COURT OF APPEAL FOR ONTARIO

CITATION: Urbancorp Toronto Management Inc. (Re), 2021 ONCA 613
DATE: 20210909
DOCKET: M52721
(M52689)

Miller J.A. (Motions Judge)

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

Kenneth Kraft, Neil Rabinovitch and Michael Beeforth, for the moving party, Guy Gissin, in his capacity as the Foreign Representative of Urbancorp Inc.

Robin Schwill, Matthew Milne-Smith and Robert Nicholls, for the responding party, KSV Restructuring Inc., in its capacity as Monitor

Matthew Gottlieb, James Renihan and Jane Dietrich, for the responding party, Mattamy Homes Limited

Heard: August 26, 2021 by video conference

ENDORSEMENT

[1] This motion arises out of long-running CCAA proceedings involving a group of companies ultimately owned by Urbancorp Inc. ("UCI"). The moving party, the

Foreign Representative of UCI, seeks a stay pending its motion for leave to appeal an order of the supervising judge. That order authorized a process for the sale of a 51% interest in a real estate development project called Downsview Homes Inc. ("DHI"), owned by Urbancorp Downsview Park Development Inc. ("Downsview"), a subsidiary of UCI. The responding party, Mattamy Homes Limited ("Mattamy"), owns the other 49% of DHI.

[2] Mattamy is the lender to Downsview under a debtor-in-possession facility (the "DHI Facility"), which matured eight months ago, on February 3, 2021. Downsview owes Mattamy over $9 million pursuant to the terms of the DHI Facility and the order approving the DHI Facility (the "DIP Order"). Downsview cannot repay the debt, and Mattamy will not extend the deadline for payment any further unless a sales process is conducted for Downsview's interest in DHI.

[3] There is also a dispute as to whether Mattamy is entitled to a substantial payment from Downsview under the co-ownership agreement they entered into with respect to DHI. The supervising judge ordered arbitration of that payment dispute. The outcome of the arbitration will have a material impact on the value of Downsview's interest in the project. If Mattamy is entitled to the payment, Downsview's interest in the project will be essentially worthless. If Mattamy is not entitled, then Downsview's interest will be worth millions of dollars, even after the repayment of the DHI Facility.

[4] Downsview argued before the supervising judge that the sale process for Downsview's interest proposed by the Monitor be postponed until the question of the disputed payment could be arbitrated. Downsview was (and remains) concerned that the uncertainty about the value of its interest in DHI will have a chilling effect on the sale process. It is conceivable, Downsview says, that no bidder will step forward because of the difficulty they would encounter conducting due diligence and ascertaining the probable value of DHI in light of the disputed payment. If the sale process fails and no bidder is found, Mattamy could, under the proposed terms of the sale process, seize Downsview's interest. This would result in a windfall to Mattamy – even if the arbitration of the disputed payment were to be resolved in Downsview's favour later.

[5] The supervising judge was persuaded by the arguments of the Monitor and decided that the sale process should not be postponed until after the arbitration. He highlighted three of the Monitor's arguments. First, that Mattamy, as the debtor-in-possession lender, was entitled to assert its rights over Downsview's interest in DHI in the event Downsview did not repay the DHI Facility. Second, that Downsview's obligations under the DHI Facility continued to accrue. Third, that the proposed sale process could be conducted without knowing the outcome of the arbitration, because the process contemplated the bidders submitting two offers – one on the basis that Mattamy was entitled to the additional payment and one on the basis that it was not.

[6] The Monitor had considered and rejected Downsview's concerns that the proposed sale process would create a "chilling effect" on potential bidders. The Monitor concluded that potential bidders would be sophisticated enough to conduct due diligence and assess both possible outcomes of the disputed payment issue, and would not be dissuaded or confused by being asked to submit separate bids for both possible outcomes. It argued that Downsview was merely speculating that potential bidders would be dissuaded from bidding.

[7] The supervising judge agreed with the Monitor that Downsview's concerns were speculative and ought to have been given no weight.

[8] Downsview is seeking leave to appeal to this court. It will argue that the supervising judge erred in concluding that its concerns were speculative, and erred in not ordering the sale process to be delayed until after the conclusion of the arbitration.

[9] Downsview argues for a stay of the sale process until the leave application can be decided. If leave to appeal is denied, then that will be the end of things and the sale process can unfold. However, if leave is granted, Downsview will seek a motion for a further stay of the order – and the sale process – pending the disposition of the appeal.

ANALYSIS

[10] The test for staying an order pending appeal is analogous to the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334 for granting an interlocutory injunction: (i) is there a serious issue to be determined on appeal; (ii) will the moving party suffer irreparable harm if the stay is not granted; and (iii) does the balance of convenience favour the granting of the stay: *Belton v. Spencer*, 2020 ONCA 623, paras. 20-21.

A. A SERIOUS QUESTION TO BE DETERMINED ON APPEAL

[11] The moving party set out four issues that it characterized as important, both to the parties and to the CCAA process as a whole: (i) the level of deference owed by the court to a “Super Monitor”; (ii) the extent to which a Super Monitor needs to obtain independent evidence to support the fairness and viability of a proposed sale process; (iii) whether the evidentiary onus regarding fairness and viability of the sale process remains with the Super Monitor or shifts to the party objecting to the sale process; and (iv) the extent to which a court can rely on a decision that is released after the parties’ hearing.

[12] Although it may seem unlikely the moving party will succeed on a motion for leave to appeal, the first two issues are at least arguable, if weak. The latter two issues would be highly unlikely to attract leave. First, although there seems to be little reason why a “Super Monitor” should be given less than the substantial

deference that a supervising judge gives to the decisions and recommendations of a receiver, there is no authority from this court settling the issue. Second, the idea that a Monitor must obtain independent evidence as to the fairness and viability of the sale process seems premised on the idea that an independent party would have greater expertise than the Monitor. Were the moving party correct, it would seem to undermine the speed at which the process is meant to operate. Third, the question of whether there was a shift in evidentiary onus is not a genuine issue – the supervising judge found that the Monitor had satisfied the evidentiary burden necessary to establish that the sale process was fair and reasonable. Fourth, the question of whether the supervising judge ought not to have cited a decision subsequently released by this court is of no importance. The decision in question did not change the law, and the ground is further weakened by the moving party's failure to outline the submissions on the decision that it would have made before the supervising judge if it had the opportunity.

[13] Above all, the moving party faces the high hurdle of the standard of review applicable to a decision of the supervising judge in a CCAA proceeding. The supervising judge had to determine whether the Sale Process ought to commence immediately or wait until the arbitration was concluded. The supervising judge applied the appropriate criteria set out in *(Re) Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. Sup. Ct.), at para. 13, in deciding whether to order a particular sale process, all of which are factual in nature. The findings of the supervising judge

will be entitled to deference on appeal, should leave be granted. The decision to order the sale process was itself made on the recommendations of the Monitor within the context of a long-running CCAA proceeding, compounding the nature of the deference owed by this court: *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, 90 C.B.R. (6th) 39, at para 19.

[14] Given the weakness of the grounds for appeal that have been articulated, as well as the unlikelihood that the moving party will satisfy the other grounds of the test for leave to appeal, the moving party is unlikely to obtain leave to appeal. This factor weighs in favour of dismissal.

B. IRREPARABLE HARM

[15] As the moving party argued, the criterion of irreparable harm refers to the nature of the harm rather than its magnitude: *RJR-MacDonald*, at p. 341. The question is whether refusal to grant relief would so adversely affect the moving party's interests that the harm could not be remedied were the moving party to lose the motion but succeed on the appeal: *RJR-MacDonald*, at p. 341.

[16] The moving party argues that if the sale process is not deferred until after the arbitration is completed, and Downsview's interest in DHI is sold, it will be impossible to know whether a higher purchase price could have been obtained had the sale process been deferred. Additionally, if the stay motion is not granted

and a sale is concluded prior to the appeal being heard, the moving party's appeal will have been rendered moot.

[17] Mattamy argues in reply that the supervising judge already adjudicated the issue of whether the sale process constitutes irreparable harm to the moving party. The supervising judge dismissed as speculative the argument that the sale process would generate a chill that would result in a lower sale price. Mattamy argues that if I were to find the prospect of irreparable harm, I would be finding that the prospect of a chill is more than speculative, and effectively would be reversing a factual finding of the supervising judge, contrary to the role of this court on a stay motion: *Hodgson v. Johnston*, 2015 ONCA 731, at para. 9.

[18] In addition, if the sale process is frustrated, Mattamy would be entitled, as a result of the moving party's default under the terms of the DHI Facility, to simply enforce its security and run another sale process, involving additional time and expense.

[19] I agree with the submissions of Mattamy. There is no basis on which I can substitute my evaluation of the efficacy of the sale process over that of the supervising judge and find that not granting the stay could result in irreparable harm to the moving party.

C. THE BALANCE OF CONVENIENCE

[20] Determining the balance of convenience requires an inquiry into which of the two parties will suffer the greater harm from granting or refusing the stay: *RJR-MacDonald*, at p. 342.

[21] The moving party argues that it will suffer the greater harm if a stay is refused, because it owns the 51% interest in DHI at issue, and therefore bears the risk of the interest being sold for a lower price than what otherwise could have been obtained. It also bears the risk of the sale process failing to attract any bids, which could result in Mattamy foreclosing on its interest. It argues that Mattamy faces no conceivable harm in delaying the sale process until such time as this court decides whether to grant leave to appeal.

[22] Mattamy and the Monitor argue to the contrary that Mattamy will suffer irreparable harm if there is further delay, and that the balance of convenience favours Mattamy. Mattamy has presented evidence on this motion that it has approached eight potential bidders since the sale process order was issued, and is concerned that those potential bidders will lose interest and faith in the sale process if it continues to be bogged down in litigation. Mattamy attests that the current market is favourable for investments of this nature because of favourable interest rates. These market conditions can change at any time, and prospective

bidders can lose faith in the process because of procedural delay and decline to participate.

[23] Comparing the potential commercial prejudice to Mattamy from delaying the sale process against what the supervising judge concluded to be an absence of genuine prejudice to the moving party in proceeding with the sale process prior to the conclusion of the arbitration, I find that the balance of convenience favours Mattamy. I would dismiss the motion.

D. SEALING ORDER

[24] All parties request a sealing order on the same basis and on analogous terms as the sealing order granted by the supervising judge, in order to preserve the integrity of the sale process and the pending arbitration. I am prepared to grant that order.

E. DISPOSITION

[25] The motion to stay is dismissed. The request for a sealing order is granted. If parties are unable to agree on an order for costs for this motion, I will receive submissions from each party not exceeding three pages within 10 days of these reasons.

J. A.

SCHEDULE “A’
LIST OF AFFILIATED ENTITIES

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.