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 (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 THE MONITOR

(Motion Returnable May 1, 2018 – Speedy Electrical Claim Dispute)

April 17, 2018

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FACTUM OF THE MONITOR

PART I ~ OVERVIEW

1. This is a motion for an order upholding the Monitor's disallowance of 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**").

2. Speedy's claim in the amount of $2,323,638.54 is in respect of a limited guarantee and collateral mortgage (the "**Secured Guarantee**") provided by King Residential Inc. ("**KRI**") for debts owing by Alan Saskin ("**Saskin**") and by Edge on Triangle Park Inc. ("**Edge**").

3. The Secured Guarantee is voidable as a transfer at undervalue and a fraudulent conveyance. It could also be considered to have been oppressive.

4. At the time the Secured Guarantee was granted, KRI received purely token consideration ($2), was not dealing at arm's length with Speedy, was insolvent, and intended to defraud, defeat, hinder or delay its creditors. Indeed, the Secured Guarantee will actually defeat or hinder the Applicant's creditors if upheld.

5. Capitalized terms used herein and not otherwise defined have the meaning ascribed to them in the Twenty-Second Report of the Monitor dated February 2, 2018 (the "**Monitor's Report**").

PART II ~ FACTS

Background to the Secured Guarantee – Non Arm's Length Dealings

6. Speedy had been a supplier to the Urbancorp Group for more than 20 years.

> Affidavit of Albert Passero sworn March 12, 2018 ("**First Passero Affidavit**"), para 2, Responding Motion Record of Speedy Electrical Contractors Limited ("**Responding Record**"), Tab 1.

7. Given this long-standing relationship, on September 23, 2014 Speedy personally loaned Saskin $1 million, ostensibly to enable Saskin to fund some of his building projects at that time. There is no evidence on the record that the funds were used in this manner. This loan was evidenced by a one year term promissory note (due September 23, 2015) providing for 12.5% annual interest payable biannually (the "**Note**").

> First Passero Affidavit, para. 3, Responding Record, Tab 1.

8. Shortly thereafter, Speedy completed the work on $6 million contract with Edge, the last day of supply of service and materials being certified as October 22, 2014 and

at which time Speedy invoiced Edge for release of the *Construction Lien Act* holdback amount of $695,408.07.

> Tenth Report to the Court of Guy Gissin, in his capacity as Court Appointed Functionary and Foreign Representative of Urbancorp Inc. dated February 27, 2018 (the "**Functionary Report**"), para. 12.

9. Almost a year later, when Speedy became aware that Edge was having cash flow issues towards the end of August 2015, it started to press for payment.

> First Passero Affidavit, para. 4, Responding Record, Tab 1.

10. Speedy then also issued an invoice to Edge on August 31, 2015 for payment of a holdback amount of $7,348.75 in respect of work invoiced on December 19, 2014.

> Functionary Report, para. 13.

11. Statement of accounts issued by Speedy and dated August 15, 2015 show outstanding amounts of $119,419.81 (apparently on the main contract) and $215,004.88 (apparently for extras). When these amounts are added to the holdback amount of $695.408.07 (invoiced on October 22, 2014) and $7,348.75 (invoiced on August 31, 2015) together with the hand written reference thereon to $1,729.83 for "The Bridge", the total is $1,038,911.34.

> Functionary Report, para. 13 and Appendices "D" and "E".

12. Discussions between Saskin and Speedy ensued about the ability to provide security on the Edge units with Speedy's counsel advising that this posed priority issues under the *Construction Lien Act*.

> First Passero Affidavit, paras. 5 to 8.

13. At this time, Speedy was also aware that Saskin was negotiating a financing in Israel and was told by Saskin that the money from that financing would be used to pay Speedy and other trades who were owed money.

First Passero Affidavit, para. 12.

14. On September 30, 2015, Speedy registered a claim for lien pursuant to the *Construction Lien Act* against Edge claiming an amount owing of $1,038,911.44 and stating therein that the time within which services and materials were supplied was from August 1, 2012 to August 31, 2015 (the "**Lien**"). At the same time, counsel for Speedy asked whether counsel for Saskin would accept service of a bankruptcy application against Saskin as by that time Saskin had also defaulted in repaying his Note which became due on September 23, 2015. Speedy was aware that the Israeli Bond Issue could not be completed with the Lien registered against Edge.

First Passero Affidavit, paras. 16, 17 and Exhibit "J".

Affidavit of Albert Passero sworn on April 7, 2018 (the "**Second Passero Affidavit**") para. 5, Supplementary Responding Record of Speedy Electrical Contractors Limited ("**Supplementary Responding Record**"), Tab 2.

15. Discussions between Saskin, Speedy and their respective counsel then ensued again with a view to obtaining a discharge of the Lien.

First Passero Affidavit, paras. 18 to 32, Responding Record, Tab 1.

16. These negotiations resulted in Speedy, Saskin, Edge and KRI entering into a Debt Extension Agreement which appears to have been signed by Saskin, Edge and KRI on November 1, 2016 and signed by Speedy on November 6, 2015 (the "**Debt Extension Agreement**"). Pursuant to the terms of the Debt Extension Agreement: (a) Speedy agreed to discharge the Lien; (b) the maturity date of the Note was extended to

January 30, 2016; (c) Speedy was to pay $2 to KRI; and (d) KRI agreed to provide a limited guarantee to Speedy for Saskin's and Edge's outstanding obligations to Speedy together with a mortgage on thirteen specific condominiums and thirteen specific parking spots for which KRI was the registered owner (the "**Mortgage**").

First Passero Affidavit, paras. 30 to 31, Responding Record, Tab 1.

Functionary Report, para. 17, Appendix "J".

17. The Lien was discharged and the Mortgage was registered on title on November 16, 2015 (the "**Guarantee Date**").

Functionary Report, Appendix "H".

18. In connection with the Israeli Bond Issue, Saskin delivered an officer's certificate dated November 6, 2015 certifying, in part, that there were no guarantees or obligations to provide a guaranty by KRI of any other person but at the same time noting that Speedy's Lien on Edge had been settled.

Functionary Report, para. 18.

19. Also in connection with the Israeli Bond Issue, counsel to Urbancorp Inc. provided two opinions (addressed to Urbancorp Inc., its Israeli counsel, the underwriter and its counsel) relating to KRI dated November 26, 2015 but stating that their effective date was November 6, 2015 (the "**KRI Opinions**"). The KRI Opinions make no reference to the Debt Extension Agreement or Secured Guarantee.

Functionary Report, para. 22.

20. On November 26, 2015, counsel to Urbancorp Inc. also wrote to Israeli counsel advising that the Lien had been discharged but made no mention of the Secured Guarantee or Debt Extension Agreement.

Functionary Report, para. 26.

21. The initial prospectus for the Israeli Bond Issue was issued on November 27, 2015, published on November 30, 2016, subsequently supplemented and, on December 7, 2015, the Tel Aviv Stock Exchange authorized Urbancorp Inc.'s prospectus registration in respect of the bond issuance. The prospectus does not disclose the existence of the Secured Guarantee.

Functionary Report, paras. 4, 24, 25 and 29.

22. On December 8, 2016, counsel to Urbancorp Inc. affirmed the accuracy of the KRI Opinions save and except that, among other things, since November 6, 2015 various condominium units had been given as collateral security for obligations of Edge. No particulars were provided, nor was it disclosed that this collateral security had also been given, in part, for Saskin's personal debt.

Functionary Report, paras. 30 and 31.

23. Funding pursuant to the bond issuance closed on December 10, 2016.

Supplement to the Twenty-Second Report of the Monitor (the "**Supplementary Monitor's Report**"), Tab F.

24. These *Companies' Creditors Arrangement* proceedings commenced on May 18, 2016, six months and two days after the Guarantee Date.

Monitor's Report at Section 1.0, paragraph 2, Motion Record of the Monitor, Tab 2.

Specifics of Speedy's Claim

25. There are two components to the amount of Speedy's claim related to: (1) the $1 million unsecured loan to Saskin, plus interest and costs which continue to accrue (the "**Saskin Loan**"); and (2) $1,038,911.44 (the "**Edge Amount**") in respect of electrical

services provided by Speedy to Edge in respect of a project located at 38 Lisgar Street, Toronto (the "**Edge Project**"). On November 11, 2015, the Monitor disallowed the Claim in full on the basis that the granting of the Secured Guarantee could be voidable as a transfer at undervalue and as a fraudulent conveyance or preference. On November 25, 2016, Speedy filed a Notice of Dispute. The Claim remains unresolved.

Monitor's Report, section 3.0, para. 1, section 1.0, paras. 6 and 8, Motion Record of the Monitor, Tab 2.

Relationship Between KRI and Edge

26. At the Guarantee Date, KRI was a wholly-owned subsidiary and nominee of TCC/Urbancorp (Bay) LP ("Bay LP") whose general partner was Deaja Partner (Bay) Inc. with a 0.01% interest and its limited partners were Saskin as to 79.99% and Vestaco Investments Inc., as nominee for Doreen Saskin, as to 20.00%. On the other hand, at this time Edge was a wholly-owned subsidiary and nominee of TCC/Urbancorp (Bay Stadium) Limited Partnership whose general partner was Deaja Partner (Stadium) Inc. (wholly owned by Saskin) and its sole limited partner was Vestaco Investments (Stadium) Inc. (wholly owned by Doreen Saskin).

Monitor's Report, section 2.0, paras. 4 to 6, Motion Record of the Monitor, Tab 2.

27. In connection with the corporate reorganization undertaken for the purposes of the Israeli Bond Issue, KRI became a subsidiary and nominee for Urbancorp Cumberland 1 LP ("**Cumberland 1**") and Edge became a subsidiary and nominee for Urbancorp Cumberland 2 LP ("**Cumberland 2**"). Both Cumberland 1 and Cumberland 2 are now subsidiaries of Urbancorp Inc., the issuer of the Israeli bonds. Cumberland 2 is the subject of independent proceedings under the CCAA pursuant to which The Fuller

Landau Group Inc. is monitor. As this Court is aware, Cumberland 1 and Cumberland 2 have distinct assets and creditors.

Monitor's Report, section 2.2, paras. 1 to 5, section 2.4, para. 1 (c), Motion Record of the Monitor, Tab 2.

28. Speedy has filed a claim in Cumberland 2's proceedings for the Edge Amount and has an unsecured claim in Saskin's proposal proceedings with respect to the Note.

Functionary Report, paras. 13 and 35.

Facts Concerning Consideration

29. The Debt Extension Agreement states that the consideration is: (a) the extension of the maturity date of the Note from September 23, 2015 to January 30, 2016; (b) the discharge of the Lien; and (c) the payment of $2 to KRI.

Functionary Report, Appendix "J", section 4.

30. Extending the maturity date of the Note benefited only Saskin. The funds loaned by Speedy to Saskin were not connected to the business and operations of KRI.

Monitor's Report, section 3.0, para. 3, Motion Record of the Monitor, Tab 2.

31. Discharging the Lien only benefited Edge. While discharging the Lien was required as an element of the Israeli Bond Issue, none of the proceeds of the bond issuance went to funding Bay LP or KRI or paying Speedy. Substantially all of the proceeds were used to pay out the Urbancorp Group's then existing secured creditors on a number of other projects and fund other ongoing project costs.

Monitor's Report, section 3.1, para. 2 and section 2.3, para. 1, Motion Record of the Monitor, Tab 2.

First Passero Affidavit, para. 34, Responding Record, Tab 1.

32. The only consideration received by KRI was the $2.

Monitor's Report, section 5.0, para 1(iii), Motion Record of the Monitor, Tab 2.

33. The value of the collateral granted to Speedy pursuant to the Secured Guarantee is estimated by the Monitor to have been $654,000 at the time, prior to the realization of the 13 parking spots. The Monitor has estimated the current value of the collateral to be approximately $1.8 million prior to the sale of the remaining twelve parking spots.

Monitor's Report, section 3.2.2, Motion Record of the Monitor, Tab 2.

Facts Concerning Insolvency

34. At the time of the Debt Extension Agreement, KRI was a nominee for Bay LP.

Monitor's Report, section 4.0, para. 2, Motion Record of the Monitor, Tab 2.

35. Based on the cash flow test, the Monitor has determined that Bay LP was insolvent at the Guarantee Date.

Monitor's Report, section 5.0, para. 1(i), Motion Record of the Monitor, Tab 2.

Facts Concerning Intent

36. Speedy and Saskin were aware of the Urbancorp Group's financial distress at the time and Speedy was granted the Secured Guarantee to address this risk for an existing unsecured obligation pursuant to the Note and, as will be outlined below, an invalid Lien against Edge.

Monitor's Report, section 5.0, para. 1 (v), Motion Record of the Monitor, Tab 2.

37. As discussed above, Speedy and Saskin were aware of the need to discharge the Lien in order to close the Israeli Bond Issue. The Lien was discharged on November 16, 2015 shortly before the initial prospectus for the Israeli bond issuance was issued

on November 27, 2015. While Saskin, personally, and Urbancorp Inc.'s counsel confirmed the discharge of the Lien in connection with the Israeli Bond Issue, the Secured Guarantee was not disclosed.

38. None of the Israeli bond proceeds were in fact used to pay Speedy or fund Bay LP and Speedy did not enforce repayment of the Note on its new maturity date of January 30, 2016 or at any time thereafter.

First Passero Affidavit, para. 34, Responding Record, Tab 1.

39. At the Guarantee Date, Bay LP's creditors were different from those of Edge.

Monitor's Report, section 3.4, para. 1, Motion Record of the Monitor, Tab 2.

40. The effect of the Secured Guarantee will be to defeat or hinder recoveries to the creditors of Cumberland 1, namely Urbancorp Inc.'s creditors which are primarily the Israeli bondholders.

Monitor's Report, section 5.0, para. 1 (vii), Motion Record of the Monitor, Tab 2.

PART III ~ ISSUES

41. The issue on this motion is whether this Court should uphold the Monitor's disallowance of the Claim on the ground(s) that:

(a) The Secured Guarantee is void as a transfer at undervalue contrary to section 96 of the *Bankruptcy and Insolvency Act* (the "**BIA**");

(b) The Secured Guarantee is void as fraudulent conveyance under the *Fraudulent Conveyances Act* (the "**FCA**"); and

(c) The Secured Guarantee could also be set aside as oppressive, or as unfairly prejudicial to, or for unfairly disregarding, the interests of the

creditors of KRI, as contrary to the provisions of the Ontario *Business Corporations Act* (the "**OBCA**").

PART IV ~ THE LAW & ARGUMENT

Voidable Transaction Provisions Apply

42. 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.

43. There will be no plan of compromise or arrangement in these proceedings to be able to provide otherwise.

The Secured Guarantee is Void under section 96 of the BIA

44. Section 96 of the BIA provides as follows:

> **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.

45. Section 2 of the BIA defines "transfer at undervalue" to mean:

a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

There Was a Transfer

46. The granting of the Secured Guarantee should be construed as a "disposition of property" as contemplated in the definition of "transfer at undervalue". This Court has previously explained that section 96 of the BIA creates a regime for nullifying "transactions prior to bankruptcy in which a bankrupt depleted its assets to the prejudice of its creditors." The purpose of section 96 is, accordingly, "to claw back into a bankrupt estate property that has been conveyed out of the bankrupt's hands by transactions at less than the proper value of the property transferred," The granting of the Secured Guarantee falls squarely within the purview of this regime.

National Telecommunications Inc. (Re), 2017 ONSC 1475 [***National Telecom***] at para. 4, Monitor's Book of Authorities ("**Monitor's BOA**"), Tab 1.

Cameron Estate (Re), 2011 ONSC 6471 at para. 14, Monitor's BOA, Tab 2.

47. Granting a charge over assets permitting the grantee priority recovery upon a bankruptcy has the same effect as the conveyance or assignment of such property at first instance. Given the purpose of such fraudulent preference and conveyance provisions, there is no logical basis or policy objective achieved by holding that

particular forms of transactions may avoid their scope if their substantive effect is the same.

Transfer was at Undervalue

48. As noted above, the Monitor has determined that KRI received $2 of consideration in return for granting the Secured Guarantee with a value of $654,000 as at the Guarantee Date.

49. Pursuant to subsection 96(2) of the BIA (read in conjunction with section 36.1 of the CCAA), "the values on which the court makes any finding under section 96 are, in the absence of evidence to the contrary, the values stated by the monitor." There is no evidence to the contrary.

50. Saskin's and Edge's ability to repay their principal obligations to Speedy at the Guarantee Date was reasonably in doubt given the known liquidity issues. Accordingly, the likelihood of being called on the Secured Guarantee at the time cannot reasonably be said to have been remote. Recovery on those principal obligations remains in doubt today as both Saskin and Edge are currently subject to their own insolvency proceedings. Accordingly, by way of the Secured Guarantee, Speedy was able to obtain collateral in support of existing unsecured and doubtful obligations – claims which Speedy, in addition to the Claim in issue here, is still pursuing in those other proceedings.

51. Speedy argues that $2 is sufficient consideration for the creation of an enforceable contract. As a matter of common law contract principles, this position is correct. The current dispute, however, does not involve the enforceability of a contract assessed pursuant to common law contract doctrine. The issue before this Court

concerns the validity of statutory challenges brought under the BIA and FCA. It is in this context that the consideration received by Bay LP must be assessed. A peppercorn here is not sufficient. By statute, the consideration must not be "conspicuously less than fair market value". $2 is conspicuously less than $654,000.

52. Furthermore, transactions will be declared void if the benefit received by a transferor (even if a considerable sum) was nevertheless "conspicuously less" than the value of the transferred property.

> *Royal Bank of Canada v.* Racher, 2017 ABQB 181 at paras. 116 and 124-125 Monitor's BOA, Tab 3.

53. For all of the same reasons, $2 is also not "adequate valuable consideration" for the purposes of section 97 of the BIA and, accordingly, the granting of the Secured Guarantee is not a protected transaction pursuant to that provision leaving aside altogether the requirement of good faith which clearly does not exist here.

54. The statutory provision also specifically stipulates that the consideration in question must be "received by the debtor" when compared to the consideration "given by the debtor". Extending the maturity date of the Note, a personal obligation of Saskin, cannot be reasonably construed as constituting consideration "received by" KRI. It is a benefit given by Speedy and received by Saskin. A benefit received by a director, officer or shareholder of a corporation is not, by itself, a benefit received by the corporation.

> *XDG Ltd. v. 1099606 Ontario Ltd.*, 2002 CarswellOnt 4535 [***XDG Ltd.***] at paras. 51, 68, 71 and 79, Monitor's BOA, Tab 4.

55. The same can be said for the benefit flowing to Edge from discharging the Lien (if it had been valid). This is obviously not consideration received by KRI. To the extent

that it facilitated the Israeli Bond Issue, none of those funds flowed to KRI. To the extent that the Lien was invalid (as discussed below) and all Speedy had was either an unsecured claim or *Construction Lien Act* trust claim against Edge, obtaining the Secured Guarantee provided no consideration to Edge (as there was no value in discharging an invalid Lien) and, therefore, couldn't possibly provide any to KRI.

56. In determining the validity of the Lien, the following provisions of the *Construction Lien Act* are relevant:

> 31 (3) Subject to subsection (4), the lien of any other person,
> (a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earliest of,
> (i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32, and
> (ii) the date on which the person last supplies services or materials to the improvement, and
> (iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and
>
> 31 (5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring,
> (a) the date on which the person last supplied services or materials under that contract or subcontract; and
> (b) that the person will not supply any further services or materials under that contract or subcontract,
> then the facts so stated shall be deemed to be true against the person making the declaration.
> [emphasis added]

57. As referenced above, Speedy provided a statutory declaration under section 31(5) of the *Construction Lien Act* that the date of the last supply of services and materials under its contract with respect to the Edge Project was October 22, 2014. The Lien was registered on September 30, 2015, well outside the required 45 day period. Accordingly, Speedy's lien rights in respect of its Edge Project contract had long since expired and the Lien was invalid as at the Guarantee Date. It cannot be

reasonably concluded that Saskin and Speedy were not both aware of this fact at the relevant time given their respective decades of experience in the Ontario construction industry.

58. Speedy has not adduced any evidence to substantiate that it had valid lien rights at the time it registered the Lien.

59. Consequently, the Secured Guarantee was a "transfer at undervalue."

Parties Were Not Dealing at Arm's Length

60. Given that the Secured Guarantee was granted on November 16, 2015 and these CCAA proceedings in respect of KRI commenced on May 18, 2016, the impugned transfer obviously occurred within one year of the commencement of these proceedings.

61. This fact alone is sufficient to void the Secured Guarantee as a transfer at undervalue pursuant to section 96(1)(b)(i) if Speedy was a party not dealing at arm's length with KRI.

National Telecom at para. 6, Monitor's BOA, Tab 1.

62. A purposive interpretation of section 96 leads to the conclusion that KRI and Speedy were not "dealing at arm's length" because KRI "agreed" to encumber its assets at the direction of Saskin, its controlling shareholder, without any independent analysis and without any apparent concern for its own economic self-interest – and in circumstances where Speedy held extraordinary leverage over Saskin by frustrating the Israeli Bond Issue due to its Lien (even though it was invalid) in addition to seeking to bankrupt Saskin at the time of a known liquidity crisis.

63. The concept of a non-arm's length relationship is one in which there is no incentive for the transferor to maximize the consideration for the property being transferred in negotiations with the transferee.

> *Juhasz (Trustee of) v. Codeiro*, 2015 ONSC 1781 [***Juhasz***], at para. 41, Monitor's BOA, Tab 5.
>
> *National Telecom*, at paras. 43-44, Monitor's BOA, Tab 1.

64. In "voluntarily" encumbering its assets for $2, the conduct of KRI evidenced the same absence of economic self-interest, and the same reflexive willingness to accommodate the transferee (Speedy), that is found in the rulings of this Court in *Juhasz* and *National Telecom.*

65. Accordingly, pursuant to section 96(1)(b)(i) of the BIA, the Secured Guarantee is void as a transfer at undervalue occurring within one year of the commencement of these proceedings between parties who were not dealing at arm's length with one another.

66. In addition, even if one considered Speedy and KRI to be dealing at arm's length, because KRI was insolvent at the Guarantee Date and had the requisite intent to defeat, defraud or hinder its creditors, the Secured Guarantee would also be void pursuant to section 96(1)(a) of the BIA.

KRI was Insolvent at the Time

67. As set out in Part II above, based on the cash flow test, the Monitor has determined that KRI was insolvent at the Guarantee Date. There is no contradicting evidence on the record.

68. It is well-established that the test set out in the BIA definition of "insolvent person" is a disjunctive "or" test such that any one of the tests being met is sufficient.

Stelco Inc., Re, 2004 CarswellOnt 1211 at para. 28, Monitor's BOA, Tab 6.

KRI Possessed the Requisite Intention

69. To satisfy the section 96 "intentionality" requirement, only the intention of KRI needs to be considered (Speedy's intention as transferee is irrelevant). Relying on principles developed under the FCA, KRI's intention is equated with the intention of its directing mind. This intention need only have existed *vis-à-vis* a single creditor (rather than as against the creditors collectively), and such intention need only have been one among many factors influencing KRI's conduct.

National Telecom at para. 51, Monitor's BOA, Tab 1.

Juhasz at paras. 52 and 54, Monitor's BOA, Tab 5.

Canadian Imperial Bank of Commerce v. Graat, 1992 CarswellOnt 136 (Gen. Div.) at para. 72, affirmed, [1997] O.J. No. 438 (C.A.), Monitor's BOA, Tab 7.

70. Furthermore, based on a purposive reading of section 96 as outlined above, and the definitions in the BIA, the reference to "a creditor" in section 96(1)(a)(iii) ought to be seen as including a person who, while not a creditor at the time of the transfer, is one on the date of the bankruptcy giving rise to the operation of section 96 in the first place. This would also be consistent with the case law on point under the FCA (see para. 83).

71. Section 96(1)(a)(iii) refers only to "a creditor" and specifically not "a creditor at the time of the transfer". Had Parliament intended this, it could have easily included such language as it has in section 96(1)(a)(ii) dealing with the time for determining the debtor's insolvency. It did not.

72. Section 2 of the BIA defines "creditor" to mean a person having a claim provable as a claim under the BIA. Section 121(1) of the BIA defines claims provable as "all debts and liabilities, present and future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt." The Israeli Functionary, on behalf of the creditors of Urbancorp Inc., including the Israeli bondholders, has a proven claim in these proceedings.

73. Accordingly, intent to defraud, defeat or delay the Israeli bondholders, whose obligations were in obvious contemplation at the time, is equally relevant.

74. Consistent with FCA principles (see below), the requisite intention can be, and is, established through the presence of several key "badges of fraud" that create a rebuttable "presumption of intention." In the specific context of section 96, a number of these "badges of fraud" have been recognized, the most immediately relevant of which are: (a) the insolvency of KRI at the Guarantee Date; (b) the grossly inadequate consideration received by KRI in return for granting the Secured Guarantee; (c) the failure of the parties to structure the transaction in a manner that protected KRI's remaining creditors; (d) a close (non-arm's length) relationship between the parties to the conveyance; and (e) the transfer is made in the face of threatened legal proceedings. To this list can be added several additional "badges of fraud" identified in *XDG Ltd.*: (i) the impugned encumbrances were granted, without consideration, by one insolvent affiliate for the sole purpose of assisting a second insolvent affiliate; and (ii) the relevant entities were subject to common control. These factors establish a presumption that KRI intended to defraud, defeat or hinder creditors. The evidentiary

burden therefore rests with Speedy, which has failed to adduce any evidence dispelling the inference of this intent.

National Telecom at paras. 53, 54, 55 and 57, Monitor's BOA, Tab 1.

Montor Business Corp. (Trustee of) v. Goldfinger, 2016 ONCA 406 at paras. 72-73, Monitor's BOA, Tab 8.

Re Rehman, 2015 ONSC 188 at paras. 51-55, Monitor's BOA, Tab 9.

Juhasz at paras. 47 and 54-56, Monitor's BOA, Tab 5.

*XDG Ltd.*at paras. 65-69, Monitor's BOA, Tab 4.

75. Based on the facts set out in Part II, it is also clear that KRI in fact demonstrated an intent to defraud, defeat or delay the Israeli bondholders. Saskin directed KRI to grant the Secured Guarantee during the very time the prospectus for the Israeli Bond Issue was being finalized, knowing that the Lien was an impediment to closing the Israeli Bond Issue and knowing that the Israeli bondholders, through Urbrancorp Inc., would effectively become creditors of Cumberland 1. At the same time, Saskin provided certifications that the Lien had been discharged without disclosing that such an encumbrance affecting Cumberland 2 (in the amount of $1,038,911.34) had been replaced by another encumbrance affecting Cumberland 1 (in the amount of $2,323,638.54) that was also going to fall under and adversely affect Urbancorp Inc., the issuer of the Israeli bonds. Furthermore, the KRI Opinions never referenced the Secured Guarantee and then only partially and obliquely after the Tel-Aviv Stock Exchange had authorized the prospectus registration.

76. Accordingly, the Secured Guarantee is also void as a result of KRI being insolvent at the time it was granted with intent to defraud, defeat or delay its creditors.

The Secured Guarantee is also Void under the FCA

77. The relevant provisions of the FCA are as follows:

> "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.
>
> 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.
>
> 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.

78. The Secured Guarantee is clearly a "conveyance" as defined under the *FCA* as it is a charge and encumbrance on real property.

No Good Consideration was Received

79. For the same reasons as set out above concerning the application of section 96 of the BIA, $2 is not "good consideration" for the purposes of the FCA and secured guarantees granted to benefit an affiliate with common ownership also does not constitute "good consideration" for the purposes of the FCA.

> *XDG Ltd.* at paras. 62 and 71-73, Monitor's BOA, Tab 4.

The Transferor (and the Transferee) Each Possessed the Requisite Intention

80. Again, for the same reasons as outlined above, the required "badges of fraud" -- embodying "suspicious circumstances" or "evidentiary indicators" of intention – are equally present here.

> *Shroukalla v. Dumolong*, 2016 ONCA 128 at paras. 24-27, affirming, 2014 ONSC 4205 at 22-24, Monitor's BOA, Tab 10.
>
> *Indcondo Building Corp. v. Sloan 2014 ONSC 4018 (affirmed 2015 ONCA 752)* [***Indcondo***], Monitor's BOA, Tab 11.

81. Although the existence of a single badge of fraud is sufficient to give rise to a presumption that this intention was present, several such indicators exist in this case as set out in para. 74.

National Telecom at para. 54, Monitor's BOA, Tab 1.

82. As noted above, the *XDG Ltd.* ruling helpfully identified additional badges of fraud unique to the granting of inter-corporate collateral security: (a) the encumbrances were granted, without consideration, by one insolvent affiliate for the sole purpose of assisting a second insolvent affiliate; and (b) the two entities shared common control.

XDG Ltd. at para. 68-69, Monitor's BOA, Tab 4.

83. It is also well-established that the term "creditors and others" in the FCA is broad enough to contemplate a person who, while not a creditor at the time of the conveyance, may become one in the future. In other words, the Israeli bondholders through Urbancorp Inc.

Indcondo at paras. 47-48, (affirmed without reference to this issue, 2015 ONCA 752), Monitor's BOA, Tab 11.

84. There is simply no evidence on the record rebutting this presumption of intent.

85. Accordingly, the Secured Guarantee is also void pursuant to the FCA being a conveyance of real property made with intent to defeat, hinder, delay or defraud creditors or others and not for good consideration.

The Secured Guarantee could also be Set Aside as Oppressive

<u>The Monitor is a "Proper Person" to Assert Creditors' Oppression Claims</u>

86. KRI is an OBCA corporation.

87. The Monitor possesses presumptive standing to be named a "proper person" to act as a "complainant" asserting allegations of oppression. In so doing, it acts on behalf of the creditors collectively, who themselves have a *prima facie* right to be named "proper persons."

> *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONSC 1366 at paras. 30-42, Monitor's BOA, Tab 12.

The Creditors' Reasonable Expectations were Oppressively Violated

88. The granting of the Secured Guarantee ignored the separate corporate existences of each participant, treated individual entities as if they were interchangeable components of a unitary "corporate family", and recklessly encumbered the assets of one group of corporations solely to assist the closing the Israeli Bond Issue while ensuring that such investors were unaware that the original encumbrance that they would not permit (i.e., the Lien in the amount of $1,038,911.34) had been replaced by a new encumbrance (i.e., the Secured Guarantee in the amount of $2,323,638.54) actually making matters worse. This was possible only because the directing minds of KRI were ignorant of, or disregarded, their basic duties to act reasonably, prudently and in good faith.

89. The following factors have been identified, more specifically, as among the "*reasonable expectations of creditors*":

1. a creditor reasonably expects that a corporation will not be used as a vehicle for fraud;
2. a creditor reasonably expects that the debtor will not convey away, for no consideration, exigible assets which will leave the creditor unpaid and unable to realize upon assets to satisfy the debt;

> Peterson and Cumming, *Shareholder Remedies In Canada*, 2d ed. (Toronto: LexisNexis, 2017+) at para. 17.144, Monitor's BOA, Tab 13.

90. In this regard, it must be borne in mind that section 248 of the OBCA creates "an equitable remedy that 'seeks to ensure fairness'" by granting courts a "broad, equitable jurisdiction to enforce not just what is legal but what is fair." It requires "fact-specific, contextual inquiries" that look at "business realities, not merely narrow legalities." This is a textbook case in which this Court could also exercise the power available to it, under section 248(3) of the OBCA should such an application be made, to issue "*an order* varying or *setting aside a transaction* or contract *to which a corporation is a party*...," thereby invalidating the Secured Guarantee.

Wilson v. Alharayeri, 2017 SCC 39 at para. 23, Monitor's BOA, Tab 14.

PART V ~ ORDER SOUGHT

Given all of the foregoing this Court should issue an order upholding the Monitor's disallowance of the claim filed by Speedy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 17, 2018

Davies Ward Phillips & Vineberg LLP

Counsel for the Monitor

SCHEDULE A - LIST OF AUTHORITIES

1. *National Telecommunications Inc. (Re)*, 2017 ONSC 1475
2. *Cameron Estate (Re)*, 2011 ONSC 6471
3. *Royal Bank of Canada v. Racher*, 2017 ABQB 181
4. *XDG Ltd. v. 1099606 Ontario Ltd.*, 2002 CarswellOnt 4535
5. *Juhasz (Trustee of) v. Codeiro*, 2015 ONSC 1781
6. *Stelco Inc., Re*, 2004 CarswellOnt 1211
7. *Canadian Imperial Bank of Commerce v. Graat*, 1992 CarswellOnt 136 (Gen. Div.)
8. *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406
9. *Re Rehman*, 2015 ONSC 188
10. *Shroukalla v. Dumolong*, 2016 ONCA 128
11. *Indcondo Building Corp. v. Sloan 2014 ONSC 4018*
12. *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONSC 1366
13. Peterson and Cumming, *Shareholder Remedies In Canada*, 2d ed. (Toronto: LexisNexis, 2017+)
14. *Wilson v. Alharayeri*, 2017 SCC 39

SCHEDULE B – RELEVANT LEGISLATION

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as am.

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, as am.**

2. In this Act

"**creditor**" means a person having a claim provable as a claim under this Act;

"**transfer at undervalue**" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;

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.

97 (1) No payment, contract, dealing or transaction to, by or with a bankrupt made between the date of the initial bankruptcy event and the date of the bankruptcy is valid, except the following, which are valid if made in good faith, subject to the provisions of this Act with respect to the effect of bankruptcy on an execution, attachment or other process against property, and subject to the provisions of this Act respecting preferences and transfers at undervalue:

(a) a payment by the bankrupt to any of the bankrupt's creditors;

(b) a payment or delivery to the bankrupt;

(c) a transfer by the bankrupt for adequate valuable consideration; and

(d) a contract, dealing or transaction, including any giving of security, by or with the bankrupt for adequate valuable consideration.

(2) The expression "adequate valuable consideration" in paragraph (1)(c) means a consideration of fair and reasonable money value with relation to that of the property assigned or transferred, and in paragraph (1)(d) means a consideration of fair and reasonable money value with relation to the known or reasonably to be anticipated benefits of the contract, dealing or transaction.

(3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

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

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;

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.

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.

***Construction Lien Act*, R.S.O. 1990, c. C.30**

31 (1) Unless preserved under section 34, the liens arising from the supply of services or materials to an improvement expire as provided in this section.

...

(3) Subject to subsection (4), the lien of any other person,

(a) for services or materials supplied to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earliest of,

(i) the date on which a copy of the certificate or declaration of the substantial performance of the contract is published, as provided in section 32, and

(ii) the date on which the person last supplies services or materials to the improvement, and

(ii.1) the date the contract is completed, abandoned or terminated, and

(iii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract; and

(b) for services or materials supplied to the improvement where there is no certification or declaration of the substantial performance of the contract, or for services or materials supplied to the improvement after the date certified or declared to be the date of the substantial performance of the contract, expires at the conclusion of the forty-five-day period next following the occurrence of the earlier of,

(i) the date on which the person last supplied services or materials to the improvement, and

(i.1) the date the contract is completed, abandoned or terminated, and

(ii) the date a subcontract is certified to be completed under section 33, where the services or materials were supplied under or in respect of that subcontract.

(4) Where a person has supplied services or materials to an improvement on or before the date certified or declared to be the date of the substantial performance of the contract and has also supplied, or is to supply, services or materials after that date, the person's lien in respect of the services or materials supplied on or before the date of substantial performance expires without affecting any lien that the person may have for the supply of services or materials after that date.

(5) Where a person who has supplied services or materials under a contract or subcontract makes a declaration in the prescribed form declaring,

(a) the date on which the person last supplied services or materials under that contract or subcontract; and

(b) that the person will not supply any further services or materials under that contract or subcontract,

then the facts so stated shall be deemed to be true against the person making the declaration.

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

245 In this Part,

"**complainant**" means,

(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(b) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(c) any other person who, in the discretion of the court, is a proper person to make an application under this Part.

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.

(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.

(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.

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 DEVELOPMENTS INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP NEW KINGS INC., URBANCORP 60 ST. CLAIR INC., HIGH RES.INC., BRIDGE ON KING INC. (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 at Toronto

FACTUM OF THE MONITOR

(Motion Returnable May 1, 2018)

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