CITATION: Urbancorp, 2020 ONSC 7920
COURT FILE NO.: CV-18-600624-00CL
DATE: 12-23-20

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: KSV KOFMAN INC., by and on behalf of URBANCORP CUMBERLAND 1 LP, by its general partner, URBANCORP CUMBERLAND 1 GP INC., Applicant

AND:

URBANCORP RENEWABLE POWER INC., Respondent

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robin Schwill, Robert Nicholls and Shane Freedman*, for KSV Restructuring Inc. (formerly KSV Kofman Inc.), the Monitor and Receiver

Neil Rabinovitch, for Adv. Guy Gissin, the Israeli Functionary

Suzanne Murphy, Heather Meredith and Alex Steele, for Enwave Geo Communications LP, the Purchaser

Jeffrey Larry, for King Towns North Inc.

Scott Bomhof, for First Capital Realty

Robert Drake and Mario Forte, for The Fuller Landau Group Inc., Monitor of Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., Edge Residential Inc. and Westside Gallery Lofts Inc.

Maria Dimakas, for the Condominium Corporations

HEARD VIA ZOOM: December 11, 2020

RELEASED: December 23, 2020

ENDORSEMENT

Introduction

[1] KSV Restructuring Inc. (formerly KSV Kofman Inc.), Court-appointed receiver (the "Receiver") of Urbancorp Renewable Power Inc. ("URPI") and as Court-appointed Monitor of Urbancorp Cumberland 1 LP ("Cumberland LP"), Urbancorp Cumberland 1 GP Inc., and certain related entities (the "Monitor", and as Receiver and Monitor, the "Court Officer") for and on behalf of Urbancorp New Kings Inc. ("UNKI"), Vestaco Homes Inc. ("VHI") and 228 Queen's

Quay West Limited ("QQW") seeks, among other things, approval of the sale of certain assets (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Receiver and Monitor (together, also referred to as the "Vendor"), and Enwave Geo Communities LP, by way of assignment from Enwave Energy Corporation (the "Purchaser") dated November 2, 2020 and appended to the Fifth Report of the Receiver and Forty-Third Report of the Monitor dated November 30, 2020 (the "Report"), and vesting in the Purchaser URPI's, Cumberland LP's, UNKI's, VHI's and QQW's (collectively, the "Urbancorp Entities") respective rights, title and interest in and to the assets described in the Sale Agreement (the "Purchased Assets"). The geothermal assets located at three condominiums developed by entities in the Urbancorp Group of Companies (the "Geothermal Assets") make up the vast majority of the Purchased Assets.

[2] The Receiver also seeks an Order sealing the Confidential Appendix to the Report (the "Sealing Order") pending further order of the Court.

[3] Finally, the Receiver seeks an Order (the "Assignment Order") compelling the assignment to the Purchaser of the rights and obligations of VHI and URPI as tenants (the "Tenants"), under a lease dated July 10, 2010 (the "Berm Lease") with King Towns North Inc. ("KTNI") as landlord.

[4] The Receiver recommends approval of the Transaction. Gus Gissen, First Capital Realty, The Fuller Landau Group Inc., the Condominium Corporations and the Purchasers support the Receiver.

[5] KTNI is opposed to the Assignment Order.

[6] The background to this matter is set out in the Report. All capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Report. The following is a summary of some of the facts central to this motion.

[7] Pursuant to an order issued on December 10, 2019, the Receiver was authorized to commence a sale process (the "Sale Process") for the Geothermal Assets (the "Sale Process Order"). The bid deadline under the Sale Process was October 20, 2020 (the "Bid Deadline").

[8] Following the Bid Deadline, the Sale Agreement was executed on November 2, 2020. The Purchase Price, subject to adjustments which are expected to be immaterial, is $24,000,000.

[9] KTNI owns land adjacent to the condominium development. The Tenants own and operate the geothermal system.

[10] KTNI entered into a long-term lease (the "Berm Lease") with the Tenants and VHI for the lease of the Berm Lands. The Berm Lease was designed to allow the Tenants to use the 82 geothermal wells on the Berm Lands for the Geothermal System.

[11] The Berm Lease provides for a 50-year term (of which some 40 years remain). The Berm Lease further provides that the Tenants have a unilateral right to extend the term of the lease on

the same terms and conditions (i.e., for the same $100 annual rent) in the event that the Tenants' Geothermal Supply Contracts are extended.

[12] When KTNI entered into the lease, each of KTNI, URPI, and VHI was owned and controlled by Saskin family entities. KTNI takes the position that the parties were indifferent about the nominal rent that was below the fair market value for use of the lands.

[13] The Berm Lease contains an assignment clause which provides that KTNI must consent to any assignment or transfer of the Berm Lease by the Tenants, and that KTNI may unreasonably withhold consent to any assignment or transfer of the Berm Lease.

[14] KTNI claims its consent has not been sought.

[15] The Receiver claims that issues relating to the assignment in the context of a transaction were raised a year ago and KTNI was not prepared to consent to the assignment of the Berm Lease.

[16] The Purchaser has allocated $2.049 million of the Purchase Price to the Berm Lease (although KTNI does not agree with this allocation).

Law and Analysis

[17] All parties agree that the Sale Process was properly conducted and produced a Purchase Price that is commercially reasonable in the circumstances. For this reason, it is not necessary, in my view, to review the principles set out in *Royal Bank of Canada* v. *Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.), at para. 16 concerning sales by a receiver.

[18] There is, however, opposition from KTNI as to whether the Assignment Order, which is critical to the Transaction, should be granted.

[19] KTNI submits that since URPI, one of the Tenants, is in receivership, the Court Officer, in its capacity as Receiver, has no statutory authority to seek the Assignment Order.

[20] In support of its argument that the Assignment Order should not be granted, KTNI references s. 84.1 of the *Bankruptcy and Insolvency Act* ("BIA") and s. 11.3 of the *Companies' Creditors Arrangement Act* ("CCAA") which provide the court, in bankruptcy and CCAA proceedings, with statutory jurisdiction to make an order assigning a debtor company's rights and obligations under an agreement, on notice to every party to the agreement and to the court officer.

[21] Since there is no corresponding provision in Part XI of the BIA dealing with Secured Creditors and Receivers, KTNI submits there is no jurisdiction to grant the Receiver's request for the Assignment Order.

[22] In addition, KTNI submits it is not "appropriate" to grant the Assignment Orders as:

a. KTNI is not being treated fairly and equitably, and

b. KTNI's consent has not been sought.

[23] In response, counsel to the Receiver submits that Canadian courts have repeatedly stated that the BIA and the CCAA are to be interpreted harmoniously. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60. While s. 84.1 of the BIA does not specifically refer to receivers, upon a purposive analysis, this policy and its underlying principles suggest an application to receivers. While the BIA is silent on when a receiver can apply for an order assigning a debtor contract, if both a trustee and a monitor may apply for such an order, the only purposive interpretation which harmonizes the Canadian insolvency regimes and prevents the loss of value from the estate of the debtor is the application of section 84.1 of the BIA to receivers.

[24] The Supreme Court recently confirmed in *9354-9186 Quebec Inc. v. Callidus Capital Corp.* 2020 SCC 10 at para. 40 that the remedial objectives of Canadian insolvency laws are to provide timely, efficient and impartial resolution of a debtor's insolvency, to preserve and maximize the value of a debtor's assets, to ensure fair and equitable treatment of the claims against a debtor, to protect the public interest, and to balance the costs and benefits of restructuring or liquidating the debtor company.

[25] In *Yukon (Government of)* v. *Yukon Zinc Corporation*, 2020 YKSC 16, at para. 46, in determining the scope of the Court's authority to authorize the actions of the receiver, the Court held that "insisting on a purposive analysis… helps to establish the scope of powers and discretion conferred by statutes on public officials, and on the court."

[26] Counsel to the Receiver also submitted that an order compelling the assignment of contracts is only required where the counterparty to such contract declines to provide their consent to the assignment. The Court held in *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302, at paras. 22-23 (Sup. Ct. J.), that it had the discretion to issue an assignment order even if consent to assignment was reasonably withheld by the counterparty. While Playdium is a pre-2009 amendment example of a forced-assignment, the Receiver submits that it continues to inform courts' analyses in post-amendment cases.

[27] In my view, it is necessary to take into consideration that the Purchase Price is $24,000,000. If the Transaction flounders as a result of the inability to assign the Berm Lease, the result would clearly be harmful to creditors. It is also necessary to take into account that an alternative route is available to the Receiver, specifically to take steps to bankrupt URPI and then rely on s. 84.1 of the BIA as the basis to seek the Assignment Order.

[28] If the Receiver is required to take this alternative approach, it would only result in a delay in completing the Transaction and would increase the cost of completing the Transaction. This is not a desirable outcome.

[29] Rather, it is preferable in my view to insist on a purposive approach to accomplish the objectives of Canadian insolvency laws.

[30] Section 243(1)(c) of the BIA provides:

> 243(1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> …
>
> (c) take any other action that the court considers advisable.

[31] This subsection, in conjunction with the provisions of s. 100 of the *Courts of Justice Act (Ontario)* ("CJA") is broad enough to form the basis of the Receiver's request for the Assignment Order and for the court to make such order. If not, the ability of a receiver to discharge its functions would be severely restricted to the point where the objectives of Canadian insolvency laws would be frustrated in the receivership context.

[32] An alternative approach is to resort to the inherent jurisdiction of the court.

[33] I recently commented on this subject in *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552.

> [65] There is also scope to grant the requested relief using the inherent jurisdiction of the court. The inherent jurisdiction of the provincial superior courts is a broad and diverse power. It has been said that inherent jurisdiction is a power that is exercisable "in any situation where the requirements of justice demands it" (*Gillespie v. Manitoba (Atty. Gen.)*, 2000 MBCA 1, at para. 92), and that "nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which is specifically appears to be so" (*Board v. Board* [1919] A. C. 956 at pp. 17-18, per Viscount Haldane).
>
> [66] Recently, the Supreme Court of Canada reviewed the inherent jurisdiction of superior courts in *Endean v. British Columbia*, 2016 SCC 42, and described it as follows:
>
> > [23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R.

> 78, at para. 24; and *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, at paras. 29-31. The Supreme Court acknowledges that the doctrine of inherent jurisdiction is amorphous in nature: *Ontario v. Ontario Criminal Lawyers Association of Ontario*, 2013 SCC 43, at para. 22. As a result, the parameters of what a Superior Court judge may do or not do under the power of inherent jurisdiction are unknown.
>
> …

[68] In the oft-cited *80 Wellesley St. E., Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), the Court of Appeal for Ontario held that except where provided specifically to the contrary, the court's inherent jurisdiction is "unlimited and unrestricted in substantial law and civil matters." The Court of Appeal set out the jurisprudential basis for this holding:

In *Re-Michie Estate and City of Toronto et al.* [1968] 1 O.R. 266 at pp. 268 – 9, Stark J, after considering the relevant provisions of the Judicature Act and the authorities, said:

> It appears clear that the Supreme Court of Ontario has broad universal jurisdiction over all matters of substantial law unless the Legislature divests from this universal jurisdiction by legislation in unequivocal terms. The rule of law relating to the jurisdiction of superior Courts was laid down at least as early as 1667 in the case of *Peacock v. Bell and Kendall* [1667], 1 Wms. Sound. 73 at p. 74, 85 E.R.84:
>
> … And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specifically appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.

[69] However, the doctrine is not unlimited: it is subject to both statutory and purposive limitations. The doctrine cannot be exercised so as to contradict a statute or rule. Inherent jurisdiction is also limited to exercises that fulfil the underlying purpose of the doctrine, being to regularize and protect the administration of justice. Inherent jurisdiction should be exercised "sparingly and with caution:" *R c. Caron*, 2011 SCC 5, at para. 28.

[70] In *Endean*, the Supreme Court set out that before exercising the court's inherent jurisdiction, a justice should first determine the scope of express grants of statutory powers before dipping into this "important but murky pool of residual authority" (*Endean*, at para. 24). Having done so, in my view, it is both necessary and appropriate to exercise inherent jurisdiction in responding to this motion.

[34] There is no statutory provision in the BIA that prohibits a superior court from granting the requested relief. In these circumstances, I am of the view that if s. 243(1)(c) of the BIA, in conjunction of s. 100 of the CJA, does not provide the basis for considering the Assignment Order, then it is appropriate to resort to the inherent jurisdiction of the Superior Court.

[35] Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, it is necessary to review the criteria the Court will consider in determining whether to order an assignment. The criteria referenced in s. 84.1(4) of the BIA and s. 11.3 of the CCAA informs the analysis for an assignment by the Receiver. The criteria are as follows:

> (a) whether the monitor approved the proposed assignment (only relevant to CCAA proceedings);
>
> (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> (c) whether it would be appropriate to assign the rights and obligations to that person.

[36] KTNI accepts that the first two factors have been established in that the Monitor has approved of the assignment and the financial obligations of the proposed assignee are nominal.

[37] The remaining issue is whether it would be appropriate to assign the rights and obligations to that person.

[38] The Receiver submits that it is appropriate to assign the rights and obligations of the Tenants under the Berm Lease to the Purchaser for the following reasons:

> (a) the Sale Process was approved by the Court;
>
> (b) the assignment of the Berm Lease does not preclude KTNI from asserting a claim as to an allocation of a portion of the Sale Proceeds based on the value inherent in the Berm Lease;
>
> (c) there is no prejudice to KTNI from the assignment since no amendments are being sought by the Purchaser in respect of the Berm Lease. KTNI's rights under the Berm Lease will be unaffected as a result; and
>
> (d) the 82 boreholes located on the Berm Lands are an integral part of the Purchased Assets.

[39] Further, the Receiver submits that the proposed assignment meets the "twin goals" of assisting the reorganization process by providing valuable liquidity to the estate of the Urbancorp Entities, while treating the counterparty fairly and equitably, as KTNI will be unaffected by the assignment without any prejudice to KTNI claiming that the value allocated to the Berm Lease ought to be directed to it rather than remain in the estate.

[40] KTNI previously advised the Court Officer that it would not consent to the assignment of the Berm Lease without receiving a portion of the proceeds from the sale of the Geothermal Assets prior to closing. The Court Officer states that it has been unable to obtain the consent of KTNI to the assignment of the Tenants' interests under the Berm Lease, without prejudice to KTNI's rights to subsequently advocate for its allocation entitlements, if any.

[41] The Receiver also submits that if the Court has the jurisdiction to assign a contract where the counterparty reasonably withholds its consent and notwithstanding any provision to the contrary in the agreement, then this Court has the requisite jurisdiction to issue the Assignment Order, notwithstanding that KTNI has unreasonably withheld consent, as permitted under the Berm Lease.

[42] KTNI takes issue with the Receiver's submission.

[43] KTNI submits that s. 11.3 of the CCAA is designed to protect parties in KTNI's exact position. This is why it is necessary to treat KTNI differently from "other creditors" who are not afforded the protections under s. 11.3 of the CCAA. KTNI references *Dundee Oil & Gas Limited (Re),* 2018 ONSC 3678 at para. 27:

> Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page. [Emphasis added.]

[44] In my view, KTNI's reliance on the foregoing passage is misdirected. The passage concerns the credit-risk of the assignee. In this case, the credit risk is for annual rent minimal. Issues relating to the environmental indemnity are addressed at [52] and [53] below.

[45] KTNI also submits that the application should fail, however, on the third factor to consider — whether it is "appropriate" to assign the rights and obligations in this case**.** Section 11.3(3)(c) of the CCAA provides that in deciding whether to make an order, the court must consider whether it would be appropriate to assign the rights and obligations to the assignee.

[46] In this case, KTNI submits that forcing an assignment of the Berm Lease, without modification of the commercially unreasonable rent or the payment of consideration to KTNI, does not treat KTNI fairly and equitably.

[47] If the assignment of the Berm Lease is approved, KTNI submits that it would be stripped of the very protection that it bargained for while diverting the entire value of the Berm Lands away from KTNI. This is not a fair, equitable or appropriate result in the circumstances.

[48] In my view, the arguments presented by KTNI have been addressed by the Receiver. Allocation entitlements will be addressed at a future date. As noted, the Purchaser has allocated $2.049 million for the Berm Lease, an amount that KTNI disputes. The Purchaser is clearly of the view that the Berm Lease has value.

[49] KTNI is also of the view that it is not appropriate to force the assignment of the Berm Lease where KTNI's consent has not even been sought.

[50] In response to this submission, I accept the explanations put forth by the Receiver at [15] and [40]. A transaction involving the Geothermal Assets has been contemplated for a considerable period of time and comes as no surprise to KTNI. The Receiver and KTNI have not been able to agree on terms and, as a result, no consent has been forthcoming.

[51] Finally, in oral argument, counsel to KTNI referenced that the Sale Agreement had recently been assigned by Enwave Energy Corporation to Enwave Geo Communications LP. While KTNI was satisfied as to the financial capability of the assignor, it has no financial information about the assignee.

[52] Although the annual rent is nominal, KTNI raised the subject of the Environmental Indemnity in s. 7.3 of the of the Berm Lease.

[53] In my view, the existence of the Environmental Indemnity does not result in a reason to not approve the Transaction. The Sales Agreement provides for an assignment by the purchaser and there is no evidence of any environmental concerns having been raised in the first ten years of the term. The Geothermal System provides heating and air conditioning to hundreds of condominium units and consequently, the proposed Tenants have an incentive to maintain the system in proper working condition. Finally, KTNI can raise this as an allocation issue.

[54] Having determined that there is jurisdiction for the Receiver to assign the Berm Lease, I conclude that, in these circumstances, the Transaction should be approved and that the Assignment Order should be granted.

[55] The Court Officer also requests an order sealing the Confidential Appendix to the Report pending the closing of the Transaction. No party raised an objection to this request.

[56] In my view, the Confidential Appendix contains highly sensitive commercial information including the Offer Summary, which, if made public, could detrimentally affect the price that could be obtained on a subsequent sale of the Purchased Assets should the Transaction not close.

[57] Having considered the guidance set out by the Supreme Court of Canada in *Sierra Club of Canada (Minister of Finance)*, [2002] 2 S.C.R. 522, at para. 53, I am satisfied that the Confidential Appendix should be sealed.

Disposition

[58] In the result, I am satisfied that it is both just and convenient to grant this motion and approve the Transaction and also grant the Sealing Order and the Assignment Order.

Chief Justice G.B. Morawetz

Date: December 23, 2020