

Vancouver

16-Jun-20

REGISTRY

NO. H200039
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PEOPLES TRUST COMPANY

PETITIONER

AND:

CENSORIO GROUP (HASTINGS & CARLETON) HOLDINGS LTD.
PETER CENSORIO also known as PETER ANTHONY CENSORIO
and PETER ANTHONY CENSORIO

STRADA 39 TRUST

BANCORP GROWTH MORTGAGE FUND II LTD.
BANCORP BALANCED MORTGAGE FUND II LTD.
BANCORP FINANCIAL SERVICES INC.

PK CAPITAL LTD.

ALL CANADIAN INVESTMENT CORPORATION
FBM CANADA GSD, INC.

MEDINA CONCRETE SERVICES LTD.
TUCUVAN CONSTRUCTION LTD.

OMNI DRYWALL LTD.

1223293 B.C. LTD.

RAHUL GLASS LTD.

SERIN INVESTMENTS LTD.

CLARION PROPERTY CORPORATION
G. I. H. PROPERTIES LTD.

BARRY CHARLES HOLDINGS LTD.

BECISON HOLDING CORPORATION

SANDRA CHAPPELL

CREST CAPITAL CORPORATION
DURHAM CAPITAL MANAGEMENT INC.

YORK VENTURES LTD.

HI-GROVE HOLDINGS (1995) LTD.

DIANE RAUCH

JEFFREY RAUCH

GERHARD RAUCH

HELGA RAUCH

PAVILION INVESTMENTS INC.

RODNEY GRANT KENYON

ALAN LONG

MANDATE MANAGEMENT CORPORATION

RESPONDENTS

APPLICATION RESPONSE

Application response of: Luigi Garcea and Cheryl Serraglio (the "Application Respondents")

THIS IS A RESPONSE TO the notice of application of the Receiver and Manager, D. MANNING & ASSOCIATES INC., ("Receiver") dated June 8, 2020

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in paragraph *nil* of Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in paragraphs 1-2 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: 3-4.

Part 4: FACTUAL BASIS

1. Unless otherwise indicated, the Application Respondents adopt the defined terms used in the notice of application.
2. The Application Respondents purchased a unit ("Unit 402") in the Property pursuant to a presale contract entered into on July 22, 2016. The Application Respondents were among the first purchasers at the Property.
3. The Application Respondents purchased Unit 402 as their long-term retirement residence. The Property's proximity to family members and their current workplaces were significant factors in the Application Respondents' decision to purchase Unit 402.

Affidavit #1 of Luigi Garcea at para 8

4. In negotiating the terms of the presale contract, the Application Respondents specified that Unit 402 was to be a custom-built home designed and finished to their specifications.
5. Unit 402 encompasses two strata lots that have been combined to form one 1,700 square foot three-bedroom apartment. The layout of Unit 402 was designed to ensure it would be accessible for the Application Respondents' aging parents.

L. Garcea #1 at para 6

6. The Application Respondents negotiated a purchase price of \$1,150,000 for Unit 402, including all upgrades and customizations. At Peter Censorio's direction, \$50,000 of this amount was paid to i3 Design Group Ltd. for the upgrades included in the purchase price.

L. Garcea #1 at para 10

7. The purchase price listed for Unit 402 in the Receiver's materials is \$1,100,000. This does not reflect the true purchase price of \$1,150,000.
8. In contrast with all but one of the other 12 presale contracts, the Application Respondents' contract for Unit 402 was at market value as of the contract date, according to the assessment performed by Oakwyn Realty at the Receiver's request. This assessment relied on the \$1,100,000 purchase price.

Affidavit #2 of Alex Ng at paras 6, 12 and Ex. Q (p. 322)

9. After signing the contract, the Application Respondents were involved in all aspects of the design and customization of Unit 402, to ensure that the unit would suit the specific needs of their family.

L. Garcea #1 at para 14

10. Most of the upgrades the Application Respondents contracted for, including the upgraded appliances they selected, have been installed in Unit 402.
11. In addition to the \$50,000 paid to i3 Design, the Application Respondents paid \$29,064.00 to MEC Mechanical Inc. for the installation of an upgraded heating and cooling system in Unit 402. This work is substantially complete.

L. Garcea #1 at para 27

12. When they purchased Unit 402, the Application Respondents were told that construction at the Property was expected to complete in August 2018.
13. On the strength of the developer's assurances regarding the expected completion date, the Application Respondents sold their previous home in March 2017 and negotiated an 18-month lease as a term of the transaction, which expired in September 2018. The Application Respondents are currently continuing to rent their previous home for \$3,000 per month on a month to month basis.

L. Garcea #1 at para 17

14. In March 2018, the Application Respondents did a walk-through of Unit 402 and confirmed various specifications, which were documented in an addendum to their purchase contract dated April 23, 2018.

L. Garcea #1 at paras 19-20

15. In March 2018 the Application Respondents purchased custom light fixtures and furniture for Unit 402 at a total cost of \$33,232.46. These items are currently in storage.

L. Garcea #1 at paras 21-22

16. The Application Respondents initially received periodic updates as to the status of construction at the Property. These updates from Censorio Group stopped in June 2019.

17. On December 10, 2019, the Application Respondents received an email from Kristina Van Hombeeck at Censorio Group requesting that they sign an extension to their contract as the outside date had passed. The Application Respondents reviewed the terms of the extension addendum and were aware that the addendum made the contract terminable at their option should Unit 402 not be completed prior to the new outside date of February 29, 2020. The Application Respondents signed the extension on December 24, 2019.

L. Garcea #1 at para 28

18. The Application Respondents were notified on February 7, 2020 that the Receiver had been appointed.

19. The Application Respondents wish to complete on their presale contract and have the funds available to do so immediately.

L. Garcea #1 at para 33

20. The estimates of the current market value of Unit 402 set out in the Receiver's report range from \$1,179,000 to \$1,265,000, for a median estimate of \$1,222,000. These estimates do not sufficiently take into account the impact of COVID-19 on the metro Vancouver real estate market, or the specific attributes of Unit 402 that are likely to make it much more difficult to market and sell than the other units at the Property.

Part 5: LEGAL BASIS

1. The Application Respondents' presale contract has not expired and remains valid and enforceable. Pursuant to the extension addendum signed December 24, 2019, the contract became terminable at the Application Respondents' option once the outside date of February 29, 2020 passed. At no point did the Application Respondents elect to terminate the contract.

2. The Application Respondents acknowledge that the Receiver has a discretion to disclaim contracts. However, in determining whether to do so, the Receiver must be cognizant of its duty to preserve the goodwill and assets of the business. It is inconsistent with that duty to disregard contracts entered into by the company before the Receiver's appointment.

bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd., 2008 BCSC 897 at para 55

3. The debtor remains liable for damages as a result of contracts disclaimed by the Receiver. If a Receiver disclaims a contract, it may face claims from the debtor that it could have realized more by performing the contract rather than disclaiming it.

bcIMC Construction at para 53

4. While one of the Receiver's goals is to maximize the recovery of assets, the Receiver is also required to assess all equitable interests when considering disclaiming contracts.

Forjay Management Ltd. v 0981478 B.C. Ltd., 2018 BCSC 527 at paras 35-36;
Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd., 2012 ONSC 4816 at para 31

5. Applying the framework set out in *Forjay*, disclaimers are considered in three stages:
 - a) What are the respective legal priority positions between the competing interests?
 - b) Would a disclaimer enhance the value of the assets? Would a failure to disclaim amount to a preference?
 - c) If a preference would arise, has the party seeking to avoid a disclaimer established that the equities support that result?

Forjay at para 44

6. At the first stage, it is acknowledged that the mortgage holders and other secured creditors of Censorio Group (Hastings & Carleton) Holdings Ltd. take legal priority relative to the presale purchasers, including the Application Respondents.
7. At the second stage, the Application Respondents submit that it must be sufficiently certain that a disclaimer will materially enhance the value of the assets for the court to order a disclaimer.
8. In this case, is not clear that a disclaimer of the Application Respondents' contract would enhance the value of the assets available to satisfy creditors. In

this respect, the Application Respondents are in a unique position vis a vis the other presale purchasers.

9. The Application Respondents presale contract price was above fair market value as of the contract date (\$1,150,000 true purchase price compared to the \$1,100,900 assessment of Oakwyn Realty). All but one of the other presale contracts are at prices below market value as of the contract dates.
10. The Application Respondents personally paid for upgrades that contribute to the present assessment of the market value of Unit 402.
11. In addition, the circumstances of this case are markedly different than the circumstances that existed in *Forjay*, where the court held that there was “no doubt” that re-selling the units would enhance the value of the assets.

Forjay at para 92

12. As of today's date, there is significant uncertainty surrounding the price that can be achieved for Unit 402 if the Application Respondents' contract is disclaimed and the unit is re-marketed.
13. The various proposals contained in the Receiver's report set out estimates of Unit 402's present market value that range from \$1,179,000 to \$1,265,000. These estimates fail to take into account the significant price uncertainty in the market due to COVID-19.
14. In addition, the Framework and Fifth Avenue proposals expressly note that Unit 402 is too large. While the Rennie and Oakwyn proposals fail to take into account the uniqueness of Unit 402, it is likely that its size and customization will make it much more difficult to re-market and sell than the smaller one and two-bedroom units in the Property.
15. The Receiver's report recommends that the Receiver be given the authority to re-sell the units in the Property at prices no less than 5% below the listing price suggested by Rennie. For Unit 402, that price is \$1,187,405. Subtracting Rennie's estimated commissions and GST on commissions (\$44,712) yields a net price of \$1,142,692. This is less than the true purchase price to be paid by the Application Respondents pursuant to their presale contract. There are no commissions payable should the Application Respondents' contract complete.
16. Even if a purchase price of \$1,187,405 can be obtained, there will be additional costs to finish Unit 402 if the Application Respondents' contract is disclaimed, as the contract did not include certain items, such as light fixtures. The Application Respondents have purchased light fixtures and fans at a total cost of \$4,968.64, which are currently being stored awaiting installation. If the unit is re-sold, light fixtures would need to be purchased in order to finish the unit.

17. These additional costs will reduce the or eliminate the difference between the amount realized from re-selling Unit 402 as compared to completing on the Application Respondents' contract, even if a higher purchase price can be obtained.
18. It is unlikely that there will be any cost savings in completing Unit 402 if the Application Respondents' contract is disclaimed. The appliances and other upgrades selected by the Application Respondents have been ordered and most have been installed. There is no suggestion that the Receiver intends to finish the unit to different specifications than those set out in the Application Respondents' contract.
19. Finally, while the Receiver's report suggest that not disclaiming the presale contracts would make it more difficult to maximize realization of the remaining unsold units, this factor applies only to the smaller presale units, as the initial sale prices can set a benchmark for subsequent sales. Unit 402 is not comparable to other units at the Property due to its size and customization. As a result, its sale price is unlikely to impact the prices that can be obtained for the other units.
20. It is not sufficiently certain that disclaiming the Application Respondents contract would materially enhance the value of the assets. The certainty of completing the Application Respondents' purchase at the contract price outweighs the tenuous prospect of achieving a higher net price from Unit 402 should the contract be disclaimed.
21. Turning to the third stage of the *Forjay* framework, even if a preference would arise from not disclaiming the Application Respondents' contract, the equities support this result.
22. The Application Respondents are in a different position relative to the other presale purchasers. Their unit is not an "off the shelf" presale unit, but rather a custom-built home specifically tailored to the needs of their family.
23. In addition to their \$55,000 deposit which is being held in trust, the Application Respondents have spent approximately \$80,000 on upgrades that have been installed in Unit 402. \$50,000 of this amount was paid to i3 Design at Peter Censorio's direction, although it was understood that this amount formed part of the purchase price and was for work that would ordinarily be performed by the developer.
24. If the Application Respondents' contract is disclaimed, they have a limited prospect of recovering these amounts, and the new purchaser of Unit 402 will obtain the benefit of the work and materials purchased by the Application Respondents. Any enhancement of value that can be obtained by re-selling Unit 402 will be at the direct expense of the Application Respondents.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Luigi Garcea, made June 15, 2020;
2. Affidavit #1 of Vince Taylor, made June 16, 2020; and
3. The pleadings and proceedings herein.

The application respondents estimate that the application will take 1 day.

- The application respondents' address for service is:

c/o Allen / McMillan Litigation Counsel
1550 – 1185 West Georgia Street
Vancouver, BC V 6E 4E6
Attention: Wes McMillan
wes@amlc.ca

Dated: 16/June/2020



Lawyer for Luigi Garcea and Cheryl
Serraglio
Wes McMillan

THIS **APPLICATION RESPONSE** is filed and served by Wes McMillan of the firm **Allen / McMillan Litigation Counsel** whose place of business is 1550 – 1185 West Georgia Street, Vancouver, British Columbia, V6E 4E6 (Direct #: 604.282.3982; Fax #: 604.628.3832; Email: wes@amlc.ca) (File No. 01448-001)