COURT OF APPEAL FOR ONTARIO

CITATION: Urbancorp Toronto Management Inc. (Re), 2019 ONCA 757
DATE: 20190927
DOCKET: C65891

van Rensburg, Hourigan and Huscroft JJ.A.

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

Matthew Milne-Smith and Chantelle Cseh, for the appellant, KSV Kofman Inc., in its capacity as Monitor

Kevin D. Sherkin and Jeremy Sacks, for the respondent, Speedy Electrical Contractors Ltd.

Neil Rabinovitch, for Guy Gissin, the Israeli court-appointed Functionary and Foreign Representative of Urbancorp Inc.

Heard: March 28, 2019

On appeal from the order of Justice Frederick L. Myers of the Superior Court of Justice dated May 11, 2018, with reasons reported at 2018 ONSC 2965, 60 C.B.R. (6th) 241.

van Rensburg J.A.:

OVERVIEW

[1] King Residential Inc. ("KRI") is part of the Urbancorp group of companies, which are presently involved in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). Speedy Electrical Contractors Ltd. ("Speedy") filed a claim against KRI pursuant to a secured guarantee given by KRI to Speedy for debts owed by Edge on Triangle Park Inc. ("Edge") and Alan Saskin. KRI's monitor, KSV Kofman Inc. (the "Monitor") argued that Speedy's claim (which was in the amount of $2,323,638.54) should be disallowed, among other things, because the secured guarantee was a transfer at undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") and a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 (the "FCA"). The motion judge disagreed and dismissed the Monitor's motion for an order disallowing Speedy's claim. The Monitor appeals, with leave.

[2] The Monitor challenges the motion judge's finding, in relation to s. 96(1)(b) of the BIA, that the secured guarantee was between arm's length parties. The Monitor says that the motion judge erred in law in focussing on the relationship between KRI and Speedy, rather than the relationships among KRI, Edge and Mr. Saskin. The Monitor also contends that there was reversible error in the motion judge's conclusion that the fraudulent intent necessary under s. 96(1)(a) of the BIA and s. 2 of the FCA was not proved.

[3] For the following reasons I would dismiss the appeal.

[4] Briefly, as I will explain, the motion judge properly considered the relationship between KRI and Speedy, rather than the relationship between KRI, Edge and Mr. Saskin, in determining whether the impugned transfer was to a non-arm's length party. Although Edge and Mr. Saskin were parties to, and beneficiaries of, the transaction that provided for the secured guarantee, the transfer sought to be impugned by the Monitor was KRI's secured guarantee in favour of Speedy. The issue, under a proper construction of s. 96(1)(b) of the BIA, is whether the transferee, Speedy, was dealing at arm's length with KRI, the transferor, in relation to the impugned transfer, which is the secured guarantee.

[5] The other main arguments on appeal challenge the motion judge's finding that the transfer was for the purpose of facilitating a financing for the Urbancorp group and not with the intention to defraud, defeat or delay KRI's creditors. This is a finding of fact, supported by the evidence, that is entitled to deference and reveals no reversible error. This finding is determinative of the appellant's claim for relief, whether under s. 96 of the BIA or s. 2 of the FCA.

[6] Finally, the motion judge's costs award against the Monitor, on behalf of the debtor, and not in its personal capacity, was a proper exercise of his discretion, and reveals no reversible error.

FACTS

[7] The Urbancorp group consists of a number of corporations and business entities all ultimately owned by Alan Saskin, and principally involved in the development of residential real estate projects in the Greater Toronto Area.

[8] Speedy operates an electrical contracting business and performed electrical services for members of the Urbancorp group.

[9] In September 2014, Speedy made a personal loan to Mr. Saskin for $1 million, with interest at the rate of 12.5%, evidenced by a promissory note due in one year dated September 23, 2014 (the "Promissory Note"). In addition, Speedy completed electrical work for Edge (an Urbancorp entity) on Lisgar Street in Toronto, ultimately registering a construction lien against the project for $1,038,911.44 on September 30, 2015.

[10] On November 14, 2015, KRI, Speedy, Mr. Saskin and Edge executed a debt extension agreement (the "DEA") under which:

- Speedy agreed to extend the due date of the Promissory Note to January 30, 2016;
- Edge confirmed its debt to Speedy and Speedy agreed to discharge its lien against the Edge project;
- In consideration of the extension of the Promissory Note, the discharge of the lien, and payment by Speedy to KRI of $2.00, KRI agreed to guarantee the two outstanding debts, secured by a collateral mortgage in Speedy's favour over 13 KRI condominium units and 13 parking spaces; and

- KRI agreed to provide evidence showing that there were no common element arrears of the subject condominium units or to pay such arrears on closing, confirmed the taxes on the units were up to date, and agreed that it would obtain a discharge or postponement of a Travelers Guarantee Company of Canada mortgage registered on the subject units.

[11] Pursuant to the DEA, on November 16, 2015, Speedy discharged its lien against the Edge property, and the collateral mortgage in favour of Speedy was registered on title to the KRI properties.

[12] At the time of the DEA, the beneficial owners of the Urbancorp group's various development projects were three limited partnerships: TCC/Urbancorp (Bay) LP ("Bay LP"), Urbancorp (Bay/Stadium) LP ("Bay/Stadium LP"), and Urbancorp (Stadium Road) LP ("Stadium Road"). Typically, the Urbancorp group set up various single-purpose, project-specific corporations that acted as bare trustees or nominees for their beneficial owners. KRI was a wholly-owned subsidiary and nominee of Bay LP, while Edge was a wholly-owned subsidiary and nominee of Bay/Stadium LP. The Monitor emphasizes that each limited partnership had distinct ownership and different creditor groups.

[13] Part of the impetus behind the DEA was to facilitate a financing of the Urbancorp group through a public bond issuance in Israel. In order to support the underwriting and to complete the financing, Mr. Saskin wanted to offer the unencumbered value of the Edge project property. And Speedy had threatened to bring legal proceedings against Mr. Saskin and was pressing forward with its lien.

[14] The parties entered into the DEA shortly before the Urbancorp group initiated a corporate reorganization, which was completed on or around December 15, 2015. The reorganization was also required to facilitate the bond issuance.

[15] According to the Monitor, as part of the reorganization, Urbancorp Inc. ("UCI") was incorporated in June 2015 and several wholly-owned subsidiaries were formed. KRI, previously owned by Bay LP, became part of a wholly-owned subsidiary called Urbancorp Cumberland 1 LP. Edge, previously owned by Bay/Stadium LP, became part of a wholly-owned subsidiary called Urbancorp Cumberland 2 LP.

[16] In December 2015, the Israeli bond issuance closed. UCI raised approximately $65 million, most of which it used to repay certain secured debt owed by various Urbancorp group members and for general working capital purposes. Speedy was not repaid.

[17] Approximately five months after the Israeli bond funding, the Urbancorp empire collapsed and substantially all the Urbancorp group entities commenced insolvency proceedings. On May 18, 2016, KRI and the other Urbancorp entities involved in these proceedings were granted protection under the CCAA. There are other insolvency proceedings involving other Urbancorp entities, including Edge.

[18] On September 15, 2016, Newbould J. made an order establishing a procedure to identify and quantify claims against the CCAA-protected entities and

their current and former directors and officers. Speedy filed a proof of claim, dated October 19, 2016, against KRI in the amount of $2,323,638.54 pursuant to its secured guarantee. On November 11, 2016, the Monitor disallowed the claim on the basis that the granting of the guarantee could be voidable as a transfer at undervalue or as a fraudulent conveyance or preference. On November 25, 2016, Speedy filed a notice disputing the disallowance.

[19] After some delay, the Monitor brought a motion on March 7, 2018, for an order declaring that Speedy's claim be disallowed in full. Guy Gissin, in his capacity as the court-appointed functionary of UCI in proceedings in Israel (the "Israeli Functionary") participated in the court below, and was represented in court in this appeal.[1] The Israeli Functionary was appointed in 2016 pursuant to an application under Israel's insolvency regime. The Israeli Functionary supported the Monitor on its motions to disallow Speedy's claim. The Israeli Functionary also sued Mr. Saskin and others in Israel, alleging, among other things, fraud and securities law violations in connection with the bond underwriting.

[20] On May 11, 2018, the motion judge dismissed the Monitor's motion for an order disallowing Speedy's claim.

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[1] The Israeli Functionary did not file a factum in this court, although counsel was present for the argument of the appeal.

[21] By the time of the hearing of the appeal, there was evidence that, shortly after executing the DEA, Speedy had waived KRI's mortgage in relation to Mr. Saskin's personal debt, a fact that was not brought to the attention of anyone when the motion was heard, including the Monitor and the motion judge. After this information came to light, the motion judge varied his original order to exclude the loan from Speedy's claim. At issue, therefore, is only the claim against KRI under the secured guarantee of Edge's debt to Speedy. This does not affect the arguments made on appeal, except, according to the Monitor, in respect of the quantum of costs awarded by the motion judge.

RELEVANT STATUTORY PROVISIONS

[22] Of relevance to this appeal, the Monitor challenged the secured guarantee under s. 96 of the BIA, and alternatively under s. 2 of the FCA.

[23] Section 96 of the BIA provides for the challenge of pre-bankruptcy transfers at undervalue made by a debtor. Section 96 is applicable in CCAA proceedings pursuant to s. 36.1 of the CCAA. Subsections 96(1) to (3) of the BIA provide as follows:

> (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

(a) the party was dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,

(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and

(iii) the debtor intended to defraud, defeat or delay a creditor; or

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or

(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and

(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or

(B) the debtor intended to defraud, defeat or delay a creditor.

(2) In making the application referred to in this section, the trustee shall state what, in the trustee's opinion, was the fair market value of the property or services and what, in the trustee's opinion, was the value of the actual consideration given or received by the debtor, and the values on which the court makes any finding under this

> section are, in the absence of evidence to the contrary, the values stated by the trustee.
>
> (3) In this section, a ***person who is privy*** means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

[24] A "transfer at undervalue" is defined as a "disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor": BIA, s. 2. "Related persons" is defined, and includes entities that are controlled by the same person: BIA, s. 4(2). 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: BIA, s. 4(4). Persons who are related to each other are deemed, in the absence of evidence to the contrary, not to deal with each other at arm's length: BIA, s. 4(5).

[25] The FCA is provincial legislation that is also available in insolvency proceedings for the declaration of fraudulent transfers as void. Sections 2 to 4 provide as follows:

> 2. Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

> 3. Section 2 does not apply to an estate or interest in real property or personal property conveyed upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge of the intent set forth in that section.
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> 4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

DECISION OF THE MOTION JUDGE

[26] The motion judge considered the Monitor's motion for an order disallowing Speedy's claim as filed against KRI on three bases: as a transfer at undervalue under s. 96 of the BIA, as a fraudulent conveyance contrary to s. 2 of the FCA, and as oppression under the *Business Corporations Act*, R.S.O. 1990, c. B.16. Only the first two grounds are relevant to this appeal.

[27] The motion judge noted that the motion resolved to two findings. The first was that Speedy and KRI were operating at arm's length when KRI gave its guarantee. As such, it would be necessary under s. 96 of the BIA for the Monitor to prove, among other things, that the guarantee was given by KRI to Speedy with the intent to defraud, defeat or delay a creditor.

[28] On the arm's length question, the motion judge rejected the Monitor's argument that Speedy had leverage to subvert normal economic incentives

because of Speedy's long-term relationship with Mr. Saskin and the personal loan it made to him. The motion judge explained that there was no evidence that Speedy and KRI were acting in concert, and that contemporaneous written communications indicated they were adverse in interest. He rejected the Monitor's argument that Mr. Saskin had acted in bad faith by offering the guarantee to remove what the Monitor argued was an untimely and therefore invalid lien. Speedy's witness had testified the lien was timely and, contrary to the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), he was not confronted with the document said to suggest the lien was registered late. As a result of all of these circumstances, the motion judge found that Speedy and KRI were operating at arm's length.

[29] The second finding of the motion judge was that the Monitor had failed to prove that the guarantee was given by KRI with the intent to defraud, defeat or delay its creditors. He recognized that such intent could be inferred from "badges of fraud", including where "the consideration is grossly inadequate". Here he noted that the adequacy of consideration was disputed. He then stated that the only apparent badge of fraud was that the transaction "was made in [the] face of threatened legal proceedings". The fact that Speedy registered its mortgage on title – as one would expect any *bona fide* commercial creditor to do – further undermined the suggestion of fraudulent intent. The motion judge concluded at para. 24: "[t]here 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."

[30] The motion judge contrasted the case of *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 41 C.B.R. (4th) 294 (Ont. S.C.), aff'd (2004), 1 C.B.R. (5th) 159 (Ont. Div. Ct.), which similarly involved a challenge to a guarantee by an insolvent affiliate for debts that did not relate to the specific business of the guarantor. In that case, the parties entered into the impugned transaction in great haste and the lender knew or ought to have known that the debtor was insolvent. The motion judge noted that here, by contrast, the solvency of the debtor depended on whether one looked at the debtor on its own or as part of the broader business of Bay LP, and that in any event, the Monitor accepted that the business was solvent on a balance sheet basis at the relevant time. He noted that he was "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": at para. 25.

[31] Having found that the necessary intention was not proved, the motion judge held that the remedies under s. 96 of the BIA and s. 2 of the FCA could not apply.

[32] As for the oppression claim, the motion judge concluded that, assuming that such a claim could 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 was no basis on the evidence for an oppression remedy to lie.

[33] Finally, the motion judge noted that he had decided the motion based solely on the arm's length relationship and lack of fraudulent intent, and that it was not necessary to deal with a number of other issues raised by the parties orally and in their factums: at para. 30.

[34] In dismissing the motion, the motion judge ordered costs of $25,000 to be paid to Speedy by the Monitor on behalf of the debtor, and not in its personal capacity.

ISSUES

[35] I would frame the issues on appeal as follows:

1. Did the motion judge err in focussing on the relationship between Speedy and KRI rather than between Edge and Mr. Saskin (as beneficiaries of the secured guarantee) and KRI?
2. Did the motion judge err by failing to consider the record as a whole, including all of the potential badges of fraud, when he refused to find fraudulent intent?
3. Did the motion judge err in misapplying the rule in *Browne v. Dunn*?
4. Did the motion judge err in his award of costs of the motion against the Monitor?

ANALYSIS

(1) Did the motion judge err in focussing on the relationship between Speedy and KRI rather than between Edge and Mr. Saskin (as beneficiaries of the guarantee) and KRI?

[36] As noted, the motion judge concluded that KRI and Speedy were acting at arm's length when the secured guarantee was given. As such, s. 96(1)(b) did not apply and the secured guarantee, provided that it was made within one year of the CCAA proceedings, could only be impugned as a transfer at undervalue under s. 96(1)(a) if: (i) KRI was insolvent at the time of the transfer or was rendered insolvent by it, and (ii) KRI intended to defraud, defeat or delay a creditor.

[37] The motion judge's conclusion that Speedy and KRI were acting at arm's length in respect of the transaction is a finding of fact under s. 4(4) of the BIA, which is subject to a palpable and overriding error standard of review: *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, 58 B.L.R. (5th) 243, at para. 66, leave to appeal refused, [2016] S.C.C.A. No. 361; *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 86 Alta. L.R. (5th) 203, at para. 17. The Monitor does not challenge this finding. Rather, its main argument on appeal is that, in determining whether the parties were acting at arm's length, the motion judge considered only the relationship between Speedy and KRI, instead of the relationship between KRI and the other parties to the DEA, namely Edge and Mr. Saskin. The Monitor says that, because KRI, Edge and Mr. Saskin were related parties, and clearly non-arm's length, the entire DEA was void as against the

Monitor, including the secured guarantee that was provided to Speedy as a term of the DEA. According to the Monitor, the motion judge failed to make any finding on this central issue. It is unclear whether any such argument was advanced before the motion judge.

[38] The Monitor submits that, in contrast with s. 95 of the BIA, which deals with fraudulent preferences and requires a "transfer" from an insolvent debtor to a "creditor", s. 96 does not explicitly use the word "creditor" and is therefore intended to encompass a broader set of relationships and harm. Edge and Mr. Saskin, in addition to Speedy, benefited from the DEA, and since Edge and KRI are both controlled by Mr. Saskin, these parties are related and presumed not to be operating at arm's length pursuant to the BIA. As such, the "transfer" was between non-arm's length parties, and can be voided without any determination of the debtor's fraudulent intent or insolvency under s. 96(1)(b)(i) since it occurred less than one year before the date of the initial bankruptcy event. The Monitor argues that this interpretation is consistent with the objective of s. 96 which is to provide a remedy for asset-stripping by insolvent debtors.

[39] Speedy asserts that the plain wording of s. 96(1)(b) does not support the Monitor's interpretation. For the purpose of this section, in determining whether a non-arm's length relationship existed, such that it is unnecessary to establish

fraudulent intent for a transfer within one year of the initial bankruptcy event,[2] the court must consider the parties to the transfer, and not whether other parties to the overall transaction may have benefited.

[40] I agree with Speedy. While s. 96 no doubt is a tool to address "asset stripping" by a debtor, as the Monitor contends, a bankruptcy trustee or CCAA monitor that seeks to impugn a transfer under that provision must nevertheless meet the requirements of the section to establish that the transfer in question is void. The point of departure is to consider the specific words used in this section of the BIA.

[41] Section 96 provides for a court order to declare void as against the trustee (in this case the Monitor) a "transfer at undervalue" or to require the "party to the transfer" or "any other person who is privy to the transfer" to pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor.

[42] "Transfer at undervalue" is defined in s. 2 of the BIA to mean:

> A disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor. [Emphasis added.]

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[2] If the transfer occurred within one year before the date of the initial bankruptcy event, fraudulent intent is not required: BIA, s. 96(1)(b)(i). If the transfer occurred more than one year but less than five years before the date of the initial bankruptcy event, fraudulent intent or insolvency is required: BIA, s. 96(1)(b)(ii).

[43] A "transfer" is defined in Black's Law Dictionary, 11th ed. (Saint Paul: Thomson Reuters, 2019) as "any mode of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, lease, or creation of a lien or other encumbrance". A "transaction", by contrast, is defined as "something performed or carried out, a business agreement or exchange". While the DEA was a transaction between KRI, Speedy, Edge and Mr. Saskin, the transaction contemplated a transfer, which was the secured guarantee given by KRI to Speedy. The only parties to the transfer, as opposed to the transaction, were KRI and Speedy.

[44] The DEA is not the "transfer" – the transfer sought to be impugned by the Monitor is the secured guarantee provided to Speedy. The overall agreement pursuant to which the guarantee and security were provided to Speedy does not make the entirety of the DEA the "transfer" for the purpose of s. 96.

[45] I also disagree with the Monitor's argument that, because s. 96 uses the term "party" rather than "creditor", the court is not limited to considering the relationship between KRI and Speedy, but should also consider the relationship between KRI and other "parties" to the DEA (Edge and Mr. Saskin). The reason that s. 96 uses the term "party" rather than "creditor" is that it applies to a broader range of dealings than s. 95, including gratuitous transfers to persons who are not creditors of the debtor.

[46] The distinction between a person who is a "party to the transfer" and a "person who is privy to the transfer" underscores that the focus in determining whether the dealing was non-arm's length is on the relationship between the parties to the particular transfer. If the transfer is between non-arm's length parties, then a person who is privy to the transfer (defined under s. 96(3) as "a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person") may be ordered, together with the transferee, to pay the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor. In this case, if the secured guarantee were impeachable (whether because KRI and Speedy as the parties to it were non-arm's length, or because fraudulent intent and insolvency were established), then Edge, as KRI's privy, and beneficiary of the transfer, could be subject to an order for a remedy in favour of KRI. Edge is a privy to KRI, but not a party to the transfer.

[47] In argument, the Monitor asserted that the "transfer" here is in fact the transfer by Edge to KRI of Edge's indebtedness to Speedy. If this is the transfer sought to be impugned, then the remedy is properly sought against Edge itself. The non-arm's length relationship between Edge and KRI, as entities under common control, would be relevant if the relief sought by the Monitor were against Edge. To the extent that Edge received value from KRI for no consideration, Edge,

as a non-arm's length party, would be liable to account for such value to KRI. The problem, of course, is that Edge is insolvent and also under CCAA protection. However, it would be an unwarranted interpretation of s. 96(1)(b) to void the guarantee KRI provided to Speedy on the basis that KRI and Edge (the beneficiary of the transaction) are related. Indeed, the Monitor has cited no case or commentary to support this interpretation of s. 96(1)(b), which ignores its plain meaning.

[48] In conclusion, s. 96 is a remedy to reverse an improvident transfer that strips value from the debtor's estate, where its conditions are met. The interpretation of the section must be considered in relation to the remedy that is sought. The remedy in this case is to prevent Speedy from enforcing its secured guarantee against KRI. While the reason KRI provided the guarantee was to accommodate its related party Edge, this does not transform the transfer sought to be impugned – the secured guarantee – into a transfer between non-arm's length parties. The focus of the motion judge was properly on the relationship between KRI and Speedy, not between KRI and the beneficiary of the transaction, its related party Edge. As such, I would dismiss this ground of appeal.

(2) Did the motion judge err by failing to consider the record as a whole, including all of the potential badges of fraud, when he refused to find fraudulent intent?

[49] The motion judge concluded that the Monitor had failed to prove that KRI held a fraudulent intention when it granted the secured guarantee. He began his

analysis by stating that it was the intent of the transferor (i.e., KRI), and not that of the transferee (i.e., Speedy) that was relevant. Noting the difficulty for an applicant to prove a debtor's subjective intention to defeat creditors, the motion judge referred to "badges of fraud" from which the court can infer the existence of the necessary intention. Relying on *Indcondo v. Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160, aff'd 2015 ONCA 752, 31 C.B.R. (6th) 110, he explained that, "[i]f 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": at para. 22.

[50] The Monitor does not take issue with the motion judge's statement of the law; rather it argues that the motion judge erred by failing to consider the record as a whole, including all of the potential badges of fraud, when he concluded that there was no fraudulent intent.

[51] I would not give effect to this ground of appeal.

[52] "Badges of fraud" can provide an evidentiary shortcut that may help to establish the subjective intention of a transferor both under s. 96 of the BIA and s. 2 of the FCA: see e.g., *Goldfinger*, at para. 72; *Purcaru v. Seliverstova*, 2016 ONCA 610, 39 C.B.R. (6th) 15, at para. 5. In *Re Fancy* (1984), 46 O.R. (2d) 153

(H.C.J.), Anderson J. explained the role of "badges of fraud" in the determination of fraudulent intent under s. 2 of the FCA. He stated at p. 159:

> Whether the [fraudulent] intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance. Although the primary burden of proving his case on a reasonable balance of probabilities remains with the plaintiff, the existence of one or more of the traditional "badges of fraud" may give rise to an inference of intent to defraud in the absence of an explanation from the defendant. In such circumstances there is an onus on the defendant to adduce evidence showing an absence of fraudulent intent. Where the impugned transaction was, as here, between close relatives under suspicious circumstances, it is prudent for the court to require that the debtor's evidence on bona fides be corroborated by reliable independent evidence.

[53] The burden of proving fraudulent intent is on the party seeking to avoid the transfer. While badges of fraud are indicia of fraudulent intent, their presence does not mandate an inference of fraud to be drawn. The alleged badges of fraud must be considered in the context of the entire record. "Whether the intent exists is a question of fact to be determined from all of the circumstances as they existed at the time of the conveyance": *Goldfinger*, at para. 72.

[54] In *Goldfinger*, as in this case, the appellant argued that the trial judge had "failed to identify and to consider the badges of fraud that were present": at para. 50. The court found that the trial judge had assessed the evidence and made findings of fact that supported his reasons for finding an absence of intent. The findings were available on the record: at para. 75.

[55] Badges of fraud are non-exhaustive and may or may not be applicable to a given fact situation: see e.g., *FL Receivables Trust 2002-A (Administrator of) v. Cobrand Foods Ltd.*, 2007 ONCA 425, 85 O.R. (3d) 561, at para. 39; *Indcondo*, at paras. 52-53. Since badges of fraud are an evidentiary shortcut, and the analysis requires taking into account "all of the circumstances as they existed at the time of the conveyance" (*Fancy*, at p. 159), it follows that the failure to identify any particular badge of fraud and to undergo a mechanical analysis does not justify appellate intervention.

[56] The Monitor accepts that the failure to consider a particular badge of fraud is not, in itself, a legal error justifying review on a correctness standard. The real issue here is whether the trial judge failed to take into account the entirety of the fact situation, and made conclusions of fact, or mixed fact and law, that were not supported by the record. In other words, was the motion judge's refusal to find that the transfer from KRI to Speedy was made with fraudulent intent adequately supported by the entirety of the record?

[57] The motion judge set out a non-exhaustive list of badges of fraud referred to in the case law, including in *Indcondo*, at para. 52. He stated that "the adequacy of consideration is disputed" and that "[t]he only apparent badge of fraud is that the transaction was made in face of threatened legal proceedings". He noted that that particular "badge of fraud" was barely impactful as it was consistent with a *bona*

fide transaction in circumstances such as those before the court. He went on to state:

> 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. [Emphasis added.]

[58] The Monitor submits that the motion judge erred by failing to recognize various badges of fraud that were present in this case. It emphasizes that the consideration for the guarantee was nominal, so that the adequacy of the consideration was not in fact "disputed". It also submits that the motion judge ought to have accepted the uncontroverted evidence that KRI was insolvent on a cash flow basis, rather than refusing to make any determination of the issue of KRI's insolvency. Moreover, it argues that, when the motion judge concluded that the lien was registered and therefore not concealed, he overlooked the fact that the secured guarantee was not disclosed in the prospectus for the Israeli bondholders. According to the Monitor, all of these factors were important "badges of fraud" that were ignored by the motion judge.

[59] I disagree. First, as already explained, the relevant intent is that of KRI in relation to the transfer with Speedy. While there is no question that the $2 Speedy paid to KRI is a nominal sum, Speedy also gave up its construction lien claim

against Edge. Whether this abandonment of the construction lien constituted consideration of value to KRI is disputed. This is what prompted the motion judge's observation that the adequacy of consideration was disputed.

[60] Second, with respect to the question of insolvency, the Monitor misinterprets para. 25 of the motion judge's reasons. At para. 25, the motion judge noted that "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 [Bay LP] as a whole (as the Monitor submits)". He did not resolve that question. Rather, he stated that "even if one looks at the financial position of the broader business of [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". This was not a finding that KRI was, in fact, solvent, but was a factor that distinguished this case from the *XDG* case relied on by the Monitor, where the insolvency of the transferor was readily apparent to the lender. The motion judge stated, "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": at para. 25.

[61] The fact that the motion judge did not determine whether or not KRI was insolvent is confirmed by his later observation, at para. 30 of the reasons, that he decided the motion based solely on the arm's length relationship and lack of

fraudulent intent, and that he did not have to deal with the other arguments raised. Since s. 96(1)(a) of the BIA requires both fraudulent intent and insolvency, it was open to the motion judge to decline to make a determination as to whether KRI was insolvent given that he was not satisfied that KRI provided the secured guarantee with the intent to defraud, defeat or delay its creditors.

[62] While the Monitor concedes that the motion judge was not required to determine whether KRI was insolvent for the purpose of s. 96 of the BIA, it nonetheless argues that he erred in law in failing to make that determination for the purpose of s. 2 of the FCA. The Monitor submits that there was uncontradicted evidence that KRI was insolvent on a cash-flow basis at the time of the transfer. It relies on *Sunlife Assurance Co. v. Elliott* (1900), 31 S.C.R. 91, to argue that KRI's insolvency is a persuasive if not determinative consideration under the FCA.

[63] In *Sunlife Assurance Co.*, a debtor made a gratuitous settlement of all of his property on his family before his death, thus rendering his estate insolvent. The Supreme Court set aside the settlement under the Statute of Elizabeth, 13 Eliz. I, c. 5, legislation to which the FCA traces its roots: see *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.* (2001), 54 O.R. (3d) 131 (C.A.), at para. 29. In setting aside the settlement, the Supreme Court stated the principle that "where at any time a person is solvent and then makes a voluntary settlement the effect of which is to make him insolvent, the settlement is void, and that too no matter what the intent of the settlor was": at pp. 94-95.

[64] Despite this one broad statement, however, there is no special rule that makes evidence of a debtor's insolvency determinative as opposed to one factor that may be considered. The common issue under s. 2 of the FCA and s. 96 of the BIA is whether the debtor made the conveyance or transfer with the intent to defraud, delay or defeat creditors. A number of the authorities referred to earlier in these reasons relating to the role in the analysis of badges of fraud, including the debtor's insolvency, were in the context of the provincial legislation. Insolvency can be a factor, but is not sufficient or decisive. Instead, the crucial question remains whether the applicant has proved the fraudulent intent of the debtor.

[65] Finally, the motion judge was well aware of the Monitor's argument that the secured guarantee was not disclosed to the Israeli bondholders. I agree that concealment of a transfer may be consistent with fraudulent intent. An alleged badge of fraud, however, must be considered in context, and in relation to how it relates to the question of the intention of the debtor at the time of the transfer. Here the motion judge noted that the discharge of the lien and the registration of the mortgages were public. The fact that the secured guarantee, while a matter of public record, was not disclosed in the prospectus in relation to the Israeli funding, may well have been a wrong against the Israeli investors. Indeed, the motion judge explained that the Israeli bondholders (who, with Speedy are the only creditors of KRI in the CCAA proceedings) have their own remedies, which they are pursuing.

[66] Ultimately, the issue was whether the Monitor had established that, in giving the secured guarantee, KRI (or arguably Bay LP) intended to defraud, defeat or delay its creditors. The overall context was the impending Israeli bond financing. There was uncontroverted evidence that Speedy's lien had to be discharged in order to facilitate the financing, and that the lawyers for Speedy and the Urbancorp group were seeking alternative security for Speedy's debt. This was accommodated by the secured guarantee and mortgages on KRI's completed units and parking spaces. The bond funding was expected to be available to discharge debts of the Urbancorp group. Instead, the funding was used for other purposes, and ultimately the Urbancorp group defaulted on its obligations to the Israeli bondholders and others. In my view, the motion judge's finding that the Monitor had not established the debtor's fraudulent intent, or that it was anything other than "to obtain Speedy's cooperation to allow Urbancorp to refinance" and "to support the refinancing of the overall business", were available on the record and did not ignore any relevant evidence.

(3) Did the motion judge err in misapplying the rule in *Browne v. Dunn?*

[67] This issue will be addressed only briefly, as in my view its determination has no effect on the outcome of the appeal.

[68] At the hearing of the motion, the Monitor argued that the construction lien that Speedy agreed to discharge under the DEA was invalid because it was registered out of time. The Monitor relied on a copy of the statutory declaration

filed by Speedy which indicated October 22, 2014 as the date of last supply of goods or services. Contrary to s. 31(3) of the *Construction Lien Act*, R.S.O. 1990, c. C.30, as it provided at the relevant time, the lien was registered on September 30, 2015, more than 45 days after the last supply. The lien itself stated that the contract price was $6,159,625, and that services and materials were supplied between August 1, 2012 and August 31, 2015.

[69] The statutory declaration was contained in a report of the Israeli Functionary dated February 27, 2018. In its own reports, which were filed with the court as evidence, the Monitor had not questioned the validity of the lien. The Monitor also did not put the statutory declaration to Speedy's witness, Albert Passero, when it cross-examined him on his affidavits, which, among other things, attested to "ongoing work up to the end of August".

[70] The motion judge noted that Speedy's witness had testified that the lien was timely, and that he was not confronted with the document on cross-examination to enable him to explain any apparent inconsistency. Absent compliance with the rule in *Browne v. Dunn*, the motion judge was not prepared to make a credibility finding against Speedy.

[71] The Monitor says that the motion judge's reliance on *Browne v. Dunn* was in error, that the statutory declaration was conclusive, and that it was beyond question that the lien was out of time.

[72] The problem with the Monitor's argument that the motion judge misapplied the rule in *Browne v. Dunn* is its apparent lack of relevance to any issue that continues to be in dispute in this appeal.

[73] Before the motion judge, the Monitor argued that the invalidity of the lien called into question Mr. Saskin's *bona fides* which was relevant to whether Speedy and Mr. Saskin were acting at arm's length when the secured guarantee was given. The motion judge's finding that Speedy on the one hand and Mr. Saskin and Edge on the other were at arm's length is not in dispute in this appeal.

[74] On appeal, the Monitor makes a different argument. At para. 70 of its factum, the Monitor states:

> But for his error in applying the rule in *Browne v. Dunn*, the Motion Judge should properly have concluded that the Lien was not registered on a timely basis and was accordingly invalid. If the Lien was invalid, then the Secured Guarantee did not provide any value to Edge (because there was no Lien that needed to be discharged and the underlying unsecured debt was not released). The Monitor's principal position, as argued above, is that it does not matter whether Edge received any consideration. KRI was the entity that granted the Secured Guarantee, it was not at arm's length with Mr. Saskin, and it did not receive consideration. However, even if one focusses, as the Motion Judge did on the relationship between Speedy and Edge, the Lien was invalid and therefore there was no consideration to Edge for the Secured Guarantee. This further supports the Monitor's submission, above, that there was no consideration for the Secured Guarantee and it is void as a transfer at undervalue.

[75] According to the Monitor, the relevance of the lien being out of time is simply that it would support the Monitor's submission that there was no consideration for the secured guarantee and it is void as a transfer at undervalue. Whether the secured guarantee was or was not a "transfer at undervalue" as defined in s. 2 of the BIA was not the question on which the motion judge's disposition of the motion turned. At para. 30 of his reasons he noted that he decided the motion based solely on the arm's length relationship and lack of fraudulent intent and that it was not necessary to deal with a number of other issues raised by the parties orally and in their factums.

[76] I have determined that the motion judge made no error in his factual conclusions that the transfer in question – the secured guarantee – was between arm's length parties, and was for the purpose of obtaining Speedy's cooperation to allow the Urbancorp group to refinance, and not with a fraudulent intent. Whether or not the secured guarantee was a transfer at undervalue is not a question that was definitively answered by the motion judge; nor does it fall to be determined in this appeal.

(4) Did the motion judge err in awarding costs of the motion against the Monitor?

[77] The motion judge awarded Speedy $25,000 in costs payable by the Monitor on behalf of KRI, and not in its personal capacity.

[78] An award of costs, as an exercise in discretion, is entitled to deference. This court will interfere where the costs award reveals an error in principle or where it is plainly wrong: see *Hamilton v. Open Window Bakery Ltd.,* 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. The Monitor says there were two such errors here.

[79] First, the Monitor says that it had no alternative but to make an application to the court after Speedy objected to the disallowance of its claim. The Monitor asserts that the motion judge erred in awarding costs in circumstances where he had concluded that it was "reasonable and appropriate" for the matter to be brought to the court. The Monitor asserts that policy considerations should have militated against an award of costs in this case.

[80] The motion judge considered the Monitor's request that, as in *XDG*, the court should award no costs. He noted that, while in some ways the facts of the case resembled those in *XDG*, there were important differences that he had already noted in his reasons. The motion judge rejected the Monitor's argument that there should be no costs unless it was found to have been unreasonable, and he applied the "normative approach that costs follow the event": at para. 33.

[81] The Monitor argues that there was an error in principle in this case because the motion judge departed from the general rule that costs should not be awarded against unsuccessful parties in the context of motions in CCAA proceedings. The Monitor relies on the observation of this court in *Re Indalex Ltd.*, 2011 ONCA 578,

81 C.B.R. (5th) 165, at para. 4, rev'd on other grounds 2013 SCC 6, [2013] 1 S.C.R. 271, that the "conventional approach" or "usual practice" in CCAA proceedings is to "rarely make costs orders", with the result that "each party bears its own costs". The Monitor also asserts that, given the policy considerations animating CCAA proceedings, it would be unjust to award costs against the Monitor, which is obliged to bring a motion to court when a creditor disputes its disallowance of a claim.

[82] We see no reversible error here. We agree with the observation of Newbould J. in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465, 88 C.B.R. (5th) 320, at para. 5, that this court's decision in *Indalex* should not be read as laying down a "general principle that costs should rarely be awarded in CCAA proceedings". There is nothing in *Indalex* that would remove the motion judge's discretion to award costs in this case, and there is nothing unreasonable in his decision that costs of the Monitor's unsuccessful attempt to disallow Speedy's claim (which, if successful, would have benefited KRI's creditors) should follow the event and be borne by the debtor's estate.

[83] Second, the Monitor asserts that the quantum of costs awarded by the motion judge, although agreed at the time of the motion, is clearly unreasonable. At the time of the motion, everyone, including the motion judge, believed that the amount in dispute exceeded $2 million. In fact, because Speedy had waived its rights under the secured guarantee in respect of Mr. Saskin's personal debt, the

amount in dispute was substantially less. The Monitor submits that this reduction should be reflected in the amount of costs.

[84] I disagree. The amount in dispute is only one of a variety of factors that are relevant to the determination of costs. In the circumstances of this case, the quantum of costs reflected the legal work required, which was the same, irrespective of the amount in dispute. There is nothing to suggest that the agreed quantum of $25,000 was other than proportional to the work and reasonable in all the circumstances.

CONCLUSION AND DISPOSITION

[85] For these reasons, I would dismiss the appeal. I would award costs of the appeal to Speedy, including the motion for leave to appeal, fixed at the inclusive amount of $15,000, to be paid by the Monitor on behalf of the debtor and not in its personal capacity. No costs are awarded in favour of or against the Israeli Functionary.

Released: KMvR SEP 27 2019 K. van Rensburg J.A.

I agree. [illegible] J.A.

I agree [illegible] J.A.

SCHEDULE "A"

LIST OF NON APPLICANT AFFILIATES

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 Partner (King South) Inc.

Urbancorp (North Side) Inc.

Urbancorp Residential Inc.

Urbancorp Realtyco Inc.