Court of Appeal File No. C65891

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

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Court of Appeal File No. C65891

COURT OF APPEAL FOR ONTARIO

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Applicants

FACTUM OF THE APPELLANT
KSV KOFMAN INC., IN ITS CAPACITY AS MONITOR

PART I - OVERVIEW

1. Should the principal of a group of insolvent corporations be permitted to use the assets of one company in the group to cover his personal debts and the debts of another company in the group, for no value in return? The Motion Judge answered this question "yes", because the creditor that benefited from these transactions was at arm's length.[1] The Appellant, KSV Kofman Inc., the Monitor of the company whose assets were exploited to favour the principal and a sister company, appeals from that decision. With respect, the Motion Judge erred in law by focussing on the relationship between creditor and debtors, rather than the relationship among the debtors and their principal. The law of insolvency does not permit the principal of an insolvent group of companies to take from

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[1] Endorsement of Myers J. dated May 11, 2018 (*Urbancorp Toronto Management Inc. (Re)*, 2018 ONSC 2965, 60 C.B.R. (6th) 241) (the "**Motion Reasons**") [ABCO, Vol. 1, Tab 5, pp. 60-68].

Peter to pay Paul.

2. The Applicant corporations for which the Appellant acts as Monitor are part of a real estate group known as the Urbancorp Group. The principal and controlling mind of each of the Urbancorp Group entities is the same person – Mr. Alan Saskin.

3. This dispute arises out of debts that Mr. Saskin and one Urbancorp Group corporation owed to Speedy Electrical Contractors Ltd. ("**Speedy**"). In September 2014, Speedy (a long-time contractor to the Urbancorp Group) gave Mr. Saskin a $1 million personal loan under a one-year promissory note (the "**Note**").[2] At that time, Speedy had also not been paid for electrical work performed for one of the Urbancorp Group's constituent corporations, Edge on Triangle Park Inc. ("**Edge**").

4. One year later, in September 2015, Mr. Saskin defaulted on the Note and Speedy threatened to petition him into personal bankruptcy. At about the same time, Speedy belatedly filed a lien against Edge for approximately $1 million (the "**Lien**").[3] Concurrently in late 2015, Mr. Saskin was trying to orchestrate a desperately needed $64 million public bond issuance in Israel for the Urbancorp Group, but could not consummate it while the Lien was outstanding. Mr. Saskin and Edge needed to pay off Speedy, but neither had unencumbered assets with which to do so.

5. To solve both of these problems, Mr. Saskin turned to King Residential Inc. ("**KRI**"), a member of the Urbancorp Group controlled by Mr. Saskin. While a member of the Urbancorp Group, KRI had distinct assets and creditors from Edge and Mr. Saskin.

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[2] Affidavit of Albert Passero sworn March 12, 2018 ("**First Passero Affidavit**"), at para. 3 [ABCO, Vol. 1, Tab 11, p. 189] and Exhibit "A" [ABCO, Vol. 2, Tab 15, pp. 215-18].

[3] First Passero Affidavit, Exhibit "J" [ABCO, Vol. 2, Tab 28, pp. 247-64].

Nonetheless, Mr. Saskin caused KRI, which was insolvent at the time, to provide a secured guarantee dated November 16, 2015 (the "**Guarantee Date**") for both Mr. Saskin's personal debt and Edge's corporate debt to Speedy (the "**Secured Guarantee**")[4] for no consideration in return, except for a token $2.

6. The fresh injection of capital provided by the Israeli bond issuance, none of which made its way to KRI, was ultimately of no avail. The Urbancorp Group's financial troubles continued, and by May 2016, the Applicants (including KRI) filed for insolvency protection under the *Companies' Creditors Arrangement Act* ("***CCAA***").[5] Importantly, this was less than one year after the Secured Guarantee was given.

7. As a result of the Secured Guarantee, KRI assumed over $2 million of debt for Mr. Saskin and Edge. KRI received no consideration for doing so, except for a token $2. In the ensuing *CCAA* proceedings, Speedy sought more than $2.3 million from KRI pursuant to the Secured Guarantee that Mr. Saskin caused it to undertake. KRI (and now its creditors) would have had no exposure to these obligations but for Mr. Saskin's self-serving machinations.

8. The Monitor disallowed Speedy's claim as a transfer at undervalue occurring less than one year before *CCAA* proceedings were commenced, and as a fraudulent conveyance. The Motion Judge disagreed based on his finding that Speedy and KRI were acting at arm's length in concluding the Secured Guarantee.[6]

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4 Twenty-Second Report of the Monitor dated February 2, 2018 ("**Monitor's Report**"), Appendix "H" [ABCO, Vol. 2, Tab 39, pp. 315-33]; First Passero Affidavit, Exhibit "V" [ABCO, Vol. 2, Tab 42, pp. 341-62].

5 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

6 Motion Reasons, at para. 15 [ABCO, Vol. 1, Tab 5, p. 62].

9. With respect, this conclusion ignored the fact that Mr. Saskin, Edge, and KRI were not acting at arm's length. The Monitor sought and was granted leave to appeal to this Court on this basis. The Monitor submits that the Motion Judge erred in holding that the Secured Guarantee given by KRI to Speedy, in order to discharge Mr. Saskin's personal debt and Edge's corporate debt, was not a transfer at undervalue or a fraudulent conveyance. The Monitor respectfully asks this Court to reverse the decision below and affirm the Monitor's disallowance of Speedy's claim against KRI.

PART II - SUMMARY OF FACTS

A. THE PARTIES

10. On the Guarantee Date, KRI was a wholly-owned subsidiary and nominee of TCC/Urbancorp (Bay) LP ("**Bay LP**"). Mr. Saskin held a 79.99% limited partnership interest in Bay LP.[7] Bay LP owned a number of project companies that comprised the Urbancorp Group.[8]

11. Also on the Guarantee Date, Edge was a wholly-owned subsidiary and nominee of TCC/Urbancorp (Bay Stadium) Limited Partnership ("**Bay Stadium LP**"), which owned a different group of project companies that were also a part of the Urbancorp Group.[9] Bay Stadium LP was in turn owned by entities that were ultimately controlled by Mr. Saskin (directly or via family members or family trusts).[10]

12. In other words, while KRI and Edge were both ultimately controlled by Mr. Saskin, they were part of different segments of the Urbancorp Group, with different direct parent

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7 Monitor's Report, s. 2.0 at paras. 4-6 [ABCO, Vol. 1, Tab 9, p. 163]. See also: Monitor's Report, Appendices "D", "E", "F", and "G" [ABCO, Vol. 2, Tabs 53-56, pp. 508-15].

8 Monitor's Report, Appendices "E" and "F" [ABCO, Vol. 2, Tabs 54-55, pp. 510-13].

9 Monitor's Report, s. 2.0 at paras. 4-6 [ABCO, Vol. 1, Tab 9, p. 163].

10 Monitor's Report, s. 2.0 at paras. 4-6 [ABCO, Vol. 1, Tab 9, p. 163].

corporations, different real estate projects, and different creditor groups.[11] Although KRI and Edge were distinct legal entities, each having its own creditors, they did not operate at arm's length given their ultimate common control by Mr. Saskin.

13. Speedy operates an electrical contracting business. The Urbancorp Group had been one of Speedy's clients for more than 20 years. The President of Speedy, Mr. Passero, has a long-standing relationship with Mr. Saskin.[12]

14. In May 2016, the Urbancorp Group collapsed and the Applicant corporations (a subset of the Urbancorp Group of entities) commenced the underlying *CCAA* proceedings. The Appellant, KSV Kofman Inc., was appointed by the Court to act as Monitor.[13]

B. DEBTS OWED TO SPEEDY

15. On September 23, 2014, Mr. Saskin approached Mr. Passero, the President of Speedy, and obtained a personal loan from Speedy (via the Note) for $1 million, ostensibly to enable Mr. Saskin to fund some of his building projects. KRI received none of these monies, either directly or indirectly.[14] The Note had a one-year term with 12.5% annual interest payable biannually.[15]

16. Shortly thereafter, Speedy completed the work on a $6 million electrical contract for a condominium development owned by Edge. Speedy certified that the last day of supply of service and materials for the project was October 22, 2014, at which time

[11] Monitor's Report, Appendices "L" and "M" [ABCO, Vol. 2, Tabs 40-41, pp. 334-40].
[12] First Passero Affidavit, at para. 2 [ABCO, Vol. 1, Tab 11, p. 189].
[13] Initial Order dated May 18, 2016 [ABCO, Vol. 1, Tab 7, pp. 75-103].
[14] Motion Reasons, at para. 8 [ABCO, Vol. 1, Tab 5, p. 61].
[15] First Passero Affidavit, at para. 3 [ABCO, Vol. 1, Tab 11, p. 189] and Exhibit "A" [ABCO, Vol. 2, Tab 15, pp. 215-18].

Speedy invoiced Edge for release of a holdback under the *Construction Lien Act* ("***CLA***")[16] in the amount of $695,408.07.[17] Speedy did not register a claim for a construction lien at this time, or within the 45 days prescribed by Part V of the *CLA*.

17. Around the end of August 2015, Speedy learned that Edge was having cash flow issues, and began pressing Edge to pay the outstanding amounts. Mr. Saskin offered to pay Edge's debts to Speedy with certain Edge condominium units.[18] Speedy rejected this proposal, which would have breached provisions of the *CLA* relating to improper preference or priority over other potential trade creditors or lien claimants.[19]

18. By this time, Speedy still had not registered a lien against the Edge project. Instead, on August 31, 2015, Speedy issued another invoice to Edge for an additional holdback amount of $7,348.75 in respect of work invoiced on December 19, 2014.[20] The total holdback amount, together with other outstanding amounts owing by Edge to Speedy, totalled $1,038,911.34.[21]

19. On September 23, 2015, the Note came due and Mr. Saskin failed to pay, putting him in default.

20. It was not until September 30, 2015, almost a year after the certified last day of

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16 R.S.O. 1990, c. C.30. Due to amendments on July 1, 2018, the *CLA* has been renamed the *Construction Act*. However, it will be referred to as the *CLA* in this factum.

17 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**"), at para. 12 [ABCO, Vol. 1, Tab 10, pp. 180-81] and Appendix "C" [ABCO, Vol. 2, Tab 16, pp. 219-21].

18 First Passero Affidavit, at paras. 4-5 [ABCO, Vol. 1, Tab 11, pp. 189] and Exhibit "B" [ABCO, Vol. 2, Tab 19, pp. 227-28].

19 First Passero Affidavit, at para. 6 [ABCO, Vol. 1, Tab 11, pp. 189-90] and Exhibit "C" [ABCO, Vol. 2, Tab 20, pp. 229-31].

20 Functionary Report, at para. 13 [ABCO, Vol. 1, Tab 10, pp. 181] and Appendix "E" [ABCO, Vol. 2, Tab 23, pp. 236-38].

21 Functionary Report, at para. 13 [ABCO, Vol. 1, Tab 10, pp. 181] and Appendices "D" and "E" [ABCO, Vol. 2, Tabs 18 and 23, pp. 225-26 and 236-38].

supply of service and materials for the Edge project, and well outside the 45 day time period provided for under s. 31(3) of the *CLA*, that Speedy purported to register the Lien against the Edge project pursuant to the *CLA,* in the sum of $1,038,911.44.[22]

21. By this time, Speedy was owed over $2 million by Edge and Mr. Saskin personally. Speedy threatened to petition Mr. Saskin into bankruptcy in respect of his personal debt,[23] and to bring legal proceedings against Edge in respect of the Lien.[24]

22. At this time in October 2015, KRI had no liability for either Mr. Saskin's personal debt or Edge's corporate debt. KRI had no involvement whatsoever with Mr. Saskin's and Edge's dealings with Speedy. As noted above, KRI belonged to a different corporate sub-group than Edge, with a different parent (Bay LP), and distinct creditors.

C. THE ISRAELI BOND ISSUANCE AND THE SECURED GUARANTEE

23. Edge and Mr. Saskin were not the only ones in financial difficulties in the summer and fall of 2015. The Urbancorp Group itself was also under strain. To address these financial problems, Mr. Saskin sought to raise funds for the Urbancorp Group through a public bond issuance in Israel.[25]

24. The bond issuance was contingent upon, among many other things, Speedy's Lien on Edge being discharged. Accordingly, Mr. Saskin approached Speedy and asked for a discharge of the Lien, as well as for an extension of time to repay the Note. Mr. Saskin promised that the funds raised through the bond issuance would be used to repay

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[22] First Passero Affidavit, at para. 16 [ABCO, Vol. 1, Tab 11, pp. 191] and Exhibit "J" [ABCO, Vol. 2, Tab 28, pp. 247-64].

[23] First Passero Affidavit, Exhibits "G" and "H" [ABCO, Vol. 2, Tabs 25-26, pp. 241-44].

[24] First Passero Affidavit, at paras. 16-17 [ABCO, Vol. 1, Tab 11, pp. 191] and Exhibit "J" [ABCO, Tab Vol. 2, Tab 28, pp. 247-64]; Monitor's Report, Appendix "I" [ABCO, Vol. 2, Tab 29, pp. 265-68].

[25] Monitor's Report, s. 2.2 at para. 1 and s. 2.3 at para. 1 [ABCO, Vol. 1, Tab 9, pp. 164-65].

Speedy and other creditors who were owed money by Mr. Saskin and the Urbancorp Group.[26] However, Speedy demanded security before it would agree to any forbearance.[27]

25. To satisfy Speedy's demands, in November 2015, Mr. Saskin caused Edge and KRI to enter into a debt extension agreement with Speedy (the "**Debt Extension Agreement**")[28] whereby: (a) Speedy agreed to discharge the Lien, but maintained its 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) KRI agreed to provide a Secured Guarantee to Speedy for Mr. Saskin's and Edge's outstanding debts, together with a mortgage on thirteen specific condominium units and parking spots for which KRI was (and is) the registered owner.[29]

26. Consistent with the terms of the Debt Extension Agreement, the Lien was discharged and the Secured Guarantee was registered on title on the Guarantee Date of November 16, 2015.[30]

27. KRI alone received no consideration in these transactions. KRI guaranteed and secured pre-existing unsecured debts owed by Mr. Saskin and Edge and received only a nominal $2. By contrast, Mr. Saskin obtained an extension of the maturity date of his

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26 Affidavit of Albert Passero sworn April 7, 2018 ("**Second Passero Affidavit**"), at paras. 4-5 [ABCO, Vol. 1, Tab 12, pp. 197].

27 Second Passero Affidavit, at para. 6 [ABCO, Vol. 1, Tab 12, pp. 198]. The negotiations occurred despite consumer complaints about delayed projects: Monitor's Report, Appendix "Q" [ABCO, Vol. 2, Tab 34, pp. 282-84].

28 Monitor's Report, Appendix "H" [ABCO, Vol. 2, Tab 39, pp. 315-33].

29 First Passero Affidavit, at paras. 30-31 [ABCO, Vol. 1, Tab 11, p. 194] and Exhibits "N", "O", and "Q" [ABCO, Vol. 2, Tabs 35-37, pp. 285-93]; Functionary Report, at para. 17 [ABCO, Vol. 1, Tab 10, pp. 181-82].

30 First Passero Affidavit, Exhibit "V" [ABCO, Vol. 2, Tab 42, pp. 341-62]; Monitor's Report, s. 3.1 at para. 4 [ABCO, Vol. 1, Tab 9, pp. 167] and Appendix "K" [ABCO, Vol. 2, Tab 57, pp. 516-21].

Note; Edge obtained a discharge of the Lien (assuming it was valid despite its late registration) and forbearance on collection of that debt by Speedy; and Speedy received security for over $2 million in impaired debt.[31] Mr. Saskin, Edge, and Speedy acted in concert to benefit themselves at the expense of KRI (which was at all relevant times under Mr. Saskin's control), and its creditors.

28. Soon after the bond issuance, the Urbancorp Group collapsed. On May 18, 2016, the Applicant corporations (of which KRI is one) filed for protection under the *CCAA*. Notably, given that the Secured Guarantee was granted by KRI to Speedy on November 16, 2015, the Secured Guarantee was granted less than one year before commencement of the *CCAA* proceedings.[32]

29. The Secured Guarantee has defeated or hindered recoveries by KRI's creditors, including the Israeli bondholders. Specifically, the Secured Guarantee deprives KRI's creditors of approximately $2.3 million (including approximately $1.35 million, inclusive of accrued interest, that was the personal obligation of Mr. Saskin) since that amount must be paid to Speedy in priority to other creditors of KRI.[33]

D. SPEEDY'S CLAIM

30. On October 19, 2016, Speedy filed a proof of claim against KRI for $2,323,638.54, comprised of the $1 million personal loan made to Mr. Saskin, the amounts Edge owed Speedy, plus interest and costs that continue to accrue.[34]

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[31] Monitor's Report, s. 2.2 at para. 1 and s. 2.3 at para. 1 [ABCO, Vol. 1, Tab 9, pp. 164-65].

[32] Monitor's Report, s. 1.0 at para. 2 [ABCO, Vol. 1, Tab 9, p. 160].

[33] Monitor's Report, s. 3.3 at para. 6 and s. 5 at para. 1(vii) [ABCO, Vol. 1, Tab 9, pp. 169 and 175].

[34] Monitor's Report, s. 3.1 at para. 7 [ABCO, Vol. 1, Tab 9, p. 167] and Appendix "A" [ABCO, Vol. 2, Tab 50, pp. 426-97].

31. On November 11, 2016, the Monitor disallowed the claim because the Secured Guarantee was void as a transfer at undervalue pursuant to s. 96 of the *Bankruptcy and Insolvency Act*[35] ("***BIA***") and voidable as a fraudulent conveyance under s. 2 of the *Fraudulent Conveyances Act*[36] ("***FCA***").[37] As noted above, at the time the Secured Guarantee was granted, KRI was insolvent and not dealing with Mr. Saskin or Edge at arm's length, and it was Mr. Saskin who caused KRI to provide the Secured Guarantee to Speedy for purely token consideration ($2).[38]

32. On November 25, 2016, Speedy filed a Notice of Dispute.[39] 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 the prescribed time period or in a manner satisfactory to the Monitor, the Monitor may refer the objection raised to the Court for adjudication.[40]

E. THE MOTION BELOW AND THE DECISION UNDER APPEAL

33. By Notice of Motion dated March 7, 2018,[41] the Monitor brought a motion seeking to uphold its disallowance of Speedy's claim in full. The motion was heard on May 1, 2018.

34. By Endorsement dated May 11, 2018,[42] the Motion Judge held that Speedy and KRI were acting at arm's length[43] and that there was no fraudulent intent.[44] As such, the

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35 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 96.
36 *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 2.
37 Monitor's Report, Appendix "B" [ABCO, Vol. 2, Tab 51, pp. 498-502].
38 Monitor's Report, s. 5.0 at para. 1(i) [ABCO, Vol. 1, Tab 9, p. 175].
39 Monitor's Report, Appendix "C" [ABCO, Vol. 2, Tab 52, pp. 503-07].
40 Claims Procedure Order dated September 15, 2016 ("**Claims Procedure Order**"), at para. 36(b) [ABCO, Vol. 1, Tab 8, p. 124].
41 Notice of Motion dated March 7, 2018 [ABCO, Vol. 1, Tab 6, pp. 69-74].
42 Motion Reasons [ABCO, Vol. 1, Tab 5, pp. 60-68].
43 Motion Reasons, at para. 20 [ABCO, Vol. 1, Tab 5, p. 64].
44 Motion Reasons, at para. 26 [ABCO, Vol. 1, Tab 5, p. 65].

Motion Judge dismissed the Monitor's motion to disallow Speedy's claim. He did so "based solely on the arm's length relationship between Speedy and lack of fraudulent intent",[45] finding that it was therefore unnecessary to deal with "a number of issues" raised by the parties on the motion.[46] These other issues include the non-arm's length relationship between Mr. Saskin, Edge, and KRI.

35. The Motion Judge further ordered the Monitor to pay $25,000 in costs to Speedy, notwithstanding: (i) his express finding that "[i]t was reasonable and appropriate for the Monitor to bring this matter to court";[47] and (ii) paragraph 36(b) of the Claims Procedure Order that expressly directs the Monitor to bring unsettled objections to the Court for adjudication.[48]

PART III - ISSUES

A. THE STANDARD OF REVIEW

36. As this Court held in *Algoma Steel Inc. v. Union Gas Ltd.*,[49] the standard of review with respect to a judge's non-discretionary decisions in *CCAA* proceedings follows the ordinary appellate review framework. This framework was set out in the Supreme Court of Canada's *Housen v. Nikolaisen*[50] and *H.L. v. Canada (Attorney General)*[51] decisions. In summarizing the ordinary standard of review framework, this Court recently held that "the identification of the correct legal standard or test is an extricable question of law but the

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45 Motion Reasons, at para. 30 [ABCO, Vol. 1, Tab 5, p. 66].
46 Motion Reasons, at para. 30 [ABCO, Vol. 1, Tab 5, p. 66].
47 Motion Reasons, at para. 32 [ABCO, Vol. 1, Tab 5, p. 66].
48 Claims Procedure Order, at para. 36(b) [ABCO, Vol. 1, Tab 8, p. 124].
49 *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (C.A.), [2003] O.J. No. 71, at para. 16 [ABOA, Vol. 1, Tab 2].
50 *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [ABOA, Vol. 2, Tab 15].
51 *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 ("***H.L.***") [ABOA, Vol. 1, Tab 14].

application of a legal standard to a set of facts is a question of mixed fact and law".[52]

37. On the other hand, the standard of review on appeals from a judge's discretionary *CCAA* order is more deferential. In such appeals, this Court reaffirmed in *Grant Forest Products Inc. v. Toronto-Dominion Bank*[53] that "appellate intervention is justified only if the *CCAA* judge erred in principle or exercised his or her discretion unreasonably".[54]

38. The instant appeal engages the ordinary standard of review framework. The underlying motion decision did not involve an exercise of discretion. Rather, it was a straightforward adjudication of Speedy's claim based on the relevant provisions of the *CCAA*, *BIA*, and *FCA*. The Monitor's submissions with respect to the standard of review applicable to each issue on appeal is incorporated into the submissions below.

B. SUBSTANTIVE ISSUES

39. The Monitor submits that the Motion Judge erred in law by:

(a) holding that KRI's Secured Guarantee to Speedy was not a transfer at undervalue under s. 96 of the *BIA* or a fraudulent conveyance under s. 2 of the *FCA*;

(b) applying the rule in *Browne v. Dunn* to the prejudice of the Monitor; and

(c) awarding costs against the Monitor.

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[52] *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Ltd. (Hydeaway Golf Club)*, 2017 ONCA 980, 138 O.R. (3d) 561, at paras. 30-31 ("***Performance Plus***") [ABOA, Vol. 1, Tab 1].

[53] *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at paras. 95-99 [ABOA, Vol. 1, Tab 12].

[54] *Ibid*, at para. 98.

PART IV - LAW AND ARGUMENT

A. THE SECURED GUARANTEE WAS A TRANSFER AT UNDERVALUE OR A FRAUDULENT CONVEYANCE

40. Section 96 of the *BIA*, applicable in *CCAA* proceedings pursuant to s. 36.1 of the *CCAA*, provides that a court may declare a transfer at undervalue void. There are two branches to the test, depending on whether the transfer was at arm's length or not. Subsection 96(1) states:

> On application by the trustee, a court may declare that a transfer at undervalue is void as against … the trustee — or order that a party to the transfer … 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.

41. In this case, the Secured Guarantee was a void transfer at undervalue regardless of whether the transaction was at arm's length. In this regard, the Monitor respectfully submits that the Motion Judge committed an error of law by focussing on the relationship between Speedy and the various debtors, rather than the relationships among KRI, Edge, and Mr. Saskin. In addition, the Motion Judge committed palpable and overriding errors in finding that KRI was not insolvent on the Guarantee Date, and in finding that KRI (as directed by Mr. Saskin) did not intend to defraud, defeat or delay a creditor.

(i) The transaction is voidable under s. 96(1)(b) because the relevant parties were non-arm's length

42. Subparagraph 96(1)(b)(i) effectively establishes a three part test to void a transfer: (i) the transfer must be at undervalue; (ii) the "party to the transfer" must not have been dealing at arm's length with the debtor; and (iii) the transfer must have occurred less than one year before insolvency. The first and third of these requirements are not in dispute in this case. There is no question that granting a Secured Guarantee for $2.3 million in debt in exchange for $2 is a transfer at undervalue. Similarly, there is no question that the Guarantee Date of November 16, 2015 is less than a year from May 18, 2016 (the date of insolvency). The only issue then is whether "the party was not dealing at arm's length with the debtor".

43. Critically, s. 96(1)(b)(i) does not require the transfer at undervalue to occur between a "creditor" and the debtor. The word "creditor" is expressly defined in the *BIA*[55] and transfers between "creditors" and the debtor are the purview of s. 95 of the *BIA*, *i.e.*, void preferences. The use of the phrase "party to the transfer" in s. 96, on the other hand,

[55] *BIA*, s. 2 *sub nom.* "creditor".

indicates Parliament's intent that s. 96 is focussed on the relationship between a beneficiary of a transfer (Speedy, Mr. Saskin, and Edge) and debtor (KRI). The purpose of s. 96 is to void transfers, like the Secured Guarantee, where the debtor (KRI) gratuitously transfers value to non-creditors (Speedy, Mr. Saskin, and Edge) in a fashion that prejudiced KRI's creditors. Put simply, s. 95 deals with preferences. Section 96 deals with asset stripping, which is precisely what Mr. Saskin did to KRI.

44. The Motion Judge therefore erred in law by focussing exclusively on the arm's length relationship between Speedy and KRI. The Monitor's principal argument was not that Speedy subverted KRI's economic interests[56] – rather it was Mr. Saskin (and at his behest, Edge) who did so. The Motion Judge erred in law by failing to address the control that Mr. Saskin exerted over KRI and Edge. He simply made no finding on this central issue. As such, it falls to this Court to make its own determination on this issue based on the record filed.[57]

45. Once one focusses on the correct set of relationships, there can be no doubt that Mr. Saskin, Edge, and KRI were not acting at arm's length. Subsection 4(2) of the *BIA* provides that two persons or entities are related if one controls the other, or if they are controlled by the same person. Mr. Saskin controlled both KRI and Edge, making them all related parties who did not act at arm's length.[58] The common law definition of "not at

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[56] Motion Reasons, at para. 18 [ABCO, Vol. 1, Tab 5, p. 63].

[57] *Performance Plus*, *supra* note 52 at para. 51 [ABOA, Vol. 1, Tab 1]; *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401, 89 R.P.R. (5th) 212, at para. 16, with leave to appeal to S.C.C. pending as of October 22, 2018 (S.C.C. Docket 38163) ("***Union Building***") [ABOA, Vol. 3, Tab 36]; and *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134(1)(a).

[58] *BIA*, s. 4(5).

arm's length" is to the same effect. In *Juhasz (Trustee of) v. Cordeiro*,[59] Wilton-Siegel J. held that, in the context of s. 96 of the *BIA*:

> …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. It addresses situations in which the economic self-interest of the transferor is, or is likely to be, displaced by other non-economic considerations that result in the consideration for the transfer failing to reflect the fair market value of the transferred property.
>
> …I consider that the absence of any economic interest of a transferor at the point of termination of a business relationship, together with evidence of accommodation of the wishes of the transferee, can support a finding that there was a non-arm's length relationship.[60]
>
> [Emphasis added.]

46. The Secured Guarantee imposed Mr. Saskin's and Edge's $2.3 million liability on KRI, a non-arm's length party, for no material consideration, within one year of insolvency. This transferred significant value to Mr. Saskin (who obtained forbearance on his debt), Edge (which saw the disputed Lien lifted), and Speedy (which received security for its unsecured or inadequately secured debts owed). Put simply, Mr. Saskin was not entitled to use KRI as his personal piggybank to guarantee his own debts and those of other corporations he controlled to the detriment of the stakeholders of KRI. The Motion Judge thus erred in not addressing the relationship between KRI, Mr. Saskin, and Edge.

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59 *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781, 24 C.B.R. (6th) 69 ("***Juhasz***") [ABOA, Vol. 2, Tab 18].

60 *Ibid*, at paras. 41-42 [ABOA, Vol. 2, Tab 18]. See also *National Telecommunications v. Stalt*, 2018 ONSC 1101, at para. 41 [ABOA, Vol. 3, Tab 21] where Pattillo J. expanded upon *Juhasz* and stated that "s. 4(4) of the *BIA* requires a determination […] of whether the transaction involved generally accepted commercial incentives such as bargaining and negotiation in an adversarial format and the maximizing of a party's economic self-interest. In the absence of any such indicia, the inference that arises is that the parties were not dealing at arm's length."

(ii) Even if the transfer was at arm's length, it is still voidable under s. 96(1)(a)

47. In the alternative, assuming that the Secured Guarantee was somehow an arm's length transaction, it is also voidable as a transfer at undervalue under s. 96(1)(a) of the *BIA* because KRI was insolvent at the time of the transaction, and it was made with the intent to defraud, defeat, or delay KRI's creditors.

(a) KRI was insolvent on the Guarantee Date

48. The Motion Judge erred in law by failing to properly analyze whether KRI was insolvent on the Guarantee Date.

49. Section 2 of the *BIA* prescribes a three-prong test to determine whether a debtor is insolvent. The first prong is a forward-looking cash flow test. The second prong is a backward-looking cash flow test. The third prong is a balance sheet test. It is well-established that the test for insolvency under s. 2 is disjunctive. Proof of any of the three prongs is sufficient for a finding of insolvency.[61] Since the first prong is forward-looking, it does not require any actual default by a debtor to be satisfied. Instead, it requires only that the debtor be "for any reason unable to meet [its] obligations as they generally become due".[62]

50. On the Guarantee Date, KRI was a nominee for Bay LP.[63] The uncontroverted evidence before the Motion Judge demonstrated that Bay LP was insolvent on a forward-looking cash flow basis on the Guarantee Date without any *post facto*

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[61] *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.), 2004 CarswellOnt 1211, at para. 28, leave to appeal to C.A. refused 2004 CarswellOnt 2936 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 [ABOA, Vol. 3, Tab 33].

[62] *BIA*, s. 2, *sub nom.* "insolvent person".

[63] Monitor's Report, s. 4.0 at para. 2 [ABCO, Vol. 1, Tab 9, p. 170].

adjustment:[64]

(a) 94% of Bay LP's entities' accounts payable were aged more than 90 days;[65]

(b) the Bay LP entities had no access to additional liquidity;[66]

(c) the Bay LP entities owed over $80 million in mortgages or loans with no means of repayment;[67] and

(d) there were numerous other indicators of financial distress.[68]

51. The first prong of the insolvency test was therefore satisfied. The Motion Judge made no finding to the contrary.

52. To the extent that the Motion Judge considered the insolvency of Bay LP, he did so only in the context of assessing whether KRI had an intent to defraud, defeat or delay its creditors, and made no clear findings on the central question of insolvency. He simply noted that the Monitor had not challenged the solvency of Bay LP on a balance sheet basis, and that with respect to the cash flow test, the Monitor's analysis "required much more *post facto* adjustment".[69] This is neither correct nor relevant. It is incorrect because the adjustments referenced by the Motion Judge relate only to the balance sheet test for insolvency performed by the Monitor,[70] not the cash flow test used by the Monitor. It is irrelevant because the calculations were unchallenged. Neither Speedy nor the Motion

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64 Monitor's Report, s. 4.3 and s. 5.0, at para. 1(i) [ABCO, Vol. 1, Tab 9, pp. 172 and 175].
65 Monitor's Report, s. 4.4 at para. 2 [ABCO, Vol. 1 Tab 9, p. 172] and Appendix "L" [ABCO, Vol. 2, Tab 40, pp. 334-37].
66 Monitor's Report, s. 4.4 at para. 3 [ABCO, Vol. 1, Tab 9, p. 172].
67 Monitor's Report, ss. 4.5 and 4.7 [ABCO, Vol. 1, Tab 9, pp. 173-74].
68 Monitor's Report, ss. 4.6 and 4.8 [ABCO, Vol. 1, Tab 9, pp. 173-74] and Appendices "O" and "P" [ABCO, Vol. 2, Tabs 31 and 43, pp. 271-74 and 363-66].
69 Motion Reasons, at para. 25 [ABCO, Vol. 1, Tab 5, p. 65].
70 Monitor's Report, Appendix "N" [ABCO, Vol. 2, Tab 33, pp. 278-81].

Judge offered any reason why the Monitor's cash flow analysis was incorrect.

53. In disregarding materially relevant, uncontested evidence, the Motion Judge committed a palpable and overriding error.[71]

(b) The Motion Judge erred in assessing KRI's fraudulent intent

54. Paragraph 96(1)(a) of the *BIA* requires proof of fraudulent intent where the parties to the transfer at undervalue dealt at arm's length. If this Court holds that the relevant parties acted at arm's length, then the Monitor submits that KRI nonetheless had an intention to defraud, defeat, or delay its creditors such that the Secured Guarantee is voidable in any event.

55. Courts have recognized that an intent to defraud, defeat, or delay creditors can be proved with objective evidence known as "badges of fraud", which establish a rebuttable presumption of fraudulent intent.[72] The Motion Judge committed palpable and overriding errors by disregarding numerous badges of fraud in the instant case.

56. Courts have articulated various recognized badges of fraud to be considered in ascertaining a debtor's intent, including the following: (i) the transfer was made in the face of threatened legal proceedings; (ii) the consideration received by the debtor was grossly inadequate; (iii) a close relationship existed between the parties to the conveyance; (iv) the transaction was kept secret; (v) the insolvency of the debtor at the time of the

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[71] *H.L.*, *supra* note 51 at paras. 55-56 [ABOA, Vol. 1, Tab 14]; *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 3 S.C.R. 331, at para. 53 [ABOA, Vol. 2, Tab 19]; and *Saramia Crescent General Partner Inc. v. Delco Wire and Cable Limited*, 2018 ONCA 519, at paras. 56 and 61 ("***Saramia***") [ABOA, Vol. 3, Tab 32].

[72] *National Telecommunications Inc. (Re)*, 2017 ONSC 1475, at para. 53 [ABOA, Vol. 3, Tab 20]; *Purcaru v. Seliverstova*, 2016 ONCA 610, 39 C.B.R. (6th) 15, at paras. 5-6 [ABOA, Vol. 3, Tab 24]; and *Conte Estate v. Alessandro*, [2002] O.J. No. 5080 (S.C.), at paras. 20-24 *per* Rouleau J. (as he then was), affirmed [2004] O.J. No. 3275 (C.A.) ("***Conte***") [ABOA, Vol. 1, Tab 9].

impugned transaction; and (vi) the impugned encumbrance was granted, without consideration, by one insolvent affiliate for the sole purpose of assisting a second insolvent affiliate.[73]

57. All of these badges of fraud were present in the instant case: (i) the Secured Guarantee was executed under Speedy's threat to commence personal bankruptcy proceedings against Mr. Saskin; (ii) the Secured Guarantee was given to address Speedy's claim for the Lien, which was registered long after the 45 days provided for under the *CLA*; (iii) KRI received only $2 in consideration for taking on a more than $2 million Secured Guarantee; (iv) Mr. Saskin and Mr. Passero had a long friendship, and Mr. Saskin controlled Edge and KRI; (v) the Secured Guarantee was not part of the disclosure material in the Israeli bond issuance;[74] (vi) as discussed above, KRI was cash flow insolvent on the Guarantee Date; and (vii) the Secured Guarantee benefitted Mr. Saskin and Edge (and their creditors, including Speedy) to the prejudice of KRI and its creditors.

58. Notably, none of the foregoing facts were controverted.

59. The Motion Judge, however, held that "[t]he only apparent badge of fraud is that the transaction was made in the face of threatened legal proceedings".[75] In the face of the uncontested evidence supporting several different badges of fraud in this case, the

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[73] *Indcondo Building Corp. v Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160, at para. 52, affirmed 2015 ONCA 752, 31 C.B.R. (6th) 110 [ABOA, Vol. 2, Tab 17]; and *XDG Ltd. v 1099606 Ontario Ltd.* (2002), 41 C.B.R. (4th) 294 (Ont. S.C.), 2002 CarswellOnt 4535, at paras. 65-69, affirmed (2004), 1 C.B.R. (5th) 159 (Div. Ct.), 2004 CarswellOnt 1581 [ABOA, Vol. 3, Tab 37]; *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 12 B.L.R. (2d) 274 (Ont. S.C.), 1994 CarswellOnt 230, at paras. 61-72 [ABOA, Vol. 1, Tab 13]; and *Nuove Ceramiche Richetti S.p.A. v. Mastrogiovanni*, 1988 CarswellOnt 184 (S.C.), 76 C.B.R. (N.S.) 310, at paras. 1 and 24-32 [ABOA, Vol. 3, Tab 22].

[74] Functionary Report, at paras. 18-31 [ABCO, Vol. 1, Tab 10, pp. 182-84] and Appendices "K", "L", "M", "N", "O", and "P" [ABCO, Vol. 2, Tabs 38 and 44-48, pp. 294-314 and 367-423].

[75] Motion Reasons, at para. 24 [ABCO, Vol. 1, Tab 5, p. 65].

Monitor submits that the Motion Judge committed a palpable and overriding error by failing to consider the record as a whole and coming to a conclusion unsupported by the evidence.[76]

(iii) The Secured Guarantee is voidable as a fraudulent conveyance

60. Sections 2 and 3 of the *FCA* state that:

> **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.
>
> **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.

61. As the text of the statute shows, there are important differences between a voidable transfer at undervalue under s. 96 of the *BIA,* and a voidable fraudulent conveyance under s. 2 of the *FCA*. First, the test for a fraudulent conveyance is the same regardless of whether the debtor acts at arm's length with the party receiving the conveyance. Second, a fraudulent conveyance is not temporally limited. And third, the test for a fraudulent conveyance does not depend on whether the debtor was insolvent or near insolvent on the date of the transaction. Critically, the Supreme Court held in *Royal Bank of Canada v. North American Life Assurance Co.*[77] that provincial fraud statutes,

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[76] *H.L.*, *supra* note 51 at paras. 55-56 [ABOA, Vol. 1, Tab 14]; and *Saramia*, *supra* note 71 at para. 61 [ABOA, Vol. 3, Tab 32].

[77] *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 [ABOA, Vol. 3, Tab 27].

such as the *FCA*, are meant to aid creditors in setting aside fraudulent transactions and therefore should be given a fair, large, and liberal interpretation.[78]

62. The sole criterion for finding a rebuttable presumption of a fraudulent conveyance under s. 2 of the *FCA* is whether the debtor had an intent to defraud, defeat, hinder, or delay its creditors. In this regard, it has long been held that a fraudulent intent will be presumed where a debtor creates or worsens an insolvent financial position by conveying property to others. As the Lord Chancellor of the Chancery Court of Appeal stated in the leading case of *Freeman v. Pope*,[79] "in all matters persons must be just before they are generous, and … debts must be paid before gifts can be made."[80] The Supreme Court of Canada, in *Sun Life Assurance Co. of Canada v. Elliott*,[81] adopted the *ratio* in *Freeman* that:

> …it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they <u>must infer the intent of the settlor to have been to defeat or delay his creditors</u>, and that the case is within the statute.[82]

63. In *Sun Life*, the Supreme Court further held that "[i]f there ever was a case where a man's generosity was at the expense of his justice it is the present case, and equity

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78 *Ibid*, at para. 59 <u>[ABOA, Vol. 3, Tab 27]</u>.

79 *Freeman v. Pope* (1870), 5 Ch. App. 538 (Eng. Ch. App.), [1861-83] All E.R. Rep. Ext. 1774 ("***Freeman***") <u>[ABOA, Vol. 1, Tab 11]</u>.

80 *Ibid*, at p. 540 <u>[ABOA, Vol. 1, Tab 11]</u>.

81 *Sun Life Assurance Co. of Canada v. Elliott* (1900), 31 S.C.R. 91 ("***Sun Life***") <u>[ABOA, Vol. 3, Tab 34]</u>.

82 *Ibid*, at p. 95 <u>[ABOA, Vol. 3, Tab 34]</u> citing to *Freeman*, *supra* note 79 at p. 541 <u>[ABOA, Vol. 1, Tab 11]</u>.

demands that so much of the subject matter of his generosity as will be sufficient to discharge his debts should be restored to his estate".[83] *Freeman* has similarly been followed in decisions from the Ontario Court of Appeal[84] and the Superior Court of Justice.[85]

64. In the instant case, KRI's generosity to Edge and Mr. Saskin was at the expense of justice to KRI's creditors. KRI executed the Secured Guarantee when it was already insolvent and unable to pay its obligations as they came due. As a consequence, beyond the badges of fraud discussed above, it must be presumed that KRI had an intention to defeat, hinder, delay, or defraud its creditors under s. 2 of the *FCA* pursuant to *Freeman* and *Sun Life*. The exception in s. 3 of the *FCA* is not applicable because, among other things, KRI did not receive "good consideration" for the Secured Guarantee, and Speedy was well aware of Mr. Saskin and Edge's financial straits.[86]

65. As such, whether by operation of ss. 96(1)(a) or (b) of the *BIA*, or s. 2 of the *FCA*, the Monitor submits that the Secured Guarantee was a transfer at undervalue or a fraudulent conveyance that should be declared void.

B. THE MOTION JUDGE ERRED IN APPLYING THE RULE IN *BROWNE V. DUNN*

66. The rule in *Browne v. Dunn*[87] is an evidentiary rule that requires parties to "give

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83 *Sun Life*, *supra* note 81 at p. 95 [ABOA, Vol. 3, Tab 34].

84 *Anderson v. Bradley* (1921), 64 D.L.R. 707 (Ont. C.A.), at p. 713 [ABOA, Vol. 1, Tab 3].

85 *Bank of Montreal v. Peninsula Brothers Ltd.*, 2009 CarswellOnt 2906 (S.C.), at para. 85 [ABOA, Vol. 1, Tab 4]; *Conte*, *supra* note 72 at para. 24 [ABOA, Vol. 1, Tab 9], quoting *Petrone v. Jones* (1995), 33 C.B.R. (3d) 17 (Ont. Gen. Div.), 1995 CarswellOnt 312, at paras. 18-21 [ABOA, Vol. 3, Tab 23]; and *Research Capital Corp. v. Brounsuzian*, 2000 CarswellOnt 3676 (S.C.), at para. 82 [ABOA, Vol. 3, Tab 25].

86 *Truestar Investments Ltd. v. Baer*, 2018 ONSC 3158, 60 C.B.R. (6th) 70, at paras. 68-69 [ABOA, Vol. 3, Tab 35].

87 *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) [ABOA, Vol. 1, Tab 6].

notice to those witnesses whom the cross-examiner intends to later impeach."[88] The rationale for the rule is that it would be unfair to allow a witness's testimony to pass without challenge, only to later impeach the witness at a time when he or she can no longer explain the inconsistency.[89]

67. Importantly, the rule in *Browne v. Dunn* does not require that every piece of evidence the cross-examiner intends to rely upon be put to the witness.[90] Instead, the cross-examiner is only required to "confront the witness with matters of substance on which the party seeks to impeach the witness's credibility and on which the witness has not had the opportunity of giving an explanation because there has been no suggestion whatever that the witness's story is not accepted."[91] In this regard, the rule in *Browne v Dunn* is not applicable when the witness knows of the confrontation, the confrontation is general in nature, and the witness's view on the matter is apparent.[92]

68. Here, the Motion Judge held that it was a breach of the rule in *Browne v. Dunn* to not confront Speedy's witness about the Lien documents, but then contradict Mr. Passero about the Lien documents. However, Speedy knew that the timing of the Lien, and therefore the validity of the Lien, was a key issue in the case.[93] In other words, the Monitor's position was apparent to Speedy, and Speedy contested the invalidity of the Lien (albeit without any evidence to justify its position).

69. Moreover, the contradiction at issue did not arise from conflicting testimony from

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88 *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 64 [ABOA, Vol. 3, Tab 29].

89 *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81, at para. 81 [ABOA, Vol. 3, Tab 30].

90 *Ibid*, at para. 81 [ABOA, Vol. 3, Tab 30].

91 *Ibid* [ABOA, Vol. 3, Tab 30].

92 *Ibid*, at para. 82 [ABOA, Vol. 3, Tab 30]; and *R. v. Vorobiov*, 2018 ONCA 448, at para. 43 [ABOA, Vol. 3, Tab 31].

93 Monitor's Report, s. 3.1 at para. 7 and s. 5 at para. 1(iv) [ABCO, Vol. 1, Tab 5, pp. 167 and 175].

Speedy's witness and the Monitor as to the validity of the Lien. The contradiction arose from the plain wording of the *CLA* itself. Subsection 31(3) of the *CLA* required the Lien to be registered by Speedy within 45 days of the last day of supply of service and materials for the project. Speedy itself certified under oath that the last day of supply of service and materials for the project was October 22, 2014. However, the Lien was not registered until September 30, 2015 – almost a year later. The Monitor did not seek to contradict Speedy's evidence, for the very simple reason that Speedy offered no evidence or explanation whatsoever for why its claimed Lien was not out of time. The Monitor simply relied on information in Speedy's own certification documents, for which Speedy offered no additional explanation. Speedy adduced no documentary evidence to support any suggestions that the Lien was timely. Instead, Speedy's witness testified in a conclusory manner that the Lien was timely.[94]

70. But for his error in applying the rule in *Browne v. Dunn*, the Motion Judge should properly have concluded that the Lien was not registered on a timely basis and was accordingly invalid. If the Lien was invalid, then the Secured Guarantee did not provide any value to Edge (because there was no Lien that needed to be discharged and the underlying unsecured debt was not released). The Monitor's principal position, as argued above, is that it does not matter whether Edge received any consideration. KRI was the entity that granted the Secured Guarantee, it was not at arm's length with Mr. Saskin, and it did not receive consideration. However, even if one focusses, as the Motion Judge did, on the relationship between Speedy and Edge, the Lien was invalid and therefore there was no consideration to Edge for the Secured Guarantee. This further supports the

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[94] First Passero Affidavit, at paras. 16-18 [ABCO, Vol. 1, Tab 11, pp. 191-92]; Second Passero Affidavit, at para. 3 [ABCO, Vol. 1, Tab 12, pp. 196-97].

Monitor's submission, above, that there was no consideration for the Secured Guarantee and it is void as a transfer at undervalue.

71. Finally, the application of *Browne v. Dunn* was not raised by any party, either in their motion materials or at the hearing. Accordingly, counsel never had an opportunity to address any concern in relation thereto. As Nordheimer J.A. recently held in *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*,[95] concerns for procedural fairness emanating from principles of natural justice are invoked "where a judge decides a proceeding on a basis that was not 'anchored in the pleadings, evidence, positions or submissions of any of the parties'…"[96] Such an error warrants appellate intervention.[97]

C. THE MOTION JUDGE ERRED IN AWARDING COSTS AGAINST THE MONITOR

72. The Motion Judge held that it was "reasonable and appropriate" for the Monitor to have brought the underlying motion.[98] Indeed, the Monitor was required to bring the underlying motion if it rejected Speedy's claim, pursuant to the Claims Procedure Order.[99] Yet, despite these facts, the Motion Judge awarded $25,000 in costs against the Monitor – costs that will ultimately prejudice the creditors to this proceeding through no fault of their own.

73. The Monitor submits that the Motion Judge's costs order was erroneous and contrary to public policy concerns that animate the *CCAA* insolvency process.

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95 *Union Building*, *supra* note 57 [ABOA, Vol. 3, Tab 36].
96 *Ibid*, at para. 13 [ABOA, Vol. 3, Tab 36].
97 *Ibid*, at paras. 13 and 15 [ABOA, Vol. 3, Tab 36].
98 Motion Reasons, at paras. 32-33 [ABCO, Vol. 1, Tab 5, pp. 66-67].
99 Claims Procedure Order, at para. 36(b) [ABCO, Vol. 1, Tab 8, p. 124].

74. As a general matter, cost orders are not often made against unsuccessful parties in the context of *CCAA* proceedings. In *Re Indalex Ltd.*,[100] the Ontario Court of Appeal held that courts should "rarely make cost orders" in *CCAA* proceedings such that "each party bears its own costs".[101]

75. The practice of not awarding costs in *CCAA* proceedings is supported by three important policy considerations:

(a) The insolvent companies at the heart of *CCAA* disputes have, by definition, limited funds for distribution. This means that parties to a *CCAA* dispute should consider the "likelihood that [they] will not recover costs" when considering whether to pursue a claim.[102]

(b) The participants in a *CCAA* proceeding are generally "involuntary parties in the process, compelled to participate by reason of the *CCAA* debtor seeking the protection of the act".[103] The rarity of cost awards against unsuccessful parties in the *CCAA* context reflects the unfairness of awarding costs against a party which was forced into the proceedings through no fault of its own.

(c) Costs awarded against a monitor on behalf of the debtor do not affect the

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100 *Indalex Ltd., Re*, 2011 ONCA 578, at para. 4 ("***Indalex***"), reversed on other grounds 2013 SCC 6, [2013] 1 S.C.R. 271 ("***Indalex SCC***") [ABOA, Vol. 2, Tab 16]; and *Calpine Canada Energy Ltd., Re*, 2008 ABQB 537, at para. 1 ("***Calpine***") [ABOA, Vol. 1, Tab 7].

101 *Indalex*, *supra* note 100 at para. 4 [ABOA, Vol. 2, Tab 16]. Although this decision was ultimately reversed on other grounds, the Supreme Court ordered that all parties were to bear their own costs of the proceedings: *Indalex SCC*, *supra* note 100 at paras. 259-62 [ABOA, Vol. 2, Tab 16].

102 *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487 (Gen. Div.), at para. 34 [ABOA, Vol. 1, Tab 8].

103 *Calpine*, *supra* note 100 at para. 1 [ABOA, Vol. 1, Tab 7].

monitor in any substantial manner, but instead harm the interests of the creditors by reducing the pool of funds available for disbursement.

76. In addition to these policy considerations, it is trite that in awarding costs, courts should consider the overarching principle that costs should be fair and reasonable in light of all the circumstances.[104]

77. Notwithstanding this Court's decision in *Indalex*, the Ontario Superior Court of Justice has taken inconsistent positions on whether costs should be awarded in *CCAA* proceedings, and if so, when it is appropriate to make such an award.

78. For example, in *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*,[105] Newbould J. declined to follow this Court's costs decision in *Indalex* in the context of a successful motion for advice and directions brought by the court-appointed monitor. In *Return on Innovation*, Newbould J. stated that the decision in *Indalex* should not be read as laying down a "general principle that costs should rarely be awarded in *CCAA* proceedings", but instead should be read as the Court "passing on what it was told" by counsel about the practice of awarding costs in *CCAA* proceedings.[106]

79. Respectfully, Newbould J. inappropriately distinguished this Court's costs decision in *Indalex* in a manner contrary to *stare decisis*. In *R. v. Henry*,[107] Binnie J. held for a unanimous Supreme Court that artificial distinctions between *obiter* and *ratios* are

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[104] *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), 2004 CarswellOnt 2521, at para. 24 [ABOA, Vol. 1, Tab 5].

[105] *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465, 88 C.B.R. (5th) 320 [ABOA, Vol. 3, Tab 26].

[106] *Ibid*, at para. 5 [ABOA, Vol. 3, Tab 26].

[107] *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 53-57 *per* Binnie J. [ABOA, Vol. 3, Tab 28].

irrelevant to assessing what is binding on lower courts. The Supreme Court made clear that what is binding is what the court actually decides. In *Indalex*, this Court decided that cost orders in *CCAA* proceedings should be rarely made. It is irrelevant whether this Court made its decision with reference to counsel's submissions. Indeed, such is inherent in an adversarial system. It was an error of law for Newbould J. to depart from *Indalex,* and *Return on Innovation* should not be followed.

80. In any event, there are other principles that militate against awarding costs against a monitor. First, in a court ordered claims process, a monitor is obliged to bring a motion to court when a creditor disputes the monitor's rejection of its claim. Awarding costs against a monitor for a procedure that it is compelled to follow by law is unjust. Second, awarding costs against a monitor dissuades the monitor from disputing questionable creditor claims to the detriment of other creditors. And third, this Court recently described a monitor as "the eyes and ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, [and] must treat all parties reasonable and fairly".[108] As such, it would be antithetical to the role of a monitor for the Court to award costs against it when it brings "reasonable and appropriate" issues to court.

81. In this case, the $25,000 costs award against the Monitor (and in turn, the Applicants' creditors) was neither fair nor reasonable. It was also inconsistent with the policy considerations outlined above. Not only was the Monitor acting as an impartial and independent officer of the Court in disputing Speedy's claim, but the Motion Judge expressly found that the Monitor's actions were "reasonable and appropriate". This costs

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[108] *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 109 [ABOA, Vol. 1, Tab 10].

order has the ultimate effect of reducing the funds available to the other creditors through no fault of their own, as the result of a motion that the Monitor was duty-bound to bring. Indeed, the creditors are effectively paying twice: once in respect of the fees and costs of the Monitor and its counsel; and once again in respect of the motion decision itself.

PART V - ORDER REQUESTED

82. For the reasons above, the Monitor requests that this Court allow the appeal, affirm the Monitor's decision to disallow Speedy's claim, and award the Monitor costs of the proceedings below as well as the costs of this appeal on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of October, 2018.

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Court of Appeal File No. C65891

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

Applicant

CERTIFICATE

I estimate that 90 minutes will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 22nd day of October, 2018.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *2105582 Ontario Ltd. (Performance Plus Golf Academy) v. 375445 Ontario Ltd. (Hydeaway Golf Club)*, 2017 ONCA 980, 138 O.R. (3d) 561.

2. *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (C.A.), [2003] O.J. No. 71.

3. *Anderson v. Bradley* (1921), 64 D.L.R. 707 (Ont. C.A.).

4. *Bank of Montreal v. Peninsula Brothers Ltd.*, 2009 CarswellOnt 2906 (S.C.).

5. *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.), 2004 CarswellOnt 2521.

6. *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.).

7. *Calpine Canada Energy Ltd., Re*, 2008 ABQB 537.

8. *Canadian Asbestos Services Ltd. v. Bank of Montreal*, [1993] O.J. No. 1487 (Gen. Div.).

9. *Conte Estate v. Alessandro*, [2002] O.J. No. 5080 (S.C.), affirmed [2004] O.J. No. 3275 (C.A.).

10. *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, 139 O.R. (3d) 1.

11. *Freeman v. Pope* (1870), 5 Ch. App. 538 (Eng. Ch. App.), [1861-83] All E.R. Rep. Ext. 1774.

12. *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426.

13. *Hall-Chem Inc. v. Vulcan Packaging Inc.* (1994), 12 B.L.R. (2d) 271 (Ont. S.C.), 1994 CarswellOnt 230.

14. *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

15. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

16. *Indalex Ltd., Re*, 2011 ONCA 578, reversed 2013 SCC 6, [2013] 1 S.C.R. 271.

17. *Indocondo Building Corp. v. Sloan*, 2014 ONSC 4018, 121 O.R. (3d) 160, affirmed 2015 ONCA 752, 31 C.B.R. (6th) 110.

18. *Juhasz (Trustee of) v. Cordeiro*, 2015 ONSC 1781, 24 C.B.R. (6th) 69.

19. *Kerr v. Danier Leather Inc.*, 2007 SCC 44, [2007] 2 S.C.R. 331.

20. *National Telecommunications Inc. (Re)*, 2017 ONSC 1475.

21. *National Telecommunications v. Stalt*, 2018 ONSC 1101.

22. *Nuove Ceramiche Richetti S.p.A. v. Mastrogiovanni*, 1988 CarswellOnt 184 (S.C.), 76 C.B.R. (N.S.) 310.

23. *Petrone v. Jones* (1995), 33 C.B.R. (3d) 17 (Ont. Gen. Div.).

24. *Purcaru v. Seliverstova*, 2016 ONCA 610, 39 C.B.R. (6th) 15.

25. *Research Capital Corp. v. Brounsuzian*, 2000 CarswellOnt 3676 (S.C.).

26. *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 7465, 88 C.B.R. (5th) 320.

27. *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325.

28. *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609.

29. *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193.

30. *R. v. Quansah*, 2015 ONCA 237, 125 O.R. (3d) 81.

31. *R. v. Vorobiov*, 2018 ONCA 448.

32. *Saramia Crescent General Partner Inc. v. Delco Wire and Cable Limited*, 2018 ONCA 519.

33. *Stelco Inc. (Re)* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.), 2004 CarswellOnt 1211, leave to appeal to C.A. refused 2004 CarswellOnt 2936 (C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336.

34. *Sun Life Assurance Co. of Canada v. Elliott* (1900), 31 S.C.R. 91.

35. *Truestar Investments Ltd. v. Baer*, 2018 ONSC 3158, 60 C.B.R. (6th) 70.

36. *Union Building Corporation of Canada v. Markham Woodmills Development Inc.*, 2018 ONCA 401, 89 R.P.R. (5th) 212, leave to appeal to S.C.C. pending as of October 22, 2018 (S.C.C. Docket 38163).

37. *XDG Ltd. v. 1099606 Ontario Ltd.* (2002), 41 C.B.R. (4th) (Ont. S.C.), 2002 CarswellOnt 4535, affirmed (2004), 1 C.B.R. (5th) 159 (Div. Ct.), 2004 CarswellOnt 1581.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

2. In this Act,

[…]

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

[…]

4(1) In this section,

entity means a person other than an individual;

related group means a group of persons each member of which is related to every other member of the group;

unrelated group means a group of persons that is not a related group.

Definition of related persons

(2) For the purposes of this Act, persons are related to each other and are related persons if they are

(a) individuals connected by blood relationship, marriage, common-law partnership or adoption;

(b) an entity and

(i) a person who controls the entity, if it is controlled by one person,

(ii) (ii) a person who is a member of a related group that controls the entity, or

(iii) (iii) any person connected in the manner set out in paragraph (a) to a person described in subparagraph (i) or (ii); or

(c) two entities

(i) both controlled by the same person or group of persons,

(ii) each of which is controlled by one person and the person who controls one of the entities is related to the person who controls the other entity,

(iii) one of which is controlled by one person and that person is related to any member of a related group that controls the other entity,

(iv) one of which is controlled by one person and that person is related to each member of an unrelated group that controls the other entity,

(v) one of which is controlled by a related group a member of which is related to each member of an unrelated group that controls the other entity, or

(vi) one of which is controlled by an unrelated group each member of which is related to at least one member of an unrelated group that controls the other entity.

Relationships

(3) For the purposes of this section,

(a) if two entities are related to the same entity within the meaning of subsection (2), they are deemed to be related to each other;

(b) if a related group is in a position to control an entity, it is deemed to be a related group that controls the entity whether or not it is part of a larger group by whom the entity is in fact controlled;

(c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests;

(d) if a person has ownership interests in two or more entities, the person is, as holder of any ownership interest in one of the entities, deemed to be related to himself or herself as holder of any ownership interest in each of the other entities;

(e) persons are connected by blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;

(f) persons are connected by marriage if one is married to the other or to a person who is connected by blood relationship or adoption to the other;

(f.1) persons are connected by common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship or adoption to the other; and

(g) persons are connected by adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is connected by blood relationship, otherwise than as a brother or sister, to the other.

Question of fact

(4) It is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length.

Presumptions

(5) Persons who are related to each other are deemed not to deal with each other at arm's length while so related. For the purpose of paragraph 95(1)(b) or 96(1)(b), the persons are, in the absence of evidence to the contrary, deemed not to deal with each other at arm's length.

[…]

Preferences

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

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

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

Preference presumed

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or

suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

[…]

Definitions

(3) In this section,

[…]

creditor includes a surety or guarantor for the debt due to the creditor;

[…]

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.

Establishing values

(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.

Meaning of person who is privy

(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.

[…]

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

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.

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.

Where s. 2 applies

4. Section 2 applies to every conveyance executed with the intent set forth in that section despite the fact that it was executed upon a valuable consideration and with the intention, as between the parties to it, of actually transferring to and for the benefit of the transferee the interest expressed to be thereby transferred, unless it is protected under section 3 by reason of good faith and want of notice or knowledge on the part of the purchaser.

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

Expiry of liens

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 60-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,

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

(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 60-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,

(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.

Separate liens when ongoing supply

(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.

Declaration of last supply

(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.

[…]

***Courts of Justice Act*, R.S.O. 1990, c.C.43**

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just.

[…]

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

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. C65891

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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