

**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

**RESPONDING FACTUM
OF THE MONITOR**
(Re: Motion Returnable May 2, 2017)

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PART I ~ OVERVIEW

1. There is only one issue on this motion: the validity of Urbancorp Inc.'s claim against TCC/ Urbancorp Bay Limited Partnership ("**Bay LP**") which has been disallowed by the Monitor.
2. Urbancorp Inc. ("**UCI**") claims that Bay LP owes it \$6 million plus accrued interest on the basis of a promissory note dated December 11, 2015 which was originally issued by Bay LP in favour of Urbancorp Toronto Management Inc. ("**UTMI**") and then assigned by UTMI to UCI (the "**UCI Note**").
3. At all relevant times, Mr. Alan Saskin was the sole officer and director or otherwise had full control over Bay LP, UTMI and UCI. He also signed all of the relevant documents for each of these entities, every time.

4. At the time the UCI Note was issued, Bay LP did not owe UTMI anything. In fact, UTMI owed Bay LP \$527,655. There is also no evidence that UTMI provided any new consideration to Bay LP in exchange for the issuance of the UCI Note. Indeed, the underlying obligations giving rise to the original basis for the UCI Note had been fully repaid by Bay LP by the 2015 year-end.

5. Furthermore, UCI did not provide any cash consideration to UTMI in exchange for the assignment of the UCI Note, so no money flowed into UTMI as a result of the assignment. UCI did not even issue its own shares to UTMI in exchange for the assignment, but rather is said to have issued special shares to Urbancorp Holdco in exchange for the assignment from UTMI.

6. Accordingly, UCI cannot properly claim to be owed anything by Bay LP on the basis of the UCI Note and, therefore, the Monitor's disallowance of this claim should be upheld.

PART II ~ FACTS

7. The facts are set out in the Sixth Report to Court of KSV Kofman Inc. as CCAA Monitor of the Applicants and Bay LP dated March 21, 2017 (the "**Sixth Report**") together with the Supplement to the Sixth Report dated April 4, 2017 (the "**First Supplemental Report**") and the Second Supplement to the Sixth Report dated April 24, 2017 (the "**Second Supplemental Report**"). The salient facts pertaining to this motion are set out below. Capitalized terms used herein and not otherwise defined have the meaning ascribed to them in the Sixth Report.

Genesis of the Original \$8 Million Note

8. On June 28, 2011, Downsview Homes Inc. ("**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.¹

9. On 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 of Bay LP's 49% interest (the "**Sale**") in Downsview Homes to Mattamy Homes for an amount in excess of \$18 million. However, the fee would only 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, and while likely to occur, had not yet occurred. The final closings, as it turned out, occurred on June 4, 2015.²

10. On July 30, 2013, Bay LP completed the Sale for an amount in excess of \$21 million (the "**Sale Price**"). From the proceeds of the Sale Price, UTMI (and not

¹ Sixth Report at Section 4.0, para. 1, p. 6.

² Sixth Report at Section 4.0, para. 1, p. 6 and Section 6.0, para. 3(i), p. 10.

Bay LP) received approximately \$14.5 million in two separate payments (\$6.8 million and \$7.7 million). These amounts were due to Bay LP and are reflected in the Intercompany Account.³

11. Inconsistent with the provisions of the Original Fee Agreement (as there was yet to be a closing of the Purchase Agreements with PDP and, therefore, UTMI should not have rendered any invoice pursuant to the Original Fee Agreement), 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. The \$1.8 million accrued management fee was a portion of the \$9.8 million fee owing from Bay LP to UTMI pursuant to the Original Fee Agreement.⁴

12. In 2014, the \$1.8 million accrued management fee (plus HST for a total of \$2,034,000) was “billed” and reflected in the Intercompany Account.⁵

13. The Intercompany Account reflects actual and notional cash payments and transfers made between Bay LP and UTMI.⁶

14. On December 15, 2014, an \$8 million promissory note dated December 15, 2014 (the “**Original Promissory Note**”) was issued by Bay LP to UTMI. The

³ Sixth Report at Section 4.0, para. 1, p. 7.

⁴ Sixth Report at Section 4.0, para. 1, p. 7.

⁵ Sixth Report at Section 4.0, para. 1, p. 7.

⁶ Sixth Report at Section 2.4, paras. 1 and 2, p. 5.

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 the \$1.8 million fee accrued in 2013 and "billed" and "paid" in 2014 via the Intercompany Account).⁷

15. As at December 31, 2014, the Intercompany Account reflected \$3,537,135 owing by UTMI to Bay LP, exclusive of the \$8 million management fee accrual discussed below.⁸

16. 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.⁹

17. Furthermore, and also inconsistent with the Original Fee Agreement, the 2014 Bay LP Financial Statements reflect 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" of \$8,150,738.¹⁰

⁷ Sixth Report at Section 4.0, para. 1, p. 7.

⁸ Sixth Report at Section 4.0, para. 1, p. 7.

⁹ Sixth Report at Section 4.0, para. 1, p. 7.

¹⁰ Sixth Report at Section 4.0, para. 1, p. 7.

18. The \$8 million management fee accrual was then "paid" via (i.e., accounted for and reflected in) the Intercompany Account on June 30, 2015.¹¹

19. The Intercompany Account reflected a balance of \$527,655 owing by UTMI to Bay LP at the end of 2015. This Intercompany Account balance accounted for and reflected the management fee in favour of UTMI pursuant to the Original Fee Agreement and the Amended Fee Agreement (discussed below).¹²

20. On June 1, 2015, an amending agreement (the "**Amended Fee Agreement**") was entered into among Bay LP, Downsview Park and UTMI. The Amended Fee Agreement reduces the fee earned on the Sale by \$3.0 million to \$6.8 million. The Amended Fee Agreement also changes 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, 2016.¹³

Genesis of the \$6 Million and \$2 Million Replacement Notes

21. Subsequent to the "payment" of the \$8 million management fee accrual via the Intercompany Account on June 30, 2015 and the reduction of the management fee to \$6.8 million pursuant to the Amended Fee Agreement on June 1,

¹¹ Sixth Report at Section 4.0, para. 1, p. 7.

¹² Sixth Report at Section 4.0, para. 1, p. 8.

¹³ Sixth Report at Section 4.0, para. 1, p. 7.

2015, on December 11, 2015, the \$8 million Original Promissory Note was replaced by a \$6 million promissory note (the UCI Note or “**\$6 Million Promissory Note**”) and a \$2 million promissory note (the “**\$2 Million Promissory Note**”) (collectively the “**Substituted Promissory Notes**”).¹⁴

22. 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.¹⁵

23. 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.¹⁶

24. Realtyco is one of the Cumberland CCAA Entities and is a direct, wholly-owned subsidiary of UCI. The books and records of Realtyco do not reflect the \$2 Million Promissory Note obligation from Bay LP. URI is a nominee for Realtyco. The books and records of URI indicate that URI has substantial liabilities to both other Urbancorp Group entities as well as to third parties.¹⁷

¹⁴ Sixth Report at Section 4.0, para. 1, p. 8.

¹⁵ Sixth Report at Section 4.0, para. 1, p. 8.

¹⁶ Sixth Report at Section 4.0, para. 1, p. 8.

¹⁷ Sixth Report at Section 5.1, paras. 1 and 2, p. 8.

25. As discussed above, the Intercompany Account reflected a balance of \$527,655 owing by UTMI to Bay LP at the end of 2015 and accounted for and reflected the management fee owing by Bay LP to UTMI pursuant to the Original Fee Agreement and the Amended Fee Agreement.

26. Bay LP also filed its 2015 T5013 with the Canada Revenue Agency, the date of the certification as "2016-03-30". Included in the 2015 Bay LP T5013 is Schedule 100, which summarizes Bay LP's assets, liabilities and partners' capital. There is no liability listed in Schedule 100 that evidences any indebtedness in respect of the Substituted Promissory Notes.¹⁸

PART III ~ ISSUES AND THE LAW

27. In order to determine whether or not UCI (or Realtyco) has a valid debt claim against Bay LP, the only thing this Court must determine is whether there was any debt owing by Bay LP to UTMI at the time the Substituted Promissory Notes were issued. The preponderance of the evidence that should be given any weight in this case is that there was not.

28. It is uncontested that the Original Promissory Note was issued by Bay LP in favour of UTMI as evidence of the principal payment obligation under the Original Fee Agreement. In other words, it was not issued as a separate, independent debt obligation of Bay LP or as payment of the obligation itself.

¹⁸ Second Supplemental Report at Section 2.1, para. 3, p. 2.

29. In such a case, as between debtor (Bay LP) and creditor (UTMI), 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.¹⁹

30. Real (or absolute) defences do not constitute a defect of title and are also available against a holder in due course.²⁰ One such absolute defence is the discharge of the instrument by payment in due course.²¹

31. At the time the Substitute Promissory Notes were issued on December 11, 2015, the evidence as between Bay LP and UTMI, taking into consideration the Amended Fee Agreement dated June 1, 2015, was that the management fee of \$8 million had been recorded as an expense and accrued liability on the 2014 Bay LP Financial Statements and was "paid" via the net transactions between Bay LP and UTMI as reflected in the Intercompany Account as at June 30, 2015. Additionally, and as further evidence that Bay LP was not indebted to UTMI, the 2015 Bay LP T2015 tax return does not reflect an obligation to UTMI.

¹⁹ Geva B., *Volume II Negotiable Instruments and Banking* Toronto: Emond Montgomery Publications Ltd., 1995 at 90-91 [Geva]; Monitor's Brief of Authorities ("**Monitor's BOA**"), Tab 4.

²⁰ Crawford, B., *Law of Banking and Payment in Canada* (loose-leaf) [Crawford], Toronto: Carswell, at 26:30.30(1); Monitor's BOA, Tab 5; and Geva, *Ibid*, at 133; Monitor's BOA, Tab 4.

²¹ Crawford, *Ibid*, at 26:30.30(1)(f); Monitor's BOA, Tab 5; and Geva, *Ibid*, at 134; Monitor's BOA, Tab 4.

32. In other words, as between UTMI and Bay LP, any and all fees owing under the Original Fee Agreement, as amended, had been fully satisfied and “paid”.

33. Given that UCI and Realtyco were controlled completely by Alan 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.

34. Accordingly, neither UCI nor Realtyco can be said to be holders in due course. They cannot be said to not have 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.²²

35. The *Bills of Exchange Act*²³ (the “**BEA**”) exists in recognition of the fact that commercial life demands that the integrity of bills of exchange be recognized and that those acquiring them in good faith should not be required unnecessarily to make inquiries to establish their authenticity.²⁴

²² Sixth Report at Section 2.3, p. 5.

²³ R.S.C., 1985, c. B-4.

²⁴ *Federal Discount Corporation Ltd. v. St. Pierre*, (1962) 32 D.L.R (2d) 86 (O.C.A.) at p. 97 [*Federal Discount*]; Monitor's BOA, Tab 1.

36. However, it is not necessary for the support of ordinary commercial transactions that the holder of a bill of exchange should under all circumstances be permitted to shield himself behind the guise of a holder in due course.²⁵

37. In the examination of any transfer to decide if it constituted the transferee a holder in due course the plaintiff's actual involvement with the transferor will be a major factor; on this account the whole relationship between the plaintiff and its transferor must be examined and considered.²⁶

38. With regards to UTMI and UCI (and Realtyco), "[t]o pretend that they were so separate that the transfer of each note constituted an independent commercial transaction not affected by the pre-existing arrangements between them would, in my view, be to permit the form to prevail over the substance".²⁷

39. UCI also fails to meet the requirement of a "holder for value" under the BEA requiring valuable consideration as there was no debt owing by Bay LP to UTMI in respect of the Substituted Promissory Notes. The debt owing by Bay LP to UTMI was already paid, as reflected in the postings to the Intercompany Account.

²⁵ *Ibid.*, at p. 97; Monitor's BOA, Tab 1.

²⁶ *Ibid.*, at p. 97; Monitor's BOA, Tab 1.

²⁷ *Ibid.*, at pp. 99-100 ; Monitor's BOA, Tab 1.

40. While an antecedent debt can be consideration for a promissory note,²⁸ an antecedent debt or liability can be found in a prior agreement only where the obligations arising from it have not been discharged.²⁹

41. The Original Promissory Note and the Substituted Promissory Notes contain a so-called “no set off provision”. That provision reads in relevant part as follows: “All payments to be made by the Borrower pursuant to this Promissory Note are to be made in freely transferrable, immediately available funds and without set-off, withholding or deduction of any kind whatsoever except to the extent required by applicable law ...” (emphasis added).³⁰

42. Payments reflected in the Intercompany Account are not payments made “pursuant to the Promissory Note”. There could have been no payments made “pursuant to the Promissory Note” because payment pursuant to the Promissory Note was never demanded. The fact is that the Intercompany Account reflects payments pursuant to the Original Fee Agreement, as amended by the Amended Fee Agreement. Neither the Original Fee Agreement, nor the Amended Fee Agreement, contain any restrictions as to effecting payment by way of set-off.³¹

²⁸ Sarna, L. *Law of Cheques and Promissory Notes (loose-leaf)* [Sarna], Toronto: Carswell, at p. 17-1; Monitor's BOA, Tab 3.

²⁹ Sarna at p. 17-6; Monitor's BOA, Tab 3.

³⁰ Sixth Report, Tabs K, O and P.

³¹ Sixth Report, Tabs I and N.

43. Lastly, given much of the evidence on which the Foreign Representative relies, what anyone believes to be owing or not between Bay LP and UTMI cannot be determinative of whether or not there is in fact any such amount owing, especially when such a belief is contrary to a number of other facts.³²

Response to Request for Equitable Relief

44. As discussed above, Realtyco is one of the Cumberland CCAA Entities and is a direct, wholly-owned subsidiary of UCI. URI is a nominee for Realtyco. The books and records of URI indicate that URI has substantial liabilities to both other Urbancorp Group entities as well as to third parties.³³

45. As also discussed above, the \$6 Million Promissory Note and the \$2 Million Promissory Note were assigned by UTMI on December 11, 2015 to UCI and UMI, respectively. On the same day, UMI assigned the \$2 Million Promissory Note to Realtyco.³⁴

46. Accordingly, if the equitable relief requested is to give effect to UCI's entitlements as an equity holder, then the \$2 million should be directed to be paid to Realtyco first in order to properly determine UCI's entitlement to any distribution from Realtyco as a shareholder thereof.

³² *Palcic v. Sadek* (2012), 9 B.L.R. (5th) 235 (B.C. S.C.), affirmed 2013 BCCA 440 (B.C. C.A.), at para. 141, per Maisonville J.; Monitor's BOA, Tab 2.

³³ Sixth Report at Section 5.1, para. 2, p. 8.

³⁴ Sixth Report at Section 4.0, para. 1, p. 8.

PART IV ~ RELIEF SOUGHT

47. The motion to dismiss the Monitor's disallowance of UCI's claim against Bay LP on the basis of the \$6 Million Promissory Note should be dismissed.

48. The motion to confirm the validity and enforceability of the \$2 Million Promissory Note should be dismissed.

49. In the event that the Alternative Relief is considered, 25% of the payments made should be directed to the Monitor on behalf of Realtyco.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of April, 2017.



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Lawyers for the Monitor

SCHEDULE "A"

The Townhouses of Hogg's Hollow Inc.

King Towns Inc.

Newtowns at Kingtowns Inc.

Deaja Partner (Bay) Inc.

TCC/Urbancorp (Bay) Limited Partnership

SCHEDULE "B"

LIST OF AUTHORITIES

Primary Sources

1. *Federal Discount Corporation Ltd. v. St. Pierre*, (1962) 32 D.L.R (2d) 86 (O.C.A.).
2. *Palcic v. Sadek* (2012), 9 B.L.R. (5th) 235 (B.C. S.C.).

Secondary Sources

3. Sarna, L. *Law of Cheques and Promissory Notes (loose-leaf)* Toronto: Carswell.
4. Geva B., *Volume II Negotiable Instruments and Banking* Toronto: Emond Montgomery Publications Ltd., 1995.
5. Crawford, B., *Law of Banking and Payment in Canada (loose-leaf)*, Toronto: Carswell.

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