders made under the CCAA (Leave Decision at para. 22, citing *Edgewater Casino Inc. (Re)*, 2009 BCCA 40 at para. 17 [*Edgewater*] and noted the highly discretionary nature of CCAA proceedings (Leave Decision at para. 22, citing *Edgewater* at paras. 18, 24).

[33] On the review application, the applicants focus their submissions on the merits factor.

[34] On an application for leave to appeal, the chambers judge is to ask whether the points raised are *prima facie* meritorious. The chambers judge noted that on this criterion, the Court is to determine whether the applicant has identified a good arguable case of sufficient merit to warrant scrutiny by a division of this Court: Leave Decision at para. 42, citing *Johnston v. Matheson* (1994), 46 B.C.A.C. 158 at para. 10, 1994 CanLII 2614 (Chambers). The chambers judge, referring to *Bartram v. Glaxosmithkline Inc.*, 2011 BCCA 539 at para. 16 (Chambers), noted the threshold has been described as “relatively low”: Leave Decision at para. 42. The chambers judge cited *Port Capital Development (EV) Inc. v. 1296371 B.C. Ltd.*,

2021 BCCA 319 at para. 47 and stated the onus is on an applicant for leave to establish a “reasonable possibility that a division of the Court of Appeal would grant the appeal on its merits”: Leave Decision at para. 43.

Legal errors alleged

[35] The applicants do not submit that the chambers judge set out and/or applied the wrong legal test governing an application for leave to appeal. Rather, the applicants identify two alleged legal errors that they submit permits the review division to consider the leave application afresh.

[36] First, the applicants submit both the chambers judge and Justice Fitzpatrick misconstrued their submission about the equitable set-off defence. They point to para. 85 of the RFJ as reflecting the error:

[85] Given that the [Developers’] claims have not yet been determined, let alone materialized into a judgment, they are essentially arguing that by simply raising the spectre of equitable set-off, Romspen has no rights in respect of its present position as a secured debtor with admitted advances pending that determination.

[Emphasis added.]

[37] The applicants submit the chambers judge similarly misconceived their position, as evident in para. 45 of the Leave Decision, where he states:

[45] ... In essence, the Developers contend a plea of equitable set-off prevents the use of a credit bid when a debtors’ property is to be sold, as the amount of the credit bid is not finally determined.

[Emphasis added.]

[38] The applicants assert that their position, before Justice Fitzpatrick and the chambers judge, is that where a party has established a triable and arguable case (as recognized by the Court of Appeal) in support of an equitable set-off defence, equity regards it as unconscionable to permit a creditor to enforce, collect, or realise upon its debt until both claims have been adjudicated. In the result, the applicants say the chambers judge assessed the leave application on an incorrect footing, suggesting the chambers judge missed their primary argument about the critical

distinction between a “plea/assertion/spectre” and “triable and arguable” equitable set-off defence.

[39] At paras. 45–47 of the Leave Decision, the chambers judge set out the submissions of the parties in some detail. In my view, it is clear in his recitation of the parties’ positions that he understood the applicants’ characterization of the equitable set-off defence. In fact, at para. 45 of the Leave Decision, the chambers judge specifically acknowledged this submission by writing that:

- a) the applicants distinguished their equitable set-off defence from a procedural set-off claim; and
- b) the applicants alleged Justice Fitzpatrick erred by not recognizing their substantive equitable set-off defence precluded Romspen from being paid out before judgment—in other words, before the amount of the credit bid is finally determined.

[40] The applicants point to single words in the chambers judge’s reasons. However, when I read the chambers judge’s reasons as a whole and consider the lengthy written submissions provided to him and the transcript references to which we were taken, I do not agree that the chambers judge failed to engage with this very issue or that he misconstrued the argument presented.

[41] The applicants’ position is that its unproven equitable set-off claims prevent Romspen from realizing on its secured position through a credit bid before that issue is adjudicated and determined in the trial court. The chambers judge (and Justice Fitzpatrick) considered this position and rejected it. Reading the Leave Decision as a whole, I do not agree that the chambers judge missed this distinction in the manner suggested.

[42] Turning to the applicants’ second alleged error, they submit the chambers judge’s conclusions, found at paras. 54–55 of the Leave Decision, rest on a misapprehension of the defence of equitable set-off and how it operates. They

assert the chambers judge confused equitable set-off with procedural set-off. In their written submissions, the applicants state the issue as follows:

The question advanced on this appeal, which the Chambers Justice never grappled with, is whether or not sections 20 and 21 of the CCAA restrict the [Court's] ability to approve a credit bid in the face of an equitable setoff defence that this Court has found to be **triable** and that is set for trial in four months.

[Emphasis in original.]

[43] I disagree that the chambers judge failed to engage with this submission or that his resolution of this issue, on an application for leave to appeal, was somehow flawed. Addressing this very point in the Leave Decision, the chambers judge outlined the parties' competing submissions and concluded:

[52] Next, the Developers contend the judge erred in concluding she had the jurisdiction to approve the AVO. In particular, they say ss. 20 and 21 of the CCAA restrict a CCAA judge from approving a transaction under s. 11, where doing so eliminates a set-off claim. They rely on the decision of the Supreme Court in *Montréal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53 at paras. 63–73.

[53] Again, s. 11 of the of the CCAA provides that a judge may "...subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances." Section 21 provides that "[t]he law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be."

[54] The Monitor contends that nothing in the AVO eliminated the Developers' equitable set-off claim. Further, they say nothing in the decision in *Deloitte* subtracts from a judge's jurisdiction to approve a transaction under ss. 11 and 36 of the CCAA. I agree with these submissions.

[55] First, for the reasons set out earlier, I see little merit to the Developers' contention that its equitable set-off claim is eliminated by the AVO. Next, with respect to whether s. 21 of the CCAA prohibits a judge from approving the sale of property when the debtor has an outstanding and yet undetermined equitable set-off claim against the creditor, I see little merit to this argument, in light of the considerations set out at s. 36, and given the broad discretion afforded to a CCAA judge in s. 11.

[Emphasis added.]

[44] Contrary to the applicants' submission, the chambers judge, after referring to the RFJ underlying the AVO, addressed this issue—and answered it. He simply disagreed with the applicants' legal submission. In the RFJ, Justice Fitzpatrick explained in detail why it was that she rejected the applicants' submission (particularly about *Cactus* and its application to the facts here):

[90] However, both outside of insolvency proceedings, and within insolvency proceedings, where a party *asserts* equitable set-off, the result is not the elimination of the other party's claim (or the invalidation of their security). Both claims continue to exist as a matter of law until such time as judgment is rendered and equitable set-off granted.

[91] Both parties cite *Cactus Restaurants Ltd. v. Morison*, 2010 BCCA 458 [*Cactus*] for competing propositions regarding the effect of set-off. The context of that case is important, which was a reconsideration of this Court's dismissal of an injunction application. The injunction had been sought by the plaintiff *Cactus* to enjoin the defendant from exercising rights under a security agreement in default of \$2 million being paid to him. *Cactus* was seeking damages from the defendant that they were attempting to set-off against that amount.

[92] In *Cactus*, Justice Lowry discussed the defence of equitable set-off, stating:

[11] Unlike the judge, I see no legal basis upon which it could be said an equitable set-off has no application in the absence of an action being commenced by Mr. Morison. An equitable set-off, as distinct from a procedural set-off, is a substantive right held by a debtor that constitutes a charge against a chose in action for his debt. (See the discussion in *Aboussafy v. Abacus Cities Ltd.*, [1981] 4 W.W.R. 660 at 669-71 (Alta. C.A.).) In his text, *Set-Off*, 2d ed. (Oxford: Clarendon Press, 1996), S.R. Derham discusses equitable set-off proceeding from the following distinction at 56-58:

1.7.4 The substantive nature of equitable set-off

We saw earlier that the right of set-off derived from the Statutes of Set-off takes effect only as a procedural defence. By this it is meant that separate and distinct debts remain in existence until judgment for a set-off, and, moreover, the defence has no effect until judgment. Prior to judgment the rights consequent upon being a creditor still attach, as do the obligations and liabilities consequent upon being a debtor. A similar analysis should apply when equity acts by analogy with the Statutes. However, a characteristic of the form of equitable set-off under discussion which has emerged in recent years is that it operates as a true, or substantive, defence. It may be invoked independently of any order of the court or of arbitrators. It may be set up by a person indebted to another, not merely as a means of preventing that other

person from obtaining judgment, but also as an immediate answer to his liability to pay the debt otherwise due. ...

Notwithstanding some judicial statements suggesting the contrary, the view that the defence is substantive does not mean that it operates as an automatic extinction of the cross-demands. A proper statement of the principle is that, if there is an entitlement to an equitable set-off, the creditor as a matter of equity is not entitled to treat the debtor as being indebted to him to the extent of the debtor's own claims against him. The cross-demands as a matter of law remain in existence between the parties until extinguished by judgment or agreement, though, as far as equity is concerned, it is unconscionable for the creditor even before then to regard the debtor as being in default to the extent of the cross-demand if circumstances exist which support an equitable set-off. A court of equity will protect the debtor's position by way of injunction, and it may also be the subject of a declaration.

[Emphasis added.]

[93] By citing the above, the Court in *Cactus* rejected Cactus' argument that advancing equitable set-off "serves to extinguish" their obligation to pay the other party (paras. 6 and 11). Rather, as stated in the quote from S.R. Derham's *Set-Off* text (para. 11), the defence does not operate as an "automatic extinction of the cross-demands" and set-off is only applied when "entitlement" to set-off is established. In *Cactus*, the plaintiffs sought equitable relief in the form of an injunction to prevent the other party from acting on his claim, which of course is not the situation here.

[94] Accordingly, I reject the [Developers'] assertion that Romspen does not have a claim until such time as their cross-claims are adjudicated. I agree with the Monitor that the [Developers'] claim for equitable set-off has not extinguished Romspen's debt claim nor invalidated Romspen's underlying security.

[45] The chambers judge considered the submissions presented and like Justice Fitzpatrick, rejected them. I agree with the Monitor's submission on this point. Nothing in the authorities invoked by the applicants establishes that the existence of a set-off claim bars realization as an interim step in insolvency proceedings. As recognized by the chambers judge—and as explained by Justice Fitzpatrick at paras. 90–94 of the RFJ—the AVO does not eliminate the Developers' set-off defence; it is preserved for trial.

[46] In the end, the chambers judge held that the applicants' argument about jurisdiction of the CCAA judge to approve a transaction should be constrained where the Court of Appeal has recognized a triable and arguable claim of set-off had "little

merit ... in light of the considerations set out at s. 36, and given the broad discretion afforded to a CCAA judge in s. 11”: Leave Decision at para. 55.

[47] In sum, I do not agree the chambers judge misapprehended the nature of equitable set-off. He provided due deference to the RFJ, in which Justice Fitzpatrick cited authority at paras. 217–225 for CCAA courts approving sale transactions under ss. 11 and 36 of the CCAA, notwithstanding the existence of triable issues between stakeholders. The chambers judge recognized the discretion afforded to the CCAA judge in this case and saw no basis to interfere with the exercise of her discretion.

The remaining *Goldman* factors

[48] I turn to the remaining *Goldman* factors. In my view, the applicants have not established reversible error.

[49] First, the applicants submit the appeal raises issues of statutory interpretation that have never been considered by an appellate court in Canada—that is, whether a court can approve a credit bid under ss. 11 and 36 of the CCAA when the amount of the credit has yet to be determined under s. 20.

[50] The chambers judge acknowledged, as did the parties, the main issue with the order being appealed is very specific to the action “in that the amount that Romspen’s credit bid is at this time undetermined”: Leave Decision at para. 28. He recognized that if the order being appealed is specific to the action, there is limited significance to the practice generally: Leave Decision at para. 27, citing *Gulamani v. Chandra*, 2009 BCCA 206 at para. 15 (Chambers). The chambers judge went on to determine Justice Fitzpatrick’s decision to approve the AVO was based on the well-established framework under ss. 11 and 36 of the CCAA: Leave Decision at para. 29.

[51] The chambers judge concluded that the proposed appeal was of no real significance to the practice and that this factor did not favour granting leave: Leave Decision at para. 32. I am satisfied this decision was open to him.

[52] Second, the applicants submit the chambers judge erred when, at para. 40 of the Leave Decision, he held that a successful appeal would not leave the Developers in a materially better position. The applicants submit this conclusion rests on his erroneous finding that the equitable set-off defence survives the AVO. However, the applicants say that once that error is corrected on this review, it becomes clear that once the PSA closes, the Developers permanently lose the Property, their equitable set-off defence is extinguished up to the credit bid amount, and the Guarantors potentially face massive personal liability under the 2ML guarantees.

[53] For the reasons stated earlier, I do not agree that the chambers judge erred by finding that the equitable set-off defence survives the AVO. In any event, the chambers judge considered the potential prejudice to the Developers if the transaction went ahead and to Romspen if it did not: Leave Decision at para. 38, citing RFJ at paras. 226–231. The chambers judge quoted Justice Fitzpatrick’s observation that, “[a]ny final result [of the parties’ liability claims] is years away and any set-off claim by the [Developers] is unproven and tentative at best”: Leave Decision at para. 39, citing RFJ at para. 184. The chambers judge considered the delicate balancing exercise at issue here and for the reasons stated earlier, I do not agree that the chambers judge erred in his assessment of the impact of the AVO. On this factor, I am satisfied it was open to the chambers judge to conclude that this factor did not favour granting leave.

[54] Third, the applicants assert the chambers judge was wrong in his assessment of whether the appeal would unduly hinder the proceedings. The applicants submit that: (1) the Monitor and Romspen can simply extend the closing date; (2) a further modest delay of a few months does not warrant denying leave; and (3) the concerns expressed by the chambers judge regarding site preservation costs and deterioration are misplaced.

[55] The respondents submit that this suggestion is not accurate and the closing date is not so easily extended. In any event, they say the applicants have not demonstrated an error on this point. The respondents made submissions before the chambers judge regarding the substantial risks involved with a delayed sale. The chambers judge considered these submissions at paras. 69–73 of the Leave Decision and concluded that “there is little doubt that allowing the appeals to continue will unduly hamper the CCAA proceeding”: Leave Decision at para. 73. I agree with Onni’s submission on this point. That is, this finding is entitled to a highly deferential standard of review. No error being shown, I would not interfere with it.

[56] Finally, the chambers judge ended his reasons by turning to “the overarching consideration [of] whether it is in the interests of justice to grant leave”: Leave Decision at para. 74, citing *Mercury Merchant LLC v. Teal Jones Holdings Ltd.*, 2025 BCCA 399 at para. 14 (Chambers). He properly noted at para. 75 of the Leave Decision that deference was owed to Justice Fitzpatrick’s balancing of the factors to be considered in the application before her. The chambers judge considered these factors and the deference he owed to Justice Fitzpatrick. The applicants have not demonstrated error here.

[57] The chambers judge considered each of the *Goldman* factors and the interests of justice and then he determined that leave should not be granted. It is my view that the applicants have not demonstrated any error with respect to the chambers judge’s articulation of the legal test, his application of it, nor in his assessment of each of the factors governing the analysis.

Disposition

[58] The applicants have not persuaded me that the chambers judge made an error of law or an error in principle that justifies intervention with his conclusion that granting leave to appeal would not be in the interests of justice. For these reasons, I would dismiss the application to vary the chambers judge’s order.

[59] **RILEY J.A.:** I agree.

[60] **FRANCIS J.A.:** I agree.

[61] **WINTERINGHAM J.A.:** The application to vary the order of Justice Mayer is dismissed.

“The Honourable Justice Winteringham”