

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, C. C. 30, AS AMENDED

BETWEEN:

WESTLB AG, TORONTO BRANCH

Applicant

and

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

**MOTION RECORD
(Returnable December 7, 2010)**

December 1, 2010

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**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, C. C. 30, AS AMENDED

BETWEEN:

WESTLB AG, TORONTO BRANCH

Applicant

and

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

MOTION RECORD

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TAB 1

**ONTARIO
SUPERIOR COURT OF JUSTICE
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IN THE MATTER OF SECTION 47(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, C. C. 30, AS AMENDED

BETWEEN:

WESTLB AG, TORONTO BRANCH

Applicant

and

THE ROSSEAU RESORT DEVELOPMENTS INC.

Respondent

**NOTICE OF MOTION
(Returnable December 7, 2010)**

Alvarez & Marsal Canada ULC, in its capacity as Court-appointed receiver and manager pursuant to section 101 of the *Courts of Justice Act* (Ontario) and trustee and receiver and manager under the *Construction Lien Act* (Ontario), and Alvarez & Marsal Canada Inc., in its capacity as interim receiver pursuant to section 47(1) of the *Bankruptcy and Insolvency Act* (jointly and collectively, the “**Construction Lien Trustee**”), of the undertaking, property and assets of The Rosseau Resort Developments Inc. (“**RRDI**”), will make a motion to a Judge of the Commercial List at 10:00 a.m. on Tuesday the 7th day of December, 2010, or as soon after that time as the motion can be heard, at 330 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion will be heard orally.

THE MOTION IS FOR AN ORDER:

- (a) abridging the time for service of this Notice of Motion and Motion Record, if necessary, validating service of the Notice of Motion and Motion Record, and dispensing with further service thereof;
- (b) declaring that all capitalized terms not otherwise defined in the Order shall have the same meaning as in the Construction Lien Claims Process Order of the Honourable Mr. Justice Campbell dated July 24, 2009 (the “**Construction Lien Claims Process Order**”);
- (c) approving the amounts determined pursuant to Notices of Determination issued by the Construction Lien Trustee for certain Claims filed by Lien Claimants under the Construction Lien Claims Process Order as described in the Thirteenth Report of the Receiver dated November 30, 2010 (the “**Thirteenth Report**”) and as set out in Schedule “A” to the Order (the “**Determined Lien Claims**”);
- (d) confirming and declaring that the Determined Lien Claims have priority over, *inter alia*, any and all judgments, executions, assignments, attachments, garnishments receiving orders, conveyances, mortgages/charges or other agreements affecting RRDI’s interest in its Premises (as defined in the CLA) including those lands legally described in Schedule “B” to the Order, the improvements thereto, and all material supplied to the improvements, other than the Receiver’s Charge and the Receiver’s Borrowing Charge (as defined in the Amended and Restated Appointment Order of the Honourable Madam Justice Pepall dated June 2, 2009, as amended), and including, but not limited to, the interests of WestLB AG (“**WestLB**”) in its capacity as agent for certain lenders under charges/mortgages of land registered on title to the Premises of RRDI as Instrument Numbers MT29969 and MT63504 (collectively, the “**WestLB Charges**”), the interests of Fortress Credit Corp. and/or 2258454 Ontario Inc., if any, under a charge/mortgage of land formerly registered on title to the Premises of RRDI as Instrument Number MT33625 (the “**Fortress Charge**”), and the interests of Travelers Guarantee Company of Canada under a charge/mortgage of

land registered on title to the Premises of RRDI as Instrument Number MT29970 (the “**Travelers Charge**”);

- (e) pursuant to paragraph 18 of the Construction Lien Claims Process Order, dispensing with the provisions of paragraphs 11 and 12 of the Construction Lien Claims Process Order and declaring that notwithstanding any provision of the Construction Lien Claims Process Order, the Notices of Determination issued by the Construction Lien Trustee are final and binding for all purposes upon the granting of the Order, subject to confirmation by WestLB and the relevant Lien Claimant of completion of the terms of Minutes of Settlement between WestLB and the relevant Lien Claimant;
- (f) setting trial dates for all Claims under the Construction Lien Claims Process Order solely for purpose of complying with section 37 of the CLA;
- (g) approving the Thirteenth Report, and the conduct and activities of the Receiver as described therein; and
- (h) such further and other relief as counsel may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

- (a) The Construction Lien Claims Process Order established a process pursuant to which the Construction Lien Trustee was to consider and determine Construction Lien Claims;
- (b) 27 Lien Claimants have Construction Lien Claims and have asserted priority over other mortgagees and encumbrances in respect of those Construction Lien Claims;
- (c) For reasons more particularly described in the Thirteenth Report, WestLB and substantially all of the Lien Claimants have engaged in settlement discussions with respect to the Construction Lien Claims and settlements have been reached with all but two Lien Claimants. One of the conditions of settlement required by

WestLB is the assignment of all rights related to the settled Construction Lien Claims, and that prior to such assignment to WestLB, those Construction Lien Claims be resolved by the Construction Lien Trustee in accordance with the Construction Lien Claims Process by way of issuance of Notices of Determination on consent of WestLB and other Lien Claimants. WestLB also requires that this motion be brought for approval of the amounts as determined by the Construction Lien Trustee (the “**Determined Amounts**”) and confirmation of the priority of the Determined Lien Claims that will be assigned to WestLB in accordance with the settlements.

- (d) The Construction Lien Trustee has issued its Notices of Determination with respect to the Determined Lien Claims, to which WestLB and the Lien Claimants have consented. This motion is therefore brought for approval of, *inter alia*, the Determined Amounts, and a declaration as to priority of the Determined Lien Claims;
- (e) The grounds as more particularly set out in the Thirteenth Report; and
- (f) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The pleadings and proceedings herein;
- (b) The Thirteenth Report; and
- (c) such further and other material as counsel may advise and this Honourable Court permit.

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IN THE MATTER of Section 47(1) of the *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O 1990, C. C. 43, AS AMENDED, AND SECTION 68 OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, C. C. 30, AS AMENDED
WESTLB AG, TORONTO BRANCH
V.
THE ROSSEAU RESORT DEVELOPMENTS INC.

Applicant

Respondent

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

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(Returnable December 7, 2010)**

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