Court of Appeal File No. M49270
Court File No. CV-16-11389-00CL

COURT OF APPEAL FOR ONTARIO

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

NOTICE OF APPEAL

THE APPELLANT, KSV KOFMAN INC., IN ITS CAPACITY AS COURT APPOINTED MONITOR, APPEALS to the Court of Appeal from the Order and Endorsement of the Honourable Mr. Justice Myers, dated May 11, 2018 (the "**Judgment**"), made at Toronto, Ontario.

THE APPELLANT ASKS that the Judgment be set aside and this Court grant an Order:

(a) vacating the Judgment which declined the Monitor's motion for an order upholding its disallowance of the claim filed by Speedy Electrical Contractors Ltd. ("**Speedy**") pursuant to the Claims Procedure Order made in these *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36

("**CCAA**") proceedings on September 15, 2016 (the "**Claims Procedure Order**");

(b) affirming the Monitor's disallowance of the claim filed by Speedy referred to in paragraph (a) immediately above; and

(c) such further and other relief as the Appellant may request and this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

A. Overview

2. The central issue on this appeal is whether the principal of a group of insolvent real estate companies is permitted to use the assets of a particular company in the group to satisfy: (a) his own unrelated personal liabilities; and (b) liabilities of other companies in the group to the detriment of the creditors of the particular company. Essentially, the issue can be summarized as whether the principal of a group of companies can take from creditors of Peter to pay the creditors of Paul. The Motions Judge held that such behaviour is permissible.

3. These CCAA proceedings concern a number of members of the Urbancorp Group of companies (the "**Urbancorp Group**"), the principal of which is Alan Saskin. Speedy has claimed $2,323,638.54 against King Residential Inc. ("**KRI**", an Applicant in these CCAA proceedings and a member of the Urbancorp Group) in respect of a guarantee and collateral mortgage (the "**Secured Guarantee**") that KRI provided to Speedy. Speedy provided no goods or services to KRI. It advanced no funds to KRI. In fact, KRI received

no consideration whatsoever from Speedy, other than a token $2. Rather, KRI provided the Secured Guarantee in respect of pre-existing unsecured personal debts owing by Alan Saskin, and pre-existing unsecured business debts owing by Edge on Triangle Park Inc. ("**Edge**"), another insolvent Saskin-controlled entity not subject to these CCAA proceedings.

4. KRI granted the Secured Guarantee within one year of the commencement of these CCAA proceedings at a time when it was insolvent. At the time, Speedy was also not dealing at arm's length from KRI or Mr. Saskin, and KRI granted the Secured Guarantee with the intent to defeat, hinder or delay KRI's creditors. At all times, both KRI and Edge were not dealing at arm's length from Mr. Saskin. The granting of the Secured Guarantee was therefore a transfer at undervalue and a fraudulent conveyance, and cannot form the basis for a valid claim by Speedy.

B. Background Facts

(i) The Parties

5. At the Guarantee Date (as defined below), KRI was a wholly-owned subsidiary and nominee of TCC/Urbancorp (Bay) LP ("**Bay LP**"). At the relevant time, Alan Saskin held a 79.99% limited partnership interest in Bay LP. Bay LP owned a number of nominees through which it held various distinct real estate projects.

6. At the relevant time, Edge was a wholly-owned subsidiary and nominee of TCC/Urbancorp (Bay Stadium) Limited Partnership ("**Bay Stadium LP**"), whose general partner was Deaja Partner (Stadium) Inc. (wholly owned by Mr. Saskin) and whose sole limited partner was Vestaco Investments (Stadium) Inc. (wholly owned by Mr. Saskin's

spouse, Doreen Saskin). Bay Stadium LP also held distinct real estate projects through various nominees.

7. While both Bay LP and Bay Stadium LP were controlled by Mr. Saskin, they were separate corporate groups engaged in various separate and distinct real estate projects. Edge was in one, and KRI was in the other. While they did not operate at arm's length given their ultimate common control at the hands of Mr. Saskin (directly or via family members or family trusts), they were distinct legal entities, each having its own distinct creditors and assets.

8. Speedy operates an electrical contracting business, and the Urbancorp Group of companies, which included Bay LP and Bay Stadium LP, had been one of Speedy's clients for more than 20 years. The President of Speedy, Albert Passero, has a long-standing relationship with Mr. Saskin.

9. In May 2016, the Urbancorp Group collapsed and the Applicants (a subset of the Urbancorp Group), including KRI, commenced the present insolvency proceedings under the CCAA. The moving party, KSV, was appointed by the Court to act as Monitor of the Applicants.

10. In addition, Edge is currently the subject of its own, separate CCAA proceedings and Mr. Saskin is currently the subject of a Proposal under the *Bankruptcy and Insolvency Act* ("**BIA**"). Speedy has filed proofs of claim in both the Edge CCAA proceedings, and in connection with Mr. Saskin's Proposal, for the same debt which is the subject of its claim against KRI.

(ii) Debts Owing by Edge to Speedy

11. On September 23, 2014, Mr. Saskin approached the President of Speedy and obtained a personal loan from Speedy for $1 million. These funds were not paid to or for the benefit of KRI or Bay LP. 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**").

12. Shortly thereafter, Speedy completed the work on a $6 million electrical contract for a condominium development owned by Edge. Speedy certified under oath that the last day of supply of services and materials for the project was October 22, 2014, at which time Speedy invoiced Edge for release of the *Construction Lien Act* ("**CLA**") holdback amount of $695,408.07.

13. The holdback amount, together with other outstanding amounts owing by Edge to Speedy, totalled $1,038,911.34.

14. In or around the end of August 2015, Speedy became aware that Edge was having cash flow issues and Speedy began pressing Edge for payment. Mr. Saskin offered to provide Speedy with certain Edge condominium units as payment for the amounts owing by Edge to Speedy. This proposal was not accepted by Speedy, as Speedy was aware that it would be contrary to provisions of the CLA relating to improper preference or priority over other potential trade creditors or lien claimants. Instead, as set out below, Speedy proceeded to improperly register a claim for lien, threaten personal bankruptcy proceedings against Mr. Saskin, and ultimately improperly obtained the Secured Guarantee from KRI as security for the debts of Edge and Mr. Saskin.

15. On August 31, 2015, Speedy issued a further invoice to Edge for an additional holdback amount of $7,348.75 in respect of work invoiced on December 19, 2014. This amount forms part of the $1,038,911.34 claimed by Speedy.

16. On September 23, 2015, Mr. Saskin defaulted on the Note.

17. On September 30, 2015, almost a year after the last day of supply of service and materials for the project and well outside the 45 day time period provided for under s. 31(3) of the CLA, Speedy registered a claim for a construction lien against the Edge project pursuant to the CLA in the sum of $1,038,911.44 (the "**Lien**").

18. In the period that followed, Speedy threatened to petition Mr. Saskin into personal bankruptcy in respect of his personal debt and to bring legal proceedings in respect of the Lien.

19. At this time, KRI had no liability for either Mr. Saskin's personal debt, or the Edge debt.

(iii) The Israeli Bond Issuance and the Secured Guarantee

20. In the summer and fall of 2015, Mr. Saskin was in the process of raising funds through a bond issuance on the public markets in Israel. The bond issuance was completed in December 2015, and Urbancorp Inc. raised $64 million.

21. The bond issuance required that the Lien on Edge be discharged. Speedy was aware that the presence of its Lien on the Edge development precluded Mr. Saskin from being able to complete the Israeli bond issuance. Mr. Saskin approached Speedy and asked for a discharge of the Lien, as well as an extension of time for payment on the Note,

with the promise that the funds raised through the bond issuance would be used to repay Speedy and others who were owed money by Mr. Saskin and the Urbancorp Group.

22. In November 2015, Speedy, Mr. Saskin, Edge, and KRI entered into a debt extension agreement (the "**Debt Extension Agreement**"). Pursuant to the terms of the Debt Extension Agreement: (a) Speedy agreed to discharge the Lien, but maintained the claim for the underlying debt against Edge; (b) the maturity date of the Note for the personal debt owing to Speedy by Mr. Saskin was extended to January 30, 2016; and (c) Mr. Saskin agreed to cause KRI to provide a limited guarantee to Speedy for Mr. Saskin's and Edge's outstanding obligations to Speedy together with a mortgage on thirteen specific condominiums and thirteen specific parking spots of which KRI was the registered owner (the "**Secured Guarantee**"). KRI received no consideration for guaranteeing and securing debts owed by Mr. Saskin and Edge, other than a nominal $2. At this time, KRI was insolvent and had its own creditors, which were distinct from those of Mr. Saskin and Edge.

23. One of the effects of KRI's secured guarantee of the Note was to convert an unsecured obligation of Mr. Saskin into a secured obligation of KRI.

24. Consistent with the terms of the Debt Extension Agreement, the Lien was discharged and the Secured Guarantee was registered on title on November 16, 2015 (the "**Guarantee Date**"). KRI was insolvent as of the Guarantee Date.

25. The $2 paid to KRI was grossly inadequate and entirely disproportionate to the value of the Secured Guarantee, which Speedy now claims is worth over $2.3 million with costs and interest. Extending the maturity date of the Note did not benefit KRI and served

only to benefit Mr. Saskin personally, while the discharge of the Lien against Edge (even assuming that it were ever valid) by Speedy did not benefit KRI, but instead benefited Edge.

26. As required in order to complete the bond issuance, counsel for Urbancorp Inc. provided opinions which disclosed the existence and later removal of the Lien, but did not disclose that KRI had provided a secured guarantee in respect of the liabilities of Mr. Saskin and Edge at all, let alone without receiving any material consideration for having done so.

27. On December 7, 2015, the Tel Aviv Stock Exchange authorized the registration of a prospectus in connection with of the bond issuance. The prospectus does not disclose the existence of the Secured Guarantee.

28. Although Urbancorp Inc. raised approximately $64 million in the bond issuance, Mr. Saskin did not use any of those funds to repay Speedy. Nor did any of these funds flow to KRI.

29. Soon after the bond issuance, the Urbancorp Group collapsed. On May 18, 2016, insolvency proceedings in respect of the Applicants (of which KRI is one) were commenced under the CCAA. Notably, given that the Secured Guarantee was granted by KRI to Speedy on November 16, 2015, the Secured Guarantee was granted within one year of the commencement of the CCAA proceedings.

30. The effect of the Secured Guarantee will be to defeat or hinder recoveries to the creditors of Urbancorp Inc., including the Israeli bondholders. Specifically, the Secured

Guarantee will deprive Urbancorp Inc. of approximately $2.3 million it would have received (and expected to receive pursuant to the bond prospectus) but for the issuance of the Secured Guarantee. If the Secured Guarantee is invalid, Speedy retains the claims it has filed against both Edge and Mr. Saskin in their respective proceedings.

(iv) Speedy's Claim

31. On October 19, 2016, Speedy filed a proof of claim against KRI in the amount of $2,323,638.54, comprising the $1 million personal loan made to Mr. Saskin as well as the amounts owing to Speedy in respect of the Edge project (plus interest and costs that continue to accrue).

32. On November 11, 2016, the Monitor disallowed the claim in full on the basis that the granting of the Secured Guarantee was voidable as a transfer at undervalue pursuant to s. 96 of the BIA and void as a fraudulent conveyance under the *Fraudulent Conveyances Act* ("**FCA**").

33. On November 25, 2016, Speedy filed a Notice of Dispute. Paragraph 36(b) of the Claims Procedure Order provides that in the event that an objection raised in a Notice of Dispute is not settled within a time period or in a manner satisfactory to the Monitor, the Monitor may refer the objection raised to the Court for adjudication.

C. The Motion Below and the Judgment

34. By Notice of Motion dated March 7, 2018, the Monitor brought a motion seeking to uphold its disallowance of Speedy's claim in full.

35. Mr. Justice Myers heard the Monitor's motion on May 1, 2018.

36. By way of Endorsement and Order dated May 11, 2018, the Motions Judge dismissed the Monitor's motion seeking to disallow Speedy's claim. He did so "based solely on the arm's length relationship and lack of fraudulent intent", finding that it was therefore unnecessary to deal with "a number of other issues" raised by the parties on the motion.

37. Unlike other types of determinations often made by supervising judges in CCAA proceedings, the Judgment did not involve an exercise of discretion by the Motions Judge in the context of managing an ongoing restructuring process. To the contrary, the Judgment arose from a straightforward adjudication of Speedy's claim and involved the application of relevant provisions of the CCAA, BIA and the FCA.

38. The Motions Judge ordered the Monitor to pay costs to Speedy in the amount of $25,000, notwithstanding: (i) his express finding that "[i]t was reasonable and appropriate for the Monitor to bring this matter to the court"; and (ii) paragraph 36(b) of the Claims Procedure Order which expressly directs the Monitor to bring unsettled objections to the Court for adjudication.

D. Reversible Errors

39. The Monitor respectfully submits that the Motions Judge made reversible errors in reaching the Judgment, such that this Court can and should set aside the Judgment and dismiss Speedy's claim in full. In particular, the Motions Judge made a number of reversible errors, including:

(a) erring in law and in principle and committing palpable and overriding errors by concluding that the Secured Guarantee should not be declared void as a transfer at undervalue under s. 96 of the BIA, including;

(i) by concluding that Speedy and KRI were dealing with one another at arm's length at the time the Secured Guarantee was given by KRI;

(ii) by not addressing the fact that Mr. Saskin, Edge and KRI were not dealing with one another at arm's length at the time the Secured Guarantee was given by KRI;

(iii) by concluding that KRI, at the direction of Mr. Saskin, did not have the intention to defraud, defeat, or delay creditors, including:

(A) by treating Edge, KRI and Mr. Saskin as a single consolidated entity for purposes of determining whether there was a transfer at undervalue notwithstanding the fact that each had its own creditors;

(B) by disregarding clear evidence of numerous "badges of fraud", including:

(I) the insolvency of KRI at the Guarantee Date;

(II) the lack of consideration received by KRI in exchange for the Secured Guarantee;

(III) the failure to have protected the distinct creditors of KRI;

(IV) the close relationship between Speedy and Mr. Saskin, and the economic pressure that Speedy exerted over Mr. Saskin;

(V) the transfer being made in the face of threatened legal proceedings which to the knowledge of Speedy would have prevented the bond issuance; and

(VI) the fact that the transfer was kept secret from the main creditor prejudiced by the transfer, as evidenced by the fact that Mr. Saskin and his counsel (in the opinions provided in anticipation of the bond issuance) disclosed the existence and removal of the Lien, but failed to disclose that KRI had provided the Secured Guarantee in respect of the personal debts of Mr. Saskin and the liabilities of Edge;

(C) by placing undue weight on the fact that Speedy registered its mortgages over the KRI condominium units on title as evidencing no secrecy in the transfer;

(iv) by misinterpreting clear evidence that KRI was insolvent on a cash flow basis at the time it granted the Secured Guarantee; and

(v) by misapplying the ruling in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), and in doing so failing to conclude that the Lien was invalid under s. 31 of the CLA in face of clear evidence of its invalidity and, in particular, Speedy's sworn Statement of Last Supply under the CLA;

(b) erring in law and in principle by concluding that the Secured Guarantee is not void as a fraudulent conveyance under the FCA for the same reasons set out immediately above; and

(c) erring in law and in principle by ordering the Monitor to pay costs to Speedy in the amount of $25,000 in the context of a court ordered claims process, in circumstances where the Motions Judge expressly found that it was both "reasonable and appropriate" for the Monitor to bring the dispute before the Court.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

40. The Endorsement of Justices Lauwers, Miller and Nordheimer granting leave to appeal to this Court dated September 10, 2018.

41. The Judgment is a final order of a judge of the Superior Court of Justice pursuant to s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

42. Sections 11, 13 and 14 of the CCAA.

September 19, 2018

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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., et al.

Court of Appeal File No. M49270
Court File No. CV-16-11389-00CL

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

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