**CITATION:** Urbancorp Toronto Management Inc.., 2021 ONSC 5073
**COURT FILE NO.:** CV-16-11389-00CL
**DATE:** 2021-09-16

**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:** *Robin Schwill and Robert Nicholls*, for the Monitor, KSV Restructuring Inc.

*Andrew Winton*, for Doreen Saskin

*Kenneth Kraft and Neil Rabinovitch*, for Guy Gissin, the Israeli Court Appointed Functionary Officer and the Foreign Representative of Urbancorp Inc.

*Yael Hershkovitz of Gissin & Co.*, Advocates

*Robert Drake and Mario Forte*, for The Fuller Landau Group Inc.

*Alan Saskin and Ted Saskin*, for Aubergine Investments Ltd.

**REASONS RELEASED:** September 16, 2021

## ENDORSEMENT

[1] KSV Restructuring Inc., in its capacity as court-appointed monitor (the "Monitor") of the Applicants seeks an order (the "Distribution Order") authorizing and directing it to make distributions from the proceeds (the "Geothermal Proceeds") of the sale of the Geothermal Assets (the "Geothermal Transactions"), as more fully detailed in the Forty-Fifth Report of the Monitor and the Sixth Report of the Receiver dated March 18, 2021 (the "Report").

[2] The Geothermal Assets are located in four condominiums owned by the Edge, Bridge, Fusion and Curve condominium corporations (the "Condo Corporations"). Prior to the closing of the Geothermal Transactions, the registered owners of the Geothermal Assets were 228 Queen's Quay Limited ("228"), Vestaco Homes Inc. ("Vestaco Homes"), Urbancorp New Kings Inc. ("UNKI") and Vestaco Investments Inc. ("VII"), collectively with 228, Vestaco Homes and UNKI, the "Geothermal Asset Owners").

[3] Approximately $22.2 million was originally available for distribution to stakeholders. Distribution issues with respect to Edge, UNKI and VII have been resolved, with the result that this endorsement only addresses distribution issues with respect to Bridge Condominium. By agreement, $2.8 million is being held in reserve pending the determination of this motion. The issues for determination relate to the Berm Lease.

[4] The Monitor recommends that the amount allocated to the Berm Lease be for the benefit of Vestaco Homes.

[5] The Monitor's recommended distribution is supported by the Foreign Representative of Urbancorp Inc.

[6] KTNI disputes the Monitor's recommended disallowance of its claim and the recommended distribution.

[7] The facts relevant to this motion are set out in the Report. All capitalized terms used in this endorsement and not otherwise defined have the meanings ascribed to them in the Report. The following is a summary of the central facts of this motion as they relate to the Bridge Condominium.

[8] The Bridge Condominium is located at 38 Joe Shuster Way, Toronto. The Bridge Geothermal Assets have 85 boreholes, of which 82 are located on real property owned by KTNI across the road from the condominium (the "Berm Lands").

[9] Pursuant to a declaration of trust dated December 27, 2012, KTNI is declared to be holding all of its interests in the Berm Lands in trust for Urbancorp Management Inc. ("UMI"). The Monitor understands that the Saskin Family Trust (the "Trust") is the sole shareholder of UMI. Doreen Saskin, Alan Saskin's spouse, alleges that she is a secured creditor of UMI for approximately $2.8 million. (Note: A slightly different ownership structure is referred to in a related decision – *Enwave Geo Communities LP v. KTNI*, 2021 ONSC 3978)

[10] Pursuant to a lease dated July 10, 2010 (the "Berm Lease") between KTNI, as landlord, and Vestaco Homes and UPI, as tenants (jointly, the "Tenants"), KTNI leased the Berm Lands to the Tenants. The Berm Lease expires on July 9, 2060, subject to certain automatic renewal provisions making it coterminous with the relevant geothermal energy supply agreement.

[11] The Berm Lease was amended in 2015 to reduce the annual rent from $200,000 per annum to $100 and added Vestaco as a party.

[12] For the purposes of this motion, the key provisions of the Berm Lease provide:

> 13.4(b) The Tenant acknowledges and agrees that its rights under this Lease Agreement shall not be assignable or otherwise transferable by the Tenant and the Tenant shall not effect any assignment, sublease or Transfer the Lease without the prior consent of the Landlord, which consent may be unreasonably withheld. Any request for consent shall be accompanied by payment of the Landlord's processing fee for review of such requests, and by such information and documentation as reasonably required by the Landlord. Subject to the foregoing, this Agreement shall enure to the benefit of and be binding on the parties and their legal representatives, heirs, executors, administrators, successors and permitted assigns, as the case may be.
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> 13.4(e) Where the Transferee pays or gives to the Transferor money or other value that is reasonably attributable to the desirability of the location of the Leased Premises or to leasehold improvements that are owned by the Landlord or for which the Landlord has paid in whole or in part, then at the Landlord's option, the Transferor will pay to the Landlord such money or other value in addition to all Rent payable under this lease and such amounts shall be deemed to be further Additional Rent.

[13] In December 2020, the court approved the sale of the Edge, Bridge and Fusion Geothermal Assets by the court officer to Enwave GEO Communities LP ("EGC") for $24 million (the "Enwave Transaction").

[14] The Monitor points out that the Approval and Vesting Order in respect of the Enwave Transaction provides that EGC obtained an assignment of the Berm Lease free and clear of any payment obligations to KTNI that may arise pursuant to s. 13.4 of the Berm Lease as a result of the assignment of the Berm Lease by the Tenants to EGC.

[15] In its Purchase Agreement, EGC allocated $2,049,000 to the Berm Lease.

[16] In January 2021, Mr. Alan Saskin, on behalf of KTNI, filed a claim against Vestaco Homes in the amount of $5,875,269, in connection with the Berm Provision of the Berm Lease purchased by EGC as a necessary component of the Bridge Geothermal Assets.

[17] The Monitor is of the view that the Berm Lease is an asset of Vestaco Homes and URPI, as Tenants, to the extent it provides for under market rent. The Berm Provision has the effect of stripping this value away from Vestaco Homes and URPI for no consideration. The Monitor is of the view that a clause set up between related parties to manage inter-group asset allocations and tax consequences should not be enforceable under the circumstances as a matter of equity and fairness when doing so would deprive the estates of value that they possessed on the filing date, for no consideration, with the consequential beneficiary being the sole officer and director of the Urbancorp group, Alan Saskin, or members of his family.

[18] The Monitor further believes that the fact that URPI was made a tenant under the Berm Lease is a matter of pure convenience as it was the manager of the Bridge Geothermal Assets for the benefit of Vestaco Homes, and the party who would be exercising access rights for repairs and maintenance. Commercially, as Vestaco Homes is the owner of the Bridge Geothermal Assets, which includes the geothermal piping located on the Berm Lands, it makes sense that the economic value of the Berm Lease would be fully allocated to it.

[19] The Monitor contends that KTNI's claim is essentially that the value of the under-market rent purchased by EGC ought to be attributed to KTNI pursuant to the terms of the Berm Lease.

[20] Urbancorp Inc. supports the Monitor's position disallowing KTNI's claim to a portion of the proceeds of sale from the Bridge Geothermal System.

[21] Urbancorp Inc. contends that the non-arm's length lease under which KTNI bases its claim was amended to reduce the annual rent payable from $200,000 to $100. The $100 annual rent was disclosed in the Prospectus (the "Prospectus") that was filed in respect of Urbancorp Inc.'s bond raise. Urbancorp Inc. contends there was no disclosure in the Prospectus that in the event of a sale of the system, KTNI could claim any portion of the proceeds of sale (other than its entitlement annual rent of $100). Urbancorp Inc. further contends that the rent reduction in the lease is for the specific purpose of ensuring that the value of the Bridge Geothermal System (which was valued based on net income) would not be reduced as a result of an annual expense of $200,000. The value of the Geothermal Assets was one of the key assets which underpinned the Israeli bond issuance.

[22] Urbancorp Inc. goes on to submit that but for the insolvency of the Urbancorp Group, the income from the Bridge Geothermal System would have been available to service and satisfy the bond obligations. As a result of the insolvency proceedings, the Bridge Geothermal System has been sold and KTNI now seeks to divert between $2 million and $5.9 million away from Urbancorp Inc. for the ultimate benefit of Alan Saskin's wife, Doreen Saskin.

[23] In support of its position, Urbancorp Inc. submitted the affidavit of David Mandel, VP of Urbancorp who drafted the original lease in 2011. Mr. Mandel states that Mr. Saskin provided no instructions or directions with respect to the contents of the original lease, other than possibly telling Mr. Mandel that the annual rent would be $200,000. There was no discussion with respect to including in the original lease s. 13.4 to address the situation where there was an assignment of the lease to a non-Saskin entity. The inclusion of that provision arose simply because it was included in a precedent form of lease which Mr. Mandel used as the basis for the original lease. Mr. Mandel also states that s. 13.4 was not inserted to reflect KTNI's intention that only related Saskin controlled entities could receive the benefit of the nominal rent.

[24] Urbancorp Inc. contends that in May or June, 2015, at Mr. Saskin's express instruction, Mr. Mandel revised the original lease to reduce the annual rent from $200,000 to $100 and added Vestaco Homes as a party. Mr. Mandel states that the reason for the amendment to the rent was that in contemplation of the Israeli bond raise, Mr. Saskin wanted the net income from the Bridge

Geothermal System to be as high as possible in order to justify the highest possible valuation of the asset.

[25] By Prospectus dated November 30, 2015, as amended on December 7, 2015, Urbancorp Inc.. issued just over 180 million NIS (approximately $64 million Canadian at the time of issuance) in bonds on the Tel Aviv Stock exchange. Urbancorp Inc. contends that the Prospectus does not disclose that KTNI could have any claim to sale proceeds in the event of a sale of the Bridge Geothermal System and contracts. Mr. Saskin signed the Prospectus.

[26] In response, counsel for Doreen Saskin points out that the payment of the Distribution Funds to Vestaco Homes will benefit Urbancorp Inc., which is represented by Mr. Gissin, the Israeli court-appointed functionary officer of Urbancorp Inc. As to Mr. Gissin, his role is to maximize the distribution of assets from the various Urbancorp proceedings for Urbancorp Inc.

[27] Mr. Gissin is the plaintiff in an Israeli action against Mr. Saskin, Doreen Saskin and others, in which Mr. Gissin claims approximately NIS 195 million in damages for, among other things, alleged misrepresentation in the Prospectus pursuant to which Urbancorp Inc. sold debentures in Israel.

[28] Counsel to Doreen Saskin also raises the prospect of abuse of process on the part of Urbancorp Inc. Urbancorp Inc., as noted, relies on two affidavits from David Mandel. Mr. Mandel is one of three Urbancorp Inc. executives who signed the Prospectus at issue in the Israeli action but was not named as defendant to that action. Counsel to Doreen Saskin suggests that what Urbancorp Inc. did not disclose, until Mr. Mandel was cross-examined, was that Mr. Gissin and Mr. Mandel negotiated a confidential "immunity" agreement whereby Mr. Mandel agreed to cooperate with Urbancorp Inc. in exchange for immunity from Urbancorp Inc.

[29] Ms. Saskin submits that Urbancorp Inc.'s attempt to adduce evidence from Mr. Mandel without voluntarily disclosing to the court the true state of affairs between Mr. Mandel and Urbancorp Inc. is an abuse of the court process that justifies denial of any discretionary relief on this motion that benefits Urbancorp Inc.

[30] It is interesting to note that Fuller Landau, in its capacity as Monitor of the Triangle Condo, while supporting KSV's position, also questions the credibility of Mr. Mandel. Specifically, it states that the purported factual evidence of Mr. Mandel does not assist the court as his reliability as a witness is suspect. They point out that his own evidence is contradictory. Mr. Mandel commented that URPI is the beneficial owner of the Edge Geothermal Assets but he also stated that the beneficial ownership of the Edge Geothermal Assets was transferred to 228 in return for Bay/Stadium receiving shares of Urbancorp Holding Co. Inc. Fuller Landau submits that Mr. Mandel's cross-examination illustrates that his memory about the transfer of the beneficial ownership, and the reorganization of the Urbancorp group as part of the issuance of the debentures is unreliable.

[31] Fuller Landau goes on to suggest that while Mr. Mandel's memory on key issues is understandable given the passage of time, documentary evidence suggests that he may be more than a disinterested bystander, due to his agreement with the Foreign Representative.

[32] Doreen Saskin submits that the only issue on this motion is whether the Monitor can ignore a term of the lease that reserves any value from a transfer of the lease to the landlord. Ms. Saskin takes the position that she has a direct interest in any proceeds and that the Monitor cannot use these proceedings to effect a breach of the lease.

[33] On the sale of the Geothermal Assets, EGC attributed $2,049,000 of the purchase price to the lease. Ms. Saskin takes the position that the lease was worth more than that, at least $2,800,000, which was the 2012 value of the land subject to the lease, as reflected in a consent settlement agreed to with Canada Revenue Agency. Ms. Saskin contends that whether the correct amount is $2,800,000 or $2,049,000, that value should be paid to KTNI, the landlord who contracted for the transfer value with the Tenants.

[34] The parties involved on this motion are no strangers to the litigation process. Insolvency proceedings involving the Urbancorp Group were commenced over five years ago. The issues involved in this motion, either directly or indirectly, have been the subject of two decisions with another two decisions, including this decision, pending.

[35] The first decision (*Urbancorp*, 2020 ONSC 7920) is dated December 23, 2020 (the "First Decision"). The First Decision was in respect of a motion brought by the Monitor for approval of an agreement of purchase and sale (the "Sale Agreement") between the Receiver and Monitor and EGC, by way of assignment from Enwave Energy Corporation. The subject matter of the Sale Agreement was the Geothermal Assets.

[36] The motion was opposed by KTNI. KTNI 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.

[37] 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.

[38] KTNI took the position that its consent had not been sought. EGC allocated $2,049,000 of the purchase price to the Berm Lease. KTNI did not agree with this allocation.

[39] The sale agreement was approved with allocation entitlements to be addressed at a future date.

[40] No appeal was taken from this decision.

[41] The second decision (*Urbancorp*, 2020 ONSC 3593) is dated May 20, 2021 (the "Second Decision"). At issue were competing applications in respect of the insolvent entity, Urbancorp Management Inc. ("UMI").

[42] The Monitor had issued an Application for Bankruptcy Order against UMI. Doreen Saskin responded by issuing an application for an order appointing a receiver and manager (in such

capacity, the "Receiver" of the assets of UMI pursuant to s. 243 of the *Bankruptcy and Insolvency Act* and s. *101 of the Courts of Justice Act*.

[43] Doreen Saskin contends that she is a secured creditor of UMI, holding a general security agreement ("GSA") from UMI and that she is owed the principal sum of approximately $2.2 million plus in excess of $600,000 of accrued interest.

[44] In argument, the Monitor pointed out that underlying the two competing applications is the motion that is the subject of this endorsement; specifically, KTNI, an entity controlled by Mr. Alan Saskin, has objected to the Monitor's proposed distributions as they do not contemplate a payment to KTNI in relation to the assignment of the Berm Lease.

[45] The Second Decision includes the following:

> [9] KSV understands that KTNI is wholly-owned by UMI and there is a significant possibility that UMI's only asset will be the funds distributed to KTNI in the event the court finds in favour of KTNI on the distribution motion. If KTNI is unsuccessful in the distribution motion, these applications will likely be moot.
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> [11] KSV questions the quantum of the debt owed to Doreen Saskin. KSV also raises concerns with respect to the validity and enforceability of the GSA. Doreen Saskin and UMI are not at arm's length. KSV wants to review transactions as between Doreen Saskin and UMI.
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> …
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> [30] In view of the non-arm's length relationship as between UMI and Doreen Saskin, it seems to me that it is appropriate to assess Doreen Saskin's claim in the bankruptcy proceeding, with the assessment being conducted by the trustee.
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> [32] The ABO is granted. A bankruptcy order shall issue with respect to UMI. KSV is appointed as trustee.
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> [33] The application for an order appointing the Receiver is not granted, nor is it dismissed at this time. Rather, the application is to be stayed, pursuant to s. 106 of the *Courts of Justice Act*, pending final completion of the review of Doreen Saskin's secured claim by KSV, in the bankruptcy proceedings.

[46] The other pending decision relates to an application brought by EGC against KTNI for an order, *inter alia*, declaring that KTNI has acted in bad faith by unreasonably withholding its consent to EGC's requested consent to an indirect change of control pursuant to the Berm Lease and an order compelling KTNI to exercise its contractual discretion in good faith, including by

granting the Change of Control Consent on terms that reflect reasonable compensation consistent with the purposes of the Berm Lease. The decision in that application is being released concurrently with this decision and is incorporated by reference in this decision.

[47] In my view, the reliance placed by the Foreign Representative on the Israeli litigation and its impact on this motion is misplaced. The liability, if any, of the defendants in the Israeli litigation will be determined by the Israeli court, not by this court.

[48] With respect to the evidence of Mr. Mandel put forth on this motion, I share the concerns expressed by counsel on behalf of Doreen Saskin. It is not necessary for me to go so far as to determine whether it constitutes an abuse of process. Rather, I have determined that, due to the arrangements entered into with Mr. Gissin, Mr. Mandel's evidence is unreliable and is disregarded.

[49] Mr. Alan Saskin has also sworn affidavits.

[50] Mr. Saskin transferred the Berm Lands to KTNI in 2012 and states that since that time he was engaged in a dispute with Canada Revenue Agency over the value of the Berm Lands at the time of the transfer. He states that that dispute was settled on consent in January 2020, the parties agreed to attribute the 2012 value of $2.8 million to the Berm Lands. Thus, he submits that the 2012 value of $2.8 million for the Berm Lands supports a finding that the transfer of the Berm Lease to EGC in 2020 was worth a lot more than the $2,049,000 attributed to the lease by and EGC. As noted in [16] above, Mr. Saskin, on behalf of KTNI, filed a claim against Vestaco Homes in the amount of $587,269 for the value of the Berm Lands.

[51] However, in its factum, counsel on behalf of Doreen Saskin requests an order directing the Monitor to effect a distribution of $2,868,500, or, in the alternative, $2,049,000, of the Distribution Funds to KTNI.

[52] I do not accept Mr. Saskin's conclusion that the CRA settlement amount is reflective of the appropriate amount to attribute to the Berm Lease. The dispute was settled on consent with CRA. This court is in no position to assess any aspect of the CRA dispute as the settlement amount. On the other hand, an arm's length purchaser, EGC, attributed a value of $2,049,000 to the Berm Lands. This is the view of an objective party of the value attributed to the Berm Lease. I accept it as an appropriate valuation, in the event of a finding that the Berm Lease transfer provision is enforceable.

**Law and analysis**

[53] In view of my determination that the evidence of Mr. Mandel is not of assistance, I am left with having to make a determination of the issues based on the documentation.

[54] Counsel to Doreen Saskin submits that the transfer provision in the Berm Lease should be interpreted by application of accepted principles of contractual interpretation and that it is uncontroversial that a commercial contract is to be interpreted:

(a) as a whole, in a manner that gives meaning to all of its terms;

(b) in a manner that avoids rendering one or more of its terms ineffective;

(c) by determining the intention of the parties in accordance with the language they have used in the written document, based on the presumption that they intend what they said;

(d) with regard to objective evidence of the factual matrix underlying the negotiation of the contract;

(e) without reference to the subjective intention of the parties; and

(f) to the extent there is any ambiguity in the contract, in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial uncertainty.

**(***Ventas, Inc.* v. *Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 at para 24.)

[55] Counsel to Ms. Saskin submits that the starting point for the interpretation of the provision is the plain language in s. 13.4(e) of the Berm Lease, which expressly states that the Transferor is required to pay the proceeds of transfer of the lease to the Landlord.

[56] Counsel further submits that this provision needs to be read in the context of the objective factual matrix of the terms of the Berm Lease as a whole. This is a long-term lease between non-arm's length parties for nominal rent and there is no dispute that the rent does not reflect the market value of the leasehold interest – which is precisely why EGC allocated $2 million in value to the lease. EGC paid URPI that sum to "buy" the right to pay $100 annual rent to KTNI for so long as the Berm Lands were being used to generate geothermal energy. Accordingly, this is precisely the circumstance contemplated by s. 13.4(e) of the Berm Lease, and there is a contractual obligation for the portion of the Distribution Funds allocated to the lease to be transferred to KTNI.

[57] I have been persuaded by the submissions of counsel to Mr. Saskin. In my view, the plain language of s. 13.4(e) of the Berm Lease establishes the basis for the claim of KTNI. In arriving at this conclusion, I have taken into account my views of expressed above, namely, that the arguments of the Foreign Representative are to be considered in the Israeli litigation and not on this motion.

[58] What remains to be considered is whether the Berm Provision should be invalidated under either the *pari passu* rule or the anti-deprivation rule.

[59] Counsel to the Monitor submits that previously combined under the "fraud on the bankruptcy law" principle, Canadian common law has two distinct rules that both invalidate contractual provisions that affect the distribution of proceeds and insolvency proceedings: the *pari passu* rule and the anti-deprivation rule. (see: *Chandos Construction Limited v. Deloitte*, 2020 SCC 25 at paragraph 12).

[60] Counsel to the Monitor goes on to submit that the *pari passu* rule forbids contractual provisions that would allow certain creditors to receive more than their fair share upon the insolvency of the counterparty. Further, it does not matter whether the provision is triggered by insolvency or bankruptcy, so long as it has the effect of altering the scheme of distribution. (*A. & N. Bail Co. v. Gingras*, (1982) 2 SCR 475, para. 22; *Chandos*, *supra*, at para. 13).

[61] The Monitor's argument is that the application of the Berm Provision in the circumstances would result in payment to a related counterparty (KTNI) to a contract with the debtor in insolvency proceedings, ahead of other creditors, altering the scheme of distribution and thus violating the *pari passu* rule.

[62] The Monitor also references the other common law rule, the anti-deprivation rule, which operates to prevent contracts from frustrating statutory insolvency schemes. The anti-deprivation rule protects third party creditors, by rendering void contractual provisions that, upon insolvency, remove value that would otherwise have been available to a debtor's creditors from their reach. (*Chandos, supra* at paras. 1 and 50).

[63] As noted by counsel to the Monitor, the Supreme Court in *Chandos* confirmed that the effects-based test for the Canadian anti-deprivation rule has two parts: first, the relevant clause must be triggered by an event of insolvency or bankruptcy; and second, the effect of the clause must be to remove value from the insolvent debtor's estate.

[64] Counsel on behalf of Doreen Saskin addresses these issues in its factum at paragraphs 43 – 50 which read as follows:

> [43] The Monitor relies on the *pari passu* rule and the anti-deprivation rule to justify its refusal to allocate any Distribution Funds to KTNI. Those rules do not apply to these facts.
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> (i) ***Pari Passu* Rule Does Not Apply**
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> [44] The Monitor's application of the *pari passu* rule is premised on an assumption of fact that has not been made out. The Monitor states at paragraph 60 of its factum, "Vestaco Homes, as assignor, sold its interest in the Berm Lease." That may be correct on its face, but the question for this Court to determine is "what was Vestaco's interest in the Berm Lease?".
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> [45] The Monitor begs the question by assuming the transfer value resides with Vestaco, subject to a claim by KTNI. That is not what the Berm Lease says or how it operates.
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> [46] The Berm Lease makes clear that Vestaco did not have an interest in the transfer value of the lease – that value was retained by KTNI via s. 13.4(e). Vestaco transferred its rights under the Berm Lease, including the right to occupy the Berm Lands for $100 annual rent. But Vestaco did not have a contractual right to the value of the transfer.

> [47] Thus, the *pari passu* rule, which invalidates contractual terms that pay one creditor ahead of others, does not come into play on these facts, because KTNI's interest in the Distribution Funds does not alter any scheme of distribution. The Berm Lease, which was not disclaimed prior to its transfer, reserved the transfer value to KTNI. Any Distribution Funds allocated to the Berm Lease are not payable by URPI to Vestaco, subject to a claim by KTNI. They bypass Vestaco entirely by operation of s. 13.4(e) of the Berm Lease and are not payable to KTNI directly.
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> (ii) **Pre-Conditions to Anti-Deprivation Rule Not Engaged**
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> [48] Unlike the *pari passu* rule, which does not matter whether a provision is triggered by insolvency or bankruptcy, the anti-deprivation rule requires as a precondition that the impugned term of a contract is triggered by an event of insolvency or bankruptcy.
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> [49] Notably, in *Chandos*, the Supreme Court confirmed that the anti-deprivation rule does not apply to provisions whose effect is triggered by an event other than insolvency or bankruptcy.
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> [50] The provision at issue in the Berm Lease does not mention insolvency or bankruptcy. It is agnostic as to whether a transfer of the lease occurs in an insolvency context or not. It applies to all transfers of the lease. The anti-deprivation rule is not triggered in these circumstances and does not apply.

[65] In my view, the submissions put forth by Doreen Saskin on this issue are a complete answer to the arguments raised by the Monitor. Specifically, the Berm Lease makes clear that Vestaco does not have an interest in the transfer value of the lease – that value was retained by the landlord, KTNI in accordance with s. 13.4(e). The Berm Lease reserved the transfer value to KTNI and, accordingly, the *pari passu* rule, which invalidates contractual terms that prefer one creditor ahead of the others, does not come into play on these facts, because KTNI's interest in the Distribution Funds does not alter any scheme of distribution.

[66] The anti-deprivation rule does not apply as the relevant clause does not mention insolvency or bankruptcy. Rather, it applies to all transfers of the lease. The clause is triggered by the transfer of the lease.

[67] In the result, I conclude that the Berm Provision is not invalidated under either the *pari passu* rule or the anti-depravation rule.

[68] Accordingly, the Monitor's recommended distribution is not accepted and the Monitor is directed to effect a distribution of $2,049,000 of the Distribution Funds to KTNI.

[69] However, there is to be no distribution of funds to Doreen Saskin until such time as Doreen Saskin's claim in the bankruptcy of UMI, the parent company of KTNI, has been fully and finally accepted by the trustee in bankruptcy of UMI.

[70] This motion was essentially a necessary motion for directions and, as such, I decline to make any order as to costs.

CHIEF JUSTICE G.B. MORAWETZ

**Date:** September 16, 2021