Court File No. CV-16-11389-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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 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

FACTUM OF
SPEEDY ELECTRIC CONTRACTORS LIMITED

April 23, 2018

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TO: SERVICE LIST

PART I - OVERVIEW

1. This is a motion by KSV Kofman Inc., in its capacity as Court-appointed Monitor (the "Monitor"), for an order declaring that the claim filed by Speedy Electrical Contractors Ltd. ("Speedy') pursuant to the Claims Procedure Order made in these proceedings on September 15, 2016 (the "Claims Procedure Order") be disallowed.

2. Speedy's claim ("Speedy's Claim") primarily consists of a proven debt in the amount of $2,323,638.54 against Urbancorp and Alan Saskin, which debt is secured by a mortgage against condominium units owned by one of Urbancorp's wholly owned subsidiaries, King Residential Inc. ("KRI").

3. On November 11, 2016, the Monitor served its "Notice of Revision or Disallowance" in respect of Speedy's claim, wherein the Monitor did not dispute the quantum of the debt, but instead, disputed Speedy's entitlement to the mortgage.

4. On or about February 2, 2018, the Monitor delivered its twenty second report (the "Report"), wherein the Monitor sets out its review of Speedy's Claim, including the solvency of certain Urbancorp entities, and the basis for the disallowance of Speedy's Claim.

5. Speedy submits that the Monitor's Report and Factum are replete with incomplete, and often misleading and incorrect statements of fact and accounting. Amongst other things, the Monitor attempts to use the complex corporate structure of Urbancorp to advance certain legal conclusions to invalidate Speedy's claim, but then also ignores those same corporate structures when they would act to defeat those same legal arguments. In particular, the Monitor creates an artificial distinction between the intertwined relationship of certain corporate entities, while ignoring those relationships at other times, and further, fails to recognize that all of the Urbancorp entities are actually related given they share one common owner, Urbancorp Inc., which in turn is owned by Alan Saskin (and at the time of the Secured Guarantee, the Urbancorp Group of companies were owned by Alan Saskin and his wife).

6. The extent to which the Monitor is willing to advance far-fetched and sometimes absurd factual and legal positions, with the intent to invalidate Speedy's legitimate claim, is concerning given the requirement of impartiality.

7. Upon an appropriate assessment of the evidence, Speedy will demonstrate that the Monitor's legal positions must fail, including the positions regarding the alleged non-arm's length dealings between Speedy and Mr. Saskin (which was raised for the first time in the Monitor's Factum), the alleged insolvency of the debtor, the alleged intent to oppress other creditors by Speedy and Mr. Saskin, and the alleged lack of consideration for the secured guarantee provided to Speedy.

8. Further, the Monitor is advancing the position that the purpose of the secured guarantee provided to Speedy was to defraud the Israeli bondholders, despite the fact that the Israeli bondholders were not even a creditor/stakeholder at the time (the mortgage was on title about a month prior to the Israeli bond issuance). The Israeli bondholders have not alleged that they have been oppressed by the provision of the mortgage to Speedy, but for some reason, the Monitor is still insisting on asserting that position despite clear evidence to the contrary. The Monitor is also not the proper party to be asserting said oppression claim in the context of this CCAA proceeding, which according to the Monitor would only benefit the Israeli bondholders, if successful.

PART II – THE FACTS

Background of the Debt

9. Speedy operates an electrical contracting business, and Urbancorp was one of Speedy's clients for more than 20 years. During those 20 years, the President of Speedy, Albert Passero ("Mr. Passero"), came to know the owner of Urbancorp, Alan Saskin ("Mr. Saskin"), and over those years built a professional relationship with him. From the outset of their relationship, Mr. Saskin told Mr. Passero he was the owner of Urbancorp and its companies.

Affidavit of Albert Passero, sworn March 12, 2018, at para. 2 (Responding Record of Speedy at p. 2)

10. In or about September 2014, Mr. Saskin approached Mr. Passero and advised him that he was in need of funds for some of Urbancorp's condominium projects and asked if he could

personally borrow 1 million dollars from Speedy to put into the building projects at issue, and that he would pay the money back within one year. Given that Mr. Saskin had told Mr. Passero many times that he was the owner of Urbancorp, and given their long-standing relationship, on September 23, 2014, Speedy advanced Mr. Saskin the sum of $1,000,000, and Mr. Saskin executed a promissory note requiring repayment within one year (the "Promissory Note"). The Monitor asserts in its Factum that there is "no evidence on the record" that the funds were injected into the various active Urbancorp projects, nonetheless, only the Monitor is in the position to verify where the funds went (not Speedy). The Monitor has decided not to look into the matter nor file any evidence on the issue to contradict what was told to Mr. Passero by Mr. Saskin regarding the use of the funds.

Affidavit of Albert Passero, sworn March 12, 2018, at para. 3 (Responding Record of Speedy at p. 2)

11. At the time the funds were advanced to Mr. Saskin, Speedy was also actively supplying electrical work to one of Urbancorp's condominium developments at 2 Lisgar Street, Toronto, Ontario, which was known as Edge on Triangle Park (the "Edge Project'). About one year later, in or around the summer of August 2015, it became apparent to Speedy that the Edge Project was having cash flow issues because Speedy was not being paid for its work.

Affidavit of Albert Passero, sworn March 12, 2018 at para. 4 (Responding Record of Speedy at p. 2)

12. In or around August 2015, Mr. Saskin offered to provide Speedy with Edge units as payment of Speedy's outstanding account for electrical work supplied to the Edge Project.

Affidavit of Albert Passero, sworn March 12, 2018, at para. 5 (Responding Record of Speedy at p. 2)

13. Speedy did not, and could not, accept Mr. Saskin's offer because Speedy learned, through its lawyers, that such a conveyance of units would likely be contrary to section 80(2) of the *Construction Lien Act*, which views the conveyance of units as an improper preference/priority over other potential trade creditors/lien claimants. Section 80 (2) of the Act states the following:

> **Where conveyance or mortgage void**
>
> **80 (2)** Any conveyance or mortgage in respect of the premises to any person entitled to a lien on the premises, in payment of or as security for that claim, whether given before or after that lien arises, is void against all other persons entitled to a lien on the premises.

Affidavit of Albert Passero, sworn March 12, 2018, at para. 6-8 (Responding Record of Speedy at p. 2-3)

14. After Mr. Saskin and Speedy were not able to come to an agreement about the manner in which to deal with the oustanding account, on September 30, 2015, Speedy registered a construction lien against the Edge Project in the sum of $1,038,911.44. Contrary to the assertion of the Monitor in its Factum, there is absolutely no evidence that Speedy's construction lien was not preserved properly in accordance with the *Construction Lien Act*, and neither Mr. Saskin nor Urbancorp ever took that position (Furthermore, if that was the case, Urbancorp would have brought a motion to discharge the lien in accordance with the *Construction Lien Act*, and they did not do so). The Monitor did not take that position in its Report nor Notice of Disallowance, and this is the first time the Monitor has taken this late blooming position.

Affidavit of Albert Passero, sworn March 12, 2018, at Exhibit "J" (Responding Record of Speedy at Tab J, p. 32-47)

15. At the same time, the funds borrowed by Mr. Saskin pursuant to the Promissory Note were due as of September 23, 2015, but Mr. Saskin had not yet repaid Speedy, and Mr. Saskin advised that the payment would be made at the end of October 2015.

Affidavit of Albert Passero, sworn March 12, 2018, at para. 5 (Responding Record of Speedy at p. 2)

Background of the Mortgage provided to Speedy

16. Given the concerns Speedy raised about potentially receiving a priority over other trade/lien creditors of the Edge Project (if Speedy were to accept units of the Edge Project as payment of its account or a mortgage on the Edge Project), Mr. Saskin offered to instead provide Speedy with security on units in another long-completed project, which project was called "The Bridge". For that reason, on October 7, 2015, Urbancorp's Vice President, David Mandell, sent Speedy's counsel, Kevin Sherkin, the list of thirteen proposed units of the the Bridge project that Speedy was to be provided security against. The list of units, created and delivered by Mr. Mandel, showed that the registered owner of the units was KRI, and that the market value of the units was $4,288,870, and that there were current loans against the units in the sum of $2,542,095 (the "KRI Units"). Based on the information provided at the time, Urbancorp was representing that there was slightly less than $2 million of equity in the KRI Units, owned by KRI.

Affidavit of Albert Passero, sworn March 12, 2018, at para. 18-19 and Exhibit "K" (Responding Record of Speedy at page 5 and at Tab K)

17. That same day, Kevin Sherkin requested that David Mandel and Urbancorp's litigation lawyer, Jack Berkow, confirm that all taxes and common expenses were in good standing for the KRI Units. On October 30, 2015, counsel for Urbancorp advised that the common expenses were paid and confirmed the taxes were paid on the KRI Units for the interim bill and that the balance would be paid before closing.

Affidavit of Albert Passero, sworn March 12, 2018, at Exhibit "L" & "S" (Responding Record of Speedy at Tab L & S)

18. On or about October 10, 2015, a meeting was held at the law office of Jack Berkow (litigation counsel for Mr. Saskin and Urbancorp), which meeting included Jack Berkow, Mr. Saskin, Kevin Sherkin (Speedy's counsel), and Mr. Passero. At the meeting, Mr. Saskin and his counsel, Jack Berkow, confirmed to Speedy that Urbancorp was having some temporary cash flow problems that were going to be resolved by a bond issuance in the public markets in Israel. Mr. Saskin advised that the purpose of the financing from Israel was to ensure the timely payment to all trade creditors for the various Urbancorp projects that were ongoing at the time, including Speedy. At the time, Speedy was aware that Urbancorp had a number of active projects that were still being completed, and others that had already finished the construction phase, but where the units had not been completely sold. These Urbancorp projects included the Edge Project, and other active projects. At no time did Speedy have an awareness or understanding of the actual ownership structure of Urbancorp, and Speedy believed that Mr. Saskin owned and operated everything, including the Edge Project and KRI, based on how Mr. Saskin conducted himself and Urbancorp affairs, and based on previous statements by Mr. Saskin.

Affidavit of Albert Passero, sworn April 7, 2018, at para. 2-4 (Supplementary Responding Record of Speedy at Tab 2, p. 386-387)

19. At the meeting held on October 10, 2015, Speedy was also advised that the financing from Israel could not occur unless Speedy agreed to remove its construction lien from the Edge Project. Meaning, if Speedy did not remove its construction lien, Urbancorp could not make timely payments to the various trade creditors, including Speedy, for work supplied to the various Urbancorp projects. This was ultimately a factor Speedy considered when deciding whether to discharge Speedy's construction lien from the Edge Project, in exchange for the mortgage to be held by Speedy against the KRI Units, as proposed by Mr. Saskin.

Affidavit of Albert Passero, sworn April 7, 2018, at para. 5 (Supplementary Responding Record of Speedy at Tab 2, p. 387)

20. On November 15, 2015, a "Debt Extension Agreement" was executed by Speedy, Edge on Triangle Park Inc. (the subsidiary of Urbancorp that owned the Edge Project), Mr. Saskin, and KRI, which was consistent with what was discussed between the parties previously. TCC/Urbancorp (Bay) LP was not a party to the agreement, despite the position now taken by the Monitor that TCC/Urbancorp (Bay) LP was the beneficial owner of the KRI Units at the time, and that KRI was simply holding the units as bare trustee/nominee.

Motion Record of the Monitor at Tab H

21. The Debt Extension Agreement explicitly confirmed the current state of affairs relating to Speedy that existed at the time:

a. Mr. Saskin confirmed that he owed Speedy the sum of $1,125,000, with interest running at 12.5% annually, pursuant to the Promissory Note, dated September 23, 2014, which matured on September 23, 2015; and

b. Edge on Triangle Park Inc. confirmed that Speedy had an outstanding account for work supplied to the Edge Project, in the sum of $1,038,911.44, and that Speedy had registered a construction lien against the Edge Project for its outstanding account.

22. The Debt Extension Agreement also provided for, amongst other things, the following:

a. KRI would guarantee the above noted debts to Speedy by Mr. Saskin and the Edge Project, and Speedy will be granted a mortgage against the KRI Units securing said debt (the "Secured Guarantee");

b. Speedy agreed to extend the term of the Promissory Note until January 30, 2016;

c. Speedy agreed to discharge its construction lien against the Edge Project after the registration of the mortgage against the KRI Units; and

d. KRI agreed to provide evidence showing that there are no common element arrears, or pay such arrears, and to confirm that the taxes on the KRI Units were up to date.

23. On November 16, 2015, Speedy's mortgage against the KRI Units was registered and Speedy's construction lien against the Edge Project was discharged, in accordance with the above referenced agreement.

Responding Record of Speedy at Tab V

24. At no time did Speedy believe that the mortgage provided to Speedy, in exchange for Speedy agreeing to discharge its construction lien, would have any negative consequence on any other creditor of Urbancorp. In fact, it was Speedy's understanding that it was actually facilitating the ability of Urbancorp and Mr. Saskin to make timely payments to other Urbancorp creditors by enabling Urbancorp to obtain the financing from Israel. Further, it was, and is, Speedy's belief and understanding that Urbancorp and Mr. Saskin were simply changing the form of security to be held by Speedy for the debt owed to Speedy by Urbancorp and Mr. Saskin. In essence, Urbancorp and Speedy were agreeing to exchange one form of security (a construction lien) for another form of security (a mortgage), and Speedy believed that the form of security was not really relevant to anyone, other than for the purpose of allowing Urbancorp to be able to obtain the financing from Israel, so that Speedy (and other creditors) could be paid.

Affidavit of Albert Passero, sworn April 7, 2018, at para. 6 (Supplementary Responding Record of Speedy at Tab 2, p. 388)

25. Further, it was never suggested to Speedy, by Mr. Saskin or his lawyers, that Mr. Saskin or Urbancorp were insolvent. To the contrary, from what Speedy was aware of, and based on the statements made by Mr. Saskin at meetings, Mr. Saskin and the Urbancorp group of companies were doing well financially, but were having a temporary cash flow blip.

Affidavit of Albert Passero, sworn April 7, 2018, at para. 7 (Supplementary Responding Record of Speedy at Tab 2, p. 388)

Urbancorp's Corporate Structure

26. The Urbancorp group of companies are now wholly owned subsidiaries of Urbancorp Inc., which in turn is owned by Mr. Saskin. For the reasons that will be more fully explained below, at all times the Urbancorp group of companies and projects were owned by Mr. Saskin, and in part, his wife (based on what Speedy is now told by the Monitor).

27. Prior to December 2015, Urbancorp apparently had a different corporate ownership structure than what existed after that time. The Monitor advises that there was a corporate reorganization that was completed on or around December 15, 2015 (the "Reorganization"), in order to facilitate the bond issuance in the public markets in Israel (the "Israel Bond Issue").

22nd Report of the Monitor at para. 2.0 (3) and 2.2 (Motion Record of the Monitor at Tab 2)

28. Prior to the Reorganization, the Monitor asserts that all Urbancorp projects were beneficially owned by either one of two limited partnerships: TCC/Urbancorp (Bay) LP ("Bay LP") or Urbancorp (Bay/Stadium) LP ("Bay/Stadium LP") .

22nd Report of the Monitor at para. 2.0 (3) (Motion Record of the Monitor at Tab 2)

29. Prior to the Reorganization, the Monitor asserts that Bay LP was the beneficial owner of the KRI Units (as well as various other Urbancorp projects). The Monitor states that Mr. Saskin was the limited partner that owned 79.99% of Bay LP, and the remaining 20% was owned by his wife, Doreen Saskin. Meaning, in essence, Mr. Saskin was the owner of 79.99% of the KRI Units, and his wife, Doreen, was the owner of the remaining 20%.

22nd Report of the Monitor at para. 2.0 (4) (Motion Record of the Monitor at Tab 2)

30. Further, prior to Reorganization, the Monitor states that Bay/Stadium LP was the beneficial owner of the Edge Project (as well as various other Urbancorp projects). The Monitor states that Mr. Saskin owned .01% of Bay/Stadium LP and Doreen Saskin owned the remaining 99.99%. Meaning, in essence, Mr. Saskin was the owner of .01% of the Edge Project, and his wife, Doreen, was the owner of the remaining 99.99% of the Edge Project.

22nd Report of the Monitor at para. 2.0 (5) and Appendix "D" (Motion Record of the Monitor at Tab 2 and Tab D)

31. After the Reorganization that apparently occurred on or around December 15, 2015, the beneficial ownership of the Urbancorp projects that were previously held by Bay LP were transferred to Urbancorp Cumberland 1 LP ("Cumberland 1"), and the beneficial ownership of the Urbancorp projects that were previously held by Bay/Stadium LP were apparently transferred to Urbancorp Cumberland 2 LP ("Cumberland 2"). The owner of Cumberland 1 and Cumberland 2 is Urbancorp Inc., which is owned by Urbancorp Holdco Inc., which in turn, is owned by Mr.

Saskin. Meaning, in essence, that Mr. Saskin is still the owner of the KRI Units and the Edge Project.

1st Report of the Monitor at para. 7 (Supplementary Responding Record of Speedy at Tab O, p. 332); and 22nd Report of the Monitor at para. 2.2 & Appendix "G" (Motion Record of the Monitor at Tab 2 and G)

Issues with the Monitor's Financial Accounting

32. In the Monitor's Report, the Monitor produced the unaudited balance sheet of Bay LP, dated October 15, 2015. The Monitor's stated intention was to show that Bay LP was insolvent at the time the mortgage against the KRI Units was provided to Speedy (the Monitor's position is that the KRI Units were beneficially owned by Bay LP at the time). The balance sheet shows the book value of Bay LP assets as $116,276,329, and the book value of total liabilities as $99,280,612. Therefore, Speedy submits that, from an assessment of the balance sheet alone, it does not appear that Bay LP was insolvent at the time given that Bay LP's assets exceeded their liabilities by a substantial margin, which resulted in total equity in the sum of $16,995,717 at the time.

22nd Report of the Monitor at para. 4.2 (Motion Record of the Monitor at Tab 2)

33. Within the same unaudited balance sheet, the Monitor then assessed the current "Fair Market Value" of the assets and liabilities. The Monitor does not provide any explanation for the "fair market adjustments", and therefore Speedy submits that the Court should not accept these adjusted figures. In any event, after making said adjustments, the balance sheet shows total adjusted assets of $104,816,767 and total adjusted liabilities of $100,362,807. Again, from an assessment of the balance sheet alone, Speedy submits that it does not appear that Bay LP was insolvent, even based on these adjusted figures, given the adjusted assets still exceeded the adjusted liabilities, which resulted in total adjusted equity in the sum of $4,453,960. It is notable that the adjusted values included an additional liability of $2.4 million on account of the Secured Guarantee, which the Monitor is now trying to invalidate.

22nd Report of the Monitor at para. 4.2 (Motion Record of the Monitor at Tab 2)

34. Speedy also submits that the Monitor's adjusted values are incorrect. The Monitor made a downward adjustment to intercompany receivables (asset) from the sum of $11,392,146 to zero,

but then did not make any adjustments to intercompany payables (liability) of $7,400,423. This makes little sense given that the payment of intercompany payables would result in collectable/realizable intercompany receivables. In the alternative, if intercompany receivables are zero, then this would be the result of zero intercompany payments being made, meaning that intercompany payables should also be zero.

35. The Monitor also produced unaudited financial statements of KRI. Speedy submits that the Monitor has incorrectly inflated the total stated liabilities of KRI, for the reasons set out below.

36. On February 16, 2018, the Monitor produced the unaudited list of creditors of KRI as of November 15, 2015 (the date of the provision of the Secured Guarantee). The Monitor showed secured debt of $2,479,475 pursuant to the mortgages registered on title to the KRI Units, and unsecured debt primarily owing to another Urbancorp entity, Westside Gallery Lofts Inc., in the sum of $44,532.45, and Accounts Payable to various entities in the sum of $25,902.15. The Monitor was therefore confirming that KRI had total liabilities of only $2,549,909.71.

Supplementary Responding Record of Speedy at Tab I, p. 198-201

37. On March 3, 2018, the Monitor then produced an unaudited balance sheet for KRI as of November 15, 2015. The Monitor had changed its position regarding the total liabilities of KRI, and was now stating that KRI actually had liabilities of $4,520,623, and not $2,549,909.71 (even with the inflated liability the balance sheet still showed that KRI's assets exceeded its liabilities). This additional liability primarily consisted of intercompany debts owed by the various projects that were beneficially owned by Bay LP at the time, in the sum of $1,949,880. This additional liability of $1,949,880 is a complete sham for the reasons set out below.

Supplementary Responding Record of Speedy at Tab J & N

38. The Monitor advised that almost all of that additional "intercompany liability" is an unsecured debt owed by KRI (a company beneficially owned by Bay LP) to the Bridge on King Inc. (another company beneficially owned by Bay LP, and the original builder/owner of the KRI Units). In support of the existence of this alleged debt, on May 13, 2016, Mr. Saskin swore an affidavit in the CCAA proceedings that there was consideration in the sum of $1,937,091 for the transfer of the KRI Units from the Bridge to KRI that occurred on January 23, 2014, which

resulted in the unsecured debt for same amount. This is a complete fabrication given that at the time the transfer occurred, the "Transfer" Instrument that was registered on January 23, 2014, as instrument AT3504546, states that the consideration for the transfer was the sum of $2.00, and the Land Transfer Tax Statement completed by Mr. Saskin states that there is no land transfer tax payable given the transfer was a "Transfer from Trustee to Trustee". Meaning, at the time of the transfer, Mr. Saskin actually took the position that there was only nominal consideration ($2.00) for the transfer given that the beneficial owner of the KRI Units (Bay LP) never changed as this was really a transfer from bare trustee to bare trustee. Furthermore, if there was $1.9 million consideration as now alleged then there was land transfer tax fraud.

Supplementary Responding Record of Speedy at Tab D, J, N; and
Affidavit of Alan Saskin, sworn May 13, 2016, at para. 85 (Supplementary Responding Record of Speedy at Tab E, p. 79)

39. Speedy also submits that intercompany debts amongst the Bridge and KRI is not a real liability if Bay LP owns all of the assets and liabilities of those entities, which would mean any amounts owing would essentially be a complete wash and would net out to zero, which is the reason Mr. Saskin originally stated that there was only nominal consideration for the transfer from bare trustee to bare trustee. It is like saying that the right pocket owes the left pocket money when its all the same person.

PART III – ISSUES AND LAW

Section 96 of the BIA does not apply to a Secured Guarantee

40. Speedy agrees with the Monitor that, pursuant to section 36.1(1) of the CCAA, sections 38 and 95 to 101 of the BIA apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

41. Speedy submits that the BIA clearly did not intend section 96 to apply to mortgages. Section 95 and 96 of the BIA explicitly make clear distinctions between the "transfer of property" and the provision of a "charge on property" made in favour of a creditor with a view to giving that creditor a preference over another creditor. Section 95 of the Act specifically deals

with applications by the Monitor for the provision of a charge on property in favour of a creditor with a view to giving that creditor a preference (and section 96 does not deal with charges/mortgages).

42. Speedy submits that the Monitor simply does not want to recognize that section 95 is the proper applicable section of the BIA because Speedy's mortgage was registered outside of the requisite time window of reviewable transactions according to that section. section 95 only permits the Monitor to bring applications to invalidate mortgages as alleged preferences if they were registered within three months prior to the initiation of the CCA proceedings (if the parties were dealing with each other at arm's length), and in this case, Speedy's mortgage was registered six months prior.

43. Section 95 of the BIA states the following:

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

> **(a)** in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

44. Speedy submits that section 96 does not apply to the Secured Guarantee. Section 95 is potentially the applicable section, but the provision of the Secured Guarantee clearly occurred outside of the reviewable period as prescribed under that section of the BIA.

45. Further, even if the Monitor establishes the existence of the prerequisite factors under section 96, this Court still has the discretion to refuse to declare the transfer as void. There is limited jurisprudence concerning when it is appropriate to exercise the court's discretion not to declare a transfer at undervalue void under section 96 of the BIA. It is, therefore, helpful to review the jurisprudence that considered the section of the BIA that section 96 replaced when amendments were made to the BIA in 2009. Section 96 of the BIA replaced the reviewable transaction provision contained in the former s. 100 of the BIA. This previous section also gave

the court discretion by providing that a court "may" give judgment to the trustee for the difference in the value of the consideration in a reviewable transaction.

> ***Mercado Capital Corporation v. Qureshi*** **2017 ONSC 5572 at para. 22-27 (Speedy's Book of Authorities ("BOA") at Tab 1)**

46. The Supreme Court of Canada in *People's Department Stores Ltd. (1992) Inc.* endorsed the view of the Ontario Court of Appeal in *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.*, which held that granting the remedy under the former s. 100 (2) of the BIA was discretionary, and that "equitable principles guide the exercise of discretion", and a contextual approach should be adopted.

> ***People's Department Stores Ltd. (1992) Inc., Re*****, 2004 SCC 68 (S.C.C.) at para. 82 (BOA at Tab 3); and *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1995), 26 O.R. (3d) 1 (Ont. C.A.) at para. 62-67 (BOA at Tab 2)**

47. Speedy submits that a consideration of the equitable principles of this case alone should result in the Court refusing to declare the Secured Guarantee as void. Speedy was a secured creditor as a lien claimant before Mr. Saskin convinced Speedy to take a mortgage in lieu of its lien. This was done so that the financing could be obtained from Israel, which was supposed to benefit all creditors. Further, it does not appear that any other creditor is actually taking issue with Speedy's mortgage.

S. 96 of the BIA: (i) Transfer at Undervalue

48. Under section 96 the Monitor must prove, on the balance of probabilities, that the provision of the Secured Guarantee to Speedy was a "transfer at undervalue".

49. Speedy submits that a Secured Guarantee does not fall into the category of "transfer" as set out above. Speedy also disagrees that there was insufficient consideration for the provision of the Secured Guarantee to Speedy, and submits that there was, in fact, sufficient consideration received.

50. Collateral mortgages are generally viewed as valid mortgages, despite the fact that the property owner does not necessarily receive anything in return for the provision of the mortgage.

Practices in Mortgage Remedies in Ontario, G William Dunn (BOA at Tab 19); *Kootenay Savings Credit Union v. Crowe* 1983 CarswellBC 1474 (BOA at Tab 4)

51. Forbearance to enforce a pre-existing debt and/or commence a law suit is generally viewed as valid consideration for the provision of a mortgage.

***Beazer v. Tollestrup Estate*, 2017 ABCA 429 at para. 43 (BOA at Tab 5); and**
***Albert Drywall Supply Ltd. v. Hauk* 1984 CarswellAlta 261 at para. 20-21 (BOA at Tab 6)**

52. The Court of Appeal in *Montor Business Corp. (Trustee of) v. Goldfinger* ("*Montor*") confirmed that forbearance from enforcing a pre-existing debt against a shareholder of the debtor is valid consideration in the context of an application under section 96.

***Montor* 2016 ONCA 406 at para. 37, & 51-63 (BOA at Tab 7)**

53. Speedy submits that, in assessing whether sufficient consideration was received in exchange for the Secured Guarantee, the Monitor has created artificial distinctions between the intertwined relationship of certain corporate entities, and fails to recognize that they are all wholly owned subsidiaries of Urbancorp Inc., which is owned by Mr. Saskin.

54. In consideration for the mortgage provided to Speedy by Mr. Saskin, which is secured against the KRI Units owned by Mr. Saskin, Mr. Saskin received the discharge of Speedy's construction lien on other units owned by him (the Edge Project) and the forbearance in enforcing the Promissory Note and the Edge debt. Further, as a result of the provision of the Secured Guarantee, Speedy did not commence a proceeding against the Edge Project, and did not sue the officers and directors of Urbancorp for breach of trust, as previously threatened on September 4, 2015 (Responding Motion Record of Speedy at Tab G). Lastly, as a result of the discharge of the construction lien, Urbancorp Inc. could obtain its financing from the bond issuance in Israel.

55. In the Monitor's Factum, the Monitor now takes the position that Speedy's construction lien was never valid (prior to its discharge), and further, that Speedy has not adduced any evidence to substantiate that it had valid lien rights at the time it registered the lien. This position is troubling given that neither the Monitor nor Urbancorp has ever before taken the position that the lien was not registered properly at the time (if the lien was invalid, then Urbancorp could

have brought a motion under the *Construction Lien Act* to discharge the lien, which never occurred). The lien was discharged based upon mutual agreement about 2.5 years ago (in consideration for the mortgage against the KRI Units), and therefore there would be no reason for Speedy to believe it needed to prove the validity of its lien, as it appeared to be a moot point.

56. In the Monitor's Factum, the Monitor also makes an unsupported bald statement that "none of the bond issuance went to funding Bay LP or KRI", which is not consistent with the evidence and is misleading. The Monitor's Report states that Urbancorp Inc. (owner of KRI) received net proceeds of $56.8 million from the bond issuance, and $51.9 million was used to repay secured debt owed by "various indirect subsidiaries" of Urbancorp Inc. The Israeli Bond Issuance therefore benefited Urbancorp Inc. and Mr. Saskin (Bay LP no longer existed at the time as the subsidiary companies were all rolled into Urbancorp Inc.). There is no other evidence filed on this issue, and only the Monitor would be in the position to know where the funds flowed once they were provided to Urbancorp Inc.

22nd Report of the Monitor at para. 2.3 (Motion Record of the Monitor at Tab 2)

57. Given the foregoing, Speedy submits that Urbancorp Inc. and/or Mr. Saskin received sufficient consideration for the provision of the Secured Guarantee provided by their wholly owned subsidiary (KRI).

S. 96 of the BIA: (ii) Arm's Length Transaction

58. The Court of Appeal in *Montor* endorsed the following criteria when considering whether a non-arm's length relationship exists for the purpose of section 96:

> [A] transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reasons of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length...
> ... was there a common mind which directed the bargaining for both parties to a transaction; were the parties to the transaction acting in concert without separate interests; and was there *de facto* control?

***Montor* at para. 67 and 68**

59. This court has also previously held that the concept of non-arm's length relationship in section 96 is one in which there is evidence that the transferor has no economic interest or incentive to maximize the consideration for the property being transferred in negotiations with the transferee, and further, there is evidence that the transferor is accommodating the interests of the transferee without any recognition of its own interests.

***Juhasz (Trustee of) v. Cordeiro*, 2015 CarswellOnt 4744 (BOA at Tab 8)**

60. The Monitor has taken the absurd position that Speedy and Mr. Saskin did not deal at arm's length, which is obviously denied by Speedy. Speedy submits that there is absolutely no evidence of this. To the contrary, the evidence in the record confirms that both parties retained their own lawyers to deal with the adversarial issue that arose as a result of Speedy's unpaid account and outstanding Promissory Note. Speedy rejected a number of proposals initially made by Mr. Saskin and his lawyers. There were a number of emails subsequently exchanged by the lawyers where both sides expressed frustration with the other side's alleged unwillingness to cooperate, and certain threats were made at times by each side, including threats of litigation. Speedy submits that the evidence is abundantly clear that the parties dealt with each other at arm's length.

Responding Motion Record of Speedy at Tab F, G, H, N, O; and Motion Record of the Monitor at Tab I.

61. Given the evidence is clear that the parties dealt with each other at arm's length, under section 96 the Monitor then has the onus of establishing both of the following: (1) that the debtor was insolvent at the time of the "transfer at undervalue"; (2) as well as establishing that the debtor intended to defraud, defeat or delay a creditor.

S. 96 of the BIA: (iii) The Debtor did NOT Intend to Defraud, Defeat, or Delay a Creditor

62. Speedy submits that the Monitor has not proven on a balance of probabilities that Mr. Saskin (nor Speedy) intended to defraud, defeat, or delay another creditor by the provision of the Secured Guarantee to Speedy. In the Monitor's Factum, the Monitor incorrectly suggests that there is a rebuttable presumption of this intention, and that Speedy has the onus to adduce

evidence dispelling the inference of intent. The Court of Appeal in *Montor* confirmed that the Monitor bears the burden of establishing the requisite intent under section 96 of the BIA.

***Montor* at para. 72 (BOA at Tab 7)**

63. The Monitor did not adduce any evidence from Mr. Saskin on this issue of intent. There is no evidence from any creditor that they were defrauded, defeated, or delayed by the provision of the Secured Guarantee to Speedy. There is also no evidence on the record that would enable the court to find that Mr. Saskin would have any reason to prefer Speedy over any other creditor.

64. Mr. Saskin treated all companies within the Urbancorp group of companies as one large corporate entity, and the evidence confirms that Mr. Saskin was simply changing the form of security (from a construction lien to a mortgage) to be held by Speedy for a debt owed to Speedy at a time when the Urbancorp group of companies maintained substantial equity according to the financial statements that have now been filed with this court. At the time the mortgage was provided to Speedy, the balance sheets of Bay LP confirm that there were millions of dollars of equity amongst all the subsidiary companies. Further, after the Reorganization, the consolidated financial statements of Urbancorp Inc., dated December 31, 2015, confirm that there was total equity of approximately $79 million amongst all the Urbancorp group of companies.

22nd Report of the Monitor at para. 4.2 (Motion Record of the Monitor at Tab 2); and Urbancorp Inc.'s Consolidated Financial Statements as of December 31, 2015 (Supplementary Responding Record of Speedy at Tab G)

65. Speedy submits that the form of security to be held by Speedy was not really relevant to anyone at the time, other than the fact that the form of security had to be changed (from a lien to a mortgage) to allow Urbancorp to be able to obtain its financing from Israel. The discussion amongst Speedy and Mr. Saskin at the time was that the provision of the Secured Guarantee would actually facilitate the ability of Urbancorp and Mr. Saskin to make timely payments to other Urbancorp creditors by enabling Urbancorp to obtain the financing from Israel. Therefore, the only evidence before the court is that the debtor was trying to facilitate further payments to creditors, which is the opposite of attempting to defraud, defeat, or delay other creditors.

66. The Monitor now asserts that the debtor was attempting to defraud, defeat, or delay the Israeli bondholders. There is no evidence of this, and this makes little sense given the Israeli

bondholders were not yet creditors when Speedy was provided the Secured Guarantee. Speedy's mortgage was registered against the KRI Units a month prior to the bond issuance in the public markets in Israel.

67. The Monitor asserts that Mr. Saskin/Urbancorp intended to defraud the Israeli bondholders, and in support of this assertion, points to the fact that on November 26, 2015, Urbancorp's lawyer, Barry Rotenberg (Harris Sheaffer LLP), provided a "Title Opinion" of the KRI Units, which did not reference the Speedy mortgage (referred to by the Monitor in its Factum as the "KRI Opinion"). The KRI Opinion states that Harris Sheaffer examined title to the property in the LRO, and set out the encumbrances registered against the KRI Units, but failed to list Speedy's mortgage, which was registered on November 16th. Unless the Monitor is suggesting that Harris Sheaffer was a party to the fraud, it appears that this is simply a situation where Harris Sheaffer did not complete an updated property search for the KRI Units (in the time that elapsed between November 16th and November 26th), which is simply negligence and not fraud (there is no requisite intent).

Tenth Report of the Court Appointed Functionary at Tab "M"

68. Speedy submits that, for the purpose of this motion, the Monitor has also failed to recognize that there is a material difference between the assertion that Mr. Saskin committed a fraud against the Israeli bondholders (which potentially may have occurred), and the assertion that Mr. Saskin provided the Secured Guarantee to Speedy for the purpose of defrauding the bondholders (denied by Speedy). Mr. Saskin may have purposefully omitted to disclose certain information in connection with the Israeli Bond Issue (to obtain the financing in the first place), which could potentially be fraudulent, including failing to disclose the existence of Speedy's mortgage. That does not mean that Mr. Saskin provided the Secured Guarantee to Speedy for the purpose of defrauding or defeating the bondholders, which would have required Mr. Saskin to, for some reason, prefer Speedy as a creditor over the Israeli bondholders (no evidence) and would require Mr. Saskin to know a number of things for certain at the time the Secured Guarantee was provided to Speedy: (i) Edge couldn't ultimately pay Speedy the debt owing (no evidence that he knew that at the time); (ii) that he wouldn't ultimately be able to pay the debt pursuant to the Promissory Note (no evidence he knew that at the time); and (iii) the Israeli bondholders (a creditor that didn't even exist at the time) would ultimately be paid less if Speedy

was a secured creditor of KRI (no evidence that he knew that at the time or that this is the case now).

69. The Monitor also fails to recognize that the provision of the Secured Guarantee did not actually cause the claim of the Israeli bondholders to be subordinate (in priority) to Speedy's debt. This is because the Israeli bondholders are creditors of both Cumberland 1 (beneficial owners of KRI) and Cumberland 2 (beneficial owners of the Edge Project). Meaning, the Israeli bondholders were either going to be second in priority to Speedy as a result of its construction lien on the Edge Project, or they were going to be second in priority to Speedy as a result of the mortgage registered against the KRI Units. The priority of the Israeli bondholders relative to Speedy's security (in one form or another) never changed.

70. The Monitor also fails to recognize that the Israeli Functionary may have a claim against Harris Sheaffer for negligence, which may result in collection of the additional $2.4 million that is the subject of the Secured Guarantee.

71. Speedy submits that the Monitor has not proven on a balance of probabilities that Mr. Saskin (nor Speedy) intended to defraud, defeat, or delay another creditor by the provision of the Secured Guarantee to Speedy. Speedy submits that the only evidence filed with the Court is that the provision of the Secured Guarantee was only intended as a means to facilitate the Israeli financing, extend the maturity of a Promissory Note, as well as avoid litigation with Speedy, and nothing more.

S. 96 of the BIA: (iii) The Debtor was not Insolvent

72. The court will not presume insolvency; it must be proved. A mere statement by the Monitor that it believes the debtor was insolvent at the time of the alleged preference is insufficient. Where a debtor owns considerable property but has defaulted in payment of relatively small debts, the debtor is not insolvent. A person is not insolvent if they have ample funds to meet their obligations but choose not to.

> ***Re Van Der Like*** **(1970), 14 C.B.R. (N.S.) 229 (Ont. H. C.) at para. 4-5 (BOA at Tab 9);** ***Thorne Riddel v. Fleishman*** **(1983), 47 C.B.R. (N. S.) (BOA at Tab 10);** ***Re Benoit*** **(1930), 12 C.B.R. 58 (BOA at Tab 11)**

73. The Monitor's position is that Bay LP was insolvent at the time of the Secured Guarantee because there was about $6.5 million in aged payables that were outstanding at the time that exceeded 90 days (i.e. the "cash flow test"). It is notable, that at the time of the Secured Guarantee, Bay LP actually would not be considered insolvent based on a review of its balance sheet (i.e. the "balance sheet test"), which showed millions of dollars of equity at the time.

74. Speedy submits that Bay LP had the ability to pay its creditors at the relevant time, but Mr. Saskin chose not to. Instead, Bay LP's financial statements show a management fee of $8M in 2014 and a management fee of $3 million in 2015, which was most likely paid to Mr. Saskin (there was no management fees in 2012). Meaning, Mr. Saskin chose to pay himself instead of the creditors. Further, according to Urbancorp Inc.'s consolidated financial statements for 2015, Urbancorp had approximately $80 million in equity, and therefore, the outstanding overdue accounts were relatively small in comparison. Speedy therefore submits that the debtor was not actually insolvent at the time, but simply chose not to pay its creditors.

Supplementary Responding Record of Speedy at Tab G, K & L

75. Speedy also disagrees that Bay LP is the "debtor" for the purpose of this analysis, as asserted by the Monitor in its Report. Speedy submits that the debtor is KRI. There is no evidence that KRI was actually holding the KRI Units as nominee for Bay LP, as suggested by the Monitor. In fact, the Affidavit of Mr. Saskin, sworn on May 13, 2016 for the purpose of initiating these CCAA proceedings, states that the KRI Units are an asset of KRI, and which produce approximately $167,000 in rental revenue per year. The fact that Mr. Saskin is now representing that there was consideration of $1.9 million for the transfer of the KRI Units from the Bridge to KRI, is further evidence that the transfer was not really a transfer from bare trustee to bare trustee. Speedy submits that Mr. Saskin previously represented in the Land Transfer Tax Statement that it was a transfer from bare trustee to bare trustee simply to avoid paying land transfer tax that was legitimately owing.

Affidavit of Alan Saskin, sworn May 13, 2016, at para. 84-85 (Supplementary Responding Record of Speedy at Tab E, p. 79)

76. Bay LP was not a party to the Debt Extension Agreement, and Speedy submits that Bay LP would have necessarily been a party to the agreement if KRI was simply a nominee for Bay LP. Speedy submits that KRI always conducted itself as a stand-alone corporate entity as

opposed to a nominee or bare trustee. Further, even if Bay LP was the beneficial owner of the KRI Units, that does not necessarily mean that Bay LP is the true debtor for the purpose of this analysis under section 96 of the BIA.

77. The Monitor has not filed the requisite evidence to establish that KRI was insolvent, but nonetheless, makes a bald statement in its Factum that KRI is insolvent, which is insufficient on this motion. To the contrary, KRI's balance sheet confirms that KRI's assets exceeded its liabilities at the time the Secured Guarantee was provided to Speedy. There is no evidence that KRI had any overdue payables at the relevant time, and there is no evidence to suggest that the rental income could not support any payables as they became due. For that reason, Speedy submits that the Monitor has not satisfied its onus of establishing that the debtor was insolvent at the time.

Is the Secured Guarantee void as a preference under the OBCA?

78. Before an analysis of whether the Secured Guantee was a preference, the court must first address whether the Monitor has standing to be a complainant under section 248 of the OBCA, which Speedy submits it does not. The Monitor incorrectly asserts in its Factum that it possesses presumptive standing and a *prima facie* right to be a complainant asserting allegations of oppression. To the contrary, the Court of Appeal in *Ernst & Yonge Inc. v. Essar Global Fund Limited* ("*Ernst & Yonge Inc.*") has stated that a Monitor is only authorized in "rare occasions" to be a complainant, and that a Monitor is neither automatically barred nor automatically entitled to standing, but it is a matter of discretion in each case whether to grant standing. The factors the court should consider when exercising discretion as to whether the Monitor should be authorized to be a complainant include whether:

a. There is a prima facie case that merits an oppression action or application;
b. The proposed action or application itself has a restructuring purpose that materially advances or removed an impediment to a restructuring; and
c. Whether any other stakeholder is better placed to be a complainant, or whether it is more efficient for the Monitor to advance the oppression claim because the alleged oppressive conduct similarly effects a conglomerate of stakeholders who are not organized as a group.

***Ernst & Yonge Inc. 2017* ONCA 1014 at para. 116, 123-124 (BOA at Tab 12)**

79. Speedy submits that the Monitor has not established any of the prerequisite factors necessary for the court to exercise its discretion to authorize it as a complainant. Firstly, the proposed application does not have a restructuring purpose that advances or removes an impediment to a restructuring. Secondly, according to the Monitor this application would only serve to benefit one creditor, the Israeli bondholders, and therefore the Israeli bondholders would be in a better position to advance this oppression claim (the Israeli Functionary has decided against participating in this application). Further, there is no prima facie case that merits this application for the reasons that will be set out below.

80. On an application under the oppression sections of the OBCA, a complainant must prove that the provision of the conveyance had the effect of giving a preference to one creditor over another creditor. The alleged preferential effect of the transaction is ordinarily proven by the evidence of other creditors, who give evidence that the creditor that received the alleged preference received different treatment from the treatment they received.

***Re Van der Like* (1970), 14 C.B.R. (N.S.) 229 (Ont. H. C.) at para. 7-8 (BOA at Tab 9)**

81. The Monitor must also establish an intent on the part of the debtor as well as an intent on the part of the creditor to receive a preference.

The 2016-2017 Annotated Bankruptcy and Insolvency Act at p. 591 ("Proof of Intent'), Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (BOA at Tab 18)

82. A complainant has the onus of establishing that the evidence supports the reasonable expectations asserted by the creditor, and that the reasonable expectations were violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest. The concept of reasonable expectations is objective and contextual. The actual expectation of a particular stakeholder is not conclusive. The question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

***Montor* at para. 99-100 (BOA at Tab 7)**

83. Even if reasonable, not every unmet expectation gives rise to a claim under section 248. The section requires that the conduct complained of amount to "oppression", "unfair prejudice" or "unfair disregard" of relevant interests. The Supreme Court of Canada in *BCE Inc., Re*, 2008 SCC 69, [2008] 3 S.C.R. 560 held that,

> "Oppression" carries the sense of conduct that is coercive and abusive, and suggests bad faith. "Unfair prejudice" may admit of a less culpable state of mind, that nevertheless has unfair consequences. Finally, "unfair disregard" of interests extends the remedy to ignoring an interest as being of no importance, contrary to the stakeholders' reasonable expectations. The phrases describe, in adjectival terms, ways in which corporate actors may fail to meet the reasonable expectations of stakeholders.
>
> ***Montor* at para. 101 (BOA at Tab 7)**

84. If the creditor receiving the alleged preference shows that a payment was made by the debtor in the bona fide expectation that it would enable the debtor to continue in business and to extricate itself from its financial difficulties, it is not a preference. A transaction cannot be attacked as a preference if the debtor's intention is to obtain ready cash.

> ***Re Norris* (1994), 28 C.B.R. (3d) 167 (Alta Q.B.) (BOA at Tab 13); *Re A.R. Colquhoun & Son Ltd.* (1936), 18 C.B.R. 124 (Sask. K.B.) (BOA at Tab 14); and *Re Trafalger Motors* (1952), 33 C.B.R. 87 (Ont. S.C.) (BOA at Tab 15); *Re Aboud* (1940), 22 C.B.R. 1221 (Ont.) (BOA at Tab 16); *Re Goldstein*, 3 C.B.R. 404; affirmed 53 O.L.R. 65 (C.A.) (BOA at Tab 17)**

85. In this case, the Secured Guarantee was agreed to between KRI and Speedy on November 15, 2015, and Speedy's mortgage was registered on title to the KRI Units on November 16, 2015. The Secured Guarantee was provided to Speedy so that Speedy would discharge its construction lien, and so that Urabancorp Inc. could obtain financing from Israel to pay its creditors. About one month later, on December 10, 2015, the funding pursuant to the Israeli bond prospectus closed.

> **Supplementary Responding Record of Speedy at Tab N; Motion Record of the Monitor at Tab H; and Responding Record of Speedy at Tab V.**

86. Speedy submits that the Israeli bondholders could not be a proper complainant under the oppression sections of the OBCA given they were not a creditor at the time of the conveyance of the alleged preference. This is the only logical conclusion to be drawn given, if they were not stakeholders at the time, the Israeli bondholders could not have held <u>any</u> expectations regarding how Urbancorp chose to secure legitimate debts to its other creditors. For that reason, there is obviously no evidence of what the Israeli bondholders might have known or expected as of November 15, 2015 (the date of the provision of the Secured Guarantee). Contrary to the

assertion in the Monitors' Factum, the legislature does not have to explicitly disqualify subsequent creditors from relying upon this section because simple logic would necessarily disqualify all subsequent creditors because, if you're not a stakeholder at the time of the subject transaction, then there can be no preference over your interests (you have no interests).

87. Further, there is no evidence from the Israeli Functionary that the Israeli bond issuance would not have closed in any event if the Israelis would have known of the existence of the Secured Guarantee. Speedy submits that it is far-fetched to suggest that the financing would not have closed if the Israelis had knowledge of the Speedy mortgage given the quantum of equity in Urbancorp Inc. at the time ($80 million) relative to the Speedy mortgage that secured $2.4 million.

88. Speedy also relies upon the submissions made previously that relate to section 96 of the BIA, which are also relevant to the analysis under the OBCA. Speedy submits that the Monitor has not satisfied its onus of proving that the KRI (or Speedy) had intent to give Speedy a preference over the Israeli bondholders, and given the foregoing, Monitor's application under section 248 should be dismissed.

The Secured Guarantee is not void under the FCA

89. Section 2 of the FCA states that a conveyance of real or personal property with the intent to defeat, hinder, delay, or defraud other creditors is void as against **those creditors**.

90. Speedy agrees with the Monitor that the provision of the Secured Guarantee could potentially be reviewed under section 2 of the FCA given that a "conveyance" is defined in section 1 of the FCA to include a "charge". Nonetheless, Speedy disagrees that the Monitor is a proper complainant under the FCA, as the Monitor does not represent the creditors.

91. Speedy submits that the Monitor is not a trustee in bankruptcy and does not represent or act for the creditors. A trustee in bankruptcy's authority to attack fraudulent conveyances made prior to bankruptcy arises under section 30(1)(d) of the BIA, which states the that the trustee may "bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt". Section 30(1)(d) of the BIA does not apply to proceedings under the CCAA (only

sections 38 and 95 to 101 of the BIA apply). Further, when determining whether the Monitor should be authorized to be a complainant under the FCA, Speedy submits that the court should apply the same prerequisite factors as applied in the analysis of whether the Monitor is a proper complainant under the OBCA, which Speedy submits are not met by the Monitor.

92. If the Court disagrees with this submission, Speedy also submits that the Monitor has not proven, on a balance of probabilities, the prerequisite factors to establish that the Secured Guarantee is void under section 2 of the FCA.

93. The Court of Appeal in *Montor* confirmed that a trustee in bankruptcy (in this case, the Monitor) would bear the onus of proving the existence of the following factors to establish that the Secured Guarantee is void under section 2 of the FCA (similar to the factors under section 96 of the BIA):

a. KRI conveyed real or personal property with the intent to defeat, hinder, delay, or defraud creditors or others; and
b. Speedy did not provide good consideration in exchange for the conveyance of the property; or
c. If Speedy did provide good consideration, Speedy had notice or knowledge of KRI's intent to defeat, hinder, delay, or defraud creditors or others.

***Montor* at para. 83 (BOA at Tab 7)**

94. For the reasons already set out above (in the analysis under section 96 of the BIA), Speedy submits that the Monitor's application under the FCA should also be dismissed.

ORDER REQUESTED

Speedy requests that the Monitor's motion be dismissed and costs ordered against the Monitor in favour of Speedy

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Jeremy Sacks/Kevin Sherkin
Counsel for Speedy

SCHEDULE "A"

Mercado Capital Corporation v. Qureshi 2017 ONSC 5572

Kootenay Savings Credit Union v. Crowe 1983 CarswellBC 1474

Beazer v. Tollestrup Estate, 2017 ABCA 429

Albert Drywall Supply Ltd. v. Hauk 1984 CarswellAlta 261

Montor Business Corp. (Trustee of) v. Goldfinger

Juhasz (Trustee of) v. Cordeiro, 2015 CarswellOnt 4744

Re Van Der Like (1970), 14 C.B.R. (N.S.) 229 (Ont. H. C.)

Thorne Riddel v. Fleishman (1983), 47 C.B.R. (N. S.)

Re Benoit (1930), 12 C.B.R. 58

Ernst & Yonge Inc. v. Essar Global Fund Limited 2017 ONCA 1014

Re Van der Like (1970), 14 C.B.R. (N.S.) 229 (Ont. H. C.)

Re Norris (1994), 28 C.B.R. (3d) 167 (Alta Q.B.)

Re A.R. Colquhoun & Son Ltd. (1936), 18 C.B.R. 124 (Sask. K.B.)

Re Trafalger Motors (1952), 33 C.B.R. 87 (Ont. S.C.)

Re Aboud (1940), 22 C.B.R. 1221 (Ont.)

Re Goldstein, 3 C.B.R. 404; affirmed 53 O.L.R. 65 (C.A.)

SCHEDULE "B"

Companies' Creditors Arrangement Act (R.S.C., 1985, c. C-36)

36.1 (1) Sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act*

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company".

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Transfer at undervalue

96 (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.

Business Corporations Act, R.S.O. 1990, c. B.16

Oppression remedy

248 (1) A complainant and, in the case of an offering corporation, the Commission may apply to the court for an order under this section. 1994, c. 27, s. 71 (33).

Idem

(2) Where, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates,

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been or are threatened to be exercised in a manner,

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer of the corporation, the court may make an order to rectify the matters complained of. R.S.O. 1990, c. B.16, s. 248 (2).

Court order

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 250;

(l) an order winding up the corporation under section 207;

(m) an order directing an investigation under Part XIII be made; and

(n) an order requiring the trial of any issue. R.S.O. 1990, c. B.16, s. 248 (3).

Idem

(4) Where an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 186 (4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until the court otherwise orders. R.S.O. 1990, c. B.16, s. 248 (4).

Shareholder may not dissent

(5) A shareholder is not entitled to dissent under section 185 if an amendment to the articles is effected under this section. R.S.O. 1990, c. B.16, s. 248 (5).

Where corporation prohibited from paying shareholder

(6) A corporation shall not make a payment to a shareholder under clause (3) (f) or (g) if there are reasonable grounds for believing that,

(a) the corporation is or, after the payment, would be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities. R.S.O. 1990, c. B.16, s. 248 (6).

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29

Definitions

1. In this Act,

"conveyance" includes gift, grant, alienation, bargain, charge, encumbrance, limitation of use or uses of, in, to or out of real property or personal property by writing or otherwise; ("cession")

"personal property" includes goods, chattels, effects, bills, bonds, notes and securities, and shares, dividends, premiums and bonuses in a bank, company or corporation, and any interest therein; ("biens meubles")

"real property" includes lands, tenements, hereditaments and any estate or interest therein. ("biens immeubles") R.S.O. 1990, c. F.29, s. 1.

Where conveyances void as against creditors

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. R.S.O. 1990, c. F.29, s. 2.

Where s. 2 does not apply

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. R.S.O. 1990, c. F.29, s. 3.

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 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

Court File No. CV-16-11389-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED IN TORONTO

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