



NO. VLC-S-H-220132
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

INSTITUTIONAL MORTGAGE CAPITAL CANADA INC., IN ITS
CAPACITY AS GENERAL PARTNER OF IMC LIMITED PARTNERSHIP

PETITIONER

AND:

0876242 B.C. LTD.
GATEWAY DEVELOPMENT LIMITED PARTNERSHIP
SEEB CAPITAL LTD.
MARK VANRY

RESPONDENTS

APPLICATION RESPONSE

Application Response of: Institutional Mortgage Capital Canada Inc., as General Partner of
IMC Limited Partnership ("IMC")

THIS IS A RESPONSE TO: The Notice of Application of The Bowra Group Inc., in its capacity
as Receiver (the "Receiver") of 0876242 B.C. Ltd. and Gateway
Development Limited Partnership

Part 1: ORDERS CONSENTED TO

IMC consents to the granting of the orders set out in the following paragraphs of Part 1 of the
Notice of Application on the following terms: ALL

Part 2: ORDERS OPPOSED

IMC opposes the granting of the orders set out in paragraphs NIL of Part 1 of the Notice of
Application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

IMC takes no position on the granting of the orders set out in paragraphs NIL of Part 1 of the
Notice of Application.

Part 4: FACTUAL BASIS

The Project

1. The Respondent, 0876242 B.C. Ltd. (“087”) is the registered owner of the lands located at 3333 Bridgeway Street, Vancouver, British Columbia (the “Lands”) as nominee and bare trustee for Gateway Development Limited Partnership (the “LP” and together with 087, “Gateway”). IMC is the first secured lender with respect to a six-storey mixed use development project at the Lands (the “Project”).

2. IMC provided first mortgage construction financing to Gateway in February 2018 up to an original principal amount of \$26.2 million. The estimated completion of the Project was April 2020 with IMC’s loan due at that time.

Oral reasons of Mr. Justice Wilson (the “Reasons”) at para 3.

3. Completion was delayed for over two years due to cost overruns, construction delays and disputes between Gateway and the general contractor, Prism Construction Ltd. (“Prism”).

Receiver’s Second Report to Court, filed August 12, 2022 (the “Receiver’s Second Report”) at para 5.

4. In 2020, Gateway’s dispute with Prism resulted in claims of builders’ liens filed by Prism and by some subcontractors. The Project stalled and IMC provided additional funding for cost overruns. Further security documents, including a new second mortgage, were prepared and the mortgage loans were extended to May 2021.

Reasons at para 4.

5. From the period of May 2021 through March 31, 2022, IMC agreed to four extensions and forbearance agreements to provide Gateway further time to complete the Project and provided further additional funding on account of additional cost overruns. Gateway failed to achieve certain milestones set out in the aforementioned forbearance agreements.

Reasons at paras 6 – 11.

Trevor Herr Affidavit #1 at para 6.

6. Given the foregoing, IMC lost confidence in Gateway's ability to complete the Project due to the construction delays, multiple disputes with Prism, cost overruns and various builders' liens and CPLs filed against the Lands. Accordingly, IMC issued a Notice of Intention to Enforce Security on March 3, 2022.

Receiver's Second Report at para 8.

The Receivership Order and Order Nisi

7. On May 10, 2022, the Honourable Mr. Justice Wilson made an Order appointing The Bowra Group Inc. as the Receiver-Manager over the Project given the Project had stalled as a result of, among other things, a funding shortfall to complete the Project and ongoing disputes with Prism resulting in builders' liens, together with a CPL on title preventing sub-division of the Project Lands into individual strata lots.

Trevor Herr Affidavit #1 at para 7.

8. On June 23, 2022, the Honourable Mr. Justice Wilson granted an Order Nisi, setting a 30 day redemption period expiring July 23, 2022 (the "**Redemption Period**").

9. As at the date of the Receiver's Second Report, IMC is owed approximately \$36 million on its first and second mortgages with interest accruing in excess of \$260,000 per month, plus an additional \$1.2 million advanced to the Receiver by IMC under the Borrowing Charge set out in the Receivership Order. The Receiver is authorized to borrow up to \$1.6 million.

Receiver's Second Report at para 7 and 11.

Project Equity / Shortfall

Completing Pre-Sales

10. Completing the pre-sale contracts (the "**Pre-Sale Contracts**") currently in place with the purchasers (the "**Pre-Sale Purchasers**") requires additional vendor improvement work (the "**Vendor Improvements**") which will take up to 11 months to complete at an additional cost in excess of \$610,000. In addition, ongoing holding costs including interest on the IMC

loans and the Receiver's borrowings will be incurred at between \$275,000 and \$300,000 per month.

Receiver's Second Report at paras 28 and 39.

11. Cushman and Wakefield ULC, the real estate brokers retained by Gateway, estimate that the gross revenue of the remaining four unsold units (approx. 8000 sq ft. out of a total 107,00 sq ft.) on the Project's sixth floor (the "**Remaining Units**") to be between \$700 and \$800 per square foot. Tobi Reyes ("**Mr. Reyes**"), a developer and the principal of Gateway, indicates comparable units in a neighbouring development had sold for approximately \$750 / sq. ft. and expects the Remaining Units to sell for \$750 / sq ft. as well.

Trevor Herr Affidavit #1 at para 8.

Tobi Reyes Affidavit #1 at para 28.

12. In the event the Pre-Sale Contracts close and the Remaining Units sell for between \$700 and \$800 / sq ft., IMC will suffer a shortfall of between \$2.9 million and \$5.6 million.

Receiver's Second Report at para 36.

13. The Pre-Sale Contract for the second floor entered into between Gateway and NYX Capital Investment Corp. ("**NYX**") sets a purchase price of \$6.7 million, however, \$1.9 million of this purchase price is not being paid in cash, but rather 1,900 Class C Units in a limited partnership to be formed for the purpose of owning the second floor along with floors three to five of the Project.

Trevor Herr Affidavit #1 at para 10.

14. Accordingly, the potential shortfall to IMC is increased by \$1.9 million at both ends of the Receiver's estimated range set out above as there is no evidence the \$1.9 million would be paid in cash rather than the Class C Units.

Pre-Sale Disclaimer and Approval of Stalking Horse Bid and Sales Process

15. In the event the Receiver is permitted to terminate the Pre-Sale Contracts and conduct a stalking horse sales process (the “**Stalking Horse Sales Process**”), there will be an estimated shortfall to IMC of \$571,000 and a potential surplus of approximately \$3.2 million.

Receiver’s Second Report at para 38.

16. The Stalking Horse Sales Process removes the requirement for the Vendor Improvements, which results in:

- (a) an earlier estimated closing date of November 30, 2022;
- (b) lower holding costs including interest costs which currently accrue at between \$275,000 to \$300,000 per month on IMC’s loans and the Receiver’s borrowings; and
- (c) savings of approximately \$610,000 in additional Project costs.

Receiver’s Second Report at para 39.

Part 5: LEGAL BASIS

17. Counsel for the Receiver accurately sets out the legal basis for the Stalking Horse Sales Process and for disclaiming the Pre-Sale Contracts.

18. NYX, who has entered into Pre-Sale Contracts for the purchase of floors 2 – 5 in the Project, is not opposed to the Receiver’s application. As a result, there is possible opposition from only the standard form purchasers (the “**Standard Form Purchasers**”) of the Project’s first floor and two units on the sixth floor.

19. Section 3.2 of the Standard Form Contracts, as defined in the Receiver’s Notice of Application, states that if the Completion Date has not occurred by the Outside Date, then either the Vendor or the Standard Form Purchaser may terminate the Agreement. The latest outside date in the Standard Form Contracts is April 28, 2022. Further, Section 7.7 of the Standard Form Contracts expressly states that “This Agreement creates contractual rights only, and not any interest in land.”

20. Accordingly, the Receiver or the Standard Form Purchasers are entitled to terminate the Standard Form Contracts without a Court Order.

Disclaiming the Pre-Sale Contracts

21. Counsel for the Receiver accurately sets out the relevant principles this Court should consider in deciding whether or not to disclaim the Pre-Sale Contracts, as set out in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 B.C.S.C. 527 (“*Forjay*”) and *Peoples Trust Company v. Censorio Group (Hastings and Carleton) Holdings Ltd.*, 2020 B.C.S.C. 1013 (“*Peoples*”).

The Receiver’s Duty to Maximize Recovery

22. As set out in *Forjay* and *Peoples*, the Receiver has a duty to maximize recovery of the assets under its administration and one tool of such realization is to affirm or disclaim contracts. A disclaimer of contracts must arise from a receiver’s proper exercise of discretion, including a consideration of its duties and also, all equitable interests involved.

Forjay at paras 35 – 43.

Peoples at para 25.

23. It is often the case that the Court relies heavily on and affords considerable deference to a receiver’s business judgment in respect of a course of action that requires the Court’s approval. The Court will look to determine that the receiver has canvassed all relevant factors and that it has not considered any irrelevant factors in its analysis.

Peoples at para 47.

Legal Priorities

24. IMC is the only priority secured creditor in this matter and Order Nisi has been granted. The Pre-Sale Purchasers do not have priority over IMC.

25. Similar to the facts in *Forjay* and *Peoples*, the Project has not been completed, permitted for occupancy or sub-divided and therefore the subject matter in the Pre-Sale Contracts

does not yet exist. Accordingly, specific performance to complete the Pre-Sale Contracts is not a remedy available to the Pre-Sale Purchasers.

Peoples at para 36-38.

Forjay at paras 74-78.

Realization / Preferences

26. In *Forjay*, the Honourable Madam Justice Fitzpatrick found that “[...] a failure to disclaim here would result in the purchasers receiving a preference in respect of value that would otherwise accrue to the mortgagees under their prior ranking security.”

Forjay at para 93.

27. There is no doubt that disclaiming the Pre-Sale Contracts enhances realization of the Project. Accordingly, a failure to disclaim would result in the Pre-Sale Purchasers receiving a preference in respect of value that would otherwise accrue to IMC under its prior ranking security.

Equities

28. As noted in *Forjay* (para. 105), the Pre-Sale Purchasers assumed inherent risk when entering into the Pre-Sale Contracts. However, the Pre-Sale Purchasers will see their deposits returned.

29. In the circumstances, the equities do not favour elevating the rights of the Pre-Sale Purchasers over IMC.

Extending the Redemption Period

30. Presumably, Mr. Reyes, on behalf of Gateway, seeks an extension of the Redemption Period set out in the Order Nisi.

The test to extend a redemption period is:

- (a) the property must have sufficient value by way of security for the amount outstanding; and

- (b) The respondent must show a reasonable prospect of payment to the petitioner of the amount outstanding under its mortgage during the extended redemption period.

Canada Permanent Mortgage Corp. v. Dan-Al Construction,
[1982] B.C.J. No. 2339 B.C.C.A at para 12.

31. The Receiver's analysis indicated IMC is facing a substantial shortfall unless the Stalking Horse Offer is approved.

32. Any redemption by Mr. Reyes, on behalf of Gateway, is predicated upon the Receiver completing the Pre-Sale Contracts and Mr. Reyes securing funds to refinance or sell the Remaining Units and pay IMC the estimated shortfall.

33. In the event the Stalking Horse Bid is not approved, there is no reasonable prospect for payment in full during any extension of the Redemption Period herein. Since 2018, Gateway's indebtedness to IMC has increased by approximately \$10 million, largely due to cost overrun funding and accrued interest. The Project was to complete in April 2020 and a further 11 months to August 2023 may be needed to complete the Project in order to close the Pre-Sale Contracts. The projected shortfall in this scenario may be up to \$5.6 million plus a further \$1.9 million if NYX does not pay cash in lieu of the Class C Units respecting its purchase of the second floor.

Part 6: MATERIAL TO BE RELIED ON

1. The Receiver's Second Report Filed August 12, 2022.
2. Affidavit #2 of Linda Alexander made May 4, 2022.
3. Affidavit #1 of Trevor Herr made June 8, 2022.
4. Affidavit #1 of Tobi Reyes made May 4, 2022.
5. Oral Reasons of Mr. Justice Wilson dated May 10, 2022.
6. Order Nisi granted June 23, 2022.
7. Receivership Order granted May 10, 2022.

The Application Respondent estimates that the application will take one day.

- The Application Respondent has filed in this proceeding a document that contains the Application Respondent's address for service.
- The Application Respondent has not filed in this proceeding a document that contains an address for service.

Dated at the City of Vancouver, in the Province of British Columbia, this 17 day of August, 2022.



Lawson Lundell LLP
Solicitors for the Application Respondent

This Application Response is filed by Bryan C. Gibbons of the law firm of Lawson Lundell LLP, whose place of business and address for delivery is 1600 – 925 West Georgia Street, Vancouver, British Columbia, V6C 3L2, e-mail address: bgibbons@lawsonlundell.com; telephone number: 604-685-3456.