CITATION: Urbancorp Toronto Management Inc., 2021 ONSC 8009
COURT FILE NO.: CV-16-00011389-00CL
DATE: 2021-12-29

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 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")

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Kenneth Kraft,* for Guy Gissin, Foreign Representative of Urbancorp Inc.

Jane Dietrich, Matthew Gotlieb, and Niklas Holmberg, for Mattamy (Downsview) Limited

Robin Schwill and Rob Nicolls, for the Monitor

HEARD: December 7, 2021

ENDORSEMENT

The Motion

[1] KSV Restructuring Inc. ("KSV"), court-appointed Monitor (the "Monitor") of the Applicants and the affiliated entities listed on Schedule "A" (collectively, the "CCAA Entities", and each individually a "CCAA Entity") brought this motion for an order:

1. terminating the Sales Process in respect of the Downsview Interest (as defined in the Sales Process Order) in accordance with the terms of the Order dated June 30, 2021 (the "Sales Process Order");

2. approving the sale transaction (the "Transaction") contemplated by an agreement of purchase and sale (the "Sale Agreement") between the Monitor (the "Vendor"), and Mattamy (Downsview) Limited ("Mattamy") dated

November 17, 2021, and appended to the 49th Report of the Monitor dated November 17, 2021 (the "Report"), and vesting in Mattamy, Urbancorp Downsview Park Development Inc.'s ("Downsview") right, title and interest in and to the assets described in the Sale Agreement (the "Purchased Assets");

3. deeming the DHI Facility (as defined in the Sales Process Order) to be fully and indefeasibly repaid;

4. discharging and releasing the DHI Facility Charge (as defined in the Sales Process Order) and the UDPDI Administration Charge (the Charge granted as security for the administrative costs incurred in connection with the DHI Facility).

[2] The Foreign Representative did not take issue with the Transaction itself with the exception of one point. The Foreign Representative requested a carveout in the Approval and Vesting Order preserving Downsview's entitlement to any amounts awarded as part of an upcoming arbitration.

Background

[3] At the commencement of the CCAA proceedings, Downsview and Mattamy were required to make an equity injection in the Downsview Homes Inc. project (the "Project") to secure construction financing for Phase 1 of the Project. Downsview could not fund its portion of the required equity and Mattamy loaned Downsview the funds it required.

[4] On June 15, 2016, an order approved a debtor-in-possession facility (the "DHI Facility") in the amount of $8 million between Mattamy, as lender and Downsview, as borrower, as well as a charge in favour of Mattamy over Downsview's property, assets and undertaking (the "DHI Interest") to secure repayment of the amounts borrowed by Downsview.

[5] On November 3, 2020, an amendment to the DHI Facility was court approved, which provided for a further secured advance by Mattamy to Downsview of approximately $6.5 million and an extension of the maturity date to February 3, 2021.

[6] The current amount owing under the DHI Facility is approximately $10.1 million, plus interest and costs.

[7] On January 25, 2021, the Foreign Representative served a motion requesting that the Monitor deliver a notice of arbitration to Mattamy in connection with certain aspects of the agreements related to the Project.

[8] On February 11, 2021, the Monitor served a motion requesting approval of a sale process for the DHI Interest.

[9] The decision in respect of both motions was released on June 30, 2021 (the "Downsview Decision"). The Downsview Decision authorized and directed the Monitor to conduct a sale

process for the Purchased Assets (the "Sale Process") and required that the arbitration (the "Arbitration") requested by the Foreign Representative be initiated.

[10] The Foreign Representative sought (i) leave to appeal the Sale Process Order; and (ii) a stay of the Sale Process pending such leave application. Both requests were denied by the Court of Appeal.

[11] The Monitor carried out the Sale Process. Eight potential buyers executed a confidentiality agreement and were provided access to conduct due diligence. None of the parties that performed due diligence raised the issue of submitting two bids as a concern.

[12] Letters of intent were to be submitted to the Monitor on October 29, 2021. No letters of intent (each an "LOI") were received by the Monitor by the deadline.

[13] The Sale Process provides that if no LOIs are submitted the Monitor may bring a motion to terminate the Sale Process and convey the Purchased Assets to Mattamy.

[14] The Monitor began negotiating the Sale Agreement with Mattamy. The key terms of the Sale Agreement include the following:

(a) Purchased Assets: the right, title and interest of Downsview in and to the common shares in Downsview Homes Inc., all cash held by Downsview, all contracts to which Downsview is a party which relate in any way to the Project and all related proceeds;

(b) Purchase Price: $10.1 million plus Mattamy's fees, costs and accruing interest to the date of Closing; and

(c) Management Fees: Mattamy acknowledges and agrees that the entitlement of Downsview to the Management Fees remains unresolved, that Mattamy is not providing consideration to Downsview as a part of the Transaction and as such Downsview retains whatever rights it may have, if any, to recover such amounts.

Position of the Parties

[15] The Monitor is of the view that the Transaction is the best available in the circumstances and recommends court approval of the Transaction as contemplated pursuant to the Sale Agreement. The Monitor's conclusions are set out in Section 2.7 of the Report.

[16] Section 36(3) of the CCAA provides a non-exhaustive list of factors the court should consider in determining whether to approve a sale of assets outside the ordinary course of business. Section 36(3) of the CCAA provides as follows:

> **Factors to be considered -** In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested party; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[17] The Monitor submits that when a court is asked to approve a sale process and transaction in a receivership context, the court is to consider the following principles (collectively, the "*Soundair* Principles"):

(a) whether the party made a sufficient effort to obtain the best price and to not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which the party obtained offers; and

(d) whether the working out of the process was unfair.

(See: *Royal Bank of Canada v. Soundair Corp*. (1991) 4 O.R. (3rd) 1 (C.A.), at para 16 ("Soundair").

[18] The Monitor further contends that the section 36 CCAA factors largely overlap with the *Soundair* principles. Furthermore, absent clear evidence that a proposed sale is improvident or that there was an abuse of process, a court is to grant deference to the recommendation of its officer to sell a debtor's assets. Counsel to the Monitor submits that only in exceptional circumstances should a court intervene and proceed contrary to the recommendation of its officer, in this case, the Monitor. This is true for both receivers selling assets on behalf of debtors and sale processes approved by monitors under the CCAA. (See *Soundair, supra* at para 21; *Marchant Realty Partners Inc. v. 2407553 Ontario Inc*., 2021 ONCA 375, at para 19; *Re Eddie Bauer of Canada Inc*. (2009), 57 CBR (5th) 241 at para 22; and *Re AbitibiBowater Inc.*, 2010 QCCS 1742 at paras 69 – 72).

[19] The Monitor submits that each of the *Soundair* principles and the applicable section 36 CCAA factors have been satisfied and that the Transaction should be approved.

[20] The Monitor opposes the position of the Foreign Representative, noting that it makes no commercial sense and is unreasonable in the circumstances. The assets being sold to Mattamy include Downsview's rights under the relevant agreements and such rights necessarily include any benefits flowing from a favourable interpretation of the agreements determined in the Arbitration. The Monitor contends that preserving an interest of the seller in the agreements would be contrary to the terms of the Sale Process.

[21] The Monitor further contends that the Sale Process contemplated conveying the DHI Interest to Mattamy in full satisfaction of all obligations of Downsview owing to Mattamy if no LOIs were submitted. It did not contemplate preserving Downsview's rights under certain agreements pending the outcome of the Arbitration and that the Foreign Representative's requested carveout fundamentally alters the nature of the Transaction and deprives Mattamy of the benefits of its foreclosure rights.

[22] The Monitor concluded in its Report the fact that no LOIs were submitted reflects that the potential return does not justify the cost, time and risk associated with acquiring the Downsview Interest. Further, the lack of interest illustrates that the outcome of the Arbitration is irrelevant.

[23] The Monitor further submits that the Foreign Representative cannot relitigate the Sale Process Order as this court and the Court of Appeal for Ontario rejected its arguments.

[24] The position of the Monitor is supported by Mattamy.

[25] Mattamy submits that the Downsview Decision imposed no reservation, restriction or carveout related to the Arbitration. Further, the Arbitration was disclosed to potential bidders, who were asked to provide LOIs on two bases (both Mattamy being successful and unsuccessful on the Arbitration). However, the Downsview Interest, including any interest in the outcome of the Arbitration was to be conveyed free and clear of any restrictions.

[26] Mattamy submits that Downsview does not have any "residual rights" to value in DHI. Pursuant to the Sale Process, the ultimate purchaser identified by the Sale Process was to acquire all of Downsview's interest in the project including the shares of DHI and the relevant project agreements. The value flowing from the Agreements is a significant part of what Mattamy is to acquire when it acquires the Purchased Assets; and the Foreign Representative's request that the court carveout those very interests renders the Purchased Assets worthless.

[27] The Foreign Representative does not take issue with the Transaction itself , but requests that any order approving the Transaction should expressly preserve the rights of Downsview, and the corresponding liability of Mattamy, for the amounts of any award made in the Arbitration in favour of Downsview.

[28] From the standpoint of the Foreign Representative, the Downsview Decision required the Monitor to either initiate the arbitration or assign the right to arbitrate to the Foreign

Representative. The Monitor ended up assigning the arbitration rights to the Foreign Representative and the Arbitration is scheduled to take place in early February 2022.

[29] The Foreign Representative submits that the distribution waterfall shows that if the position of the Foreign Representative asserted in the Arbitration is upheld then there would be positive value to the Downsview interest.

[30] The Foreign Representative also submits that the Sale Process expressly contemplated preserving the rights of Downsview by virtue of the requirement that bids be submitted on two bases.

[31] The Foreign Representative submits that to approve the Transaction without the proposed carveout would render the arbitration moot as Mattamy would own the Downsview interest in its entirety.

[32] Counsel to the Foreign Representative submitted that the court should exercise its discretion to insist upon the carveout and the determination of the issue in the Arbitration. The Downsview Decision set in motion a process to determine the value of the Downsview interest, if any. This requires that any approval of the Transaction expressly preserve Downsview's residual rights to any value that may be determined in the Arbitration.

Analysis

[33] In my view, the objections raised by the Foreign Representative have no merit. The submissions of the Monitor and Mattamy are a complete answer to the submissions made by the Foreign Representative.

[34] The Sale Process Order was unsuccessfully challenged by the Foreign Representative.

[35] The Monitor embarked on a Sale Process as provided for in the Sale Process Order.

[36] No LOIs were received. In accordance with the Sale Process Order, if no bids were received, the termination of the Sale Process and a transaction with Mattamy were specifically contemplated.

[37] The evidence of the Monitor in its Report and summarized in its factum establishes that all Mattamy acceptable buyers were given a reasonable opportunity to review the opportunity, conduct diligence and make an offer. Mattamy also confirmed that it was prepared to renegotiate the agreements which address the economics of the Project (as required by the Sale Process). None of the Mattamy acceptable buyers who performed due diligence raised the issue of submitting two offers as a concern.

[38] The Report goes on to state in s. 2.7(1)(h) that the market having been canvassed in accordance with the Sale Process Order, it is apparent that the prospective purchasers do not believe the potential return on the Downsview Interest justifies the cost of repaying the DHI Facility.

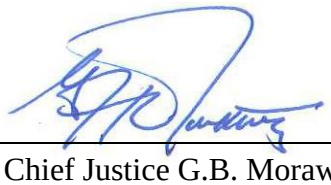
[39] The Sale Process contemplated preserving the rights of Downsview by virtue of the requirement that bids be submitted on two bases. However, this only becomes relevant if there is value in the joint venture. In this case, the market has spoken. The market values the joint venture, after taking into account the liabilities, at zero - regardless of the outcome of the Arbitration. As such, there is no value to preserve for Downsview.

[40] The Foreign Representative urged this court to exercise its discretion and insert the requested carveout. In my view, this would have the effect of overriding the approved Sale Process. In other words, the Foreign Representative is attempting to achieve a result that is contrary to the Downsview Decision, to which the Court of Appeal for Ontario denied leave to appeal. This is not an appropriate case in which to exercise such discretion.

[41] I see no supportable basis on which to disregard or disagree with the recommendations of the Monitor. I accept the recommendations of the Monitor, as these recommendations take into account the s. 36(3) CCAA factors as well as the *Soundair* principles. The Sales Process is terminated. The Transaction is approved. The DHI Facility is deemed to be fully repaid and the DHI Facility Charge and the UDPDI Administration Charge are discharged and released.

[42] The request of the Foreign Representative to grant approval of the Transaction while expressly preserving Downsview's residual rights to any value that may be determined in the Arbitration is denied.

[43] In the result, the motion of the Monitor is granted.



Chief Justice G.B. Morawetz

Date: December 29, 2021

SCHEDULE "A"

Urbancorp Power Holdings Inc.

Vestaco Homes Inc.

Vestaco Investments Inc.

228 Queens 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 Realty Inc.