CITATION: Re Urbancorp, 2017 ONSC 2356
COURT FILE NO.: CV-16-11389-00CL
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DATE: 20170418

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN SCHEDULE "A" HERETO

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")
AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP

BEFORE: Newbould J.

COUNSEL: *Robin B. Schwill*, for the Monitor

Lisa S. Corne and Michael J. Brzezinski, for Certain Home Buyers

Edmond Lamek, for the Urbancorp CCAA Entities

Neil S. Rabinovitch, for the Guy Gissin, the Israeli Functionary of Urbancorp Inc.

Vern W. DaRae, for Stefano Serpa and Adrian Serpa

Adam M. Slavens, for Tarion Warranty Corporation

Dominique Michaud, for Terra Firma Capital Corporation

Benjamin Rouse, in person

HEARD: April 13, 2017

ENDORSEMENT

[1] The Monitor moves for an order declaring that any claim for damages by a home buyer made in the claims process in these CCAA proceedings be disallowed in full. It is opposed by a number of the home buyers who filed claims for damages resulting from their purchase agreements not being performed by the relevant Urbancorp entity which contracted to build and sell residential units.

[2] There are five Urbancorp entities involved in this dispute, being Urbancorp (St. Clair Village) Inc., Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp (Bridle Path) Inc. and Urbancorp (Woodbine) Inc. Each held an interest in real property as bare trustees and intended to develop residential homes. They pre-sold 185 freehold homes and collected deposits totalling $15.6 million from home buyers. The deposits were spent prior to the commencement of these insolvency proceedings. There was no statutory or other requirement that the deposits be held in trust or otherwise segregated.

[3] At the commencement of the CCAA proceedings, these companies were in the process of obtaining, and in some cases had obtained, approvals required to develop each of their projects. With the exception of Bridlepath, all were holding raw land. Construction of an underground garage had been commenced by a prior owner of Bridlepath.

[4] On March 4, 2016, Tarion Warranty Corporation issued to each of the vendors a Notice of Proposal to Refuse to Renew Registration pursuant to the *Ontario New Home Warranty Plan Act*. This was a precipitating factor in the vendors taking insolvency proceedings. On April 25, 2016

the Urbancorp companies in question filed notices of intention (NOI) to make a proposal under the BIA. On May 18, 2016 they moved for relief under the CCAA, at which time the Monitor was appointed.

[5] On June 30, 2016 a sales process order was made authorizing the Monitor to take steps to sell the property owned by each Urbancorp company. The properties were sold to buyers who refused to take an assignment of the purchase agreements made with the home buyers. The sales were approved by court order and vesting orders were provided to each buyer with title free and clear of all obligations, including the agreements of purchase and sale entered into between the Urbancorp companies and the home buyers.

[6] There is no dispute that the home buyers are entitled to the return of their deposits and no dispute that they will be paid their deposits. The issue is whether any of the home buyers are entitled to damages for the loss of their bargain in their purchase agreements not being completed. The value of real estate has increased substantially since the agreements were made in 2014 and the home buyers have lost the value of this increase. Some have bought other homes at much higher prices than would have been the case in 2014 when they made their agreements with Urbancorp.

[7] The Monitor conducted a claims process under which the home buyers were not required to file proofs of claim. Instead, the Monitor prepared each home buyer's claim and sent it to each home buyer. Home buyers were entitled to accept the claims as determined by the Monitor or dispute the amount of the claim by filing an objection notice. After reviewing the purchase agreements made with the home buyers and an exclusion of liability provision in clause 45 which provided that if the vendor could not complete the transaction for any reason, the purchaser had no claim for damages, the Monitor determined that the home buyers had a claim only for the return of their deposits and sent the claims to the home buyers that reflected that conclusion. Sixty-four of the 185 home buyers have disputed the Monitor's position and claim damages.

[8] The damage claims being asserted by the objecting home buyers are (i) the difference between the purchase price of their home and the market value of the home as at the closing date set out in their purchase agreement; (ii) additional costs and expenses incurred in connection with

obtaining and relocating to alternative residential properties; and (iii) legal, appraisal, and other professional fees.

Analysis

[9] The issue is whether the exclusion of liability clause as properly construed prevents a damage claim and if so whether the clause should not be enforced on various equitable grounds. The clause in all of the purchase agreements is as follows:

> 45. Notwithstanding anything contained in this Agreement, it is understood and agreed by the parties hereto that in the event that construction of the Dwelling is not completed on or before the Closing Date for any reason or in the event the Vendor cannot complete the subject transaction on the Closing Date, other than as a result of the Purchaser's default, the Vendor shall not be responsible or liable to the Purchaser in any way for any damages or costs whatsoever including without limitation loss of bargain, relocation costs, loss of income, professional fees and disbursements and any amount paid to third parties on account of decoration, construction or fixturing costs other than those costs set out in the Tarion Addendum.

[10] The analysis to be undertaken in considering the applicability of exclusion of liability clauses was settled in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1 S.C.R. 69. While the Court was split on the outcome of the case, there was agreement on the analysis to be undertaken and described by Justice Binnie as follows:

> **121** The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
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> **122** The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

> **123** If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

(i) Does clause 45 apply?

[11] The Monitor says that the clause is unambiguous and that it covers any situation in which construction is not completed on the closing date for any reason or the vendor cannot complete the transaction on the closing date. The Monitor says that occurred in this case and the claims of the home buyers are clearly covered by the exclusion of claims for loss of bargain.

[12] It is argued by the home buyers that the clause by its terms only applies when there has been a delay in closing and not when there has been a failure to close. The language certainly does not say that. It is argued however that the last sentence of the clause that excludes damages and costs makes an exception for "those costs set out in the Tarion Addendum". It is argued that section 7 in the Tarion Addendum to the purchase agreements provides for compensation for delayed occupancy, but only if the purchase closes, which is said to be an indication that clause 45 was meant to apply only to a delay in occupancy, not a failure to provide occupancy.

[13] I do not agree. Each of the purchase agreements for the five developments contained the same Tarion Addendum as set out in the agreed statement of facts. Before paragraph 7 of the Addendum is a heading "MAKING A COMPENSATION CLAIM". Section 7 begins with the heading Delayed Occupancy Compensation. It provides for payment of $150 per day of delay and for other things such as moving and storage and moving costs. Paragraph 12 under the same general heading is headed Refund of Monies Paid on Termination and provides for a refund on termination of any deposit made and money paid for upgrades and extras.

[14] I think it an unwarranted stretch of the last proviso in clause 45 of the purchase agreements to say that the costs referred to are only the types of costs set out in section 7 and not to those referred to in section 12 of the Tarion Addendum.

[15] In any event, the language of clause 45 does not permit an interpretation that it only applies to a delay and not a failure to close. Excluded from claims are claims for loss of bargain, relocation costs and any amount paid to third parties on account of decoration, construction or fixturing costs. There would be no realistic claim for these things if late occupancy were given. They would realistically apply only if no occupancy were given.

[16] The home buyers also argue that the *contra proferentum* rule applies so that any ambiguity is to be held against Urbancorp. I think it right to say that the contracts, in so far as the fine print is concerned, including clause 45, can be considered to be contracts of adhesion and that the *contra proferentum* rule would apply if there were an ambiguity. However, I do not find there is an ambiguity giving rise to that rule.

[17] The home buyers rely on the case of *Aita v Silverstone Towers Ltd.* (1978), 19 O.R. (2nd) 618 (C.A.) involving a sale of a condominium that the vendor refused to close by taking steps held to be a repudiation of the agreement. The purchase agreement had a clause which provided:

> In the event the transaction is not completed by reason of default on the part of the Vendor, the liability of the Vendor shall be limited to the return to the Purchaser of the deposit monies herein.

[18] It was held that on the vendor's interpretation of the clause, the vendor could capriciously or wrongfully refuse to complete the transaction without any liability. In order to prevent such a result, the clause was interpreted to apply only to a default in carrying out a term of the agreement rather than a repudiation of the agreement. Arnup J.A. stated:

> I do not accept the defendant's construction of that paragraph as limiting its liability, even in the event of its arbitrary refusal to carry out the contract. In my view, the paragraph was intended to cover default by the defendant in carrying out a term of the contract that required it to do something. This is the ordinary meaning of the word "default". The paragraph was not intended to cover a complete and outright repudiation of the entire contract.

[19] I do not think that case is apt to the circumstances of this case. Apart from the fact that the clause in that case was not the same as the Urbancorp clause, there was no arbitrary action or repudiation by Urbancorp of the purchase agreements. What occurred was as a consequence of the Israeli bond issuance, the later Israeli and CCAA proceedings and a court-approved sales process.

[20] In late December, 2015 or early in 2016, Urbancorp Inc. raised approximately $64 million by issuing its Israeli bonds. The bond offering was to deleverage the Urbancorp balance sheet and to provide the capital to arrange construction financing. It was subordinated debt so that the banks would count it as part of the equity of Urbancorp. Of the net funds received, $54 million was used to pay existing secured obligations of various Urbancorp entities and the balance was used for working capital purposes. Urbancorp clearly intended to complete the construction and close the purchase agreements with the home buyers.

[21] After Tarion issued its Notice of Proposal to Refuse to Renew Registration for each project, the Urbancorp entities in question filed their NOI proceedings under the BIA. The bondholders of Urbancorp Inc. in Israel considered that there had been default under the terms of the bonds and on April 25, 2016 the Israeli court appointed Mr. Gus Gissin as the functionary of Urbancorp Inc. As a result, these CCAA proceedings were filed by the relevant Urbancorp entities.

[22] In his affidavit in support of the CCAA filing, Mr. Saskin stated his view that the primary challenge facing the Urbancorp entities was their inability to raise the necessary financing to advance their major projects beyond their current stages of development and that the subsidiaries of Urbancorp Inc., which include the relevant subsidiaries on this motion, had significant net asset value in excess of obligations to creditors so long as the assets were properly restructured or sold in an orderly manner. He further stated that the Monitor should be given enhanced powers that would enable it to make all material decisions in respect of the operation of the business and the conduct of a SISP. That enhanced power was given to the Monitor.

[23] As stated, the sales process undertaken by the Monitor resulted in the projects being sold as raw land with no purchaser being willing to take an assignment of the purchase agreements of the home buyers and with vesting orders being provided to the buyers giving them free title. That left the Urbancorp entities with no ability to complete the purchase agreements. I cannot, however, find that there was some unlawful repudiation of those purchase agreements by Urbancorp.

[24] Nor is this a situation such as existed in *1465152 Ontario Limited v. Amexon Development Inc.*, 2015 ONCA 86; leave to appeal refused [2015] S.C.C.A. No 102 (S.C.C.), in which a landlord

rescinded the bargain and evicted a tenant in an effort to make more money because something better had come along.

[25] To suggest that Mr. Saskin took the steps that he did to make money for himself as the owner of the various Urbancorp entities flies in the face of the evidence. It is quite clear that there is no money from the Urbancorp entities that sold homes to the home buyers that will end up in Mr. Saskin's pocket. The balance available after the creditors of these subsidiaries are paid will go to partially pay money owing on the Israeli bonds. Mr. Saskin has himself filed NOI proceedings under the BIA.

[26] I find that clause 45 applies in the circumstances of this case. Once the Monitor sold the properties to buyers who would not take an assignment of the purchase agreements and who obtained vesting orders that provided that title was taken free of any obligations under the purchase agreements, Urbancorp could not complete construction or close the purchase agreements as referred to in clause 45. Thus the damages claimed by the home buyers are excluded by the language of clause 45.

(ii) Unconscionability

[27] Unconscionability is a doctrine that permits a party to void a contract that is manifestly unfair. In order to demonstrate unconscionability, a contracting party must show that the other party 1) enjoyed unequal bargaining power, and 2) a substantially unfair bargain resulted. The inquiry is directed at whether the contract was manifestly unfair at the time the contract was entered into. See Re *Tercon* (Binnie J.) at para. 122; *Morrison v. Coast Fin. Ltd.* (1965), 54 W.W.R. 257, 55 D.L.R. (2d) 710 (B.C.C.A.); *Harry v. Kreutziger* (1978), 9 B.C.L.R. 166, 95 D.L.R. (3d) 231 (C.A.).

[28] *Tercon* offers little guidance on the scope of the unconscionability test. See Hall, Geoff R., *Canadian Contractual Interpretation Law*, Third Edition, 2016: LexisNexis Canada at p. 330, §9.12.2.3. The author states that it appears that unconscionability provides a relatively high bar that is difficult to meet to invalidate a limitation of liability provision. Case law supports this conclusion.

[29] In *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, MacPherson J.A. adopted the following test for unconscionability:

> **38** In a recent case dealing with the doctrine of unconscionability in a wrongful dismissal context, *Cain v. Clarica Life Insurance Co., supra*, Côté J.A. reviewed the leading cases and academic commentary and concluded, at para. 32:
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> > Those authorities discuss four elements which appear to be necessary for unconscionability ...
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> > 1. a grossly unfair and improvident transaction; and
> >
> > 2. victim's lack of independent legal advice or other suitable advice; and
> >
> > 3. overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
> >
> > 4. other party's knowingly taking advantage of this vulnerability.

[30] See also *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*, [1997] O.J. No. 2359 (C.A.) in which Robins J.A. stated:

> **34** ... Mere inequality of bargaining power does not entitle a party to repudiate an agreement. The question is not whether there was an inequality of bargaining power. Rather, the question is whether there was an abuse of the bargaining power.

[31] It is argued that there was an inequality of bargaining power because at the time the purchase agreements were made by the home buyers, it was a seller's market in that there were more buyers than product available and that Urbancorp had greater expertise in selling residential units than the relative unsophistication of the buyers and lack of experience in buying homes. I do not accept this assertion.

[32] The homes in question were sold by third party agents in sales offices for each project employed by International Home Marketing Group Limited, a fully integrated sales management and marketing company that works with various developers in the Greater Toronto Area and assists them with marketing projects to the public and staffing sales offices when the projects are first

made available to the public for purchase. Recognizing that the projects were marketed in varying ethnic communities and to varying potential purchasers, particularly real estate investors with a Chinese background, IHM staffed the sales offices and events with IHM sales agents who would be able to communicate with potential purchasers in their native language, including several dialects of Mandarin. The sales offices or events for the projects were all very well attended by potential purchasers who lined up on the first day that homes were made available to them.

[33] The evidence of Mr. Saskin, not really challenged, was that for a number of years most condominium buyers have been investors who buy the homes and rent them out. There were usually five or six persons available for every unit sold. Usually all units for a project sold out in one day.

[34] The majority of the home buyers from St. Clair signed their purchase agreements on January 18, 2014. Approximately half of the home buyers from Lawrence represented by Dickinson & Wright signed their purchase agreements on April 18, 2015. The home buyer from Mallow represented by Dickinson & Wright signed on October 18, 2014. With the exception of one home buyer, all of the home buyers from Woodbine represented by Dickinson & Wright signed their purchase agreements on May 24, 2014. A substantial majority of home buyers from Bridlepath signed their purchase agreements on May 24, 2014.

[35] The Monitor prepared a questionnaire that was sent to the objecting home buyers who were ordered to complete it. The responses reflect that of the objecting home buyers who completed the Monitor's questionnaire:

(a) 74% have a college or university degree or equivalent;

(b) 84% can read and understand English;

(c) 89% are employed or self-employed, of which the substantial majority have white-collar jobs;

(d) 71% had previously entered into at least one agreement of purchase of sale to purchase a home and more than 53% had previously entered into more than one agreement of purchase of sale to purchase a home;

(e) 58% stated that they were represented by a real estate agent. (This is contrary to the CCAA Entities' books and records, which reflect that approximately 86% of the objecting home buyers were represented by a real estate agent);

(f) 26% had a lawyer review their Home Buyer Agreement during the 10-day rescission period.

[36] There is no evidence that any pressure was put on the home buyers by the sales agents. What generally took place was that pressure on a buyer, if any, was because of the large number of other persons who would be willing to purchase the unit if he or she did not commit to purchasing the unit. That is, any pressure was caused by the market and not by Urbancorp or the agents.

[37] I cannot find that the purchase agreements signed by the home buyers were grossly unfair or improvident. There is no evidence that they were. Moreover there was no overwhelming imbalance in bargaining power caused by the situation of the home buyers or, more importantly, any evidence of Urbancorp or the sales agents knowingly abusing any bargaining power or taking advantage of any vulnerability of a home buyer.

[38] The home buyers argue that the clause should not be applied because there is an onus to point out a term in a printed form which differs from what the consumer might reasonably expect and they rely on the case of *Tilden Rent-A-Car Co. v. Clendenning* (1978), 18 O.R. (2nd) 601 (C.A.). In that case, Dubin J.A. referred to a statement of Professor Waddams that case law suggested that there was an onus on a supplier to point out any terms in a printed form which differ from what a consumer might reasonably expect. He stated that in cases in which the party relying on the contract knew or ought to have known that the signature of the party does not represent the true intention of the signer who is unaware of the stringent and onerous provisions, the provision cannot be relied on unless the party relying on it must have taken reasonable measures to draw such terms to the attention of the other party.

[39] I do not see the statements of Dubin J.A. as being applicable in this case. There is no evidence that a purchaser would not reasonably expect an exclusion of liability clause in an agreement such as this to purchase a home to be constructed on vacant land. What evidence there

is on the record is to the contrary. On his cross-examination, Mr. Saskin, the principal of the Urbancorp companies, said that such clauses were used by most builders and standard in agreements. The Monitor expressed the view in its report that such a clause is a common provision in home buyer agreements when purchasing a residential home from a developer. Dickenson & Wright sent a questionnaire to all of its clients asking a number of questions. It did not include a question as to the clients' expectations about an exclusion of liability clause.

[40] Generally, it has been held that there is an obligation on a party who signs a contract to read it and failure to do so is not a reasonable basis for refusing to abide by the contractual terms absent unconscionability, good faith and a fiduciary standard if applicable. See *978011 Ontario Ltd. v. Cornell Engineering Co.*, [2001] O.J. No. 1446 (C.A.) at para 32-33. This case dealt with a term other than an exclusion clause and was prior to *Tercon*. In an exclusion clause case prior to *Tercon*, it was held that in a commercial setting, in the absence of fraud or other improper conduct inducing the plaintiff to enter into the contract, the onus rests on the plaintiff to review the document before signing it. See *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*, [1997] O.J. No. 2359 (C.A.) at para. 32. The principles governing exclusion clause exceptions are now discussed in *Tercon* which holds that the exceptions to enforcement of an exclusion clause are unconscionability and public policy.

[41] With such a high number of persons represented by real estate agents, and the intelligence level of the purchasers, I find it difficult to accept that the agents for Urbancorp in the sales pavilions were obliged to point out an exclusion of liability clause that on the evidence was common to such purchase agreements. With respect to 16% of people who said they cannot read and understand English, they were able to complete the questionnaires and they must have had assistance in doing so. There is no evidence they did not have such assistance when they signed their purchase agreements. Moreover, there were several interpreters in the sales pavilions and I cannot imagine a person who could not read and understand English to sign a purchase agreement for a substantial sum without some assistance from someone such as an agent or lawyer. There is no evidence that these persons did not understand what they were doing.

[42] In these circumstances, I cannot find that any failure to point out the exclusion of liability clause was unconscionable.

[43] I find that there was no unconscionability giving rise to a finding that clause 45 of the purchase agreements are unenforceable.

(iii) Public Policy

[44] The issue as described in *Tercon* is to determine if there is some overriding public policy that outweighs the strong public interest in enforcement of contracts. In *Tercon*, Binnie J. said that the public policy exception will rarely be exercised. He stated:

> **115** I agree with Professor Waddams when he writes:
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> > [I]t is surely inevitable that a court must reserve the ultimate power to decide when the values favouring enforceability are outweighed by values that society holds to be more important. [para. 557]
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> **116** While memorably described as an unruly horse, public policy is nevertheless fundamental to contract law, both to contractual formation and enforcement and (occasionally) to the court's relief against enforcement. As Duff C.J. observed:
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> > It is the duty of the courts to give effect to contracts and testamentary dispositions according to the settled rules and principles of law, since we are under a reign of law; but there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual.
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> (*Re Millar Estate*, [1938] S.C.R. 1, at p. 4)
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> See generally B. Kain and D. T. Yoshida, "The Doctrine of Public Policy in Canadian Contract [page121] Law", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation*, 2007 (2007), 1.
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> **117** As Duff C.J. recognized, freedom of contract will often, but not always, trump other societal values. The residual power of a court to decline enforcement exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised. Duff C.J. adopted the view that public policy "should be invoked only in clear cases, in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds" (p. 7). While he was referring to public policy considerations pertaining to the nature of the entire contract, I accept that there may be well-accepted public policy considerations that relate directly to the nature of the breach,

and thus trigger the court's narrow jurisdiction to give relief against an exclusion clause.

[45] The home buyers rely on a number of cases, such as *Hurley v. Roy* (1921), 50 O.L.R. 251 (C.A.), which hold that a party cannot take advantage of a rescission clause if it has not acted reasonably in fulfilling a condition of a contract. I have considerable doubt that the principles of this case fall under the public policy exception enunciated in *Tercon*, but if they do, I see no evidence in this case that Urbancorp engaged in any such conduct.

[46] The home buyers contend that recklessness of a party in the making of a contract will disentitle that party to rescind the contract, and rely on cases such as *Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.* (1997), 36 O.R. (3rd) 328 and *Great Jordan Realty Group v. Genesis Marketing Organization, Ltd.* (1977), 15 O.R. (2nd) 701 for that proposition. Again, I have doubt that the principles of those cases fall under the public policy exception enunciated in *Tercon,* but if they do, I see no evidence in this case that Urbancorp engaged in any such conduct.

[47] The home buyers contend that the dates for closing and the extensions for closing put in the purchase agreements were not achievable and that Urbancorp was reckless in setting those dates. They point to evidence of a normal time for various steps in the process of taking raw land through to completed construction and say that all of those steps could not possibly be completed within the closing dates put in the purchase agreements. They say that Urbancorp knew or ought to have known that construction of the homes could not be completed by the closing dates.

[48] This issue is completely irrelevant to what happened in this case. The time for construction had nothing to do with the purchase contracts not being completed and was not a cause of the liquidity crisis in which Urbancorp could not raise the necessary financing to advance their major projects. In any event, the contention of the home buyers is not supported by any cogent evidence. Notably, they have not provided the evidence of any person knowledgeable in the business to support their argument that the closing and extension closing dates in the purchase agreements were reckless. The evidence was the assertion put to Mr. Saskin on his cross-examination. His response was that the assertion was wrong, that when Urbancorp goes to market it comes up with

occupancy dates that it believes are achievable and if subsequent events cause delays, Urbancorp avails itself of these extensions.

[49] So far as public policy is concerned, Tarion, which was set up under provincial legislation and regulations, provides in the Tarion Addendum that the consequences of a developer being unable to deliver a home by an outside date are that the purchaser can rescind the purchase agreement and be entitled to a return of his or her deposit. There is no provision that if a home cannot be delivered on time the vendor will be unable to rely on an exclusion of liability clause or be liable for more than the costs thrown away by the purchaser. Nor is there any provision preventing the use of an exclusion of liability clause.

[50] The home buyers refer to *Bhasin v. Hrynew,* and say that the organizing principle of good faith means that Urbancorp had an obligation to conduct its business in a financially responsible manner so as to meet its financial obligations and to take all steps to maintain its registration with Tarion. I think they take *Bhasin* too far. That case established a common law duty of honest performance of contracts. It did so under a general organizing principle of good faith as the objectionable conduct did not fit within any of the existing situations or relationships in which duties of good faith have been found to exist. In so far as the organizing principle of good faith is concerned, Justice Cromwell described it as follows:

> **63** The first step is to recognize that there is an organizing principle of good faith that underlies and manifests itself in various more specific doctrines governing contractual performance. That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and not capriciously or arbitrarily.
>
> **64** As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations: [citations omitted] It is a standard that helps to understand and develop the law in a coherent and principled way.
>
> **65** The organizing principle of good faith exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner.

> While "appropriate regard" for the other party's interests will vary depending on the context of the contractual relationship, it does not require acting to serve those interests in all cases. It merely requires that a party not seek to undermine those interests in bad faith. This general principle has strong conceptual differences from the much higher obligations of a fiduciary. Unlike fiduciary duties, good faith performance does not engage duties of loyalty to the other contracting party or a duty to put the interests of the other contracting party first. (Underling added)

[51] There is no evidence that Urbancorp was not acting honestly or acting in bad faith in taking the steps that it did to obtain financing or in dealing with Tarion in in filing under the CCAA. There was no duty on Urbancorp as argued that it had a duty to the home buyers to ensure its financial success.

[52] I see no public policy doctrine in play in this case to prevent Urbancorp from relying on the exclusion provision in clause 45 of the purchase agreements.

Conclusion

[53] The motion of the Monitor is allowed. Clause 45 of the purchase agreements is valid and enforceable. Any claims by any of the home buyers for damages are disallowed

Newbould J.

Date: April 18, 2017