

In the Supreme Court of British Columbia

Between

PEOPLES TRUST COMPANY

Petitioner

and

CENSORIO GROUP (HASTING & CARLETON) HOLDINGS
LTD.
PETER CENSARIO also known as PETER ANTHONY
CENSORIA and PETER ANTHONY CENSORIO,
STRADA 39 TRUST,
BANCORP BALANCED GROWTH MORTGAGE II FUND
LTD.,
BANCORP BALANCED MORTGAGE FUND II LTD.,
PK CAPITAL LTD.,
ALL CANADIAN INVESTMENT CORPORATION,
FBM CANADA GSD INC.,
MEDINA CONCRETE SERVICES LTD.,
TUCUVAN CONSTRUCTION LTD.,
ONMI DRYWALL LTD.,
1223293 B.C. LTD.,
RAHUL GLASS LTD.,
SERIN INVESTMENTS LTD.,
CLARION PROEPRTY CORPORATION
G.I.H. PROPERTIES LTD.,
BARRY CHARLES HOLDINGS LTD.
BECISION HOLDING CORPORATION
SANDRA CHAPPELL
CREST CAPITAL CORPORATION
DURHAM CAPITAL MANAGEMENT INC.
YORK VENTURES LTD.,
DIANE RAUCH,
JEFFREY RAUCH,
HELGA RAUCH,
PAVILION INVESTMENTS INC.,
RODNEY GRANT KENYON,
ALAN LONG,

MANDATE MANAGEMENT CORPORATION

Respondents

APPLICATION RESPONSE

Application response of: PATRICK HUNTER, BRIAN GILLIS, NADER VATANCHI, GLORIA BEVACQUA, JEFFREY WINTERS, ALEXANDRA GRAHAM, JIM GRAHAM, MARIO TINUCCI, NICK DESANTIS, and 1166538 B.C. LTD, (the "application respondents")

THIS IS A RESPONSE TO the notice of application of D. Manning & Associates Inc. filed June 8, 2020.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of the orders set out in paragraph 4 of Part 1 of the notice of application.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the orders set out in paragraphs 1 and 2 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in paragraph 3 of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. The pre-sale contracts were made at or above market value at the time of signing in the amounts as follows:
 - a. Patrick Hunter entered into a presale purchase agreement with respect to the unit that would become #101 also known as strata lot 1, for the sum of \$784,900.00 on or about May 30, 2017;
 - b. Brian Gillis entered into a presale purchase agreement with respect to the unit that would become #103 also known as strata lot 3, for the sum of \$404,900.00 on or about November 4, 2016;
 - c. Mario Tinucci and Cheryl Bryce entered into a presale purchase agreement with respect to the unit that would become #204, also known as strata lot 11 for the

sum of \$399,900.00, on or about January 25, 2017.

- d. Nader Vatanchi entered into a presale purchase agreement with respect to the unit that would become #304 also known as strata lot 19, for the sum of 409,9000.00 on or about April 4, 2017;
 - e. Gloria Bevacqua entered into a presale purchase agreement with respect to the unit that would become #308 also known as strata lot 17, for the sum of \$424,900.00 on or about May 27, 2017;
 - f. 2533569 Ontario Ltd entered into an assignment of the presale purchase agreement from Repeat Homes with respect to the unit that would become #401 also known as strata lot 21, for the sum of \$671,900.00 on or about March 15, 2019
 - g. Alexandra and Jim Graham entered into a presale purchase agreement with respect to the unit that would become #403 also known as strata lot 22, for the sum of 404,900.00 on or about May 27, 2017;
 - h. Nick De Santis entered into a presale purchase agreement with respect to the unit that would become #408 also known as strata lot 25, for the sum of \$419,900.00 on or about September 13, 2016; and
 - i. 1166538 B.C. Ltd entered into a presale purchase agreement with respect to the commercial unit space also known as strata lot 29, for the sum of \$2,500,000.00, on or about July 10, 2016.
- 2.

The residency of the respondents were/are as follows:

- a. Unit #101 was, intended to become a primary residence for Patrick Hunter; however due to prolonged construction would become an investment property;
- b. Unit #103 was, and still is intended to become a primary residence for Brian Gillis;
- c. Unit #304 was, and still is intended to become a primary residence for Nader Vatanchi;
- d. Unit # 204 was and still is intended to become a primary residence for Mario Tinucci and Cheryl Bryce;
- e. Unit #308 was, and still is intended to become an investment opportunity for Gloria Bevacqua;
- f. Unit #401 was intended to become an investment property for 2533569 Ontario Ltd;
- g. Unit #403 was, and still is intended to become an investment property for Alexandra and Jim Graham;
- h. Unit #408 was, and still is intended to become a primary residence for Nick De Santis; and
- i. 1166538 B.C. Ltd intended to lease the commercial unit space to two separate

tenants and had leases prepared to reflect this arrangement.

3. All purchasers entered into pre-sale contracts understanding the units were at fair market value at the time of the contract.

Part 5: LEGAL BASIS

Powers of the Receiver

- 1 A Receivership Order does not bind the receiver to any existing contract by the debtor. This does not mean the receiver may arbitrarily break a contract. Proper discretion must be exercised in doing so to ensure that the realization is more from terminating the contract.

Bayhold Financial Corp. v. Clarkson Co., [1991] N.S.J. No. 488, citing *Receiverships* by Frank Bennett (*Toronto: Carswell, 1985*)

- 2 The receiver owes a fiduciary duty to all stakeholders and must balance the interests of all.

Yukon (Government of) v. Yukon Zinc Corporation, 2020 YKSC 16

Pre-Sale Contracts

- 3 The pre-sale contracts were entered into at fair market value at the time the contracts were signed and priced in consideration of the 5% GST that is to be paid on new construction. The purchase contracts clearly stated GST was not included in the sale price.
- 4 There is an inherent risk in market fluctuation when purchasing on pre-sale and each individual understood the risks involved buying property years out.
- 5 The pre-sale contract prices were determined by the developer and in consideration of the minimum pre-sale requirements set by Bancorp to secure funding resulting in Bancorp's secured creditor position.
- 6 Funding requirements for pre-sale establish a duty on the creditor to determine the minimum sale price. A relationship between the purchaser and the creditor is established when their contracts are a funding requirement.

CareVest Capital Inc. v. Chychrun, 2008 BCSC 1138

Interests

- 7 The receiver must consider whether failure to disclaim might result in an unjustified preference in favor of one stakeholder

bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd., 2008 BCSC 897
Forjay Management Ltd. v 0981478 B.C. Ltd., 2018 BCSC 527

- 8 When interpreting its authority from statute, the receiver can do what justice dictates and practicality demands.

Yukon (Government of) v. Yukon Zinc Corporation, supra

- 9 The receiver's role under the *BIA* is to enhance and facilitate the preservation and realization of the assets for the benefit of the creditors. The highest value should be received for the assets as so to maximize the return to the creditors.

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Park Ltd. 1995 CanLII 7059 (ON SC), 23 OR (3d) 781

- 10 The eight pre-sale purchase contracts are equivalent to \$4,216,200. This is guaranteed realization on assets if the contracts are completed for the creditors.
- 11 The Receiver must act reasonably and exercise good business sense in doing so.

Yukon (Government of) v. Yukon Zinc Corporation, supra

- 12 A risk of a better return is not in the best interest of the secured creditors in an unstable market.
- 13 Current market value has not contemplated the effects Covid-19 has had on the real estate industry. Market proposals were analysed pre-Covid and cannot predict the corresponding decline.
- 14 The effect of the Covid-19 pandemic is unprecedented and its effects on Canadian economy is still uncertain. The unemployment rate in British Columbia has increased to 13.4% as of May 2020, an increase of 9.0% from twelve months ago. With temporary closures and a shortage of work, many people are surviving on savings and government benefits. Investment in real estate is no longer a priority.
- 15 The slow of sales has saturated the supply and decreased the demand. Properties have remained on the market for significantly longer periods of time.
- 16 Sales of apartment style homes have seen a decrease in sales of 67% between March 2020 and April 2020. Competitive pricing is required to sell units.
- 17 Sales in condominiums in Burnaby have seen a slow decrease since March 2020. Between April and May 2020 this was a decrease of 0.3%. Sales are slowing and inventory is sitting on the market for longer periods. Coupled with less new listings, only 31% of new listings in the Burnaby area were sold between May 14 and June 11.
- 18 The risk of remarketing and selling all units together, listing at higher than market value

will outweigh the benefit of completing the pre-sale contracts and postpone realization on the assets for the creditors. The marketing proposal from Rennie suggests that at the higher price point all units will be sold by mid-May 2021.

19 Carrying costs of unsold units will reduce the realization of assets for the creditors the longer the units take to resell. Marketing proposals suggest that all 27 units will not be sold until spring 2021. Practicality suggests completing the contracts on a guaranteed realization than risk resale in market that is trending a decrease in sales.

20 As of February 5, 2020, the amount and interest owed to the first and second creditors were as follows:

- a) Peoples Trust Company
Amount: \$10,957,362 plus interest at a rate of 2.00% + prime with a minimum of 5.95% interest only monthly
- b) Bancorp Growth Mortgage Fund II Ltd, Bancorp Balanced Mortgage Fund II Ltd.
Amount: \$3,991,443 plus interest at a rate of 12.05%+ prime with a minimum of 15.00% compounded monthly

Market Value

21 Censorio Group had the development appraised as of November 26, 2015 and again on July 17, 2017 by Garnett Wilson Realty Advisors Ltd. The average price per square foot was calculated at \$592.82. On average the purchasers paid \$658.50 per square foot, an increase of value by \$65.11 per square foot. The pre-sale contracts were signed during the period the 2015 appraisal was effective.

22 The following table compares the appraisal value of 2015 and 2017 with the actual sale price and contract date.

Carleton Price per Square Foot Comparison				
Suite	2015*	2017*	Actual**	Date
101	\$547.61	\$711.60	\$689.00	May 30 2017
103	\$565.88	\$636.64	\$649.00	November 4, 2016
204	\$538.44	\$655.57	\$677.00	January 30, 2017
304	\$609.67	\$663.77	\$652.00	April 4, 2017
308	\$608.33	\$668.08	\$652.00	May 27, 2017
401	\$598.84	\$598.84	\$615.00	July 13, 2016
403	\$601.47	\$686.85	\$677.00	May 27, 2017
408	\$633.49	\$667.57	\$688.00	July 12, 2016
*Data taken from the 2015 and 2017 Garnett Wilson Realty Advisors				
**Data taken from New Sale Memos				

23 Strata value is affected by location and unit size. Smaller units achieve a greater price per square foot than larger units.

- 24 Comparable units in the same location are selling at \$593 p.s.f. and \$652 p.s.f. This range is comparable to the pre-sale purchase price p.s.f and much lower than the anticipated sale price from the market proposals.
- 25 Comparable units were reviewed in April 2020. The Forte, a new development on Hastings Street has since decreased its prices to fill the remaining 30% vacancies to approximately \$780 p.s.f. The units in Forte are more square feet and have proper bedrooms
- 26 The marketing proposals have estimated realization by selling the units at their proposed list price. The list prices are higher than the market value as each proposal has built in a buffer of up to \$20,000.00 in some cases, under the expectation of buyer negotiation. The prices also do not reflect the payable GST. The anticipated realization is much higher than the actual realization when these factors are contemplated.
- 27 The commercial retail space was priced at \$2,550,000 at fair market value at the time of signing in July 2016. The anticipated sale price of \$3,100,000 to \$3,300,000 is estimated based on the current income and leases of the unit sold with tenants. Tenants add value to the retail space, and had previously been secured by the pre-sale purchaser.
- 28 Since the receivership order, one tenant has backed out of their lease. Tenants cannot be guaranteed, and sale value should reflect vacancy of the commercial retail space.

Arm's Length Transactions

- 29 The pre-sale contracts for strata lots 3,11,17,19,21,23, and 25 are non-arm's length transactions. Strata lot 1 and 29 were contracted above market value based on the appraisals received by the developer.
- 30 The pre-sale contract for the commercial retail space was between 1166538 B.C. Ltd and Censorio Holdings. It was purchased at fair market value and was a contract between businesses.
- 31 Fair market value is defined by business valuers and appraisers as the highest price in an open and unrestricted market between informed and prudent parties acting at arm's length and under no compulsion to act.

Bamrah v Waterton Precious Metals Bid Corp, 2020 BCCA 122

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Peter Censorio made June 16, 2020
2. Affidavit #1 of Jeffrey Winters made June 16, 2020
3. Affidavit #1 of Patrick Hunter (to be filed)
4. Affidavit #1 of Brian Gillis (to be filed)
5. Affidavit #1 of Mario Tinucci (to be filed)
6. Affidavit #1 of Nader Vatanchi (to be filed)

7. Affidavit #1 of Gloria Bevacqua (to be filed)
8. Affidavit #1 of Alexandra Graham made (to be filed)
9. Affidavit #1 of Jim Graham (to be filed)
10. Affidavit #1 of Nick De Santis (to be filed)
11. Affidavit #1 of Alexsandra Iameo (to be filed)


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

[Check whichever one of the following is correct and complete any required information.]

- 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. The application respondent's ADDRESS FOR SERVICE is:.

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Attention: Desmond J. MacMillan

Date: 16Jun2020



Desmond J. MacMillan Counsel for
Respondent(s) PATRICK HUNTER, BRIAN
GILLIS, NADER VATANCHI, GLORIA
BEVACQUA, JEFFREY WINTERS,
ALEXANDRA GRAHAM, JIM GRAHAM,
MARIO TINUCCI, NICK DESANTIS, and
1166538 B.C. LTD.