CITATION: Re Urbancorp, 2017 ONSC 2900
COURT FILE NO.: CV-16-11549-00CL
DATE: 20170511

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 (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: *Neil S. Rabinovitch and Kenneth Kraft,* for Guy Gissin, the Israeli Functionary of Urbancorp Inc.

Robin B. Schwill, for the Monitor

David Preger, for Downing Street Financial

Adam M. Slavens, for Tarion Warranty Corporation

Lori Goldberg, for Fuller Landau, the Receiver of Alan Saskin

HEARD: May 2, 2017

ENDORSEMENT

[1] Guy Gissin, the Israeli Functionary of Urbancorp Inc. ("UCI") and recognized in this proceeding as the Foreign Representative, moves to set aside the disallowance of a claim made by UCI in the claims process on a promissory note of $6 million issue by Bay LP, an Urbancorp entity, to Urbancorp Toronto Management Inc. ("UTMI") and assigned by UTMI to UCI. Mr.

Gissin also moves for a declaration confirming the validity of a companion $2 million note issued by Bay LP to UTMI and assigned to Urbancorp Realtyco Inc. ("Realtyco"), a subsidiary of UCI.

[2] These notes were issued in connection with management fees to be paid by Bay LP to UTMI and they replaced an earlier $8 million note of Bay LP to UTMI. The relevant events are contained in the Monitor's sixth report, as follows.

[3] The management fee relates to a fee charged by UTMI to Bay LP in respect of the sale of Bay LP's 49% interest (the "Sale") in Downsview Homes Inc. ("Downsview Homes") to Mattamy Homes. A history of Downsview Homes, the Sale, the management fee and the promissory notes, is as follows:

- June 28, 2011 – Downsview Homes, a nominee for Downsview Park, which was the nominee for Bay LP, entered into agreements (the "Purchase Agreements") for the purchase of lands (the "Lands") from Parc Downsview Park Inc. ("PDP"). The Purchase Agreements were to close upon the rezoning of the Lands. The date for the closing was unknown at the time of entering into the Purchase Agreements.

- June 10, 2013 – A consulting agreement (the "Original Fee Agreement") was entered into among Bay LP, Downsview Park and UTMI. The Original Fee Agreement provided, inter alia, that Bay LP would pay UTMI a $9.8 million fee if Bay LP successfully completed the Sale for an amount in excess of $18 million. The fee would become payable upon an invoice being rendered by UTMI to Bay LP, which UTMI agreed would not be rendered prior to the closing of the Purchase Agreements with PDP. At the date of the Original Fee Agreement, the date of the final closings for the Purchase Agreements was unknown. The final closings, as it turned out, occurred on June 4, 2015.

- July 30, 2013 – Bay LP completed the Sale of its 49% interest to Mattamy Homes for an amount in excess of $21 million. From the proceeds of the sale price, UTMI received approximately $14.5 million in two separate payments ($6.8 million and $7.7 million).

- December 15, 2014 – An $8 million promissory note (the "Original Promissory Note"), dated December 15, 2014 was issued by Bay LP in favour of UTMI. The debt supporting the Original Promissory Note was the unbilled balance of the fee relating to the Original Fee Agreement (i.e. $9.8 million less $1.8 million fee accrued in 2013). The payment terms of the Original Promissory Note differ from the payment terms of the Original Fee Agreement; the Original Promissory Note was "Due on Demand", whereas the Original Fee Agreement specifies the fee

would be due upon the rendering of an invoice by UTMI to Bay LP, which would not be rendered prior to the final closing of the Purchase Agreements.

- June 1, 2015 – An amending agreement (the "Amended Fee Agreement") was entered into among Bay LP, Downsview Park and UTMI. The Amended Fee Agreement reduced the fee earned on the Sale by $3.0 million to $6.8 million. The Amended Fee Agreement also changed the date on which the fee is to be due and payable to the date of the first advance from bcIMC Mortgage Fund ("bcIMC") of the construction financing for the Downsview Park project. The first funding from bcIMC, although not known at the time of the Amended Fee Agreement, occurred in 2016. The financing facility provided by bcIMC closed on July 21, 2016.

- December 11, 2015 – The $8 million Original Promissory Note was replaced by a $6 million promissory note (the "$6 Million Promissory Note") and a $2 million promissory note (the "$2 Million Promissory Note") (collectively the "Substituted Promissory Notes"). The Substituted Promissory Notes make reference to the Original Promissory Note (although the Substituted Promissory Notes state the Original Promissory Note had been issued on December 11, 2015 rather than December 15, 2014). The terms of the Substituted Promissory Notes appear to be the same as the Original Promissory Note except that the Substituted Promissory Notes bear interest (at 1%), whereas the Original Promissory Note stated there is no interest. The $6 Million Promissory Note and the $2 Million Promissory Note were assigned by UTMI on December 11, 2015 to UCI and Urbancorp Management Inc. ("UMI"), respectively; on the same day, UMI assigned the $2 Million Promissory Note to Realtyco.

[4] UCI was incorporated to raise money in the Israeli bond market which it did in December 2015 by raising $64 million through a public bond issuance on the Tel Aviv Stock Exchange. UCI was required as a condition of the bonds to transfer assets from Urbancorp to UCI to support UCI's ability to pay the bonds. A number of Urbancorp entities were transferred into UCI. As well, Mr. Saskin, the owner of the various Urbancorp entities, agreed to assign to UCI $8 million of obligations described as loan obligations. The prospectus reflected this condition as follows:

> "The Rights Holders [Mr. Saskin and his family] have committed that, prior to the listing for trading [of the bonds]...they would transfer to [UCI] their rights ... in the transferred entities which indirectly hold rights to rental investment property....and would assign [UCI] their right to the repayment of loans held be [sic] them, which amounts to CAD 8,000 thousand (hereinafter together "the Transferred Rights")...

[5] As part of the Bond Issuance, interim pro forma consolidated financial statements of UCI as of June 30, 2015 were prepared by Brightman Almagor Zohar & Co. ("Deloitte Israel"). These unaudited interim pro forma consolidated financial statements as at June 30, 2015 and as at September 30, 2015 indicated that UCI had a current asset of $8 million in respect of "related parties". The notes to the financial statement referred to an assignment to UCI of the right to receive loans from entities owned by Mr. Saskin and his family.

[6] Mr. Saskin was examined by counsel for the Foreign Representative. In answers to very leading questions he said that the reference in the prospectus to the right to repayment of $8 million in loans and the reference in the pro forma unaudited statements to the current asset in respect of related parties were to the $8 million promissory note. I find it difficult to understand why a promissory note issued in respect of obligations under the Original Fee Agreement for management fees, as acknowledged by the Foreign Representative in its factum, would be referred to as a right to repayment of loans. There is no evidence the promissory note had anything to do with loans. I do not put any reliance on the assertions of Mr. Saskin who has no real recollection of the $8 million note or its purpose.

[7] The Foreign Representative takes the position that UCI, as an assignee from UTMI, is a good faith holder in due course of the $6 million note free of any defect of title and personal defences between the prior parties to the note. It also says that UCI gave value for the assignment of the note to it by issuing special shares of UCI to Urbancorp Holdco, wholly owned by Mr. Saskin.

[8] The position of the Monitor and its reason for disallowing the claim of UCI on the $6 million promissory note is that the original $8 million note was issued by Bay LP in favour of UTMI as evidence of the principal payment obligation under the Original Fee Agreement and was not an obligation of Bay LP independent of the obligation under the Original Fee Agreement. By the time the substituted $6 million note was issued, Bay LP did not owe UTMI anything and UTMI owed Bay LP $527,655. This argument is based on the accounting records of Bay LP and UTMI. The Monitor also says that that UTMI provided no new consideration to Bay LP in exchange for the issuance of the $6 million note.

Analysis

[9] A promissory note is not always a promise separate from an underlying transaction. In Benjamin Geva, *Vol II, Negotiable Instruments and Banking* Toronto: Emond Montgomery Publications Ltd, 1995 it is stated at page 90:

> Sometimes, an instrument is taken by a creditor from his debtor merely to evidence the debtor's undertaking under the basic transaction (e.g., sale of goods, loan of money). In such a case, as between the debtor and creditor, the instrument itself does not give rise to any liability on the debtor's part. The basic transaction remains the only effective source of the debtor's liability. The debt is neither discharged nor suspended by the giving of the instrument. The instrument is only intended to serve as evidence of the indebtedness.
>
> Normally, however, an instrument is given by a debtor to his creditor either as collateral security to, or by way of payment of, the indebtedness arising from the basic transaction. There is moreover a presumption in favour of payment.

[10] What was the purpose of the original $8 million promissory note? It was signed by Mr. Saskin. On his cross-examination, he said he did not know what the purpose of the note was. He said it was likely made on accounting and legal advice, but even on that he was guessing. There is no evidence from any accountant or legal advisor about the purpose of the note.

[11] Mr. Cole of MNP, the accountant for Urbancorp, was asked what the reason was for the original $8 million note being split into two notes, one for $6 million and one for $2 million. He said that the original note was split into two for tax purposes to avoid a capital gain on the transfer of certain assets to UCI subsidiaries. What those certain assets were was not said. He was asked why the replacement notes provided for 1% interest when the original provided for no interest, and his response was that he did not know. This information was not sworn but contained in answer to questions posed by counsel for the Foreign Representative.

[12] I cannot find that the $6 million note or the $2 million note were independent obligations regardless of whether the management fees were paid. The best that can be made on the record before me is that they were issued for tax purposes.

[13] So far as the original $8 million note dated December 15, 2014 is concerned, it represented the balance at that time of the management fees of $9.8 million to be paid under the Original Fee Agreement which had been reduced by the payment of $1.8 million which was paid not by cash but by off-setting entries in the Bay LP and UTMI intercompany accounts. It had nothing to do with any outstanding loans owed by Bay LP to UTMI.

[14] The form of the $8 million promissory note bears all of the hallmarks of a note given by a debtor to an independent holder. For example, it provides that if the note is put in the hands of a solicitor for collection the borrower shall pay all costs as between a solicitor and his own client. The note was signed by Mr. Saskin. It was in favour of UTMI. Mr. Saskin controlled both companies and the notion that he would retain a lawyer for his company UTMI to go after his company Bay LP is fanciful. There is no evidence of any intent at the time for UTMI to assign the note to any independent party who might wish to rely on such clauses.

[15] Moreover, Bay LP was not a borrower at all but had a potential liability for management fees in the future if Bay LP was successful in selling its 49% interest in two agreements to acquire property. The amount of management fees depended on the amount received by Bay LP and could be only $3 million if the sale was for an amount up to $10 million, or $7 million if the sale was between $10 million and $18 million, or $9.8 million if the sale was for more than $18 million. The note was said to be a demand note, which if truly was the case meant that UTMI could demand payment of $8 million at any time even though management fees were not yet payable or in that amount[1]. Under the Original Fee Agreement no management fees could be invoiced or paid until after the purchase of the underlying properties were completed, which as it turned out did not occur until June 4, 2015.

[16] I cannot find that the original $8 million note was an obligation of Bay LP independent of the obligation of Bay LP to pay management fees to UTMI. There is simply no evidence that it was intended to be an obligation separate from the obligation to pay management fees. Like the

[1] When the first payment of management fees was made in 2013, they were not yet owing as the purchase of the lands in question did not close until June 4, 2015 and no invoice for management fees was or could be rendered at the time that payment was made. It is apparent that all of the documentation was not intended to be closely followed.

later $6 million and $2 million replacement notes, it is likely that the $8 million note was made for some tax purpose of Urbancorp. The explicit terms of the $8 million note, like the terms of the replacement $6 million and $2 million notes, were not intended to be binding on Bay LP or UTMI.

[17] An issue therefore is whether the balance owing by Bay LP to UTMI in management fees was paid, or paid by the time of the issuance of the replacement notes on December 11, 2015. The balance owing under the Original Fee Agreement as it turned out was $8 million. The total management fees were amended in the Amended Fee Agreement dated June 1, 2015 which reduced the management fees to be paid by Bay LP to UTMI to $6.8 million in total, which would leave only $5 million outstanding.

[18] It seems clear that as between Bay LP and UTMI, the accounting treatment was the method by which accounts were settled. The first payment of $1.8 million owing by Bay LP to UTMI was taken care of by the intercompany offsets.

[19] The 2013 Bay LP financial statements reflect a "Management fees" expense of $1.8 million in the statement of earnings. These management fees were included in the 2013 Bay LP's balance sheet item "Accounts payable and accruals" of $1,817,030. On December 31, 2014, the $1.8 million accrued management fee (plus HST for a total of $2,034,000) was entered in the intercompany account between Bay LP and UTMI as being "capitalized". It is acknowledged by the Foreign Representative that this was treated as a payment of the $1.8 million payable for management fees.

[20] The December 31, 2014 Bay LP financial statements reflected a "Management fees" expense of $8 million in the statement of earnings. The management fees were included in the 2014 Bay LP's balance sheet item "Accounts payable and accruals" item of $8,150,738. As at December 31, 2014, the intercompany accounts between Bay LP and UTMI reflected $3,537,135 owing by UTMI to Bay LP, exclusive of the $8 million management fee accrual. If the $8 million note was issued as an independent liability, it would be expected that the amount remaining owing for management fees would be recorded in the intercompany accounts as being paid by the note. That is not what happened.

[21] On June 30, 2015 the intercompany account of Bay LP with UTMI recorded an accrued liability for management fees of $8 million. On December 31, 2015 that intercompany account recorded a reduction of $3 million that was stated to be a NMP year-end adjustment to the management fee accrued liabilities to UTMI. That is, NMP, the accountant for the Urbancorp entities, including Bay LP and UTMI, directed that year-end adjustment. At the year-end, the intercompany balance showed $527, 654.20 owing from UTMI to Bay LP. This was net of i.e. took into account, the remaining management fee liability.

[22] The accountants for Bay LP provided the Monitor with the 2015 and 2016 Bay LP trial balances and year end adjusting entries. The December 31, 2016 Bay LP trial balance reflects a balance of $727,655 owing by UTMI to Bay LP. The December 31, 2015 Bay LP trial balance reflects a balance of $527,655 owing by UTMI to Bay LP. Neither the 2016 Bay LP trial balance nor the 2015 Bay LP trial balance reflects amounts owing to either UCI or Realtyco in connection with the substituted $6 million and $2 million promissory notes.

[23] As well, the 2015 Bay LP trial balance was the basis for Bay LP's 2015 T5013 tax information that Bay LP filed with the Canada Revenue Agency. The date of the certification of the 2015 Bay LP T5013 is "2016-03-30". Included in the 2015 Bay LP T5013 is Schedule 100, which summarizes Bay LP's assets, liabilities and partners' capital. The Monitor points out that in the Schedule 100, there is no liability listed that would support an indebtedness in respect of the $6 million and $2 million promissory notes. That is, the tax return of Bay LP was a statement that liability on the two notes did not exist.

[24] The Foreign Representative says the intercompany balances should not govern as year-end adjusting entries were not made and had that occurred, they would have reflected a balance owing on the $6 million and $2 million promissory notes. Reliance is placed on some answers provided by Mr. Cole of MNP to questions posed by the Foreign Representative's counsel. In those answers, which have not been sworn by Mr. Cole, he stated that it was his opinion that the intercompany balances were not completely accurate. In answer to a question "As the accountant to UTMI and [Bay LP], would MNP have posted year-end adjusting entries for these companies if the intent had been to keep the $8 million debt outstanding?" Mr. Cole answered "Yes". In answer to a further

question "If yes, can you please advise what entries you would have posted in regards to this $8 million liability owed by [Bay LP]?" Mr. Cole stated "Unsure as did not prepare the financials".

[25] I do not take much from these unsworn answers as assisting the Foreign Representative. First, I have noted that in the 2015 intercompany Bay LP accounts, a year-end adjustment to the $8 million management fee accrual was made by MNP to reduce it by $3 million. Presumably it did so after discussion with management. Second, the question put to Mr. Cole was whether he would have made a year-end adjusting entry "if the intent had been to keep the $8 million debt outstanding". The question did not provide any particular year-end. Mr. Cole did not say, nor presumably could he say, that there was an intent to keep the $8 million debt outstanding.

[26] In yet a further question as to whether Mr. Cole would have made any adjustment to recognize the $8 million liability in relation to the notes, he responded that he would have inquired of management whether the note remained outstanding and if management said yes, the liability would have been booked. Apart from the fact that the information was unsworn and untested, it is not any evidence that the adjustment would in fact have been made. It would require a statement from management that the note was outstanding and presumably some questions from Mr. Cole to test the reasonableness of the statement.

[27] Mr. Cole did say that MNP was engaged to prepare the tax returns and the related adjusting year-end tax entries. The tax return of Bay LP for 2016 is direct evidence that the $8 million debt was not outstanding.

[28] Moreover, there was no question of $8 million being outstanding at the time of the replacement notes dated December 11, 2015. On June 1, 2015 the original management fee of $9.8 million was reduced by agreement by $3 million to $6.8 million, and $1.8 million of that had already been paid. There was only $5 million left for a management fee under the Amended Fee Agreement.

[29] The Foreign Representative relies on a provision in both the original $8 million promissory note and the replacement $6 million and $2 million notes that state that all payments to be made by Bay LP pursuant to the promissory note are to be made in freely transferrable and immediately

available funds and without set-off. Therefore it says there is no basis to contend that the notes were paid by the management fees being set-off in the Bay LP and UTMI intercompany accounts by amounts owing by UTMI to Bay LP. The problem with this argument is that this provision is part of promissory notes that as previously stated were never intended to be binding on Bay LP or UTMI. It makes no sense for two companies controlled by Mr. Saskin to act on the basis of such a set-off provision and there is no evidence at all that Mr. Saskin at the time of the notes wanted to prevent set-off of payments owing between Bay LP and UCI. The whole history of the affairs of the Urbancorp companies is that accounts were set-off each year.

[30] Moreover, the notes were not independent obligations but reflective and given in connection with the management fee agreement, and the payments made were not made pursuant to the notes but by way of entries in the intercompany accounts.

[31] I find that the management fees owing by Bay LP to UTMI have been paid and were paid by the time the replacement notes of the $6 million and $2 million were issued.

[32] The $6 million note was assigned by UTMI to UCI. The Foreign Representative says UCI is a holder of that note "in due course" and that under section 73 of the *Bills of Exchange Act* ("BEA") a holder of a note in due course is entitled to enforce it in accordance with its terms free from any defect of title and personal defences that UTMI might have had on the note. Section 57(2) of the BEA provides that every holder of a bill, in the absence of evidence to the contrary, is deemed to be a holder in due course. The same argument is made with respect to the $2 million note that was assigned by UTMI to Urbancorp Management Inc. and then to Urbancorp Realtyco Inc.

[33] A holder in due course is defined in section 55 of the BEA as follows

> **55(1) Holder in due course**
>
> A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely,

> (a) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; and
>
> (b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

[34] I do not see this defence assisting the Foreign Representative. The assignments of the notes were all signed by Mr. Saskin on behalf of companies he controlled and to companies he controlled. The notes were not intended to be acted on by the parties to them and the assignee companies are not able to suggest they were independent of the assignor and not aware of that. In any event, by the time of the assignments of the notes, the underlying obligation to pay management fees had been fulfilled and nothing was owing under the notes. The assignees did not take the assignments before the notes were overdue, which is a requirement of being a holder in due course.

[35] Real (or absolute) defences do not constitute a defect of title and are available against a holder in due course. One such absolute defence is the discharge of the instrument by payment in due course. See Benjamin Geva, *supra*, at p. 133 and Crawford, B., Law of *Banking and Payment in Canada* (loose-leaf) , Toronto: Carswell, which states at §26:30.30(1):

> It is fundamental to any law of negotiable instruments that there be a distinction between the substance of real, or absolute, defences on the one hand, and defects of title and personal defences on the other. The former are the defences that apply against all persons, no matter whether the holder has or has not had notice of them, whether or not he took for value, whether before or after maturity, and whether or not the instrument is complete and regular in form.

[36] The Foreign Representative acknowledges that Mr. Saskin is the principal and controlling mind of Bay LP, UTMI and UCI. He argues, however, that Mr. Saskin's involvement with the three entities does not disqualify UCI from having obtained the $6 million promissory note in good faith because at all material times, he believed, and continues to believe, that the $6 million and $2 million notes are valid and enforceable. Reliance for this argument is placed on evidence Mr. Saskin gave on his examination by counsel for the Foreign Representative. I have a great deal of difficulty with this argument. Mr. Saskin made representations in the prospectus for the Israeli

bond offering and it is in his interest to say the notes are good and outstanding. As well, virtually all of his evidence was given to leading questions by counsel for a party in interest with Mr. Saskin.

[37] Mr. Saskin asserted that the replacement $6 million and $2 million notes dated December 11, 2015 were good and that the $8 million was owed then and continues to be owed. That however could not be the case. Apart from the fact that Mr. Saskin did not know what the purpose of the original $8 million note was, and could not know what the purpose of the two replacement notes were, it is clear and admitted that the $8 million note was given in respect of the $8 million balance owing for management fees and that before the replacement notes were issued for tax purposes, the management fee had been reduced on June 1, 2015 to reduce the total management fee to $6.8 million, $1.8 million of which had already been paid. Mr. Saskin signed the Amended Fee Agreement on behalf of all of the parties, being UTMI, Urban Downsview Park Development Inc. and Bay LP and had to know that $8 million could not have been owing. I do not put any store in Mr. Saskin's assertions of a present day belief that the notes are valid and enforceable or were at the time he signed them.

[38] The Foreign Representative argues that even if it is determined that Mr. Saskin was aware of a risk to the enforceability and validity of the 2015 $6 million and $2 million promissory notes, this knowledge should not be imputed to UCI because while Mr. Saskin was the controlling mind of UCI, the circumstances do not warrant discounting the lack of knowledge of other UCI stakeholders, namely, the bondholders. I do not accept this. The bondholders have an interest in seeing the claim on the notes succeed, but it is UCI and not its creditors that is relevant to whether UCI can be considered to have taken the notes with or without knowledge of their validity. The bondholders did not take any assignment of the notes.

[39] I agree with the Monitor that given that UCI and Realtyco were controlled completely by Mr. Saskin, as were UTMI and Bay LP, and all relevant documents were signed by him, it cannot be reasonably held that UCI or Realtyco were unaware of this state of affairs between UTMI and Bay LP. I agree with the Monitor that neither UCI nor Realtyco can be said to be holders in due course. They cannot be said to have not had actual notice of the state of their own intercompany affairs and the fact that the management fee pursuant to the Original Fee Agreement, as amended, had been fully booked as an expense against reported taxable income and "settled" or "paid" via

postings to the intercompany account, especially given that UTMI administered the internal affairs of all of them.

[40] The Foreign Representative argues that if UCI was not a holder in due course when the $6 million note was assigned to it by UTMI, UCI was a holder for value of the note and that under section 73 of the BEA, UCI can enforce the note subject to any defects in title and mere personal defences. In effect, it argues that the rights of a holder for value are greater than the rights of a holder in due course, as a holder in due course is subject to real, or absolute, defences. Assuming without deciding that UCI gave value for the assignment of the note to it, I cannot agree with the Foreign Representative. Section 73 of the BEA does not provide that a holder in value can sue subject only to any defects in title or mere personal defences. It simply says that a holder of a bill may sue on the bill in his own name and says nothing of what defences are available to a holder that is not a holder in due course. It provides:

> **73. Rights and powers of holder**
>
> The rights and powers of the holder of a bill are as follows:
>
> (a) he may sue on the bill in his own name;
>
> (b) where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;
>
> (c) where his title is defective, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and
>
> (d) where his title is defective, if he obtains payment of the bill, the person who pays him in due course gets a valid discharge for the bill.

[41] A holder for value that is not a holder in due course is subject to real, or absolute, defences.

Conclusion

[42] The motion of the Foreign Representative to dismiss the Monitor's disallowance of UCI's claim against Bay LP on the basis of the $6 million promissory note is dismissed. The motion of

the Foreign Representative to confirm the validity and enforceability of the $2 million promissory note is also dismissed.

[43] The Monitor has not claimed costs in its material. There will be no order as to costs.

[44] The assets of Bay LP have been sold. The Monitor reports that after admitted claims and a reserve for expenses, $7,844,500 remains. There are disputed claims that if successful would eat up those remains. It is possible that the disputed claims would ultimately be dismissed, leaving equity available for the partners of Bay LP. One partner with a 20% interest is Vestaco Investment Inc. as a nominee of Doreen Saskin, the wife of Alan Saskin[2]. Mr. Saskin himself is a 79.99% partner in Bay LP. An agreement among all partners on May 15, 2008 provided Vestaco with a priority return of $7 million plus interest at 7% compounded annually.

[45] The Foreign representative has contended in its factum that if the disallowance of the claim on the $6 million note is upheld, any equity in Bay LP after payment of all debts should not go to Doreen Saskin. That argument was by agreement adjourned as other parties are interested in the issue and it will come on for hearing when fully briefed. I would note that until all claims against Bay LP are determined, the issue may be academic.

Newbould J.

Date: May 11, 2017

[2] On December 9, 2016 Doreen Saskin transferred her beneficial partnership interest to DS (BAY) Holdings Inc. whose sole officer and director is Doreen Saskin.