

CITATION: Urbancorp Inc. (Re), 2016 ONSC 5426
COURT FILE NO.: CV-16-11389-00CL
DATE: 20160829

**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**

Court File No.: 31-2114850

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**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
URBANCORP (WOODBINE) INC. OF THE CITY OF TORONTO, IN THE PROVINCE
OF ONTARIO**

**IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF
URBANCORP (BRIDLEPATH) INC. OF THE CITY OF TORONTO, IN THE
PROVINCE OF ONTARIO**

BEFORE: Newbould J.

COUNSEL: *Lisa S. Corne and David P. Preger*, for the moving parties
Edmond F. B. Lamek, for the Urbancorp interests
Robin B. Schwill, for the KSV Kofman Inc., the Monitor and Proposal Trustee
Adam Slavens, for Tarion Warranty Corporation
Vern W. DaRe, for Stefano Serpa and Adrian Serpa
James M. Wortzman, for Atrium Mortgage Investment Corporation
Trent Morris, for several purchasers
Monique Sassi, for Mattamy Homes Limited
Dominique Michaud, for Terra Firma Capital Corporation.
Kenneth D. Kraft, for Guy Gissin, the Foreign Representative of Urbancorp Inc.
Chris Burr, for Laurentian Bank

HEARD: August 25, 2016

ENDORSEMENT

[1] This is a motion brought at the request of 40 different purchasers of residential units from Urbancorp (Lawrence) Inc. ("Lawrence"), Urbancorp (St. Clair Village) Inc. ("St. Clair"), Urbancorp (Woodbine) Inc. ("Woodbine"), and Urbancorp (Bridlepath) Inc. ("Bridlepath") for the appointment of Dickinson Wright LLP ("Dickinson Wright") as their representative counsel in the CCAA and BIA NOI proceedings and for an order that their legal fees and disbursements capped at \$150,000 be paid and secured by an administrative charge against the four properties.

[2] The motion is supported by Tarion. It is opposed by KSV, the Monitor and Proposal Trustee, and by Mr. Gissin, the Foreign Representative of Urbancorp Inc. appointed by the Israeli Court. It is also opposed by the Urbancorp entities and with respect to the Bridlepath project by two purchasers of units and Atrium, a secured lender on that project.

[3] For the reasons that follow, the motion is granted in part.

[4] The four properties in question are vacant properties which Urbancorp intended to develop for residential use. No construction has been commenced and the properties consist of raw land. Each of the Urbancorp companies pre-sold freehold homes and received deposits from home buyers in connection with the home sales. The deposits were \$3.7 million on the Lawrence property, \$3.3 million on the St. Clair property, \$1.9 million on the Woodbine property and \$5.6 million on the Bridlepath property. The Urbancorp companies did not hold the deposits in trust and they have all been spent. As the projects involved the construction of freehold homes, there was no legislation requiring home buyer deposits to be segregated or held in trust.

[5] On June 30, 2016, orders were made in the CCAA proceedings and the NOI proceedings approving sale processes for the properties¹. Offers were due on August 16, 2016. Multiple offers were received for each of the properties. As of the date of August 23rd, offers had been accepted for the Lawrence and Bridlepath properties and the sale process is advancing for the other properties. Any transaction will be subject to approval by this Court.

[6] All of the leading offers received in the sale process required that clean title be vested in the purchaser free of all obligations, including the agreements of purchase and sale entered into between the Urbancorp companies and home buyers. The agreements of purchase and sale are obligations of the Urbancorp companies and do not attach to the real estate owned by them.

[7] In the event that the contemplated transactions are completed, KSV states that it appears that the sale proceeds from each transaction will be sufficient to repay in full the amount of the deposits as well as any registered liens and mortgages. KSV as Monitor and Proposal Trustee is in the process of commencing a claims process in the CCAA and NOI proceedings, so further claims may be identified. However, no creditor not already known to KSV has contacted KSV advising that they may have a material claim against one or more of the Urbancorp companies.

[8] Ms. Corne advises that forty buyers have either retained her firm Dickinson Wright or requested it to bring this motion for a representative order and a charge for legal fees and disbursements. Buyers that have signed retainer engagements had agreements for the purchase of homes on three of the projects, being St. Clair, Lawrence and Bridlepath. None of the Woodbine purchasers have signed engagement letters but Dickenson Wright has been asked by 11 of the purchasers to represent their interests. Some of the purchasers wish to just get their deposits back while others would like to see that the homes they purchased be built and their contract accepted by any purchaser of the lands. There are a total of approximately 183 purchasers of pre-construction homes who have lost their deposits. Some have retained other firms. Fogler

¹ The order covered more than the four projects in question. This endorsement covers only the four properties which are the subject of this motion.

Rubinoff has been retained by two purchasers of the Bridlepath property and Mr. Morris has been retained by five undisclosed purchasers of one or more of the four properties.

[9] The agreements of purchase and sale are in a standard form and provide that in the event that the construction of a dwelling has not been completed by the closing date, the vendor shall not be liable for any damages or costs other than the costs paid by Tarion, which has a maximum coverage of \$40,000 per purchaser.

Legal framework

[10] The authority to appoint representative counsel in CCAA proceedings is undoubted under section 11 of the CCAA and rules 10.01 and 12.07 of the rules of practice in Ontario. See *Re Target Canada Co.* (2015), 22 C.B.R. (6th) 323 and *Re Nortel Networks Corporation*, 2009 CanLII 26603. I agree with Justice Wilton-Siegel in *Re Kitchener Frame Limited*, July 7, 2011 unreported, that there is no reason why the same should not pertain to a proposal under the BIA.

[11] In *Re CanWest Publishing Inc.* (2010), 65 C.B.R. (5th) 152, Pepall J. (as she then was) stated that factors that have been considered by courts in granting these orders include:

- the vulnerability and resources of the group sought to be represented;
- any benefit to the companies under CCAA protection;
- any social benefit to be derived from representation of the group;
- the facilitation of the administration of the proceedings and efficiency;
- the avoidance of a multiplicity of legal retainers;
- the balance of convenience and whether it is fair and just, including to the creditors of the Estate;
- whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
- the position of other stakeholders and the Monitor.

[12] As the issue of whether to appoint a representative counsel is one of equity, there can be no hard and fast rules governing any particular case, but these factors need be considered.

[13] So far as granting a charge to secure the fees and disbursements of a representative counsel, this is covered by section 11.52 (1)(c) of the CCAA which provides:

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[14] Thus the court must be satisfied that the security or charge is necessary for the effective participation of representative counsel in the proceedings. In considering this issue. Pepall J. in *Re CanWest Publishing Inc.* (2010), 63 C.B.R. (5th) 115 stated that factors that might be considered would include:

- (a) the size and complexity of the businesses being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;
- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the Monitor.

Analysis

[15] It is contended that the purchasers are an especially vulnerable and disparate group of creditors and that without representation counsel who can advocate for their rights, they will be

prejudiced. It is said that with such a large group of purchasers, it is administratively preferable to have one representative counsel who can deal with the purchasers of the properties and with KSV rather than have a multiplicity of individual legal retainers and the inefficiencies that would involve.

[16] It is argued that for the majority of purchasers, it would not be economical to retain their own legal counsel to represent their interests in these proceedings. However, the evidence to support this is very meagre. There are two purchasers, one from the St. Clair project and one from the Lawrence project, who state in affidavits that they cannot afford to retain counsel individually to represent them. However, there is no evidence that the purchasers could not together retain any law firm to represent all of them, as Dickinson Wright seeks to do on this motion. If all 185 purchasers retained a law firm with a cap on fees and disbursements of \$150,000, it would amount to approximately \$800 per purchaser.

[17] A group retaining one law firm is not unknown to the Urbancorp saga. In the Leslieville project that was being developed by an Urbancorp entity, Dickinson Wright was retained by a group of approximately 35 purchasers of residential townhouse condominium units. Due to Urbancorp's failure to complete the construction and sale of the Leslieville homes, these purchasers retained Dickinson Wright to commence an application for the appointment of an investigative receiver of Urbancorp Leslieville. That application prompted Urbancorp Leslieville's senior secured creditor to seek the appointment of a receiver of Urbancorp Leslieville. Dickinson Wright is continuing to represent these purchasers in respect of the ongoing receivership proceedings of Urbancorp Leslieville.

[18] KSV, the Monitor and Proposal Trustee, is opposed to the appointment of representative counsel and an administration charge against the properties for the legal fees. It does not believe that \$150,000 is well spent taken that it is likely that all purchasers will get their deposits back. It says that there is no question but that the purchasers are in an unfortunate position because of the Urbancorp insolvency, as is the case for unsecured creditors in any insolvency, and that it will be the purchasers' interests to be represented by counsel. It says that the issue is really one of asking the estates to fund the purchasers, and that as funding has to be fair to all stakeholders, it would be wrong to have funding that would be solely in the interest of one group of stakeholders.

Funding the purchasers' lawyers would not assist in maximizing the assets or in negotiating a plan of compromise in this liquidating proceeding. So far as dealing with claims of the purchasers, that is a normal process for a Monitor or Proposal Trustee to deal with claimants.

[19] Ms. Corne says that the majority or nearly all of the purchasers who have contacted Dickinson Wright will want to try to hold on to whatever equity there is in their agreements caused by the increasing market values, and will want a seat at the table to sit down with prospective purchasers of the properties to attempt to negotiate some arrangement to continue with their purchase agreements, perhaps by way of paying some top-up. It is pointed out by KSV and Urbancorp that what is being sold is raw land and there is no knowledge of what the purchasers of the land will intend to build on the land. To suggest that the purchasers of the pre-construction units will be able to save their purchase agreements in some way is speculative at this stage.

[20] I have considerable doubt that appointing a representative counsel by whom all 185 purchasers are to be represented unless they opt out is warranted. It is likely that their interests are not all similar. Some may be prepared to simply walk from the situation if they get back their deposit, which appears in all likelihood will be the case. Some are investors whose interests might be quite different. Some want to negotiate with a purchaser of the raw land. Already there have been two other lawyers retained by some purchasers, albeit a small number. I recognize however that whether a conflict will exist is to some extent hypothetical at this stage.

[21] This is not a situation such as *Target* in which representative counsel was appointed to represent some 17,600 employees or in *Nortel* in which there were many thousands of affected employees and representative counsel was obviously needed to represent their interests.

[22] I recognize that purchasers are better off if they have legal advice and be represented by counsel. This issue is really whether the Urbancorp estates should fund representative counsel. I am not at all satisfied that a security or charge against the Urbancorp properties is necessary for the effective participation of purchasers in these proceedings. There is no evidence of any financial inability of the purchasers to jointly engage counsel to represent them. Two purchasers of the Bridlepath project are opposed to representative counsel being appointed for the

Bridlepath purchasers. On that project the pre-sales for the then proposed 37 units averaged approximately \$1.18 million.² Purchasers in the Urbancorp Leslieville insolvency were able to jointly retain Dickenson Wright and there is no evidence that the purchasers on the four Urbancorp projects in question could not do the same.

[23] Taken that all purchasers are likely to get back their deposits, legal representation for further action would likely be to negotiate with the known or potential purchasers of the raw lands to agree to some arrangement that would result in purchasers obtaining some part of their equity in their deals being preserved³. There would be nothing wrong in their attempting to do so. However to do that with estate funds could well be contrary to the interests of the insolvent estates. Any purchaser of the raw lands would want the lands free and clear of any claims, and the best prices offered have reflected that. If such a purchaser were to provide to any of the pre-sale construction buyers some of the equity in their agreements, that no doubt would reduce what a purchaser would be willing to pay for the raw land and be against the interests of the estates as a whole. As well, KSV points out that there is no certainty that purchasers would have bid for the properties in the sales process if they were required to construct homes conforming to the requirements in the agreements with the home buyers.

[24] Estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole. If there is some equity available after all creditors of these Urbancorp entities have been paid, there are other interests entitled to share in such equity, including other Urbancorp entities under cross-collateralization agreements and Urbancorp Inc., represented by its Foreign Representative Mr. Gissin, which owes approx. \$64 million plus interest on debentures issued in Israel and which is the shareholder of many of the Urbancorp insolvent entities.

² The average purchase price for the St. Clair Village project was approximately \$800,000 and for the Lawrence project approximately \$652,000. I do not believe the average price for the Woodbine project is in the record.

³ During argument Ms. Corne said that her firm had no intention of commencing litigation against the Urbancorp entities in question. In light of the contractual provisions, that is understandable. It does not mean that some purchaser might not want to do that however.

[25] Thus it is not at all clear that funding a representative of the purchasers will be for the benefit of the companies in question.

[26] It is said that the amount of funding and the security for it is minimal, being \$150,000. That may be but the issue is whether in principle it should be ordered. As well, it is by no means clear that representative counsel would not come back and later ask for that amount to be increased. Originally they proposed a total of \$300,000 but later reduced that to \$150,000.

[27] In all of the circumstances, I am prepared to make an order appointing Dickenson Wright as representative counsel for the purchasers of the four projects in question, but rather than having an opt-out provision as requested, the order shall provide an opt-in process in which purchasers are clearly advised that they will be represented by Dickenson Wright only if they choose to do so.

[28] I am not prepared to make an order that the fees and disbursements of Dickenson Wright be paid from the estates or secured by a charge. Counsel for KSV contended that if any representative order is made, the fees and disbursements could be paid by the estates from the distributions to be made to the purchasers who opted in. That would align the interests of whatever purchaser wanted to retain Dickenson Wright with the steps taken on behalf of such purchasers. I accept that position and the order may provide that Dickenson Wright is entitled to be paid its fees and disbursements by the particular estates from the distributions to be made to those purchasers who choose to be represented by Dickenson Wright. The notice to purchasers advising them of their right to opt-in shall make this payment provision clear.



Newbould J.

Date: August 29, 2016