

CITATION: Urbancorp (Woodbine) Inc. (Re), 2018 ONSC 2966
COURT FILE NO.: CV-16-11549-00CL
DATE: 20180511

**ONTARIO SUPERIOR COURT OF JUSTICE
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: F.L. Myers J.

COUNSEL: *John Porter*, lawyer for Terra Firma Capital Corp.
Neil Rabinovitch and Kenneth Kraft, lawyers for Guy Gissin, the Israeli
court-appointed Functionary and Foreign Representative of Urbancorp Inc.
Andrew Winton, lawyer for DS (Bay) Holdings Inc.
Robin B. Schwill, lawyer for KSV Kofman Inc., in its capacity as monitor
Adam Slavens, lawyer for Tarion Warranty Corporation

HEARD: May 1, 2018

ENDORSEMENT

The Motion

[1] This motion involves claims against the debtor TCC Urbancorp (Bay) Limited Partnership.

[2] Guy Gissin is the Israeli court-appointed Functionary and Foreign Representative of Urbancorp Inc. He has the authority to advance claims on behalf of a group of Israeli bondholders who lent approximately \$65 million to Urbancorp Inc. ("UCI") in 2015.

[3] The Functionary and Terra Firma Capital Corporation seek an Order: (a) deeming the Functionary to have validly late filed with KSV Kofman Inc., in its capacity as monitor, a claim against the debtor on behalf of the bondholders of UCI in the amount of \$8 million based on alleged misrepresentations in relation to two promissory notes purportedly due

from the debtor to UCI; and (b) approving a settlement agreement between the Functionary and Terra Firma in this proceeding.

The Late Claim

[4] No one objects to the late filing of the proposed claim by the Functionary on behalf of UCI bondholders. There is no prejudice by the timing of the filing. The timing was adequately explained by the Functionary in that it did not know that it had a tort claim against the debtor until its principal claim on the debtor's promissory notes was denied by this court. Therefore, the late filing is approved. Approval is limited to the timing of the filing of the claim. No defence that may be raised to this claim - substantive or procedural - is affected by this holding other than with respect to the timing of the delivery of the proof of claim in relation to the claims bar date set out in the claims process.

Evidence Issue

[5] The Functionary has purported to deliver evidence to the court by way of an unsworn report.

[6] In *Confectionately Yours Inc. (Re)*, 2002 CanLII 45059 (ON CA), the Court of Appeal discussed reporting by a receiver as follows:

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements.

[7] The Functionary is an officer of the Israeli Court. He appears before this court in the pursuit of his jurisdiction and with recognition of his representative capacity with the fullest of comity, cooperation, and coordination between this court and the Israeli court. However, the Functionary is not accountable to this court. He is not accountable to all interested parties in this proceeding. This court has no oversight role in relation the discharge of the Functionary's duties. In other words, the Functionary is not an officer of this court. He does not report to this court and therefore he is not entitled to have his unsworn reports received in evidence.

[8] All parties consent to the exhibits to the report being received in evidence. It is just the Functionary's unsworn narrative that is inadmissible.

The Motion to Approve a Settlement

Terra Firma's Claim

[9] Terra Firma advanced a claim on a secured guarantee granted to it by the debtor. The underlying indebtedness of about \$6 million plus substantial interest due had nothing to do with the affairs of the debtor. Rather, the guarantee was agreed to by the ultimate owner or controlling shareholder of all of the Urbancorp entities Alan Saskin. Mr. Saskin gave Terra Firma a secured guarantee from this debtor as part of a transaction in which Terra Firma loaned money to an Urbancorp entity well above the debtor on the complex Urbancorp corporate chart.

[10] The Monitor disallowed Terra Firma's claim on the secured guarantee. No one doubts that the delivery of a guarantee to induce a lender to grant a loan to a different borrower is valid consideration to support the enforceability of the guarantee as a matter of contract law. However, the Monitor says that when this debtor gave its guarantee it was insolvent. As such, the transaction is reviewable under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as incorporated into s. 36.1 of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36. The Monitor asserts that the guarantee is a transaction at undervalue under s. 96 of the BIA, or a fraudulent conveyance under the *Fraudulent Conveyances Act*, RSO 1990, c. F.29, or that it was oppressive under the *Business Corporations Act*, RSO 1990, c. B.16.

[11] The Monitor argues that even though the guarantee may have been supported by consideration that would make it valid and binding against a solvent entity, where a guarantee is given by an insolvent company, the court needs to look at whether there was actual value "received by the debtor" commensurate with the obligation undertaken. This requirement is set out in the definition of "transfer at undervalue" in s. 2 of the BIA. If there was no value received or conspicuously less quantifiable value received than guaranteed, then the transaction may be void under the statutory provisions on which the Monitor relies.

[12] Terra Firma relies on the validity of the guarantee under contract law and has exercised its right to appeal the disallowance to this court. The appeal has not been perfected and is not part of this motion.

The Functionary's Claim

[13] UCI raised approximately \$65 million on its bond issuance in Israel in late 2015. As part of that transaction, UCI represented in its prospectus and otherwise that it held \$8 million in promissory notes from the debtor. Earlier in this proceeding, Newbould J. upheld the Monitor's decision to disallow the Functionary's claim for UCI on the promissory notes on the basis that, despite the promissory notes, there was no debt owing to UCI by the debtor. In his decision, Newbould J. held that it appears that all of the Urbancorp entities involved had notice that the claims for which the promissory notes were issued had been paid in full

previously. On that basis, the Functionary says that the bondholders have a claim for misrepresentation against this debtor. This is the claim that the Functionary is allowed to be assert late discussed above.

[14] As the late filing has just been approved, the Monitor has not assessed the merits of this claim as yet. It is not self-evident to me that a person who grants a promissory note is liable to the creditors of the payee if the payee misrepresents the value of the note to its own creditors. However, much will likely turn on the factual support for the torts alleged and the knowledge of the various players at the relevant times. At this stage, this is an asserted but wholly untested claim against this debtor.

The Settlement

[15] There is approximately \$10 million awaiting distribution to creditors in this debtor's bank account. Rather than spend time and money litigating their claims with the Monitor, the Functionary and Terra Firma commenced negotiations among themselves. They have agreed to resolve the distribution of the estate on the basis that the Terra Firma will limit its secured claim to \$3 million. Proven claims by third parties (employees and Tarion) will be paid in full. These claims amount to approximately \$3 million. Whatever remains will go to the Functionary. It should be noted that the claim of Terra Firma is a secured claim. If it were to win its appeal from the disallowance of its claim, then it would be entitled to all or nearly all of the available proceeds. This is therefore a very attractive deal for Tarion and employees with proven claims as they will be paid in full rather than losing out to a senior creditor or sharing the distribution *pari passu* with the Functionary on its large claim (if valid).

[16] If neither of the claims of the Functionary or Terra Firma is valid, then there could possibly be an excess of funds available in the debtor's accounts after the other creditors are paid in full. Were that to happen, the funds would be claimed by the owners of the equity of the debtor. DS (Bay) Holdings Inc. holds 20% of the equity but says that it takes in priority to the majority shareholder due to an agreement between them. DS (Bay) Holdings Inc. is owned ultimately by Doreen Saskin, the spouse of Alan Saskin. An entity owned by Alan Saskin holds the remaining 80% of the equity of the debtor.

[17] The CRA may have significant claims against DS (Bay) Holdings Inc.

[18] The Monitor has not taken a position on the settlement. It notes that it is attractive to the third party creditors. It says that the ultimate division of the estate is properly a matter for the creditors and therefore it has stepped back and left it to them to negotiate. It did properly insist that Terra Firma and the Functionary provide notice of this motion to the other creditors, the equity holders, and the CRA.

[19] DS (Bay) Holdings Inc. opposes the settlement on the basis that it is absurd for creditors who do not have valid claims against a debtor to purport to divide the debtor's funds and give themselves the bulk of the money. Terra Firma's claim has been disallowed. It currently

has no right to receive any money. Its appeal has been outstanding for better part of a year. The Functionary's claim has just been brought and has not been adjudicated to be valid by the Monitor under the claims process.

Analysis

[20] A court may approve a settlement agreement in a *CCAA* proceeding if it is consistent with the spirit and purpose of the *CCAA* and it is fair and reasonable in all of the circumstances. Fairness turns on a balancing of the interests of all interested parties. *Nortel Networks Corporation, (Re)*, 2010 ONSC 1708, at para. 73.

[21] To approve a settlement of this type, the court must be satisfied that: (i) the transaction is fair and reasonable; (ii) the transaction will be beneficial to the debtor and its stakeholders generally; and (iii) that the settlement is consistent with the purpose and spirit of the *CCAA*. *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONSC 1078, at para. 49.

[22] There is a problem with the settlement agreement as proposed. It purports to settle two major claims. The claims are asserted by two creditors against the debtor. But no one has agreed to the settlement of either claim on behalf of the debtor. In Terra Firma's case, it seeks to settle a debt under a guarantee without the guarantor's consent. The Functionary seeks to settle a tort claim without the tortfeasor's consent.

[23] A settlement is a consensual compromise of a claim. There can be no settlement of a claim without the consent of both parties to the claim.

[24] In this case, there is an approved claims process that provides a mechanism to determine claims under s. 20(1)(iii) of the *CCAA*. Here the claims have not been admitted by the company nor determined by the court. Nothing stops the Monitor, as the master of the claims process, from seeking approval to settle claims on a reasonable basis to avoid unnecessary expense and delay. But a settlement of the claims in the claims process requires the Monitor's agreement and support. In every one of the cases cited in the Joint Factum of the Functionary and Terra Firma, at paras. 38 to 40 on this point, the Monitor actively supported the fairness and reasonableness of the settlements for which approval was sought.

[25] The claims themselves are not before the court for determination. If there is no settlement of a claim that the Monitor is prepared to support before the court, then the claim must proceed through the claims process to become a valid claim for distribution purposes.

[26] Until the claims are proven or settled, there is no basis for this court to find proposed distributions to claimants fair and reasonable under the first step of the settlement approval test. The motion is therefore dismissed.

[27] While costs normally follow the event, it is premature to consider the outcome to support an award of costs. Nothing of substance has been resolved. I do not know if Terra Firma or the Functionary have good claims. I do not know whether DS (Bay) Holdings Inc. had a legitimate basis to be involved at all. Costs are reserved to the judge who hears the principal distribution motion in relation to this debtor.


F.L. Myers J.

Date: May 11, 2018