IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Institutional Mortgage Capital Canada Inc. v. 0876242 BC Ltd.,* 2022 BCSC 1520

Date: 20220823
Docket: H220132
Registry: Vancouver

Between:

Institutional Mortgage Capital Canada Inc., in its capacity as General Partner of IMC Limited Partnership

Petitioner

And

0876242 BC Ltd., Gateway Development Limited Partnership, Seeb Capital Ltd. and Mark Vanry

Respondents

Before: The Honourable Justice Wilson

Oral Reasons for Ruling Re Application for Approval of a Stalking Horse Bid and Other Relief

In Chambers

Counsel for the Receiver Bowra Group Inc.:	C.D. Brousson
Counsel for the Petitioner:	B.C. Gibbons N. Mann
Counsel for 0876242 BC Ltd. and Gateway Development Limited Partnership:	R. Clark, QC
Place and Date of Hearing:	Vancouver, B.C. August 19, 2022
Place and Date of Oral Ruling:	Vancouver, B.C. August 23, 2022

[1] **THE COURT:** This application is brought in the receivership of a six storey commercial project in Vancouver. The receiver, Bowra Group, seeks the following orders:

a) approval of a stalking horse bid process with respect to the sale of the entire development in the form proposed by way of a schedule attached to the notice of application;

b) an order permitting the receiver to disclaim all of the pre-sale contracts and leases previously arranged by the developer 0876242 BC Ltd. and Gateway Development Limited Partnership (“Gateway”);

c) a vesting order of title to the stalking horse bidder subject to the outcome of the stalking horse bidding process; and

d) approval of the receiver's activities up to and including his second report.

Background

[2] I will not go into the background facts in great detail because they are well known to the parties and for the most part are not controversial.

[3] The petitioner (“IMC”) provided construction financing to Gateway in February 2018 in the principal amount of $26.2 million. The estimated completion for the project was April 2020, and the loan was due at that time.

[4] In 2020, Gateway had a dispute with its general contractor, Prism Construction Ltd., and claims of builder's lien were filed by Prism and some of the subcontractors. The project stalled. IMC provided additional funding and further security documents were prepared. The loans were extended to May 2021.

[5] In 2021 there were further problems. The respondents Seeb Capital and Mark Vanry filed claims and certificates of pending litigation.

[6] The relationship between IMC and Gateway was clarified by way of a letter dated May 28, 2021. At the time the debt was confirmed, defaults were confirmed,

and the respondents waived a redetermination period and there was an acknowledgment by Gateway that it would consent to the appointment of a receiver/manager.

[7] In the fall of 2021, Gateway had another dispute with Prism that led to further claims of builder's liens and further delays.

[8] In November 2021, another repayment deadline came and went, and the parties entered into a forbearance agreement in November 2021. Again, the debts were confirmed. It was acknowledged there were no defences, and Gateway consented to the appointment of a receiver with power of sale as before.

[9] By January 2022, a further supplemental forbearance agreement was entered into. There were similar consents and acknowledgments provided by Gateway, including acknowledgment they would consent to the appointment of a receiver.

[10] The supplemental forbearance agreement also set certain milestones. The respondent would arrange for funding, but anticipated $800,000 to account for shortfalls, which was $100,000 more than contemplated in the previous forbearance agreement. The charges on title, being the certificates of pending litigation, would be cleared, and the respondent would confirm extensions of the outside dates of the closing of various pre-sales in the development.

[11] By March 2022, there had no repayment by Gateway, and the milestones had not been met. Certificates of pending litigation remained on title to the property. Gateway had not arranged for any shortfall funding, and no confirmation of the extension of the outside dates of the pre-sales had been arranged. IMC's patience had run out, as had its confidence in Gateway's principals. IMC made demand on its loans. They also brought an application for the receiver.

[12] In March 2022, a certificate of substantial completion was issued by the project architect, albeit there was still some deficiency work required to be completed. Claims of lien and certificates of pending litigation remained, which precluded registration of the subdivision plan that is necessary to create the strata

lots for sale. At present, 92 percent of the project by square footage is under pre-sale contract.

[13] The receiver was authorized to take those steps necessary to complete the construction, to obtain the necessary permits and to subdivide the development and create the strata lots necessary to give effect to the pre-sale contracts. IMC had sought an order that would also give the receiver power of sale, but I declined to do so, there having been no order *nisi* sought nor granted in the proceeding.

[14] An order *nisi* was subsequently made on June 23, 2022, and a one-month redemption period was ordered. Gateway has not redeemed, and there is no application pending to extend the redemption period.

[15] In the course of its duties, the receiver has ascertained that there remains a significant amount of work to be done in order to bring the project to completion and estimates that the further work will cost in excess of $600,000 and will take up to eleven months to complete. Although the receiver did not have power of sale, it was approached by and entered into an agreement whereby a third party, Access Self-Storage Inc., is willing to purchase the entire development for $38.25 million. I will refer to Access Self-Storage as the “stalking horse bidder”.

[16] A stalking horse bid process has been approved by this Court on numerous occasions in the past, including in *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 BCSC 1855. A stalking horse bid process involves the court approving an initial offer and then putting into place and implementing a sales process whereby the property is marketed with a view to trying to obtain better offers.

[17] In this case, the proposed sales process is that if no other offers are received, the stalking horse bidder's contract will be completed. If superior bids are received within the time stipulated in the bidding process, the stalking horse bidder has the opportunity to improve its offer. The overall purpose of this kind of sales process is

that the property will be sold for a price not less than, and potentially more than, the stalking horse offer, and in a relatively short period of time.

[18] In this case, the stalking horse bid requires, as a preliminary matter, that the receiver be entitled to disclaim pre-sale contracts entered into by Gateway. As I had indicated earlier, Gateway has sold 92 percent of the square footage, which represents all but four of the units. The total amount that would be received under the pre-sale contracts is $32.8 million. The estimated recovery on the unsold units based upon the receiver's realtor Cushman & Wakefield's estimates would result in a gross recovery that exceeds, but only slightly, the stalking horse bid.

[19] However, there are two other factors that need to be taken into account. First, the largest of the pre-sale contracts with a company called NYX includes an equity component of $1.9 million that would not be readily converted into cash.

[20] Second, the monthly interest accruing to the petitioner is close to $300,000 per month. While Gateway disputes the receiver’s estimate of the cash component of the cost to finish the project, it did not seriously dispute that several months would be required to bring the project to fruition.

[21] The effect of these two factors renders the stalking horse bid superior to completing the project, completing the pre-sale contracts and selling the four remaining units. Indeed, Gateway does not dispute that the stalking horse bid would result in a greater recovery.

[22] In this case, the realtor is sufficiently confident that a better offer will be received that he has agreed to reduced commission in the event that the stalking horse bid remains the only bid.

Issues

[23] There are two main issues that must be determined on this application:

a) Should the receiver be permitted to disclaim the pre-sale contracts and leases?

b) Is it appropriate to grant a vesting order in favour of the stalking horse bidder that is subject to a better offer?

[24] An additional concern raised by Gateway at the outset was that the stalking horse bid process contemplated a 45-day sales process. By the time the matter was scheduled for court, there was less than 45 days until the close of bids, and the realtor would still be required to prepare and post all of the relevant marketing materials.

[25] Over the lunch break, the receiver had discussions with the stalking horse bidder and, over the weekend following the hearing of the application, written amendments were made to the stalking horse bid that extended the various dates by a further week that would allow for the sale process to take the full 45 days if the process is approved.

Should the receiver be permitted to disclaim the pre-sale contracts and leases?

[26] The pre-sale parties were served with the application, and two of them attended and made submissions, Mr. Chris Doray, of Chris Doray Studio Inc., one of the pre-sale purchasers, and a representative of Suna Entertainment Group Inc. (“Suna”), a proposed tenant.

Suna

[27] Suna has a contract to lease proposed strata lots 6 to 11, which constitute 16,600 square feet. Suna paid an initial deposit of $60,000. Suna's lease includes a right to purchase at a predetermined price, and according to Suna's representative, Mr. Murr, the proposed strata lots it was intending to lease may be worth up to $2 million more than the price fixed in the right to purchase.

Chris Doray Studio Inc.

[28] Mr. Doray's company was initially promised that they would be able to move in during August 2021. He agreed to purchase his unit because he was intending to set up a post-secondary institution which he referred to as a learning hub. He has

undertaken marketing in addition to architectural, engineering, plumbing and tenant improvements. His move-in date of August 2021 was pushed back to January 2022, and then again to the spring of 2022.

[29] Mr. Doray said that the location of the unit was ideal because it was both affordable for him and is close to a future proposed SkyTrain station. Mr. Doray's company has a financing commitment with the Business Development Bank, and he says it will cost him $40,000 if the loan does not fund. Mr. Doray says the equities of the matter favour him because he is trying to set up a post-secondary learning hub, something that is of societal value.

[30] Finally, he only recently discovered that even though his intended use was always known, the building is currently zoned as a warehouse, and in order for Mr. Doray to use it for his intended purpose, he would need a change of use or rezoning to allow for office space. He only recently discovered that any rezoning or change of use process has not been undertaken.

Discussion

[31] The relevant principles to be considered when deciding whether or not a contract should be disclaimed was set out in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, and was summarized by Justice Fitzpatrick in *People's Trust Company v. Censorio Group (Hastings & Carleton) Holdings Ltd.*, 2020 BCSC 1013. At paragraphs 24 and 25 of *People's Trust*, Justice Fitzpatrick discussed the relevant principles as follows:

> [24] The relevant law is not in dispute. In fact, that law was reviewed by me in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, aff'd *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 251 in similar circumstances.
>
> [25] At paras. 35-43 of *Forjay Management*, I discussed the relevant principles, including that:
>
> > a) A receiver has a duty to maximize recovery of assets under its administration;
> >
> > b) One tool of realization is to affirm or disclaim contracts;

> c) Typically, the court order will empower the receiver to act in respect of contracts and often, a receiver will seek specific directions if circumstances dictate that level of oversight; and
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> d) Any 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.

[32] Justice Fitzpatrick then went on to discuss the appropriate framework for analysis in determining whether a disclaimer is appropriate. At paragraph 26 of *People's Trust*, she returned to *Forjay* and summarized as follows:

> I considered whether disclaimer was appropriate within the following framework of issues:
>
> a) Firstly, what are the respective legal priority positions as between the competing interests?
>
> b) Secondly, would a disclaimer enhance the value of the assets? If so, would a failure to disclaim the contract amount to a preference in favour of one party?
>
> And c) Thirdly, if a preference would arise, has the party seeking to avoid a disclaimer and complete the contract established that the equities support that result rather than a disclaimer?

[33] I will now consider the receiver's application to disclaim the pre-sales and leases with reference to these principles.

[34] It is clear that IMC has the legal priority as first charge holder. The interests of the pre-sale purchasers and tenants are all derived through Gateway, and if IMC chose to take order absolute in this proceeding, for example, Gateway and all those interests that are derived through it would be foreclosed from title.

[35] As for the second factor, it is not disputed that the disclaimers here will enhance the value of the development, and there is no realistic scenario that would lead to a contrary conclusion.

[36] I turn now to the final factor, which is whether the party seeking to avoid a disclaimer and to complete the contract has established that the equities support that result. I confess that I have some sympathy for Mr. Doray, who is clearly passionate about his learning hub project. I note that he has also secured early

access to the premises and has completed some of his tenant improvements, in addition to the fact that he is now faced with a $40,000 bill from the Business Development Bank.

[37] However, as the Court confirmed in *Forjay*, the equities to be considered by the court are not those as between Mr. Doray and Gateway but rather between Mr. Doray and IMC. The situation of a disappointed purchaser is far from unique. Justice Fitzpatrick described the typical situation at paragraph 99 of *Forjay*, which reads as follows:

> [99] I would venture to say that most, if not all, insolvency landscapes are littered with the broken promises of the debtor. Secured creditors are not paid; suppliers and trades are not paid; employees are not paid; and the list goes on. Such is the nature of insolvency. The insolvency regimes available to stakeholders (such as bankruptcy, receivership or restructuring) are intended to stabilize matters and allow an orderly realization of assets for the benefit of stakeholders generally. To suggest that a stakeholder's claim is elevated by the debtor having broken its promise to that stakeholder does little to distinguish that claim from all others.

[38] There are other considerations at play here as well. First, the strata lot that Mr. Doray would choose to purchase has not been created and does not exist, and it cannot be said to be certain that it would ever happen. Second, because the application for change of use from warehouse to office has not been undertaken, nor indeed has it even been started, there is no guarantee as to when or even if Mr. Doray would be permitted to use the premises as he wishes.

[39] Third, and perhaps most importantly, is the terms of the contract between Gateway and Mr. Doray. Paragraph 3.2 of the standard form purchase contract for the pre-sales provides for an outside date for completion. The outside date in the contract is August 31, 2021, and it may be extended to a maximum aggregate period of an additional 240 days. The outside date, even with all its extensions, would be no later than approximately the end of April 2022:

> 3.2 **Outside Date**. If the Completion Date has not occurred on or before the Outside Date (as defined below), then either of the Vendor or the Purchaser may at its option, exercisable by notice in writing from such party to the other, terminate this Agreement and upon such termination, the Deposits and any interest accrued thereon will be

> returned to the Purchaser, and each party will be released from all of its obligations to the other hereunder provided that:
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> (a) if the Vendor is delayed from completing the construction of the Strata Lot(s) or satisfying any other conditions of closing as a result of earthquake, flood or other act of God, fire, explosion or accident, howsoever caused, act, omission or delay of any governmental authority, strike, lockout, inability to obtain or delay in obtaining labour, supplies, materials or equipment, delay or failure by carriers or contractors, breakage or other casualty, climactic condition, interference of the Purchaser, or any other event of any nature whatsoever beyond the reasonable control of the Vendor, then the Outside Date shall be extended for a period equivalent to such period of delay; and
>
> (b) the Vendor may, at its option, exercisable by notice to the Purchaser delivered at any time prior to the then current Outside Date, in addition to any extension pursuant to subsection (a) above and whether or not any delay described in subsection (a) above has occurred, elect to extend the Outside Date for an aggregate period of an additional 240 days.
>
> For the purposes of this Agreement, the "**Outside Date**" means August 31, 2021, as such date may be extended pursuant to this section 3.2.

[40] The effect of clause 3.2 of the contract is to provide that either purchaser or vendor can terminate if the contract has not been completed by the outside date. As such, Gateway and now the receiver standing in Gateway's shoes is entitled to terminate the contract without reference to the analysis in *Forjay*.

[41] As I said earlier, I have some sympathy for Mr. Doray, who has done nothing other than act in a manner that is entirely consistent with his reasonable expectations that he would be purchasing the strata unit. However, as a matter of law, I find that the receiver is entitled to disclaim the Doray contract.

[42] As it pertains to the Suna lease, the narrow question is which party is entitled to the presumed increase in value of the premises that Suna would have the option to purchase. IMC is in a shortfall position, and as I have already indicated, has legal priority. I was not advised of any other equitable considerations, and I conclude that the receiver is entitled to disclaim the Suna lease as well because the receiver has established that the order is appropriate under the *Forjay* analysis.

[43] I am advised by counsel that other pre-sale purchasers either consented or took no position or did not respond to the application. I therefore find that the receiver is entitled to disclaim all of the pre-sale contracts, including the leases.

[44] All deposits which are held at a Vancouver law firm are to be returned with interest as contemplated in the various contracts.

[45] An issue arose as to a deposit paid by Suna which I understand has since been released. If the deposit was released with Suna's consent, that would appear to be the end of the matter. If not, then Suna would presumably be entitled to return of its deposit.

Is it appropriate to grant a vesting order in favour of the stalking horse bidder that is subject to a better offer?

[46] I turn now to the question of whether a vesting order in favour of the stalking horse bidder is appropriate.

[47] Gateway does not oppose the stalking horse bid generally but says that the vesting order as drafted should be amended to include a provision that in the event that no other bids are received, the stalking horse bidder would be entitled to a vesting order, “only if Gateway has not obtained an extension to the redemption period”. This last clause is problematic from the receiver's perspective.

[48] In the course of an ordinary foreclosure proceeding, the petitioner would now be in a position to apply for order for sale. The respondent owner's response would often be an application to extend the redemption period.

[49] Gateway argues that the order in the form sought is inappropriate because it is conditional and creates what is sometimes referred to as a guillotine order. In *1299362 B.C. Ltd. v. Marine Investments Inc.*, 2021 BCSC 2569, on appeal from a master’s order, Mr. Justice Skolrood concluded that a conditional order absolute was inappropriate. At paragraph 30, he stated the following:

> [30] First, I was provided with no authority supporting the granting of a conditional order absolute. As held by Justice McLachlin in *Bank of Montreal*,

> the concepts of a conditional order and a final order or order absolute are inconsistent. Second, having found that the test for extending the redemption period was met, it was not open to the master to make a prospective order absolute effective upon the expiry of the extended period. I agree with the submissions of 121 and Living Marine that the decision to issue such an order, and to extinguish all rights of redemption, is an exercise of discretion that must be made based upon the circumstances in place at the time the order is made effective. Those circumstances may well be very different from the time of the initial order, particularly when dealing with commercial transactions that often have a certain degree of fluidity to them.

[50] I agree with the principle, but I conclude that it does not apply here.

[51] It is well established that the right to redeem is fundamental in the law relating to mortgages. In *Marine Investments*, the Court had already concluded that the redemption period should be extended, but then went on to order that the order absolute would go if the property was not redeemed by the date certain. As such, the effect of the master's order was that the respondent could lose the right to redeem without further order of the court even though it had established that the redemption period should be extended. This is not the case here.

[52] The redemption period expired in July, and Gateway has made no application to extend it. Based upon the evidence presently before the court, such an application would not succeed. The test to extend the redemption period is:

a) there must be sufficient equity in the property; and

b) there must be a reasonable likelihood of payment.

[53] As discussed earlier, the evidence satisfies me that there is no equity in the property. The evidence also satisfies me that the stalking horse bid is superior to the outcome that would follow if the subdivision plan is registered and the pre-sales were to close. This is so even if the few remaining lots are sold based on Gateway's best-case scenario in terms of the sales price. Under either scenario, the petitioner will experience shortfall.

[54] On the question of reasonable likelihood of payment, there is simply no evidence that would lead to the inference that payment will be forthcoming. The fact

that there is no equity would tend to suggest that the possibility of a third-party lender advancing sufficient funds to see the petitioner made whole is improbable.

[55] If the court approves the stalking horse bid with a vesting order subject only to there being a better offer through the stalking horse process, the only unknowns here are whether or not the bid process generates a better price, and perhaps the identity of the purchaser.

[56] By asking the court to approve the stalking horse bid, the court is being asked to conclude that the proposed sale to the stalking horse bidder is provident in all of the circumstances. The effect of an order that approves the stalking horse bid is that it will in effect constitute a final order approving sale, and the question is just whether or not that is appropriate.

[57] In most cases where there is an application made to approve sale, there is evidence of marketing and also appraisal evidence. The purpose of the appraisal and the marketing evidence is to show the court that the proposed offer is a reasonable one in all of the circumstances.

[58] This is an unusual case because Gateway has already been marketing the property, and its pre-sales are evidence of value to be received if the subdivision process is completed. Gateway has sold 92 percent of the square footage, and as such, only 8 percent stands to be sold. Even taking the respondent's most optimistic view of the evidence, the stalking horse bid is still better. There is little or nothing to be gained by having an appraisal for marketing evidence here because there is very little left for Gateway to market. I conclude that the court has the evidence it needs to be able to assess the efficacy of the stalking horse bid.

[59] I turn now to the question of whether the conditional vesting order in favour of the stalking horse bidder is appropriate in the event that no better offer is received, given Gateway's right to redeem. As Justice Gomery held in *Kruger v. Wild Goose Vintners Inc.*, 2021 BCSC 1406, at paragraph 74, the right to redeem must be given due weight. I agree, and the question is what does "due weight" mean here.

[60] The redemption period has expired, and Gateway has not brought an application to extend it. I am asked to infer that no such application has been brought because it could not succeed. Courts have in rare cases allowed a respondent to redeem after a sale has been approved, and in rarer cases still, following an order absolute. It is certainly more difficult to do so when the sale has been approved or order absolute has been granted because the rights of other parties are in play and need to be considered. However, it would not be appropriate for me to make an order that forever closes the door on Gateway, nor have I been asked to do so.

[61] I am satisfied that a vesting order in favour of the stalking horse bidder as proposed is appropriate. I accept that the conditional vesting order is a clause that the receiver agreed to in its negotiations with the stalking horse bidder, but the stalking horse bidder has irreversibly committed to purchase, subject only to being outbid.

[62] If Gateway intended to apply to extend the redemption period, the time to do so was now. It has not done so and I infer that it has not done so because it could not succeed. It is almost two months since a one-month redemption period was granted, and nothing before me convinces me that Gateway is going to be in any better position to redeem in the near future.

[63] I conclude that granting a vesting order in favour of the stalking horse bidder, subject to there being a better offer, represents the best chance for maximum recovery, and that order is granted.

Disposition

[64] In terms of the form of order, the vesting order in favour of the stalking horse bidder is approved, subject to there being a better offer. The receiver's proposed form of order that was circulated yesterday that includes for the extra seven days is the version that I approve.

[65] I have already said that the receiver has the right to disclaim the pre-sales and the leases, and all deposits are to be returned in accordance with the various contracts.

[66] Finally, on the issue of approving the receiver's activities, I have read the receiver's second report and also the supplemental report. They seem reasonable, and having heard no objections from anyone, I approve the receiver's activities to date.

[67] That concludes my decision.

"Wilson J."