

Clerk's stamp:

APPEAL NUMBER 1301-0244AC
COURT FILE NUMBER 1201-05843
COURT COURT OF APPEAL OF ALBERTA

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT,
RSC 1985, c C-36, AS AMENDED**

**AND IN THE MATTER OF UBG BUILDERS INC., ALBERTA BUILDERS
CAPITAL INC., ALPINE HOMES (2006) INC., AMERICAN BUILDERS
CAPITAL (US) INC., EDGEWATER AT GRIESBACH INC., ELITE HOMES
(2006) LTD., EVOLUTION BY GREENBORO INC., GREENBORO
COMMUNITIES (2006) INC., GREENBORO ESTATE HOMES (2006) LTD.,
GREENBORO HOMES (2006) LTD., GREENBORO LUXURY HOMES INC.,
HIGH POINTE INC., MOUNTAINEERS VILLAGE (2006) INC.,
MOUNTAINEERS VILLAGE II INC., ORIGINS AT CRANSTON INC., SOUTH
TERWILLEGAR VILLAGE INC., THE BRIDGES MANAGEMENT INC., THE
LEDGES INC., TIMBERLINE LODGES (2006) INC., TODAY'S
COMMUNITIES (2006) INC., TODAY'S HOMES (2006) INC., TUSCANY
DEVELOPMENTS (2006) INC., UBG ALBERTA BUILDERS (2006) INC., UBG
ALPINE HOMES (2006) LTD., UBG BRIDGES INC., UBG BUILDERS (USA)
INC., UBG COMMERCIAL INC., UBG LAND INC., UBG LOT DEPOSIT
CORP., UBG 4500 CALGARY INC., UBG 75 CANMORE INC., UBG 808
CALGARY INC., UNITY INVESTMENTS (2012) INC., VALMONT AT ASPEN
STONE INC., VALOUR PARK AT CURRIE INC., VILLAGE AT THE
HAMPTONS INC., VILLAGE ON THE PARK INC., WILDERNESS HOMES BY
RIVERDALE INC., WILDERNESS RIDGE AT STEWART CREEK INC.
(COLLECTIVELY, THE "APPLICANTS")**

DOCUMENT **MEMORANDUM OF ARGUMENT OF THE RESPONDENT UBG**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

DENTONS CANADA LLP
Bankers Court
15th Floor, 850 - 2nd Street S.W.
Calgary, Alberta T2P 0R8

Attention: Travis Lysak
Phone (403) 268-7063
Fax (403) 268-3100
Solicitors for the Respondent

ROSE LLP
810, 333 - 5 Ave SW
Calgary, Alberta T2P 3B6

Attention: Jane Sidnell
Ph. (403) 776-0515
Fax: (403) 776-0501
Solicitors for the Appellant

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I. RELIEF SOUGHT

1. Unity Builders Group ("UBG") seeks the dismissal of the stay application brought by Streetside Development Corporation ("Streetside") with respect to the Sale Approval and Vesting Order granted by Madame Justice Kent on August 30, 2013 (the "Sale Order") affecting lands comprising UBG's "Valmont Project" (the "Lands") sold by one member of the UBG Group, Valmont at Aspen Stone Limited Partnership ("Valmont"), to 771280 Alberta Ltd. ("771").

II. FACTS

2. The facts are as set out in the Affidavit of Robert Friesen sworn in these proceedings on August 22, 2013 (the "Friesen Affidavit") and the following reports made by Ernst & Young Inc., the court appointed Monitor (the "Monitor") in these proceedings: Report in Respect of the Valmont Project dated August 22, 2013 (the "First Report"), the Confidential Supplemental Report in Respect of the Valmont Project dated August 28, 2013 (the "Second Confidential Report"), and the Second Supplemental Report in Respect of the Valmont Project dated September 3, 2013 (the "Third Report").

III. GROUNDS FOR RELIEF

Serious Issue to be Tried

3. Based on the evidence before Madam Justice Kent, Streetside cannot demonstrate a serious issue to be tried. The sale of the Lands occurred in accordance with the Sales Procedure appended to the Valmont Stalking Horse Order granted by Madame Justice Horner on July 20, 2013 (the "Stalking Horse Order"):

- (a) paragraph 5 of the Stalking Horse Procedure appended to the Stalking Horse Order provides that all bids must be received by August 9, 2012. 771 submitted its revised offer to the Monitor on August 9, 2012;

Second Confidential Report at para 10

- (b) paragraph 1 of the Stalking Horse Procedure provides that the Lands be sold "on terms and conditions that are (a) no less favourable, (b) no more burdensome or conditional, and (c) except for purchase

consideration greater than the Purchase Consideration, substantially similar to the Offer.” The offer submitted by 771 to the Monitor on August 9, 2013 was substantially similar to the “Offer”.

Appendix “A” to the Second Confidential Report

- (c) paragraph 6 of the Stalking Horse Procedure provides that “(i)f the Monitor receives one or more Competing Bids then: the most favourable Competing Bid shall be selected as the successfully bidder.” The 771 was the highest offer received for the Lands and the Monitor selected it as the most favourable Competing Bid.

First Report at paras. 17 and 18

4. Streetside fails to meet this requirement of a stay application on any articulation of the test. It cannot meet this requirement in the case at bar for the additional reason that the Court should take a closer look at the merits of the appeal where the effect of the stay is to allow the appeal:

“In a case such as this, where granting a stay of execution of an order made in the trial court pending determination of an application for leave to appeal or an appeal may have the effect of securing the relief the applicant seeks on appeal, it is necessary to look more closely at the merits than would otherwise be the case.”

Citizens Bank of Canada v. Anthony 2000, B.C.C.A 168, 2000 Carswell B.C. 512 (B.C.C.A.) at para. 5 [TAB 1].

5. The issue before Justice Kent in this case was whether the Stalking Horse Procedure sale was properly conducted. This is a question of fact and the standard of review of those findings is palpable and overriding error. The significance of the standard of review being palpable and overriding error on an application for a stay pending appeal is that the within appeal “...falls into the category of appeals that traditionally are very hard to bring...”

Vysek v. Nova Gas International Ltd., [2001] A.J. No. 1538, 2001 ABCA 300 at para. 11 [TAB 2]

Irreparable Harm

6. In *Semelhago v. Paramadevan*, the Supreme Court of Canada found that damages for breach of contract for the purchase and sale of real estate will not be an inadequate remedy in all cases:

“...While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case. Residential, business and industrial properties are all mass produced much in the same way as other consumer products. If a deal falls through for one property, another is frequently, though not always, readily available.

It is no longer appropriate, therefore, to maintain a distinction in the approach to specific performance as between realty and personalty. It cannot be assumed that damages for breach of contract for the purchase and sale of real estate will be an inadequate remedy in all cases...

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available...”

Semelhago v. Paramadevan [1996] 2 SCR 415 at paras 20, 21, and 22 [TAB 3]

7. Streetside will not suffer irreparable harm if the stay is not granted. The Lands represent a business opportunity to Streetside, who are a property developer. There are, and will be in the future, many other real estate development opportunities for Streetside to pursue: the Lands are not unique. Streetside presumably seeks to acquire the Lands to earn a profit – money – so it is submitted that an award of damages granted to Streetside would be sufficient in the case at bar.

Balance of Convenience

8. The balance of convenience may favour the Respondent where the effect of granting the stay is to allow the Appellant's appeal or where to grant the stay is to render the appeal nugatory from the respect of the Respondent. In *Triple Five Corp. v. United Western Communications Ltd.*, Justice Kerans stated:

Where it can be shown that the relief sought would be nugatory if a stay was not allowed and there is no harm to the Respondent, I have always granted a stay unless I could say there was no reasonable possibility of success on the appeal. On the other hand, it is often the case that the granting of a stay pending the hearing of an appeal, with all the attendant delays, would render nugatory the rights that the Respondent invoked to get the Order under appeal.

Triple Five Corp. v. United Western Communications Ltd., 19 Alta. L.R. (3d) 153 (C.A.), 1994 CarswellAlta 100 [TAB 4]

9. In the case at bar, the closing date for the sale of the Lands to 771 is September 6, 2013. In the event that a stay of the Kent Order is granted, UBG will not be able to close the sale to 771. UBG, and all its stakeholders (who will be paid out in full from the proceeds from a sale to 771), will lose the sale to 771 and will be faced with increased carrying costs and uncertainty while the appeal process runs its course. For these reasons, and the fact that the effect of granting the stay is to grant Streetside's appeal to the extent that it seeks to block the sale to 771, the balance of convenience favours the dismissal of Streetside's application for a stay of the Sale Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF SEPTEMBER, 2013.

DENTONS CANADA LLP

Per: _____

Travis P. Lysak

Solicitors for the Respondent UBG