CITATION: Re: 144 Park Ltd. 2015 ONSC 6735
COURT FILE NO.: CV15-10843-00CL
DATE: 20151102

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: IN THE MATTER OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

AND IN THE MATTER OF AN APPLICATION MADE BY 144 PARK LTD. FOR THE APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE *CONSTRUCTION LIEN ACT*, R.S.O. 1990, c. C.30, AS AMENDED

BEFORE: Newbould J.

COUNSEL: *Harvey Chaiton and Sam Rappos*, for Collins Barrow Toronto Limited, the Trustee

Matthew B. Lerner, for William Seegmiller

Irwin A. Duncan and David M. Steele, for Richard Magnussen, Marilyn Magnussen, Joseph Siefried, Susan Siefried, AJ Mueller, Kerry Mueller, Ryan Cyrankiewicz and Laurie Cyrankiewicz

Eric Sherkin, for MarshallZehr Group

Asim Iqbal, for Laurentian Bank of Canada

Oliver Romaniuk, self-represented

HEARD: October 27, 2015

ENDORSEMENT

[1] Collins Barrow Toronto Limited was appointed as Trustee pursuant to the *Construction Lien Act* by order of January 22, 2015 with respect to certain lands and premises owned by 144 Park Ltd. ("144") at 144 Park Street in Waterloo, Ontario. The Trustee brings this motion for advice and directions as a result of a problem of a lack of parking units in the building.

Factual background

[2] Mady Development Corporation acquired the lands and premises in question and transferred the property to 144 which is the registered owner. The property was acquired for the purpose of developing and constructing a 19 story residential condominium tower with indoor parking and other amenities.

[3] In 2011 and 2012, the lands immediately to the east of the property and known municipally as 155 Caroline Street, Waterloo, Ontario were purchased by One 55 Mady Ltd. ("One 55"), a related company to 144, with the intention of developing a second residential condominium tower. It was the intention of Mady, which 144 and One 55 were a part of, that the 144 project and the 155 project would have joined parking garages and would share certain facilities. The developer of the 155 project encountered financial difficulties and did not proceed with the project.

[4] 144 began selling residential units for the 144 Park project in the spring of 2009. 144 entered into 129 pre-sale agreements for the project. Sales took place in the following years: 2009 – 39 units; 2010- 70 units; 2011- 11units; 2012 -2 units; and 2013- 5 units. At the time the Trustee was appointed, 129 units had been sold and 20 remained unsold.

[5] 144 agreed to convey 154 parking units to purchasers of the 129 pre-sold residential units. The purchasers include twenty five purchasers who agreed to purchase two parking units for their single residential unit.

[6] As there are only 149 parking units in the 144 project, 144 had agreed to convey 5 more parking units than exist in the project. As a result, there were insufficient parking units available for the purchasers, and no parking available for purchasers of the 20 unsold units. The Trustee

understands that it was originally intended by Mady that parking units in the 155 project would be available to be transferred to residents in the 144 project.

[7] By the end of 2014, the project was substantially complete although a number of units still had work to be done on them. However 144 was in financial difficulty and most of the unit purchasers had entered into interim occupancy of their units in the late summer and fall of 2014 and were paying interim occupancy fees. At the time of the appointment of the Trustee on January 22, 2015, the condominium had not been registered due to the insolvency of 144 and the registration of numerous construction liens.

[8] After the Trustee was appointed, the condominium was registered on May 25, 2015 and the Trustee began closing some of the sales. Between July 7, 2015 and September 24, 2015, the Trustee closed the sale of 97 of the pre-sale transactions, including 98 of the 149 permanent parking units.[1] The Trustee has not closed any of the units that were sold with two parking spaces for one unit.

[9] The Trustee was in a position to close these transactions as result of, among other things, 12 of the 25 purchasers who bought two parking spaces for their unit agreeing to relinquish one of their parking units for a reduction in their purchase price by the amount of $33,900, inclusive of HST.

[10] Twenty-nine of the pre-sale transactions have not closed to date. If the 29 remaining sale transactions were closed by the Trustee pursuant to the terms of their agreements, it would require 42 of the 51 parking units to be transferred to the purchasers, leaving only 9 parking units available in the 144 project to be sold with the 22 unsold units.

[11] The Trustee is concerned that units without any parking space either cannot be sold or will fetch far less than they would if a parking space could be sold with them. A letter from a

[1] One purchaser received two parking units on closing, as his sale transaction involved the combination of two residential units into a single larger unit.

local realty brokerage indicates that the unsold units will be of a lower value without any parking than if they had one parking space and that there is no commercial evidence to support that these units will be saleable without parking. This is contested by the purchasers who have appeared to oppose the relief sought by the Trustee. Laurentian Bank, the first mortgagee of the property, and MarshallZehr Group, the third mortgagee of the property, oppose the Trustee completing the 29 sale transactions and leaving only 9 parking units for the 22 unsold units.

[12] The Trustee has proposed to the purchasers who agreed to buy two parking units that they agree to relinquish one parking unit in exchange for a reduction of $33,900 in the purchase price. The trustee has proposed that they may use without any additional cost an extra parking space for the earlier of 12 months or until the unit is no longer available. If the unit is available after 12 months, it could be rented out on a month to month basis at a rate of $150 per month until it is no longer available. The adjacent property is in the process of being sold and the buyer has said that if there are any extra parking spaces available in that building once constructed and sold out, these spaces could be acquired for $35,000 plus HST. None of the purchasers who agreed to purchase two parking units have accepted the proposal.

[13] The Trustee's view is that, in balancing the interests of the various stakeholders, the most appropriate option in the circumstances is for the Trustee to be authorized to terminate the agreements of purchase and sale with the purchasers who bought two parking units unless such purchasers are prepared to close the transactions with one parking unit, with a reduction in the purchase price by $33,900 for the parking unit given up. The Trustee seeks an order permitting it to do so. If any agreements were terminated by the Trustee, the purchasers would receive any deposit money being held in trust and could make a claim for any deposit money released to 144 against a bond provided for the project by Aviva. Any upgrades paid for by the purchasers would not be reimbursed.

[14] The agreements of purchase and sale, being pre-sales and for the most part made prior to the mortgage financing, all contained a provision that the purchase agreement was subordinate to and postponed to any mortgages arranged by the vendor.

Analysis

[15] The Trustee was appointed under section 68 of the *Construction Lien Act* which provides in subparagraph (2) that, subject to the supervision and direction of the court, a trustee appointed under subsection (1) may act as receiver and manager. A Trustee may take such steps as are appropriate subject to court approval. Section 68 provides:

> **68.** (1) Any person having a lien, or any other person having an interest in the premises, may apply to the court for the appointment of a trustee and the court may appoint a trustee upon such terms as to the giving of security or otherwise as the court considers appropriate.
>
> (2) Subject to the supervision and direction of the court, a trustee appointed under subsection (1) may,
>
> (a) act as a receiver and manager and, subject to the *Planning Act* and the approval of the court, mortgage, sell or lease the premises or any part thereof;
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> (b) complete or partially complete the improvement;
>
> (c) take appropriate steps for the preservation of the premises; and
>
> (d) subject to the approval of the court, take such other steps as are appropriate in the circumstances.

[16] Pursuant to paragraph 3 of the appointment order, the Trustee was authorized to act as receiver and manager of the property and to take any steps reasonably incidental to the exercise of these powers.

[17] There is authority that a court appointed receiver is not bound by existing contracts made by the debtor. See Houlden, Morawetz & Sarra, *The 2015 Annotated Bankruptcy and Insolvency Act,* L§30, p. 107 which quotes *Bank of Montreal v. Scaffold Connection Corp.* [2002] A.J. No. 959 as authority. In that case, Wachowich C.J.Q.B. relied on *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.) as authority for the statement.

[18] However, *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 C.B.R. (3d) 159 (N.S.C.A.) can be taken as authority for the propositions that (i) a court appointed receiver/ manager has a duty to maintain the goodwill of the debtor company and it is inconsistent with that duty to disregard contracts made by the debtor before the appointment of the

receiver/manager and (ii) that a receiver/manager should apply to court for approval to disregard any executory contract made by the debtor. In *Bayhold*, Hallett J.A. quoted *Re: Newdigate Colliery Ltd.; Newdegate v. The Company*, [1912] 1 Ch. 468 (C.A.) as follows::

> The *Newdigate* case is authority for the following valid proposition (p. 468):
>
> > "It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment."
>
> In that case, the receiver/manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver/manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts…
>
> …
>
> The reasons a receiver/manager cannot break contracts are that to do so could destroy the goodwill of the business and result in the company in receivership being liable for such a breach as the company continues in existence and could be sued for failure to honour its contracts should it get out of receivership. That is one of the reasons why a receiver/manager should apply to the court for approval to disregard any executory contracts. But the breach of such contracts does not make the receiver/manager personally liable to the creditors…

[19] In *Bayhold*, Hallett J.A. again quoted from *Newdigate* for the proposition that a receiver/manager is not personally liable on a contract made by the debtor. He stated:

> …the receiver/manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore the respondents are not liable to pay the interest that was payable during the receivership under the mortgages made by Community prior to the date of the receivership order. This is abundantly clear from the statements made in the *Newdigate* case where Cozens-Hardy, in dealing with contracts which the receiver/manager did not wish to perform and in which he had applied to the court to be excused from performing, stated at p. 474:
>
> > "I do not quite like the phrase 'break these contracts,' because it is not a question of breaking them. They are still subsisting, but it is

> impossible to suggest that the receiver and manager is under any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager."

Buckley L.J. in the same case made it abundantly clear that receiver/managers are not personally bound by existing contracts. He stated at p. 476-477:

> "As is notorious, and as appears by the evidence in this case, the value of coal has recently very largely risen, and if the Court were to make the order asked for, the receiver and manager would be directed to refuse to perform the existing contracts for sale of coal in order that he might sell it at the enhanced price it now commands, with the result that the company would be liable on the contracts for damages for breach thereof. The question is whether the Court ought to give such a direction as that. Something has been said about these contracts being binding upon the receiver and manager personally. That is not so at all."

[20] I take from *Bayhold*, that the proposition should be (i) a court appointed receiver/manager is not personally liable on a contract made by the debtor prior to the appointment of the receiver/manager; (ii) however, the receiver/manager has a duty to maintain the goodwill of the debtor company and it is inconsistent with that duty to disregard contracts made by the debtor before the appointment of the receiver/manager; and (iii) the receiver/manager should apply to the court for permission to disregard the contract. In my view, that is the proper approach.

[21] In *Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.* (2012), 99 C.B.R. (5th) 120, a receiver appointed by the court on a motion by the mortgagee sought to disclaim agreements of purchase and sale and leases to enable it to sell the entire property. The agreements were made after the mortgage and they contained a provision that subordinated the purchasers' and lessee's interests to the mortgagee. Morawetz J. (as he then was), held that the mortgagee's interest took legal priority over the interests of the purchasers and lessees, but that before authorizing the

receiver to terminate the purchase agreements and leases, it was necessary for the receiver to take into account the equitable considerations of all stakeholders.

[22] In *Re Jade-Kennedy Development Corporation*, Court file No. CV-10882-00CL, Justice Pattillo adopted the analysis of Morawetz J. in *Firm Capital* and applied the same test of taking into account the equitable considerations of all stakeholders to a trustee under the *Construction Lien Act* who sought permission to disclaim two purchase agreements of a residential condominium.

[23] While the CCAA is not applicable, it does provide some guidance of what is to be considered when a debtor wishes to disclaim a contract without the approval of the monitor. Section 32(4) includes in the factors to be considered whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This is consistent with the direction in *Firm Capital* that it is necessary to take into account the equitable considerations of all stakeholders.

[24] I accept that in this case the mortgagees have priority over the purchaser of the condominium units by virtue of the subordination clauses in the agreements of purchase and sale. I must, however, take into account the equitable considerations of all stakeholders, including any financial hardship to the stakeholders, in considering the request by the Trustee to terminate the purchase agreements under which two parking units were sold.

[25] There is little doubt that if units are sold without a parking space, they will bring in less than if sold with a parking space. In that case the mortgagees would be materially affected. What the chances are of that happening must be considered.

[26] Mint Realty advised the Trustee in August, 2015 that the 20 units unsold at the time of its letter (there are now 22) would be less valuable by a total of $3.7 million if they were all sold without a parking unit. However, it will not happen that there will be that many units that will have to be sold without a parking unit.

[27] If the purchasers who bought two parking units all close their deals and acquire two parking units, that will leave 9 parking units available for the remaining 22 units, with a potential 13 units to be sold without a parking unit. However, on October 16, 2015 an order was made permitting the Trustee to disclaim seven pre-sales of units with two parking units as those purchasers never appeared to this application to object. The Trustee has offered to let them close with one parking unit and reduce the purchase price by $33,900. If all seven of these purchasers agree to this proposal, it will free up seven parking units, leaving only six units to be sold without a parking unit. If none of these seven purchasers agree to this proposal, the Trustee will disclaim their agreements and 14 parking units will become available, leaving no units to be sold without a parking unit. Thus at the worst, there may be six units to be sold without a parking unit.

[28] It is contended by those who oppose the relief sought by the Trustee that the mortgagees have known from the outset of their mortgage advances that they knew of the units that were sold with two parking units and knew of the potential parking unit problem. I agree that the evidence supports this proposition. The mortgagees took the sale agreements as part of their security package and were provided with copies of all of the agreements.

[29] When 144 applied to Court for the appointment of the Trustee under the *Construction Lien Act*, the mortgagees consented to the order. The application by 144 said that a trustee was required in order to be able to register the condominium and to close the 129 pre-sales which would be a benefit to all stakeholders. The order appointing the Trustee on January 22, 2015 expressly gave the Trustee the power to close all of those sales. MarshallZehr, the third mortgagee, agreed to provide funding to the Trustee on a super-priority basis to enable the Trustee to take the necessary steps.

[30] Thus the mortgagees consented to a process that intended to close all of the 129 pre-sales in circumstances where they had to know of the sales of units with two parking units leaving a shortage of parking units for the rest of the building unless units became available after the construction of the adjacent building at 155 Caroline Street was finished. They were obviously prepared to take that risk at a time when the adjacent building had not been started and proceed with the Trustee closing the sales rather than acting on their mortgages under their security and

taking such steps to protect their interests that way. Nothing has really changed except that the 155 project is now being sold to a developer who intends to proceed with it. The risk that parking units will not become available was a risk taken by the mortgagees when they consented to the order appointing the Trustee which provided the Trustee with power to close all pre-sales.

[31] The financial implications to the purchasers are greater by far than the $33,900 offered to each of them to give up one parking unit. The evidence makes clear that the loss of a parking unit will substantially reduce the value of their condominium units.

[32] Mr. Seegmiller purchased one unit, being a three bedroom townhouse that is a part of the condominium development, for $616,000 in May 2009. An appraisal as of October 22, 2015 puts the market value of the property with two parking units at $692,000 on the assumption that the construction of the unit has been completed and at $584,000 if there is only one parking unit. The difference is $108,000. Reducing the price by $33,900 does not compensate Mr. Seegmiller for the loss of equity that he would suffer. If he did not agree to the Trustee's proposal, and the Trustee were permitted to terminate the agreement, this increased equity would go to the benefit of the mortgagees.

[33] The other purchasers who purchased two parking units would be in the same position. The evidence is that the average deemed compounded increase for single family residential properties in the Kitchener-Waterloo area from January 1, 2010 to September, 2015 has been 19.27%. The purchasers represented by Mr. Duncan have all spent money on upgrades to their units which would be lost if the Trustee were permitted to terminate their purchase agreements. The Trustee acknowledges in its factum that any upgrade money paid to 144 will not be reimbursed and will constitute unsecured claims against 144, i.e. will not be recoverable. Any upgrades paid for by purchasers who retained their own contractor obviously would not be recoverable.

[34] The issue of upgrades is not necessarily a minor matter. All of Mr. Duncan's clients have put in upgrades. One of them, Richard Magnussen, paid over $1 million for his unit and spent a further $340,000 on upgrades.

[35] If any purchaser agrees to the Trustee's proposal, the Trustee says that the purchaser will be able to claim the return of the deposit against any money still being held in trust and also make a claim against the bonding company Aviva. That may be. However, how secure the return of the deposits are is unclear on this record as it is not known how much is still being held in trust and as the terms of the bond have not been provided, it is unclear whether the bond would respond to this situation in which purchase agreements were terminated by the Trustee.

[36] The Trustee suggests that the problem for purchasers who purchased two parking units may be alleviated for those purchasers who accept the proposal by their being able to obtain a parking unit from the adjacent building at 155 Caroline Street when that building is constructed by the new owner. That cuts both ways. It would also mean that any buyer of the unsold units at the 144 project who was unable to purchase a parking unit, which will likely be six units at most and perhaps none, would also have that opportunity.

[37] In all of the circumstances, I am of the view that taking into account the equitable situation of all stakeholders, the request of the Trustee for permission to terminate the purchase agreements of the pre-sales that have not yet closed should be dismissed.

Newbould J.

Date: November 2, 2015