CITATION: Urbancorp Toronto Management Inc. (Re), 2018 ONSC 2965
COURT FILE NO.: CV-16-11389-00CL
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 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 LISTED IN SCHEDULE "A" HERETO

BEFORE: F.L. Myers J.

COUNSEL: *Robin B. Schwill,* lawyer for KSV Kofman Inc., in its capacity as monitor
Neil Rabinovitch and Kenneth Kraft, lawyers for Guy Gissin, the Israeli court-appointed Functionary and Foreign Representative of Urbancorp Inc.
Kevin Sherkin and Jeremy Sacks, lawyers for Speedy Electrical Contractors Ltd.

HEARD: May 1, 2018

ENDORSEMENT

The Motion

[1] This motion involves a claim against the debtor King Residential Inc. ("KRI").

[2] KSV Kofman Inc., in its capacity as monitor moves for an order disallowing the claim filed by Speedy Electrical Contractors Ltd.

[3] Speedy claims $2,323,638.54 against KRI pursuant to a secured guarantee given by KRI to Speedy. In support of its obligations under the guarantee, KRI granted mortgages in favour of Speedy over 13 condominium units and 13 parking spaces.

[4] The Monitor says that when KRI gave Speedy its guarantee and supporting mortgages 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.

[5] For the reason that follow, I dismiss the Monitor's motion and uphold the validity of Speedy's secured claim.

The Facts

[6] KRI is a nominee holding title to a condominium being developed by the Urbancorp group of companies. Urbancorp is a complex web of companies and business entities all ultimately owned by Alan Saskin. Mr. Saskin's spouse holds some interests in the corporate structure that do not factor into this motion. KRI was one of many single purpose nominees that held title to a single building that was initially owned through or under TCC/Urbancorp (Bay) LP.

[7] In late 2015, Mr. Saskin reorganized much of the Urbancorp empire for the purpose of raising funds through a bond issuance on public markets in Israel.

[8] Prior to the reorganization, Speedy had loaned $1 million to Mr. Saskin personally. In addition, another Urbancorp entity, that has no relationship to the business of KRI, owed Speedy $1,038,911.44 for electrical services performed by Speedy on a building on Lisgar St. in Toronto. Speedy registered a claim for lien against the Lisgar St. property.

[9] Mr. Saskin wanted to clean up title to the Lisgar St. property so as to be able to offer the unencumbered value of that property to support the Israeli underwriting. Speedy, through its counsel, was pressing Mr. Saskin on his personal debt as well as the liened debt. Speedy was threatening to bring proceedings against Mr. Saskin personally and pressing forward with its lien. Mr. Saskin wanted Speedy to give him time so he could raise funds in Israel to pay Speedy and others.

[10] On November 14, 2016, Speedy and Urbancorp entities entered into a debt extension agreement under which Speedy agreed to extend the due date of Mr. Saskin's personal loan to January 30, 2016; Speedy discharged its claims for lien on Lisgar St.; and KRI provided its secured guarantee for these two outstanding debts plus $5,000 for costs.

[11] Several weeks after Speedy discharged its liens and took the KRI mortgages instead, the financing went ahead in Israel. Urbancorp Inc. raised over $65 million from Israeli bondholders. However, Mr. Saskin did not use the funds to repay Speedy. Moreover, the Urbancorp enterprise collapsed and commenced insolvency proceedings within several months of the Israeli underwriting.

[12] The UCI bondholders, represented by Mr. Gissin, the Israeli court-appointed Functionary and Foreign Representative, are suing Mr. Saskin and others in Israel for a host of causes of action including alleged fraud and securities law violations in connection with that bond underwriting.

The Monitor's Position

[13] The Monitor argues that KRI received nothing of value in return for its guarantee and, as such, the guarantee and its supporting security should be declared void as a transfer at undervalue under s. 96 of the *BIA*. Even though KRI's 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 value has actually been "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 if conspicuously less quantifiable value was received than guaranteed, then the transaction diminishes the insolvent company's assets to the prejudice of its existing creditors and may be void under the statutory provisions on which the Monitor relies.

[14] The Monitor argues that Speedy and KRI were not at arm's length so that proof of KRI's insolvency is a sufficient basis to set aside the transaction under s. 96 (1)(b)(ii)(A) of the *BIA*. Alternatively, if the parties were operating at arm's length, the Monitor argues that in addition to proof of insolvency, it has established that KRI gave the guarantee with the intention to defraud, defeat, or delay creditors and therefore it violated s. 96 (1)(a) of the BIA.

Analysis

[15] The motion resolves to two findings. First, Speedy and KRI were operating at arm's length. As a result of this holding, s. 96 (1)(a)(iii) of the *BIA* requires that to succeed, the Monitor must establish that in granting the guarantee, KRI intended to defraud, defeat, or delay creditors. In my view, the Monitor has failed to prove that KRI held a fraudulent intention at the relevant time. As such, the claim does not meet the requirements for relief under s. 96 of the *BIA*.

Arm's Length

[16] In *Montor Business Corporation v. Goldfinger*, 2016 ONCA 406 (CanLII), the Court of Appeal discussed the inquiry into whether there is an arm's length relationship between a debtor and its creditor as follows:

> [66] Section 4(4) of the *BIA* states: "It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length." As a result, absent a palpable and overriding error, the trial judge's finding on this issue is entitled to deference.

[67] The trial judge considered the *dicta* in *Abou-Rached (Re)*, 2002 BCSC 1022 (CanLII), 35 C.B.R. (4th) 165, at para. 46:

> [A] transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reasons of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length.

[68] He also considered *Piikani Energy Corporation (Trustee of) v. 607385 Alberta Ltd.*, 2013 ABCA 293 (CanLII), 556 A.R. 200, which identified factors that provide guidance on non-arm's length analysis in the context of *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) jurisprudence. These factors, enumerated at para. 29 of *Piikani*, are: was there a common mind which directed the bargaining for both parties to a transaction; were the parties to the transaction acting in concert without separate interests; and was there *de facto* control?

[69] There was no common mind directing Goldfinger and Annopol or indeed, Kimel. They were adverse in interest and on the verge of litigation. The evidence also fails to suggest that they were acting in concert. As discussed, the trial judge did not fail to consider the parties' relationship at the time of the Payments. Nor did Goldfinger or Annopol exercise *de facto* control over the other.

[17] In *Juhasz Estate v Cordeiro*, 2015 ONSC 1781 (CanLII), Wilton-Siegel J. looked at the economics at play and found that a relationship was not arm's length where in the negotiations between the parties there was a lack of incentive for the transferor to maximize the consideration for the property being transferred.

[18] In this case, the Monitor argued that the long term relationship between Mr. Saskin and Speedy and the fact that Speedy had loaned money to Mr. Saskin personally, gave Speedy leverage to subvert normal economic incentives so as to render the relationship non-arm's length.

[19] The Monitor also tried to support its argument by pointing to a document that appears to suggest that the lien filed by Speedy may have been untimely. It questioned Mr. Saskin's *bona fides* in offering up a secured guarantee to remove an invalid lien. But Speedy's witness testified that the lien was timely. He was not confronted on cross-examination with the

document relied upon by the Monitor to enable him to explain any apparent inconsistency. Absent compliance with the rule in *Browne v Dunn* (1893), 6 R. 67 (H.L.), I am not prepared to make a credibility finding against Speedy.

[20] The contemporaneous written communication between counsel for Speedy and Mr. Saskin shows plainly that they were adverse in interest and were operating under normal economic incentives. There is no evidence suggesting that Speedy and KRI were under common control or acting in concert. The Monitor's counsel agreed that with the upcoming refinancing and faced with a late breaking registration against title to a property whose value was being relied upon in the proposed transaction, Mr. Saskin realistically had to respond regardless of the merits of the lien as claimed. Moreover, granting loans to longstanding business associates is perhaps an indication of a degree of trust and a statement of trustworthiness of the borrower's covenant and financial wherewithal. But that is no different than a multitude of relationships between business owners and lenders. Banks have lost on unsecured loans to longstanding personal clients who owned much bigger businesses than Urbancorp. A personal loan to a business owner with whom one has had lengthy business dealings, on its own, is not an indication of a non-arm's length relationship. In my view, there is no evidence to establish that the relationship between Speedy and KRI was anything other than an arm's length, businesslike one.

Fraudulent Intent

[21] To become entitled to relief for arm's length transactions that otherwise fall within s. 96 of the *BIA*, the trustee (or the monitor under the *CCAA*) must prove that the transferor (i.e. the bankrupt or the *CCAA* debtor) held the intent to defraud, defeat, or delay its creditors. The intention of the transferee/recipient is not part of the test to challenge a transaction at undervalue under s. 96 of the *BIA*.

[22] It is very difficult for an applicant to prove a debtor's subjective intention to defeat creditors. Therefore, the law provides that the court can infer the existence of a transferor's intention to defeat or delay creditors where there are recognized "badges of fraud" associated with a transaction. If the court draws the inference of fraudulent intent due to the existence of badges of fraud, then an evidentiary burden will fall to the respondent to explain its conduct to try to rebut the inference of fraudulent intent. The ultimate persuasive burden remains on the applicant throughout. *Indcondo v. Sloan*, 2014 ONSC 4018 (CanLII) at para. 53, aff'd 2015 ONCA 752 (CanLII).

[23] In *Indcondo*, Penny J. set out the badges of fraud as follows:

> [52] The badges of fraud derive from *Twyne's Case* (1601) 76 E.R. 809. As interpreted by modern courts, the badges of fraud include:
>
> (d)[*sic*] the donor continued in possession and continued to use the property as his own;

(e) the transaction was secret;
(f) the transfer was made in the face of threatened legal proceedings;
(g) the transfer documents contained false statements as to consideration;
(h) the consideration is grossly inadequate;
(i) there is unusual haste in making the transfer;
(j) some benefit is retained under the settlement by the settlor;
(k) embarking on a hazardous venture; and
(l) a close relationship exists between parties to the conveyance.

[24] On the facts of this case, the adequacy of consideration is disputed. The only apparent badge of fraud is that the transaction was made in face of threatened legal proceedings. On its own however, as in *Montor* above, that badge is barely impactful as it is consistent with a *bona fide* transaction in circumstances such as those before the court. Of greater impact, in my view, is the fact that Speedy registered its mortgages on title. It gave notice to the world as one would expect any *bona fide* commercial creditor to do. There is nothing about the facts of this transaction that leads me to infer that it was made with a fraudulent intent rather than to obtain Speedy's cooperation to allow Urbancorp to refinance as intended at the time.[1]

[25] In *XDG Ltd. v. 1099606 Ontario Ltd.*, 2002 CanLII 22043 (ON SC), on similar facts, (a guarantee by an insolvent affiliate for debts that did not relate to the specific business of the guarantor) D.J. Gordon J. found that there were badges of fraud that were sufficient to make the circumstances strongly suspicious. In that case, Gordon J. held that the lender knew or ought to have known that the debtor was insolvent. There was great haste. Gordon J. found that there was no consideration received by the debtor. Here, the solvency of the debtor depends upon whether one looks at the debtor on its own behalf (as Speedy submits) or considers the position of the beneficial owner TCC/Urbancorp (Bay) LP as a whole (as the Monitor submits). Even if one looks at the financial position of the broader business of TCC/Urbancorp (Bay) LP, with all of its various nominees and buildings, the Monitor accepts that the business was solvent on a balance sheet basis at the relevant time. The liquidity-based insolvency found by the Monitor required much *post facto* adjustment to financial statements. That is not to criticize the Monitor's finding. Rather, I am simply pointing out that the situation in *XDG* was quite different from this case in which the debtor was undertaking obligations to support the refinancing of the overall business within a few weeks' time and the refinancing occurred.

[26] I am therefore unable to infer that the KRI gave its secured guarantee with the intent to defraud, defeat, or delay a creditor.

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[1] To the extent that the Functionary argues that the secured guarantees at KRI were also relevant in the Israeli underwriting and were not properly disclosed to bondholders, he has his own remedies.

Outcome

[27] Having found that the necessary intention was not proved, the remedies under s. 96 of the *BIA* and the *Fraudulent Conveyances Act* cannot apply. The Monitor conceded that the *CCAA* proceeding was brought too late for the presumption of intent in the unjust preference remedy in s. 95 of the *BIA* to apply.

[28] The Monitor has also raised the oppression remedy. Assuming that oppression can be raised in response to a debt in a *CCAA* claim process without an oppression claim being separately heard and an appropriate remedy granted, there is no basis on the evidence for an oppression remedy to lie. There is no evidence that any creditor of the debtor held a reasonable expectation that the debtor would not participate in, or grant security as part of group financing efforts. The entire group was owned by Mr. Saskin. As best as I can tell from these proceedings, businesses that dealt with Mr. Saskin in the ordinary course knew that he owned the entire enterprise and dealt with him accordingly i.e. indifferent as to the technicalities of legal title when the ultimate beneficial ownership all lay in the same hands.

[29] The Israeli bondholders may be an exception to this generality as they did not deal with Mr. Saskin day-to-day like the bulk of the trade creditors. As the granting of the guarantee by KRI pre-dates the bondholders' involvement, it is not clear if they could be entitled to relief for oppression. In responding to a claim in the claims process, I do not understand the Monitor to be purporting to bring an oppression proceeding on behalf of the bondholders or UCI *per se*. But nothing precludes the bondholders, UCI, or their representative from seeking leave to bring proceedings that they may believe appropriate. They have done so already in Mr. Saskin's bankruptcy proposal proceeding.

[30] I note that I have decided this motion based solely on the arm's length relationship and lack of fraudulent intent. It has not been necessary therefore for me to deal with a number of other issues raised by the parties orally and in their factums.

[31] The motion is dismissed.

Costs

[32] It was reasonable and appropriate for the Monitor to bring this matter to the court. While in some ways the facts of this case resembled those in the *XDG* case, there are important differences as noted above. Each case is determined on its own facts.

[33] The Monitor argues that there should be no costs unless it was found to have been unreasonable. In my view, the normative approach that costs follow the event should apply in this matter. The issue was one of money as between the other creditors of the debtor and Speedy. It is appropriate that those who would benefit from the proceeding bear their fair share of the costs in the ordinary course by a diminution of the assets of the debtor. The Monitor and Speedy agreed that costs, if appropriate, should be fixed at $25,000 all-

inclusive. Therefore the Monitor, on behalf of the debtor and not in its personal capacity, shall pay costs in the amount of $25,000 to Speedy within 30 days.

F.L. Myers J.

Date: May 11, 2018

SCHEDULE "A"

Urbancorp Power Holdings Inc.
Vestaco Homes Inc.
Vestaco Investments Inc.
228 Queen's Quay West Limited
Urbancorp Cumberland 1 LP
Urbancorp Cumberland 1 GP Inc.
Urbancorp Partners (King South) Inc.
Urbancorp (North Side) Inc.
Urbancorp Residential Inc.
Urbancorp Realtyco Inc.