

CITATION: Canadian Imperial Bank of Commerce v. Urbancorp, 2020 ONSC 5160
COURT FILE NO.: CV-16-11409-00CL
DATE: 2020-09-14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CANADIAN IMPERIAL BANK OF COMMERCE, Applicant

AND:

URBANCORP (LESLIEVILLE) DEVELOPMENTS INC., URBANCORP (RIVERDALE) DEVELOPMENTS INC., & URBANCORP (THE BEACH) DEVELOPMENTS INC., Respondents

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Chris Burr, Pamela Huff and Caitlin McIntyre* for Alvarez & Marsal Canada Inc.,
Construction Receiver

Brendan Bissell, for Terra Firma Capital Corporation

Adam Slavens, for Tarion Warranty Corporation

HEARD BY ZOOM HEARING: August 19, 2020

DECISION RELEASE: September 14, 2020

ENDORSEMENT

[1] Two motions were heard by Zoom on August 19, 2020.

[2] The first motion was brought by Alvarez & Marsal Canada Inc., (“A&M”) as Receiver and Manager (in such capacity, the “Receiver”), and as Construction Lien Trustee (in such capacity, the “Construction Lien Trustee), (the Receiver together with the Construction Lien Trustee, the “Construction Receiver”) all of the assets, undertakings and property (the “Property”) of Urbancorp (Leslieville) Developments Inc., Urbancorp (Riverdale) Developments Inc., and Urbancorp (The Beach) Developments Inc. (collectively the “Debtors”), for an order:

- (a) approving the payment of the Final Distribution;
- (b) directing Tarion to pay any residual Tarion cash collateral to Terra Firma Capital Corp. (“Terra Firma”);
- (c) directing the City of Toronto to pay any residual Water Cash Collateral to Terra Firma;

- (d) approving the activities of the Construction Receiver described in the Tenth Report of the Construction Receiver dated August 6, 2020 (the “Tenth Report”);
- (e) approving the Interim Receipts and Disbursement Statement; and
- (f) approving the fees and disbursements of:
 - i. the Construction Receiver for the period February 1, 2019 through to and including July 31, 2020;
 - ii. The Construction Receiver’s independent counsel, Blake Cassels and Graydon LLP (“Blakes”) for the period February 1, 2019 through to and including July 31, 2020;
 - iii. The Construction Receiver’s counsel Gowlings WLG (Canada) LLP (“Gowlings”) for the period February 1, 2019 through to and including March 31, 2019; and
 - iv. The Construction Receiver’s counsel Miller Thomson LLP (“Thomson”) for the period February 1, 2019 through to and including December 31, 2019;
- (g) approving the fee estimates for the Construction Receiver and Blakes for the period of August 1, 2020 through until the filing of the Completion Certificate; and
- (h) releasing the Construction Receiver and its counsel and discharging the Construction Receiver effective upon the filing of the Completion Certificate.

[3] The second motion was brought by Terra Firma for an order that the Construction Receiver be directed to distribute to Terra Firma the Park Levy Reserve as defined in the Tenth Report.

[4] Subject to issues relating to the Park Levy Reserve, and the consequent impact on the Final Distribution, the requested relief was not challenged.

Background

[5] On May 31, 2016, A&M was appointed as Construction Receiver of the Property of the Debtors (the “Appointment Order”).

[6] Prior to the appointment of the Construction Receiver, the Debtors carried on business as land developers, with a focus on the construction and sale of residential projects in Toronto.

[7] At the commencement of these proceedings, three of the Debtors' residential projects – the Riverdale Project, Leslieville Project and the Beach Project – were at various stages of completion.

[8] With the exception of a few remaining activities to complete, the Receivership Proceedings are ready to be formally brought to an end.

[9] In respect of the Leslieville Project, the Tenth Report references that the Leslieville units are subject to warranties under the *Ontario New Home Warranties Plan Act* ("ONHWPA"). ONHWPA warranties will be in effect until August 2025. Pursuant to a previous court order, the Construction Receiver paid \$1,100,000 to Tarion as cash collateral to fund Tarion's remediation and other costs (the "Tarion Cash Collateral"). Any residual Tarion Cash Collateral is payable to the Construction Receiver but the earliest the cash collateral refund could occur is in late 2025. The full balance of the Tarion Cash Collateral, if any were to be refunded, would be payable to Terra Firma pursuant to its security. The Construction Receiver seeks directions to pay the balance of the Tarion Cash Collateral to Terra Firma on the cash collateral refund date.

[10] There are no further assets to be realized upon under the Beach Project.

[11] The potential remaining asset to be realized upon with respect to the Riverdale Project is cash collateral being held by the City of Toronto (the "City") in support of future city water discharge fees over a 20-year period (the "Water Cash Collateral"). The City has advised the Construction Receiver that it anticipates that the Water Cash Collateral will be fully utilized. However, in the event that any Water Cash Collateral remains following the expiry of the 20-year period, the Construction Receiver seeks directions for the City to remit any remaining funds to Terra Firma.

[12] The Park Levy was the subject of a motion heard in 2019 (the "Certain Curzon Purchasers' Motion"), which was decided in favour of the Certain Curzon Purchasers (*CIBC v. Urbancorp (Leslieville) Developments Inc.*, 2019 ONSC 4971) (the "Certain Curzon Purchasers' Decision"). This decision was appealed by Terra Firma (but not the Construction Receiver). This decision was upheld by the Court of Appeal for Ontario on July 9, 2020 (*Canadian Imperial Bank of Commerce v. Urbancorp (Leslieville) Developments Inc.*, 2020 ONCA 449).

[13] Terra Firma advised the Construction Receiver that it reserves all rights to further appeal, but because the judgment is not stayed, the Receiver made a distribution to Shibley Righton LLP (the "Certain Curzon Purchaser's Counsel") on July 29, 2020.

[14] The Construction Receiver currently holds a reserve of approximately \$202,500 (the "Park Levy Reserve") with respect to the Park Levy paid by purchasers that are not Certain Curzon Purchaser's (the "Unrepresented Purchasers") on the closing of the sale of the Leslieville units.

[15] The Tenth Report also provides details with respect to the requested fees to the various professionals. As the ranking secured creditor, Terra Firma has the direct economic interest in

respect of the requested fees. Neither Terra Firma nor any other party objected to the fee requests.

[16] The Construction Receiver is of the view that it is appropriate at this time to seek its discharge subject to filing the Completion Certificate confirming that remaining activities have been completed.

[17] Subject to issues relating to the Park Levy Reserve, and any consequent impact on the Final Distribution, I am satisfied that the relief requested by the Construction Receiver is appropriate in the circumstances and is granted.

Park Levy Reserve

[18] The entitlement of the Unrepresented Purchasers to a refund of their Park Levy payment was not decided as part of the Certain Curzon Purchasers' Motion. The Court of Appeal did not address the issue of the Unrepresented Purchasers on appeal.

[19] The factual background relating to this issue is set out in the Certain Curzon Purchasers' Decision. It is equally applicable to this decision and is therefore not repeated.

[20] As detailed in the Supplement to the Tenth Report, the Construction Receiver sent communications to the Unrepresented Purchasers. Unrepresented Purchasers were asked if they intended to make a claim for refund of the Park Levy paid by them in connection with the closing of their Urbancorp Leslieville units and if so, they should notify the Construction Receiver by no later than August 17, 2020 (the "Notice Deadline").

[21] At least one Unrepresented Purchaser communicated with the Construction Receiver's counsel and asked that the Construction Receiver consider the communication to be an official request for a refund of their portion of the Park Levy Reserve. This Unrepresented Purchaser paid a park levy in the amount of \$13,459.48 plus HST of \$1749.73 for a total of \$15,209.21.

[22] The Construction Receiver notes that the distinction between the Certain Curzon Purchasers who received a refund of their Park Levy and the Unrepresented Purchaser who has now requested a refund is that the former sought to proactively enforce their claims, while the latter raised her claim only after the issue was adjudicated. The balance of the Unrepresented Purchasers who paid a Park Levy have taken no action whatsoever, despite the passage of 16 months to do so.

[23] Terra Firma takes the position that the Construction Receiver collected adjustments on the sale of condominium units at the Leslieville development that had been undertaken by Urbancorp (Leslieville) Developments Inc. and was completed by the Construction Receiver.

[24] Terra Firma submits that, as the highest-ranking secured creditor, it is entitled to receive the distribution of the remaining Property in the Leslieville estate, as the Construction Receiver has concluded that there is no possibility that the subsequent ranking stakeholders will receive any distributions under the most optimistic scenario.

[25] Accordingly, Terra Firma submits that the Park Levy Reserve should be distributed to Terra Firma.

Analysis

[26] In the Certain Curzon Purchasers' motion, the Certain Curzon Purchasers contended that there was no contractual obligation and/or juridical reason upon which the Receiver could charge the purchasers for an adjustment for the notional value of a "Park Levy", and that they were entitled to the return of the adjustment made for that purpose.

[27] I determined that the Agreements of Purchase and Sale did not require the Certain Curzon Purchasers to pay for the notional value of the Parkland transfer to the City.

[28] The relevant portions of this decision reads as follows:

[71] In the result, I conclude that the position of the Certain Curzon Purchasers prevails. An order shall issue declaring that the Receiver has no right, title, or interest to the Parks Levy that it received from the Certain Curzon Purchasers. The Receiver is to repay to each of the Certain Curzon Purchasers the amount of the Park Levy (inclusive of HST) that each of them paid at Closing, together with interest calculated in accordance with the *Courts of Justice Act*, RSO 1990, c. C. 43.

[72] With respect to the subsidiary issue raised by Terra Firma, namely whether the Parks Levy adjustment paid by the Purchasers other than the Certain Curzon Purchaser's was valid, I make no comment other than to note that all purchasers were served with the Receiver's Motion Record and no other purchasers appeared on the return of the motion.

[29] The Agreements of Purchase and Sale involving the Certain Curzon Purchasers was in the identical form as those involving the Unrepresented Parties.

[30] In my view, the legal position of the Unrepresented Parties is no different than the Certain Curzon Purchasers. Simply put, the Park Levy should not have been collected from either Certain Curzon Purchasers or the Unrepresented Parties. At no time did the funds paid by the Unrepresented Parties become Property of Urbancorp Leslieville. As such, the funds could at no time form part of the collateral subject to the security interest charged by Urbancorp Leslieville in favour of Terra Firma. In my view, this is the fatal flaw in the argument put forward by Terra Firma.

[31] It follows that Terra Firma has no interest in the Park Levy Reserve and there is no legal basis upon which Terra Firma can make a claim to the Park Levy Reserve.

[32] The fact that the Unrepresented Purchasers may not have taken timely steps, or indeed any steps, in these proceedings to recover their *pro rata* share of the Park Levy Reserve is not relevant to the analysis. The passing of the Notice Deadline does not disentitle the

Unrepresented Purchasers from recovering their property. The Unrepresented Purchasers have, at all times, maintained a proprietary right to the funds in question. Given that the funds are being held by the Receiver, the funds are traceable.

[33] The Construction Receiver presumably has records that will enable it to identify the Unrepresented Purchasers. The Construction Receiver is directed to send a communication to the Unrepresented Purchasers advising them that they are entitled to the return of their share of the Park Levy mistakenly paid to the Construction Receiver. Upon confirming to the satisfaction of the Construction Receiver that they are the party entitled to receive the funds, the Construction Receiver is authorized to return the funds to the identified purchaser. Both law and equity require that the mistakenly paid Park Levy should be returned to the rightful party. Neither Terra Firma nor any other creditor of Urbancorp Leslieville can make a claim to the Park Levy Reserve. The Construction Receiver is to return the Park Levy Reserve to the Unrepresented Purchasers prior to the filing of the Completion Certificate.

[34] Accordingly, the distribution to Terra Firma shall not include the Park Levy Reserve.

Disposition

[35] Subject to the foregoing direction in respect of the Park Levy Reserve, the Construction Receiver's motion is granted.

[36] The Terra Firma motion is dismissed.



Chief Justice Geoffrey B. Morawetz

Date: September 14, 2020