Court of Appel File No.: M49270
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 THE RESPONDING PARTY, SPEEDY ELECTRICAL CONTRACTORS LTD.

July 12, 2018

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OVERVIEW OF THE MOTION

1. This is a motion by the Monitor for leave to appeal the decision of Justice Myers, dated May 11, 2018, wherein His Honour dismissed the Monitor's motion to disallow the claim filed by Speedy Electrical Contractors Ltd. in the CCAA proceedings. The decision of Justice Myers allows Speedy to be paid the substantial funds owed to it for over three years.

2. Speedy's claim ("Speedy's Claim") primarily consists of a proven debt in the amount of $2,323,638.54 against a subsidiary of Urbancorp (Edge on Triangle Park) and Alan Saskin (the owner of the Urbancorp enterprise of companies), which debt was later secured by a mortgage against condominium units owned by one of Urbancorp's wholly owned subsidiaries, King Residential Inc. ("KRI"), based upon an agreement between the parties. Justice Myers and the Monitor have referred to this collateral mortgage as the "Secured Guarantee". According to the Monitor, the Secured Guarantee was conveyed by KRI to Speedy at a time when KRI was allegedly insolvent (Justice Myers did not ultimately make any finding on the issue of whether KRI was insolvent).

3. Speedy submits that the Monitor has mischaracterized the decision of Justice Myers and the nature of their proposed Appeal in their Factum. The Monitor incorrectly asserts that "the issue on appeal is whether in the context of insolvency proceedings the principal of a group of companies, Alan Saskin, can use the individual corporate entities to pay personal debts of Mr. Saskin and other companies he controls, without compensation to the prejudice of the creditors of the paying entities". There was no evidence in the record that Mr. Saskin intended that KRI would ultimately be the payor of the debt that was eventually secured by the collateral mortgage, and the Secured Guarantee was only provided by KRI as part of an agreement that was to facilitate financing for the benefit of all of the Urbancorp group of companies. Contrary to the Monitor's assertion, Justice Myers did not make any finding, general or otherwise, that Mr.

Saskin could use individual corporate entities to pay personal debts, or that Mr. Saskin could "take from Peter to pay Paul". To the contrary, Justice Myers acknowledged that the provision of a collateral mortgage by a company, at a time when the company was allegedly insolvent, is reviewable under section 96 of the BIA, and therefore could possibly be declared void by the court as a result, and therefore he applied the proper legal test required under said section to make his determination.

4. The Monitor has not taken the position that Justice Myers applied the incorrect legal test with respect determining whether the Secured Guarantee should be declared void as a transfer at undervalue under section 96 of the BIA, and that is not one of the grounds of appeal. The Monitor is also not taking the position that Justice Myers applied the incorrect legal test with respect to his determination that the Secured Guarantee should not be declared void as a fraudulent conveyance, and that is also not one of the grounds of appeal.

5. In fact, Justice Myers applied the correct legal tests in determining that Speedy's Secured Guarantee could only be found void by the Court if the Monitor either (1) established that Mr. Saskin (acting on behalf of KRI) had the intent to defraud, defeat, or delay another creditor in conveying the Secured Guarantee to Speedy, or (2) in the alternative, Mr. Saskin (acting on behalf of KRI) was dealing with Speedy at non-arm's length. Justice Myers ultimately found that the evidence did not establish the existence of either of those requirements. Given those two critical and determinative factual findings, Justice Myers did not address any of the remaining arguments advanced by the parties as it was not necessary to do so, including whether KRI was actually insolvent at the time of the conveyance (which was another pre-requisite for the relief being sought by the Monitor on the motion). Further, even if the Monitor had satisfied its evidentiary burden under section 96 of the BIA, the section is clear that Justice Myers would still have discretion to refuse to grant the relief.

6. Speedy submits that the Monitor is attempting to frame its proposed appeal as an appeal of an error of law, but it is clear from the substance of the Monitor's submissions in its Factum that the proposed appeal is really an appeal of findings of fact by Justice Myers. On this motion, the Monitor is taking the position that, on the facts of this specific case, Justice Myers erred when His Honour failed to conclude that the debtor had the intention to defraud its creditors. Further, the Monitor is taking the position that, on the facts of this specific case, His Honour erred when he failed to conclude that the parties were not dealing with one another at arm's length. The findings of fact by Justice Myers can only be set aside in the event that His Honour made a palpable and overriding error. Speedy submits that no such palpable and overriding error was made, and deference should therefore be provided to His Honour's findings.

7. Speedy submits that the accurate characterization of His Honour's decision is that, in the context of a CCAA proceeding, the alleged transfer of property at undervalue by an insolvent debtor to another party, will not be declared void by the Court unless the evidence on the specific facts of the case confirm an intention on behalf of the insolvent debtor to defraud, defeat, or delay another creditor, or in the alternative, that the parties were dealing with each other at non-arm's length. This is a correct proposition in law, and there was no error, nor is any error being asserted by the Monitor in that regard.

8. This Court has been abundantly clear that leave to appeal in the context of CCAA proceeding will only be granted "sparingly", and the Monitor must establish that the issues raised on the proposed appeal are of "significance to the insolvency practice". Speedy submits that there is no broad policy implication or development of new law that occurred as a result of the decision of Justice Myers. His Honour simply applied the prevailing law in Ontario in regards to section 96 of the BIA and fraudulent conveyances, and the motion was decided based on the specific facts of the case.

9. Contrary to the Monitor's assertion in their Factum, the proposed appeal does not have significant importance to the CCAA proceeding, but only impacts one single creditor, the Israeli bondholders.

PART I – STATEMENT OF FACTS

Background of the Debt

10. 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.

> **Affidavit of Albert Passero, sworn March 12, 2018, at para. 2 (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 279)**

11. Urbancorp is a complex web of companies and business entities all ultimately owned by Mr. Saskin, which includes KRI, as well as the condominium project at 2 Lisgar Street, Toronto, Ontario, which was known as Edge on Triangle Park (the "Edge Project').

> **Decision of Justice Myers, dated May 11, 2018, at para. 6 (Motion Record of KSV Kofman Inc., Volume I, at Tab 2, p. 35)**

12. 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 its related companies, and given their long-standing business 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"), which Promissory Note accrued interest at the rate of 12% per annum and

compounded annually. The Monitor asserts in its Factum that there is "no evidence on the record" that the funds were paid to or for the benefit of KRI, but there is no evidence in the record to support that statement. The Monitor filed no evidence on the motion on this issue, and only the Monitor is in the position to verify where the funds went (not Speedy).

Affidavit of Albert Passero, sworn March 12, 2018, at para. 2-3 (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 279); and Promissory Note (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(A), p. 287)

13. At the time the funds were advanced to Mr. Saskin, Speedy was also actively supplying electrical work to 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 (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 279)

14. 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 (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 279)

15. 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.

Affidavit of Albert Passero, sworn March 12, 2018, at para. 6-8 (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 279-280)

16. 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. 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 & Exhibit "J" (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 279 & Tab 6(J), p. 308-324); and**

17. Contrary to the assertion of the Monitor in its Factum, there is no evidence that Speedy's construction lien was not preserved in accordance with the *Construction Lien Act*, and neither Mr. Saskin nor Urbancorp ever took that position prior to the motion heard by Justice Myers (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). For the reasons that will be more fully discussed below, the Israeli Functionary's report was not "evidence". The only evidence before His Honour was the uncontroverted evidence from Albert Passero that Speedy supplied ongoing work to the Edge Project until the end of August 2015, which is consistent with the construction lien registered on title that states the last day of supply was August 31, 2015 (i.e. within the 45-day requirement for preserving a Claim for Lien).

> **Affidavit of Albert Passero, sworn March 12, 2018, at para. 16 & Exhibit "J" (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 281 & Tab 6(J), p. 308-324)**

Background of the Mortgage provided to Speedy

18. 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" (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 282, and at Tab 6(K), p. 326-327)

19. 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" (Motion Record of KSV Kofman Inc., Volume I & II, at Tab 6(L) and Tab 6(S))

20. 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 (Motion Record of KSV Kofman Inc., Volume II, at Tab 7(2), p. 667-668)

21. 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 (Motion Record of KSV Kofman Inc., Volume II, at Tab 7(2), p. 668)

22. 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.

Debt Extension Agreement (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(H), p. 217-233)

23. 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.

24. 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.

Exhibit "V" to the Affidavit of Albert Passero, sworn March 12, 2018 (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(V), p. 352-372)

25. 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 (Motion Record of KSV Kofman Inc., Volume II, at Tab 7(2), p. 669)

26. 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 (Motion Record of KSV Kofman Inc., Volume II, at Tab 7(2), p. 669)

27. Urbancorp's Israeli bond financing closed in December 2015, and Urbancorp Inc. raised approximately $64.2 million. The Monitor's Report at paragraph 2.3 states that the bond financing was used to repay secured debt owed by various indirect subsidiaries of Urbancorp Inc. (KRI is a wholly owned subsidiary of Urbancorp Inc.) and the remainder was used for general working capital purposes. The Report does not provide any further particulars of which wholly owned subsidiaries had their debts paid by the Israeli financing, and only the Monitor would have this information.

Twenty Second Report of the Monitor, dated February 2, 2018, at section 2.2 and 2.3 (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2), p. 112-113)

Urbancorp's Corporate Structure

28. 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).

29. Prior to December 2015, Urbancorp apparently had a similar, but 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").

Twenty Second Report of the Monitor at section 2.0 (3) and 2.2 (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2), p. 110-112)

30. 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").

> **Twenty Second Report of the Monitor at para. 2.0 (3) (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2), p. 110)**

31. 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%.

> **Twenty Second Report of the Monitor at para. 2.0 (4) (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2), p. 111)**

32. 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.

> **Twenty Second Report of the Monitor at para. 2.0 (5) and Appendix "D" (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2), p. 111 & 209)**

33. 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.

First Report to the Court of the Fuller Landau Group Inc. in its capacity as Trustee under the Notice of Intention to make a Proposal of Alan Saskin at para. 7 (Motion Record of KSV Kofman Inc., Volume II, at Tab 7(1)(O) p. 612); and see also Twenty Second Report of the Monitor at para. 2.2 & Appendix "G" (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2), p. 112 & 214-215)

The CCAA Proceeding, Speedy's Claim filed with the Monitor, and Delay

34. On September 15, 2016, the Monitor obtained a Claims Procedure Order from Justice Newbould that established the process for creditors to file claims against the Urbancorp entities in the CCAA proceeding.

"Claims Procedure Order" (Motion Record of KSV Kofman Inc., Volume I, at Tab 4)

35. After Speedy filed its claim with the Monitor with respect to its claim against KRI ("Speedy's Claim"), 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 security. Speedy filed the required notice with the Monitor whereby Speedy advised it would be challenging the Monitor's determination.

"Speedy Proof of Claim" & "Notice of Disallowance of the Monitor" (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2)(A), & Tab 5(2)(B))

36. Counsel for the Monitor has confirmed that the Monitor has been in the position to make distribution to the creditors of KRI (including Speedy), subject to the validity of Speedy's Secured Guarantee (and subject to court approval).

Exhibit "E" and Exhibit "G" to the Affidavit of Michelle Cruz, sworn July 12, 2018 (Speedy's Responding Motion Record at Tab E, p. 18, and Tab G, p. 23)

37. On March 10, 2017, counsel for the Monitor advised that they would be serving their motion for an order upholding its disallowance, and the motion would be returnable April 2017. Counsel for Speedy responded that they agreed with that timetable. Nonetheless, for reasons that were never explained, the Monitor failed to deliver any motion materials in accordance with the agreed upon timetable, and the motion did not proceed as agreed.

Exhibit "A" to the Affidavit of Michelle Cruz, sworn July 12, 2018 (Speedy's Responding Motion Record at Tab A, p. 6)

38. In April 2017, counsel for the Monitor proposed a new timetable to deal with its motion for an order upholding its disallowance of Speedy's Claim. The parties agreed that the Monitor would deliver its motion record on May 5, 2017, and the return of the motion would be May 31, 2017. The Monitor again failed to deliver its materials in accordance with the agreed upon timetable, and the motion again did not proceed as agreed.

Exhibit "B" to the Affidavit of Michelle Cruz, sworn July 12, 2018 (Speedy's Responding Motion Record at Tab B, p. 9-12)

39. Speedy followed up with counsel in the months that followed, and the Monitor then agreed to provide its motion record on September 8, 2017. The day before the Monitor's materials were due to be delivered, counsel for the Monitor advised that the Monitor again would not be delivering its motion record in accordance with the agreed upon schedule as the Monitor was waiting for additional information from Urbancorp. Counsel for the Monitor advised that a schedule would be proposed by the Monitor once their motion record was delivered.

Exhibit "C" to the Affidavit of Michelle Cruz, sworn July 12, 2018 (Speedy's Responding Motion Record at Tab C, p. 14)

40. After not hearing from the Monitor for another three months, on December 8, 2017, counsel for Speedy again followed up with counsel for the monitor requesting delivery of their

motion record. In response, the Monitor confirmed delivery of their record by December 21, 2017.

Exhibit "E" to the Affidavit of Michelle Cruz, sworn July 12, 2018 (Speedy's Responding Motion Record at Tab E, p. 18)

41. The Monitor again failed to deliver its record in accordance with their proposed schedule, and therefore counsel for Speedy demanded an explanation from counsel given the unexplained delay to that point in time. In response, counsel for the Monitor ignored Speedy's request for an explanation, and simply advised that the motion record would be delivered the week of January 22nd, 2018.

Exhibit "F" to the Affidavit of Michelle Cruz, sworn July 12, 2018 (Speedy's Responding Motion Record at Tab E, p. 20)

42. The Monitor then again failed to deliver its motion record by the promised date, and instead, served its motion record on or about March 7, 2018, wherein the Monitor attached its Twenty Second Report (the "Monitor's Report") dated February 2, 2018.

PART II – THE RESPONDING PARTY'S POSITION REGARDING EACH ISSUE RAISED BY THE MONITOR

A. <u>What is the test for Leave to Appeal, and should Leave be granted in this case?</u>

43. The Court of Appeal has been clear that leave to appeal should only be granted sparingly in *CCAA* proceedings.

***Stelco Inc., Re*, 2005 CarswellOnt 1188 at para. 24 (KSV Kofman Inc.'s Book of Authorities at Tab 2)**

44. Speedy agrees with the Monitor that, in considering whether to grant leave, the Court will consider:

(a) Whether the point on the proposed appeal is of significance to the practice;

(b) Whether the point on the proposed appeal is of significance to the action;

(c) Whether the proposed appeal is prima facie meritorious or frivolous; and

(d) Whether the proposed appeal will unduly hinder the progress of the action.

45. For the reasons that will be set out below, Speedy submits that the Monitor has not established the required factors necessary for the court to consider granting the Monitor leave to appeal the order of Justice Myers, and the motion should be dismissed.

B. Whether the issues raised on the Proposed Appeal are of significance to the Practice and the Parties?

46. In considering the first factor (i.e. the matter of "significance to the practice"), the court considers whether the issue being appealed has some greater significance to the insolvency practice as a whole. The appeal must raise an opportunity for the Court of Appeal to provide guidance on legal issues of significance to the practice. The Court of Appeal has consistently held that an appeal that turns on the particular facts of the case does not have significance to the insolvency practice because it does not have broader policy or legal implications.

> ***4519922 Canada Inc., Re*, 2016 CarswellOnt 21662 at para. 5 (Book of Authorities of Speedy at Tab 1); *SNMP Research International Inc. v. Nortel Networks Corp.* 2016 ONCA 749 at para. 8-9 5 (Book of Authorities of Speedy at Tab 2); and *Nortel Networks Corp., Re* 2016 ONCA 332 at para. 93 (Book of Authorities of Speedy at Tab 3)**

47. In considering the second factor (i.e. significance of the action), the Court of Appeal has consistently held that the significance of the appeal to the parties or the specific CCAA proceeding, standing alone, is insufficient to warrant granting leave to appeal.

> ***SNMP Research International Inc. v. Nortel Networks Corp.* 2016 ONCA 749 at para. 10 (Book of Authorities of Speedy at Tab 2); and *Nortel Networks Corp., Re* 2016 ONCA 332 at para. 95 (Book of Authorities of Speedy at Tab 3)**

48. Speedy submits that, as a result of the fact-specific nature of the decision of Justice Myers, the proposed appeal does not raise broader issues for the insolvency practice.

The supervising *CCAA* judge, Justice Myers, who has extensive familiarity with the circumstances of the debtor, considered the evidence before him and did no more than decide that in this case, on these facts, the evidence presented by the Monitor was insufficient to establish that there was an intent to defraud, defeat, or delay another creditor, or that the parties were dealing with each other at non-arm's length. The proposed appeal turns on the particular facts of this case and the sufficiency of the evidence marshalled by the Monitor. Those findings are entitled to deference and cannot be disturbed on appeal absent palpable and overriding error. Speedy submits that there is no such error in Justice Myers' reasons.

49. Speedy also submits that the subject matter raised by the appeal is not significant to the CCAA proceeding, and it only impacts the Israeli bondholders. In the Monitor's Report at section 3.3, the Monitor identifies the "Impact of the Speedy Claim", and states that the monies paid to satisfy the Speedy Claim will reduce the amount ultimately recoverable by the Israeli bondholders as the Secured Guarantee is a charge on KRI's assets in priority to the Israeli bondholders who are owed approximately $64 million. There is no evidence that the Secured Guarantee will have an affect on any other creditor in the CCAA proceeding, and the Monitor's Report only references the Israeli bondholders as an affected creditor. In that regard, Justice Myers states in his decision that the Israeli bondholders have other remedies, including their lawsuit against Mr. Saskin and others in Israel for fraud and securities law violations in connection with the bond underwriting (see footnote on page 6 of His Honour's decision).

50. Speedy submits that the Monitor made a bald statement in its Factum that there are currently 14 similar actions outstanding with similar reviewable transaction issues in separate proceedings involving other Urbancorp affiliated entities. The Monitor has not included a copy of these proceedings in its materials to support its statement. In any event, Speedy submits that

the decision in this case turned on the specific facts of this case and would therefore not affect any other proceeding.

51. Speedy further submits that the Monitor should not be granted leave to appeal the cost award in favour of Speedy. The matter of costs decided by Justice Myers was discretionary, and His Honour found that the normative approach that cost follow the event should apply based on the specific facts of the case. For that reason, the point on appeal is not significant to the insolvency practice.

52. Further, Speedy submits that there is no merit to the appeal of the cost award. The Monitor is asserting that the creditors of the Urbancorp CCAA entities should not need to bear the cost of the Monitor's failed motion. Speedy submits that the only alternative is that Speedy would have to solely bear the cost of responding to a motion by the Monitor (which was brought to benefit those creditors) which was ultimately dismissed by the court for lack of evidentiary foundation. Further, Speedy submits that the motion by the Monitor really only stood to benefit the Israeli bondholders, and now the recovery by the Israeli bondholders will be reduced by the amount of the cost award, which Speedy submits is fair under the circumstances. Speedy submits that there was no error in Justice Myers using his discretion to award costs, and deference should be provided to the decision regarding costs. Further, as stated by Justice Myers in his decision, the Monitor agreed that costs, if appropriate, should be fixed at $25,000 all-inclusive.

C. Is there merit to the Appeal?

a. Did the motions judge err in concluding that the Secured Guarantee should not be declared void as a transfer at undervalue pursuant to the BIA?

53. In accordance with section 96 of the BIA, Justice Myers recognized that the Monitor had the onus of establishing the existence of all of the following prerequisite factors before the Court could use its discretion to declare the Secured Guarantee void:

(i) KRI was insolvent when the Secured Guarantee was conveyed to Speedy;

(ii) KRI received no consideration for the provision of the Secured Guarantee, or in the alternative, the consideration received by KRI was conspicuously less than fair market value of the consideration given by KRI[1]; and

(iii) KRI intended to defraud, defeat or delay another creditor by the provision of the Secured Guarantee to Speedy, **OR** Speedy and KRI were not dealing at arm's length

(the full text of section 96 of the BIA can be found in Schedule "B" to this Factum)

54. The Monitor is not appealing Justice Myer's application of the test under section 96 of the BIA. In applying the proper legal test under section 96 of the BIA, Justice Myers ultimately found that the evidence did not establish that there was an intent to defraud, defeat, or delay another creditor, and further, His Honour found that the evidence did not establish that the parties were dealing with each other at non-arm's length. Given those two critical and determinative factual findings, Justice Myers did not address any of the remaining arguments advanced by the parties as it was not necessary to do so. Justice Myers did not make any determinative finding regarding whether KRI was actually insolvent at the time of the conveyance, nor whether KRI received sufficient consideration.

55. Speedy submits that Justice Myers committed no error in his application of the test under section 96 of the BIA, which is not a ground of appeal being asserted by the Monitor. Further, as

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[1] 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

will be more fully set out below, His Honour made no palpable and overriding error with respect to his findings that the evidence did not establish that there was an intent to defraud, defeat, or delay another creditor, nor that the evidence did not establish that the parties were dealing with each other at non-arm's length. Speedy submits that deference should be provided to the factual findings of Justice Myers.

56. Further, even if the Monitor establishes the existence of the prerequisite factors under section 96 (which the Monitor failed to do), Justice Myers still had the discretion to refuse to declare the transfer as void (section 96 states that the court "may" declare the transaction 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 (Book of Authorities of Speedy at Tab 4)**

57. 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 (Book of Authorities of Speedy at Tab 5)**

58. 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, no other creditor took issue with Speedy's mortgage, other than the Israeli bondholders, who closed their financing when Speedy already had its mortgage registered on title.

59. Speedy submits that a discretionary order, based on the specific facts of the case, should not be provided leave to appeal for the reasons already stated.

b. Did the motion judge err in finding that the Monitor had not proven that KRI and Speedy were dealing at non-arm's length?

60. Speedy submits that Justice Myers committed no error in finding that the Monitor had not established that Speedy and KRI were dealing at non-arm's length, and deference should be provided to His Honour's finding.

61. The evidence in the record confirmed 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.

Exhibit "F", "G", "H", "N", & "O" of the Affidavit of Albert Passero, sworn March 12, 2018 (Motion Record of KSV Kofman Inc., Volume I and II, at Tab 6(F), 6(G), 6(H), 6(N), and 6(O)); and Appendix "I" to the 22nd Report of the Monitor (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2)(I), p. 236-238)

62. In Justice Myers' decision at paragraph 16, His Honour cited the following passages from the Court of Appeal's decision in *Montor Business Corp. (Trustee of) v. Goldfinger* ("*Montor*") with respect to the Court's inquiry into whether there is an arm's length relationship between a debtor and its creditors:

> [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?

63. Justice Myers ultimately found, at paragraph 20 of his decision, that "there was no evidence to establish that the relationship between Speedy and KRI was anything other than an arm's length, business like one", for the following reasons:

(a) The written record between counsel for Speedy and Mr. Saskin showed that they were adverse in interest and were operating under normal economic incentives;

(b) There is no evidence suggesting that Speedy and KRI were under common control or acting in concert; and

(c) A personal loan to a business owner with whom one has had lengthy business dealings, on its own, is not an indication of a non-arm's length relationship.

64. The Monitor asserts in their Factum that His Honour "asked the wrong question" when considering whether KRI and Speedy were dealing at non-arm's length: The Monitor asserts that His Honour improperly considered whether Speedy and Mr. Saskin were at arm's length. The Monitor then asserts that His Honour, instead, should have either considered whether (a) KRI and Mr. Saskin/Edge were at arm's length, or (b) KRI and Speedy were at arm's length.

65. Speedy submits that it is not correct that His Honour was required to consider whether KRI and Mr. Saskin/Edge were operating at arm's length. Section 96(1)(b) of the BIA states that it is only relevant whether Speedy and KRI were dealing at non-arm's length. Further, the Monitor is not appealing the decision of Justice Myers on the grounds that His Honour failed to consider whether KRI and Mr. Saskin/Edge were operating at arm's length. The Monitor's Notice of Motion for Leave to Appeal, at paragraph 43(i), only alleges that Justice Myers erred by "concluding that Speedy and KRI were dealing with one another at arm's length" (further, the question posed by the Monitor in its Factum is whether "KRI and Speedy were Not Dealing at Arm's Length").

66. Speedy submits that the Monitor's assertion that Justice Myers failed to consider whether KRI and Speedy were operating at non-arm's length is nonsensical. KRI can only act through its corporate directors and officers, and therefore an assessment of whether KRI was operating at non-arm's length can only be determined by assessing the relationship of the people that act for or on the company's behalf. In this case, Mr. Saskin acted for the company as its President[2], and therefore Justice Myers properly assessed the relationship between Mr. Saskin and Mr. Passero (Speedy's President).

c. Was KRI insolvent at the time it granted the Secured Guarantee?

67. The issue of whether or not KRI was insolvent was not decided by Justice Myers, and can therefore not be an appealable error. Justice Myers correctly found that he did not have to address the issue of whether KRI was insolvent at the time of the provision of the Secured Guarantee, given that the Monitor had failed to establish the other required pre-requisite factors

[2] Mr. Saskin executed the Acknowledgement and Direction to register the KRI mortgage as "President" of KRI (Motion Record of KSV Kofman Inc. at page 152)

required before the court may declare the transaction void: namely, Justice Myers found that the evidence did not establish that there was an intent to defraud, defeat, or delay another creditor, and further, that the evidence did not establish that the parties were dealing with each other at non-arm's length. Given those two critical and determinative factual findings, Justice Myers did not address any of the remaining arguments advanced by the parties as it was not necessary to do so, including whether KRI was actually insolvent at the time of the conveyance.

d. Did Justice Myers err in finding that the Monitor had not proven that KRI had the intention to defraud, defeat or delay other creditors?

68. Speedy submits that Justice Myers committed no error in finding that the Monitor had not established that KRI had the intent to defraud, defeat, or delay another creditor by the provision of the Secured Guarantee.

69. Justice Myers recognized that the Monitor had the burden of establishing the presence of "badges of fraud" in the circumstance of this specific transaction, and if established, the onus would then shift to Speedy to adduce evidence that there was no intent to defraud, defeat, or delay another creditor by the provision of the Secured Guarantee. Justice Myers considered all of the evidence, and found that the Monitor had not established the requisite badges of fraud. Speedy submits that the Monitor simply disagrees with the finding of Justice Myers that the evidence did not establish "badges of fraud", which is not sufficient for the purpose of an appeal as deference is to be provided to the findings of Justice Myers.

70. The Monitor incorrectly asserts that it was an error when Justice Myers considered the intent of Mr. Saskin in providing the Secured Guarantee to Speedy (on behalf of KRI). Speedy submits that Mr. Saskin was the directing mind of KRI, and therefore, assessing Mr. Saskin's intent would be the only possible way for Justice Myers to assess the intent of KRI under the

circumstances. Speedy submits that the Monitor is incorrect in asserting that Justice Myers treated Edge, KRI, and Mr. Saskin as a unified entity. Speedy submits that Justice Myers considered the intent of Mr. Saskin given that he was controlling the actions of Edge and KRI, and those companies, standing alone, do not have a mind of their own.

71. Justice Myers considered that 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 were filed with the 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. Meaning, it did not appear at the time of the provision of the Secured Guarantee that any creditors would be prejudiced by it (Justice Myers pointed out in his decision that the alleged insolvency of KRI being asserted by the Monitor "required much *post facto* adjustments")

> **22nd Report of the Monitor at para. 4.2 (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2)(I), p. 119); Urbancorp Inc.'s Consolidated Financial Statements as of December 31, 2015 (Motion Record of KSV Kofman Inc., Volume II, at Tab 7(G), p. 493); and Decision of Justice Myers at para. 25 (Motion Record of KSV Kofman Inc., Volume I, at Tab 3, p. 39)**

72. On the motion before Justice Myers, Speedy's adduced evidence 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.

73. On the motion before Justice Myers, the Monitor asserted that the debtor was attempting to defraud, defeat, or delay the Israeli bondholders, and the Monitor did not assert that KRI was trying to defraud, defeat, or delay any other creditors. There was no evidence adduced by the Monitor that established that KRI intended to defraud, defeat, or delay the Israeli bondholders by the provision of the Secured Guarantee, 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, which was a fact relied upon by Justice Myers when he found that Speedy "gave notice to the world as one would expect any *bona fide* commercial creditor to do" (paragraph 24 of the decision).

74. The Monitor 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. The Title 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. On the motion heard by Justice Myers, the Monitor never suggested to the Court that Harris Sheaffer was a party to an alleged fraud, and it appeared that this was 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). In fact, the Israeli Court Appointed Functionary commenced a lawsuit, on

behalf of the Israeli bondholders, against Harris Sheaffer LLP and Barry Rotenberg for negligence (not fraud). The Monitor is now asserting in its Factum, at paragraph 24, that counsel for Urabancorp Inc. "intentionally failed to disclose that KRI had provided a guarantee in respect of the liabilities of Mr. Saskin and Edge". There was absolutely no evidence filed with the court that Mr. Rotenberg, or anyone at Harris Sheaffer LLP, intended to defraud the bondholders, and said allegation is improper and inflammatory, and was never suggested to Justice Myers.

> **Tenth Report of the Court Appointed Functionary and Foreign Representative, dated February 28, 2018at Appendix "M" (Motion Record of KSV Kofman Inc., Volume III, at Tab 8(M), p. 825-850); and see also Statement of Claim issued against Harris Sheaffer LLp and Barry Rotenberg, dated April 25, 2018 (Speedy's Responding Motion Record, dated July 12, 2018, at Tab H, p. 25-19)**

75. Speedy submits that the Monitor has 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 <u>for the purpose</u> 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 (on behalf of KRI) 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).

76. 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. 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. Now that the Monitor has, for the most part, liquidated the assets of Cumberland 1 and Cumberland 2, it is now apparent from the Monitor's reports that Cumberland 1 has more realizable assets than Cumberland 2, so it is the Israeli bondholders interest for the Monitor to attack the collateral mortgage secured against the assets of KRI (which is in the Cumberland 1 stream).

Twenty Second Report of the Monitor, dated February 2, 2018, at section 2.2 and 2.3 (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2), p. 112-113)

77. Speedy submits that Justice Myers did not commit a palpable and overriding error when he found that the Monitor did not establish that KRI 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 was 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.

e. Did Justice Myers err in finding that the Secured Guarantee should not be declared void as a fraudulent conveyance?

78. For the reasons already set out above, Speedy submits that Justice Myers made no error in finding that that KRI conveyed real or personal property with the intent to defeat, hinder,

delay, or defraud creditors or others, and therefore the Secured Guarantee could not be declared void by the Court in accordance with section 2 of the FCA.

f. Did the Motions Judge misapply the Ruling in Browne v. Dunn?

79. Speedy submits that Justice Myers did not misapply the Rule in *Browne v. Dunn*, which requires proposed contradictory evidence to be put to a witness so that the witness has an opportunity to give an explanation.

> ***R. v. Quansah*, 2015 ONCA 237 at para. 81-82 (KSV Kofman Inc.'s Book of Authorities at Tab 10)**

80. Nowhere in the Monitor's Report nor Notice of Disallowance did the Monitor take the position that Speedy's construction lien was not preserved/registered in accordance with the 45-day requirement set out in the *Construction Lien Act*. Further, the Monitor never took the position that Speedy's lien was invalid in their Report. It only took a position regarding same in their factum long after the Israeli Functionary filed a "Report" with the Court for the purpose of the Monitor's motion that asserted that position. The Israeli's filed no factum.

> **"Twenty Second Report of the Monitor", dated February 2, 2018 (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2), p. 105-125); and see also "Notice of Disallowance of the Monitor", dated November 11, 2016 (Motion Record of KSV Kofman Inc., Volume I, at Tab 5(2)(C), p. 199-202); and see also "Tenth Report to the Court of Guy Gissin, in his Capcity as Court-Appointed Functionary and Foreign Representative of Urbancorp Inc.", dated February 28, 2018 (2016 (Motion Record of KSV Kofman Inc., Volume III, at Tab 8)**

81. The Monitor's assertion in its Factum that "Speedy knew that the timelines of the Lien was in question" is wholly incorrect. Neither Mr. Saskin nor Urbancorp ever took that position regarding the lien (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).

82. Speedy submits that the only "evidence" that was before Justice Myers was the uncontroverted evidence from Albert Passero that Speedy supplied ongoing work to the Edge

Project until the end of August 2015, which is consistent with the construction lien registered on title that states the last day of supply was August 31, 2015 (i.e. within the 45-day requirement for preserving a Claim for Lien as set out in the *Construction Lien Act*, prior to being amended as of July 1, 2018). No one from Urbancorp provided any evidence. The Israeli Functionary's "report" did not attach any sworn evidence and was not evidence before the court as the Israeli Functionary is not a court officer in Ontario that can file reports similar to the Monitor. No further Report of the Monitor or sworn evidence was served and no one requested to examine Passero or a 39.03 witness, despite the schedule allowing for same.

Affidavit of Albert Passero, sworn March 12, 2018, at para. 16 & Exhibit "J" (Motion Record of KSV Kofman Inc., Volume I, at Tab 6(1), p. 281 & Tab 6(J), p. 308-324)

83. The Monitor also asserts in its Factum that the alleged invalidity of the lien supports the Monitor's argument that there was no consideration received for the Secured Guarantee. In response, Speedy submits that this issue was not decided by Justice Myers (as he was not required to do so given the other determinative findings), and therefore the issue raised by the Monitor is irrelevant.

D. Will the Proposed Appeal hinder the progress of the underlying CCAA Proceedings?

84. In addressing this part of the test when deciding whether to grant leave to appeal, in *4519922 Canada Inc., Re* the Court of Appeal considered that the appeal would hinder a definitive end to long delayed litigation as one of the considerations in ultimately deciding to refuse leave.

***4519922 Canada Inc., Re* 2016 CarswellOnt 21662, at para 5 (Book of Authorities of Speedy at Tab 1)**

85. In *Nortel Networks Corp., Re*, the Court of Appeal also stated the following:

> [103] Furthermore, the fact that this case is a liquidation and not a restructuring does not render delay immaterial, where so many individuals and businesses continue to await a resolution of this proceeding. The potential of an interim distribution, remote or otherwise, does not alter this reality. In addition, the parties acceded to a liquidation under the *CCAA*. They cannot now reject the parameters of that statute, which requires leave to appeal, and where the jurisprudence on the applicable test is settled and long-standing.
>
> ***Nortel Networks Corp., Re* 2016 ONCA 332, at para. 103 (Book of Authorities of Speedy at Tab 3)**

86. Speedy submits that the court should consider that that the proposed appeal is hindering a definitive end to Speedy's long delayed litigation with Urbancorp. Speedy has been owed payment for over three years, and there has been unexplained delay by the Monitor in bringing the motion ultimately heard by Justice Myers. According to the Monitor, the court's determination on the Secured Guarantee is the only substantive matter that is prohibiting payment to Speedy.

87. The Monitor now asserts that the proposed appeal will not hinder the progress of the underlying CCAA proceedings because it's a liquidation and there is no ongoing operating business. Speedy submits that the Court of Appeal has already held that the fact that the case is a liquidation and not a restructuring does not render the delay immaterial, especially when a creditor continues to await a resolution of the proceeding.

ORDER REQUESTED

For the foregoing reasons, Speedy requests that the Monitor's motion for leave to appeal be dismissed, and costs ordered against the Monitor in favour of Speedy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Kevin Sherkin And Jeremy Sacks

LEVINE SHERKIN BOUSSIDAN
Kevin Sherkin/Jeremy Sacks
Counsel for Speedy

SCHEDULE "A"

4519922 Canada Inc., Re, 2016 CarswellOnt 21662

SNMP Research International Inc. v. Nortel Networks Corp. 2016 ONCA 749

Nortel Networks Corp., Re 2016 ONCA 332

Mercado Capital Corporation v. Qureshi 2017 ONSC 5572

People's Department Stores Ltd. (1992) Inc., Re, 2004 SCC 68 (S.C.C.)

R. v. Quansah, 2015 ONCA 237

SCHEDULE "B"

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

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.

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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