

No forward funding: the Alderbridge Way revision

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In *Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 1433, in considering the liability of lenders terminating a loan agreement, the British Columbia Supreme Court emphasized the significance of clear contractual conditions in financing transactions.

Background

The developers in Alderbridge Way were looking to finance a large and complex construction development project in Richmond, British Columbia (the project). The project aimed to build seven residential and commercial office towers, with a projected cost of approximately \$726 million.

Romspen Investment Corporation (Romspen), a private mortgage lender specializing in commercial real estate mortgages, agreed to provide the necessary financial backing. Pursuant to a loan agreement executed in November 2019, Romspen provided construction financing to the developers for the first phase of the project. The credit facility outlined in the loan agreement exceeded \$400 million. Both Romspen and the developers recognized that, due to the size of the loan, syndication would be necessary; Romspen could not sustain a loan of over \$400 million independently. Under the loan agreement, Romspen's commitment was \$212 million.

Romspen began advancing funds to the developers for the construction of the project. Starting in December 2019, Romspen made efforts to syndicate a portion of the loan, as outlined in the loan agreement. Despite these efforts, it was unable to assemble a successful syndication.

On March 31, 2020, Romspen ceased funding the project. By this point, approximately \$143 million had been advanced to the developers. Following Romspen's cessation of funding, the developers failed to secure alternative financing and were unable to continue the project, leading to insolvency and the initiation of proceedings under the *Companies' Creditors Arrangement Act*.

The developers alleged that Romspen's decision to stop funding the project on March 31, 2020, was a breach of the loan agreement.

The decision

The issue for the Court to decide was whether Romspen was entitled to terminate its funding of the project in March 2020 under the loan agreement. Justice Majawa concluded that Romspen was entitled to cease funding as it did.

Notably, in coming to this conclusion, Justice Majawa observed that evidence of what was said and communicated during negotiations or included in previous drafts of the agreement was not admissible as part of the factual matrix. Therefore, such evidence should not be considered when interpreting the terms of a contract.

Upon reviewing the terms of the contract, Justice Majawa noted that Romspen's obligations to commit funds under the credit facility were subject to the satisfaction of the terms and conditions found in the loan agreement. In particular, the loan agreement stated that "the Construction Facility shall be funded by way of periodic advances, *the timing and amount of which shall remain in the sole discretion of the Lender and on the terms and conditions set out herein*"^[1] and, further that, "neither the preparation nor registration of any documents contemplated herein shall bind the Lender to make an advance it being agreed that *any advance of the Construction Facility from time to time shall be in the sole absolute unfettered discretion of the Lender*" (emphasis added).^[2]

The plaintiffs further claimed that Romspen was required to advance its \$212-million commitment, even if it was unable to successfully syndicate the loan. Justice Majawa disagreed, noting that if the parties had intended for the loan agreement to obligate Romspen to provide a minimum of \$212 million, they could have explicitly stated so. In particular, rather than the loan agreement saying, "[t]he Lender has no obligation to fund future advances beyond the portion of the Construction Loan Amount set out in Schedule B,' the parties could have stated that 'the Lender has an obligation to fund no less than \$212 million' if that had been their intent" (emphasis in original).^[3]

Takeaways

The case illustrates the importance of drafting loan agreements with clear language that reflects the parties' intentions. It also reaffirms the principle that evidence from negotiations is generally inadmissible for the purpose of interpreting a loan agreement.

[1] *Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 1433, para. 108.

[2] Para. 109.

[3] Para. 139.