

CITATION: *City of Toronto v. Upwood Park et al.*, 2022 ONSC 1229
COURT FILE NO.: CV-21-00658491-00CL
DATE: 2022-03-03

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: CITY OF TORONTO, Applicant

AND:

UPWOOD PARK/SALVADOR DEL MUNDO CO-OPERATIVE HOMES
INC., Respondent

BEFORE: Penny J.

COUNSEL: Mark Siboni for the Applicant

Raymond G. Colautti and Anita Landry for Saffia Abdul-Haqq and Masbal
Abokar

Miranda Spence for the Receiver

HEARD: February 22, 2022

ENDORSEMENT

Overview

- [1] This is a motion for an order for advance payment of legal fees of \$46,000 for the purposes of opposing a pending motion by the City of Toronto to extend the appointment of an interim receiver over the business and affairs of the respondent Uptown Park, a cooperative housing enterprise. The applicants, Saffia Abdul-Haqq and Masbal Abokar, are members of the respondent housing co-op who were elected to the co-op’s board of directors at a meeting the validity of which has been challenged by the City.
- [2] Notwithstanding the able and forceful arguments of Mr. Collautti, I am not satisfied the order sought in the present circumstances comes within the “highly exceptional” class of cases in which such orders may be made. The motion is therefore dismissed. There is no order as to costs of the motion.

Background

Regulatory Framework

- [3] Upwood Co-op/Salvador Del Mundo Co-operative Homes Inc. owns two neighbouring residential buildings, with a total of 318 units, located in the City of Toronto. This housing

project is funded and administered in accordance with the *Housing Services Act, 2011*, S.O. 2011, c. 6, Sched. 1.

- [4] Social housing programs are government funded initiatives designed to provide affordable rental accommodation to low-income households. Co-operative non-profit corporations that own residential properties throughout the province act as “housing providers”. These housing providers make their rental units available to individuals and families who are part of low-income households. The government subsidizes the operating costs of the co-op and, in some cases, the rent paid by members.
- [5] The HSA provides a comprehensive administrative mechanism to help municipalities manage their social housing responsibilities. Municipalities that are designated as “service managers” under the HSA and its regulations are able to supervise these housing providers. A housing provider is a person who operates a housing project under the HSA. The City is a service manager and Upwood is a housing provider.
- [6] The HSA includes specific enforcement provisions that grant municipal service managers powers to ensure that these housing projects are properly managed and that the tenants and members in these housing projects have access to the protections and services that they need. In the event that a social housing provider fails to operate a housing project properly, having regard to the normal practices of similar housing providers, a service manager can take certain steps under the HSA to remedy the situation.
- [7] Subsection 85(6) of the HSA provides that the service manager may appoint a receiver over a housing project. The receiver then manages the non-profit housing corporation and acts as a surrogate housing provider. Under ss. 95(2) and 95(3) of the HSA the maximum period that an interim receiver may be appointed over a housing provider is 180 days. That period may be extended on application to the Ontario Superior Court of Justice.

Events Giving Rise to the July 11, 2020 Members’ Meeting

- [8] On June 3, 2020, a member of Upwood sent to the Co-op Board a requisition to convene a meeting so that members of the Co-op could decide whether to terminate Upwood’s existing contract with its property manager. On June 30, 2020, that member prepared and distributed what she described as Notice of a General Members Meeting. The notice suggested that a general members meeting was scheduled to take place on Saturday, July 11, 2020, to secure the approval of the Co-op’s membership, not only to the termination of the property manager’s contract but to the removal of four members of the Board and to hold elections to elect a new Board.
- [9] The City, in conjunction with the Co-operative Housing Federation of Toronto (this is a non-profit organization that provides assistance and advice to co-operative housing providers in Toronto) identified a number of reasons why the scheduled July 11 meeting could not proceed:
 - (1) a requisition to convene a general meeting must be delivered to the Co-op’s office. The Board then has 30 days within which it must call and hold a members’ meeting. If, and only if, the Board refuses to call the meeting, the member who submitted

the requisition can call the meeting themselves. The requisition that was sent to the Board on June 3 was not properly delivered and the meeting was called in contravention of the prescribed protocol;

- (2) the member's requisition identified only one issue for the membership's consideration – the removal of the property manager. Upwood's membership, however, does not have the authority to terminate a property manager's contract;
- (3) the requisition made no reference to the critical issues (that is, concerning the governance structure at Upwood and the removal and replacement of members of the Board) that the subsequent purported notice of the meeting indicated would be considered at the meeting;
- (4) lastly, the purported notice that was circulated for the July 11 meeting called for an in-person meeting. At the time, the City of Toronto was subject to restrictions imposed by provincial order prohibiting in-person gatherings of more than 10 people due to the COVID-19 pandemic. In order to establish a quorum, at least 50 people must be present at a "General Meeting". Even if the proposed in-person meeting was not improperly called, it would be unsafe and illegal.

[10] Mr. Mendes, a housing consultant for the City, along with Ms. Mary Ann Hannant, a co-op advisor at CHFT, advised the Co-op and the Board why the proposed July 11 meeting was improperly convened and could not proceed. As a result, a majority of the Board directed the property manager to alert all the Co-op's members that the notice of meeting did not comply with the provisions of the legislation or the Co-op's organizational by-law and that the July 11 meeting referenced in the notice was cancelled. This communication was circulated to the members of the Co-op on July 3, 2020.

[11] On July 9, 2020, Mr. Mendes and Ms. Hannant attended a meeting of the Co-op's Board convened in accordance with emergency orders put in place by the province of Ontario. Ms. Hannant chaired this meeting and, once again, specifically addressed the deficient notice of meeting to members and the reasons why it was improper.

[12] Notwithstanding the advice and direction of the City, the CFHT and the duly elected Board of the Co-op, on July 11, a group of Upwood's members convened an in-person meeting. Those members present at the July 11 meeting, which included Ms. Abdul-Haqq and Ms. Abokar, took the following actions:

- (i) they purported to remove four members of the existing Board;
- (ii) they purported to hold elections to fill these four vacancies to form a new Board; and
- (iii) they purported to terminate the existing property management company and took immediate action to effect this removal by changing the locks to the Co-op's office.

[13] The steps taken at the purported members' meeting resulted in significant unrest among Upwood's membership. The City and CHFT received numerous emails from members expressing concerns about the improperly convened meeting, the governance issues that

resulted, the lack of property management, and the risk that members' personal information could be improperly accessed.

- [14] The City's concerns about the situation at Upwood were exacerbated by a history of underlying problems with financial controls with which the Co-op had been struggling. This included arrears for housing charges of over \$84,000 and that the Co-op's audited financial statements for the most recent fiscal year, showed (a) an operating loss in the amount of almost \$100,000, and (b) a depletion of Upwood's capital reserve fund as a result of \$400,000 in expenditures in 2018 and an additional expenditure of over \$500,000 in 2019.

Initial Appointment of Receiver

- [15] As a result of these concerns, on July 16, 2020, the City appointed BDO as receiver and manager of Upwood on an interim basis under s. 85(6) of the HSA.

- [16] BDO took a number of initial steps in an effort to preserve and protect the assets of the Co-op, including:

(a) engaging a new property management company to serve the membership, maintain the two buildings, and assist with the day-to-day administration of the Co-op;

(b) conducting a comprehensive review of Upwood's finances;

(c) conducting a comprehensive review of the households in the Co-op to ensure that they met the governing rent-geared-to-income eligibility criteria; and

(d) implementing financial controls in order to rehabilitate Upwood's financial position.

- [17] The initial investigation undertaken by BDO also revealed serious shortcomings in Upwood's financial management of the Co-op:

- Upwood had suffered significant operating losses based on a review of the Co-op's audited financial statements over the previous two years. In 2019 the Co-op experienced operating losses of \$99,313, and in 2020 it suffered operating losses of \$121,145.

- Upwood's capital reserve fund was depleted by expensing \$417,658 in 2018, and \$516,339 in 2019. The review undertaken by BDO showed that 60% of these funds had been used to address cosmetic unit upgrades rather than the requisite building repairs that these funds were to be used for. Building condition assessments prepared in 2015 and 2020 called for the prioritization of repairs to the exterior walls, elevators, and roofing systems which had not been done.

- As of July 31, 2020, member rental arrears were significant. 115 households were delinquent in a total amount of over \$100,000.

- Vacancies had not been filled in a timely manner.

- There were a number of unpaid supplier invoices, dating back to 2019. BDO was required to pay over \$10,000 in unpaid invoices from 2019 and over \$50,000 in invoices that had accrued in 2020 prior to its appointment.
- There were ongoing mechanical issues with recently upgraded boilers that were the result of improper maintenance.
- There were over 100 vehicles that BDO found in the underground parking garage whose owners could not be identified.

Motion to Extend Appointment

- [18] On March 12, 2021, the City brought an application before the Court to extend BDO's appointment. Ms. Abdul-Haqq and Ms. Abokar appeared unrepresented at the March 12, 2021 hearing and requested an adjournment in order to engage legal counsel to assist them in opposing the extension of the Receiver's appointment.
- [19] Justice McEwen adjourned the application to extend the Receiver's appointment but made an interim order extending the appointment of BDO as the Receiver of Upwood pending the return of the application.
- [20] Since March 2021, BDO has, among other things:
- Convened the 2021 Annual General Meeting, at which the 2022 budget was presented and approved.
 - Prioritized reducing housing charge arrears and made available additional payment methods to all members in order to facilitate timely monthly payment of rent.
 - Continued to monitor the monthly financial performance and the financial position of the Co-op.
 - Reviewed the building condition assessment reports that Upwood had commissioned in 2015 and 2020 and identified over \$7 million in required maintenance projects that had to be undertaken to keep the Upwood building in a proper state of repair over the next several years. The projects that would need to be undertaken include ones that involve the repair of structural elements of the building, replacement of the roof, modernization of the elevators, and repair of the exterior walls. These projects would require attention by 2023. To that end, BDO applied for, and secured funding to defray the cost of some of these repairs.
 - Settled outstanding balances owed to the City for subsidy overpayments the Co-op received in 2019 and 2020.
 - Conducted a full review of the rent-geared-to-income units.
 - Maintained the building's security system and added additional security guards to patrol the Co-op.

- Replaced the boiler, AC units, and elevator ceilings.
- Overseen general building maintenance.

[21] On March 24, 2021, the moving parties advised the Receiver they were impecunious and ask that the Receiver use Upwood’s operating monies to fund their efforts to oppose the extension of the Receiver’s appointment. The Receiver advised these members that Upwood did not have funds available for their initiative and referred them to the City. On November 23, 2021, after engaging legal counsel, Ms. Abdul-Haqq and Ms. Abokar filed their motion seeking \$50,000 (later reduced to \$46,000) from Co-op funds to challenge the extension of the Receiver’s appointment.

The Test for Advance Interim Costs

[22] Although framed by the applicants’ factum slightly differently, the applicants’ motion rests on s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and the particular test for advance awards of interim costs laid out by the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371.

[23] Section 131 of the CJA provides that the costs of, and incidental to, a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

[24] In *Okanagan*, the Supreme Court held that the power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. In the Court’s detailed review of the law, however, it emerged that such orders are, “highly unusual” and something that should be permitted “only in very rare cases”.

[25] There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. First, the party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. Second, the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And third, there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate: *Okanagan*, at para. 36. One, but not the only, category of special circumstances involves cases of significant public importance or interest.

The Applicants’ Argument

[26] The applicants are residents and members of a subsidized housing project. They claim to be impecunious. The City does not challenge that claim.

[27] The applicants want to argue essentially two issues as the basis for denying any further extension of the receivership of the Co-op. First, they argue that s. 85(1) of the *Co-operative Corporations Act*, R.S.O. 1990, c. C.35, requires that every co-operative *shall*

have a board of directors however designated. The applicants wish to argue that the receivership denies the Board the ability to oversee the affairs of the Co-op, contrary to the CCA. Put another way, the applicants argue that there is a conflict between s. 85 of the HSA (permitting the appointment of a receiver to manage the Co-op) and s. 85 of the CCA, requiring there to be a board of the Co-op. They say this conflict raises a significant legal issue which warrants consideration by the court.

- [28] The second issue the applicants wish to raise is the allegation that the actions of the City in seeking to extend the Receiver's mandate unduly interfere with the members' *Charter* protected rights to freedom of expression under s. 2(b), freedom of assembly under s. 2(c) and freedom of association under s. 2(d) of the *Charter*. This issue too, they say, raises important legal questions of public importance.
- [29] Another issue raised on the motion was the Co-op's ability to pay the advance interim costs. Contrary to the claims of the City and the Receiver, the applicants took the position that the Co-op is in possession of sufficient funds to satisfy the applicants' funding request. According to the applicants, the Co-op had a total accumulated surplus of \$255,839 for 2020. Further, the Co-op puts aside over \$190,000 per year into the capital reserve account. Additionally, they point to financial disclosure statements provided by the Receiver which show over \$800,000 in a trust account, held by the Receiver on behalf of the Co-op.

Analysis

Prima Facie Case on the Merits

The Alleged Conflict

- [30] I am unable to agree with the applicants that there is any inconsistency or conflict between s. 85(1) of the CCA and s. 85(6) of the HSA. First, s. 85(1) of the CCA speaks of there *being* a board. It does not speak at all about the exercise of the board's powers, either in general or in relation to various regulatory and other powers exercised by the City. Private corporations are also required to *have* a board of directors, but every day the court appoints monitors, receivers and trustees, whose powers take precedence over the powers of the board.
- [31] Cooperative social housing providers are subject to both Acts. These Acts must be read as a harmonious whole. Cooperatives are entitled to self-governance but when circumstances arise in which the interests of the membership as a whole are being compromised, the City has available to it a panoply of powers and remedies which it may use to intervene in the governance of the cooperative. There is nothing inconsistent between the conferral of governance powers on the board of directors and the City's ability to suspend the board's authority, by various means such as the appointment of an interim receiver, in prescribed circumstances.
- [32] Even if this were not so, s. 180 of the HSA specifically provides that "this Act" prevails over any other Act or regulation in the event of a conflict.

The Charter

- [33] Nothing about the appointment of the interim Receiver infringed in any way the members' freedom of expression, association or assembly. Indeed, under the auspices of BDO, there has been an annual general meeting and the members, including the applicants and those members who support them, have had ample opportunity to advance their concerns and positions. The right to be heard does not mean the right to have legal representation paid for by the opposing party. The applicants have cited no authority for the proposition that the provision of funds to hire a lawyer is an essential component of the freedom of expression.

Other Factors

- [34] Apart from these two specific issues, it is also important to consider what the applicants have not alleged or argued. The applicants have not identified, for example, any specific steps taken by the Receiver, and specifically any financial expenditure, commitment or priority, that they say is improper or unjustified. They have likewise identified no harm or material prejudice arising from the existence or conduct of the interim Receiver. Put another way, on the record as it currently stands, everything the Receiver has done is, on its face, supported by the evidence, necessary and reflective of sound financial management.

Ability to Pay

- [35] As to the issue of the availability of funds to pay for the applicants' costs, the applicants have confused the fact that the Co-op has money in reserve with the conclusion that the Co-op can therefore afford to pay for their costs. The Receiver's investigation has shown that the Board has been seriously deficient in its oversight of the financial affairs of the Co-op. Many residents were not current with their rent obligations, the capital fund was insufficient and had been depleted by non-essential improvements, security was lax and the parking garage, for example, had become burdened with over a hundred vehicles with no known connection to any resident. I accept the Receiver's analysis of future requirements for necessary capital improvements. The funds that the Co-op has are, I find, already spoken for to address priorities which themselves have not been subject to any challenge.
- [36] This conclusion standing alone however, would not necessarily preclude the applicants' request. What the present financial situation shows, nevertheless, is that any contribution to the applicants' costs would have to be recovered either from increases to charges already being levied on the members or by reductions to spending on other crucial matters.
- [37] The issue of ability to pay in such circumstances, therefore, brings us back to the overall question of the exercise of the discretion of the court under the CJA and the applicable constraints arising from the jurisprudence. Do the circumstances warrant the court, in effect, interfering in the spending priorities established by those responsible for the financial management of the Co-op (in this case, by law, the City and the Receiver) or visiting upon the members likely increases in their payment obligations to the Co-op? The

ability of the Co-op to pay for the applicants' costs and the financial consequences of ordering it to do so are, it seems to me, relevant considerations in the overall assessment of the applicants' request and the exercise of the discretion of the court.

[38] In the context of an assessment of the merits, therefore, a party seeking to advance a weak argument is less likely to be able to justify visiting what amount to adverse financial consequences on the Co-op and its membership at large. I will return to this issue again in my analysis of the final factor – special circumstances.

Special Circumstances

[39] The applicants have not established special circumstances warranting the extraordinary order they seek. The applicants have not shown any *prima facie* substantive grounds for why the extension of the interim receivership should not be granted. Their arguments are either plainly unmeritorious or no more than vague appeals to general principle.

[40] Nor have the applicants satisfied me that the issues they wish to raise involve matters of significant public interest. This case is entirely fact driven. The governance vacuum, the lack of sound financial oversight and what the Receiver has done about the lack of financial and management controls are all fact specific issues unique to this particular Co-op at this particular time. I can see no basis for exercising the discretion of the court on the ground of significant public interest.

[41] As noted earlier, the applicants' request, although modest in the scheme of things, will have a negative impact on the financial condition of the Co-op. It cannot be forgotten, as well, that Ms. Abdul-Haqq was a member of the prior board of directors which seems to have allowed, or at least failed to identify and take steps to correct, many of the financial and management practices that have so occupied the Receiver since its appointment.

[42] Finally, the timing of the applicants' request has only added to the problem of justifying the need to fund their participation in opposing the extension of the Receiver's appointment. I say this because the applicants only raised the issue of retaining counsel to oppose the extension at the end of the statutory period when the extension was first sought on March 12, 2021. An adjournment was granted to permit this, but along with an interim extension preserving the Receiver's appointment.

[43] While the applicants raised their wish to receive advance interim costs to fund their opposition (and were turned down) before the end of March 2021, they took almost a year to take steps to seek this relief. The point is not so much to criticize the applicants for delay but that, in the meantime, the Receiver has carried on with its program of financial and management rehabilitation. The list of the Receiver's extensive activities and accomplishments since the first, interim extension is set out in para. 20 above.

[44] One of Mr. Colautti's points is that, even if the applicants' request to deny the Receiver any further extension was to be dismissed on the return of the motion, there would still be questions about the terms and conditions of the appointment, including a plan laying out the timing and the steps necessary for a return of management authority to a properly elected board of the Co-op. While Mr. Colautti's point is a good one, it is a very different

proposition than opposition to the extension of the Receiver's role at all. And, more importantly, given all that the Receiver has already accomplished, it seems to me that both the City and the Receiver can and will be addressing these questions and that it would be the expectation of the court in any further extension proceeding that they do so in any event. I will come back to this issue in my conclusion.

[45] For the forgoing reasons, I find that the applicants, in addition to failing to raise a *prima facie* case for termination of the Receiver's appointment, have also failed to establish the necessary special circumstances required for the court to order the extraordinary relief they are seeking.

Conclusion

[46] There are three requirements for the applicants to establish an entitlement to advance interim costs:

- (i) impecuniosity;
- (ii) a *prima facie* meritorious case; and
- (iii) special circumstances.

[47] For the reasons set out above, the applicants have failed to establish either the second or third branches of the test. The motion is therefore dismissed.

[48] As noted earlier, the interim Receiver has been in place since July 2020. Its investigations and work appear to have set Upwood on a path to better management controls and financial health. Even though I have denied the applicants' motion for advance interim costs, the City must still bring on its motion for an extension. It is my expectation that, on the return of that motion, a full, up to date report will be provided to the court from the City and the Receiver outlining all that has been done to date, what remains to be done and, importantly, laying out a timetable and path for the termination of the interim receivership and the return of management authority to a properly elected board of directors of the Co-op.

Costs

[49] I make no order as to costs.



Penny J.

Date: 2022-03-03