Estate / Court File No.: 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

IN THE MATTER OF *THE BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.

BOOK OF AUTHORITIES OF CONCORD PROPERTIES DEVELOPMENTS CORP.

(Returnable July 16, 2021)

July 15, 2021

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LIST OF AUTHORITITES

TAB 1

Court File No. 05-CL-5741
Date: 20050330

SUPERIOR COURT OF JUSTICE
ONTARIO
COMMERCIAL LIST

BETWEEN: CENTURY SERVICES INC.

AND: BROOKLIN CONCRETE PRODUCTS INC ET AL.

BEFORE: C. CAMPBELL J.

HEARD: March 30, 2005

COUNSEL: *Aubrey Kauffman for* The Receiver; *Melvyn Solomon* for Michael Crupi, *William Burden* for ROI, *Vern DaRae* for 206, *Deborah Grieve* for Gould Leasing

E N D O R S E M E N T

[1] The motion before the Court follows on 2 decisions the first I made on March 17, 2005, which accepted the bid of ROI and directed that the closing be postponed to March 29, 2005 pending the expected decision by Ground J. relating to share ownership of Brooklin. By letter to counsel of March 29, Ground J. advised of his decision that the transaction before him represented an unconditional sale and transferred the shares.

[2] Mr. Solomon submits that it would be appropriate for the Court to extend the closing date to permit him and his client to review the reasons of Ground J. when delivered and then decide whether to appeal. In my view, given the decision of Ground J., it is appropriate for this Court to grant the vesting order sought by the Receiver. The issue of postponement of closing is one that would have to be made before a judge of the Court of Appeal based on material relating to appeals of both my Order and that of Ground J. The additional reason for not postponing closing is to enable the business to operate on a proper financial footing which should not be the case if closing were postponed. Regularization of the position of other creditors including Gould Leasing is also important. The order for a vesting order will issue. Closing to be arranged as per the accepted agreement.

[3] During the course of submissions, an issue arose regarding the form of order that should issue in the circumstances of the granting of the vesting order but in the absence of reasons from Ground J. As submitted, the draft order is "subject to provisional execution notwithstanding any appeal." The phrase comes from s. 195 of the *BIA* and is an exception to the otherwise operative language of the section that where an appeal is taken, there is a stay of the order unless varied by a judge of the Court of Appeal.

[4] Reference was made to an article appearing in CBR (Articles) 4th Series, 2002 by Gavin J. Tighe and Stephen A. Thiele, which argues that "provisional execution" is a concept

recognized in the law of Quebec and that its inclusion in s. 195 should be limited only to Quebec where the concept is applicable and that "there is no doctrine or rule entitling a judge to order provision execution in Ontario."

[5] I am advised that there are Ontario cases which have recognized the concept. I am of the view that the concept is within the inherent jurisdiction of this Court and should be exercised sparingly and with caution, given the normal operation of a notice of appeal. I do think the provision should remain part of my Order but in addition to the issue of inherent jurisdiction, do so based (a) on the findings in these proceedings by Catzman J.A. concerning the design of Mr. Crupi; and (b) that what is sought to be stayed here is not the vesting Order, since any stay application of it should be before the Court of Appeal, but rather the closing date which flows from it – a different circumstance.

[6] As part of the relief sought on behalf of Mr. Crupi, which is otherwise dismissed, is sought on his behalf and on behalf of "206" the financier of the $6,092,806.19 paid into an interest-bearing account in the joint names of the firms of counsel for Crupi and ROI.

[7] Mr. Solomon urges that this sum in respect of redemption was paid in specifically on the condition that it would be repayable if Mr. Crupi was not successful in the redemptive effort. That condition was not part of the understanding of Mr. Burden, counsel for ROI or of the Court at the time of my March 17 endorsement.

[8] I advised counsel that in my view, should Mr. Crupi be released from the term of payment of that sum, both he and "206" should forfeit the right of redemption (if any) that would go with it and so order.

[9] The issue of the costs of Q.T. Inc. are addressed on the basis of written submissions of their counsel. A claim for costs was addressed on the basis that if Crupi was enabled to redeem the bidding process was frustrated and costs would be appropriate. The bidding process did operate as anticipated except that ROI, not Q.T., was successful. In the circumstances no award of costs to Q.T. is appropriate. The remaining issues of accounting as between the secured creditors may be brought before me if necessary. Counsel are to attend at a 9:30 appointment on March 31, 2005 to settle the terms of the Order that flows from these reasons.

C. CAMPBELL J.

Released:

TAB 2

CITATION: Computershare Trust Company of Canada v. Beachfront Developments Inc. and Beachfront Realty Inc. 2010 ONSC 4833
COURT FILE NO.: CV-10-8705-00CL
DATE: 2010903

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

APPLICATION UNDER section 243(1) of the *Bankruptcy and Insolvency Act* R.C.C. 1985, c.B-3, as amended

RE: COMPUTERSHARE TRUST COMPANY OF CANADA

Applicant

-- and --

BEACHFRONT DEVELOPMENTS INC. and BEACHFRONT REALTY INC.

Respondents

BEFORE: Newbould J.

COUNSEL: E. Patrick Shea, for the Applicant

Douglas G. Loucks, for Community Trust Corporation

HEARD: September 2, 2010

ENDORSEMENT

[1] On August 25, 2010 I released my endorsement on a motion brought by Computershare in which I authorized the receiver to take steps to sell two properties in Wasaga Beach owned by the respondents and mortgaged to Computershare, and to authorise the receiver to expand the premises on the property leased by Canada Post and to borrow money for that purpose. The motion was opposed by CTC which holds mortgage security on several properties as security for a loan, one of which mortgage is a second mortgage on the two properties mortgaged to Computershare.

[2] The order reflecting my endorsement has not yet been taken out. CTC retained new counsel who delivered a notice of appeal from my decision. Computershare moves for an order under section 195 of the BIA that the order to be taken out provide that it is subject

to provisional execution notwithstanding any appeal. The order sought is opposed by CTC.

[3] An order made subject to provisional execution notwithstanding an appeal is provided for in section 195 of the BIA, which provides:

> 195. Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[4] CTC takes the position that the request by Computershare should not be entertained but rather that Computershare should move before a judge of the Court of Appeal to vary or cancel the stay of proceedings. That would certainly be one way of dealing with the matter, but in the circumstances of this case, and the need for the receiver to act promptly to protect the value of the asset under receivership, I decline to accept CTC's position. CTC has retained new counsel who is away until at least mid-September and I see no reason not to exercise the jurisdiction granted to me under section 195 of the BIA.

[5] The receiver has delivered a third report supporting the request by Computershare that the order be made subject to provisional execution for reasons having to do with the premises currently leased by Canada Post. I need not repeat all of the circumstances regarding that lease that I referred to in my earlier endorsement.

[6] Canada Post is one of two tenants in the properties under receivership. Its lease expires in February 28, 2011 and Canada Post will only enter into a new long term lease if an additional 600 square feet of space is constructed, without which it will vacate the premises at the expiration of its current lease. Subject to that, Canada Post and the receiver have agreed on a new rental rate which the Receiver believes is beneficial.

[7] The receiver has great concern that if it does not immediately begin steps to plan for the expansion required by Canada Post, it will not be able to satisfy Canada Post with the likelihood that Canada Post will not renew its lease but take premises elsewhere.

[8] The receiver will not be in a position to build the expansion of the property for a number of months. It has retained an architect, Intra Architect Inc. Intra advises that it will take approximately two months, once they are retained, to prepare the site plan documentation and construction drawings. Once the site plan documentation and construction drawings have been received, the receiver will have to apply for site plan approval and building permits, and perhaps variances, and based upon information from Intra, it could take one to three months more to obtain site plan approval and one month to obtain building permits. Based on the advie received, the receiver believes that it will not be in a position to start construction of the expansion before four to six months have elapsed from the date that it is permitted to proceed, assuming no variances are required. As can be seen, the time is extremely tight for the Canada Post lease expires at the end of February 2011.

[9] I have been provided with authorities at the court of appeal level in Ontario and Alberta dealing with the test to be applied when a stay imposed by an appeal to a court of appeal is sought to be vacated under section 195 of the BIA. It appears that in Ontario the Court of Appeal has applied a variation of the test set out in *RJR-MacDonald Inc. v. Canada*. In *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 637, Lang J.A. stated that the criteria included whether there was a serious issue to be appealed, whether the moving party would suffer irreparable harm if the stay were not lifted and whether the moving party would suffer greater harm than the responding party if the stay were not lifted. She also referred to the decision of the Alberta Court of Appeal in *After Eight Interiors Inc. v. Glenwood Homes Inc*. (2006), 391 AR 202 which adopted a contextual approach meriting consideration of all of the relevant facts of the case. In that case, Fruman J.A. stated that courts generally in applications under section 195 focussed on the relative prejudice to the parties and the interest of justice generally.

[10] The notice of appeal that has been served[1] requests an order setting aside the order authorizing the property to be sold by the receiver. It is also apparent, although incorrectly stated, that CTC will also appeal from the order granting authority to the receiver to expand the Canada Post premises and to borrow for that purpose.

[11] I would not presume to consider whether an appeal in this case from my decision is or is not without serious merit. If that is a factor to be considered, I will assume that there is some merit to the appeal.

[12] I would add, however, that the notice of appeal as served contains incorrect statements as to what decisions were made in my endorsement of August 25, 2010. The notice of appeal states that I authorized the receiver to sell the property subject to the Computershare mortgage. There was no such proviso. It states that Computershare was authorized by the order to borrow money. That is incorrect as it was the receiver who was so authorized. It also states that I erred in finding that Computershare had not accelerated payment of the principal under its mortgage security and in finding that CTC was not entitled to redeem the Computershare mortgage without payment of interest to maturity. Those issues were not before me. It was CTC's position on the motion that Computershare had not accelerated payment of the principal due under its security or served a notice of sale and that as a result CTC was unable to redeem the Computershare mortgage. CTC took the position that Computershare should not be entitled to have the receiver given the power to sell the property and that if Computershare wished the property to be sold, it should accelerate the payment of principal and serve a notice of sale. In argument before me on this present motion, Mr. Loucks confirmed that that was the position taken by CTC on the previous motion.

[13] Whether it is a consideration of irreparable harm and balance of convenience or a consideration of the relative prejudice to the parties, in my view, Computershare has established that the order sought should be made. If the receiver is prevented from now

[1] The notice of appeal was drawn quickly by new counsel for CTC without the benefit of seeing the draft order to be appealed from and I understand that a further and corrected notice of appeal will be filed by him after his return.

taking any steps towards the eventual expansion of the Canada Post premises, there is a substantial risk that Canada Post will not renew its lease and instead go elsewhere in Wasaga Beach. That is the concern of the receiver and it appears well grounded. It is clear from the material provided on the previous motion, included the confidential cash flow projections provided by the receiver, that the value of the property under receivership would likely deteriorate substantially without Canada Post being a tenant. Deterioration of the value of the property would be prejudicial to Computershare as the Wasaga beach property is its security for its outstanding loan.

[14] As well, if as the receiver fears, Canada Post is likely to go elsewhere if the receiver cannot now take steps to expand the Canada Post premises, the appeal by CTC from the order permitting the receiver to expand those premises and borrow for that purposes could well be moot.

[15] On the other hand, it is not at all clear that CTC requires its second mortgage security on the Wasaga Beach property in order to have its loan retired, which at April 2010 was approximately $5.2 million. It appears that the primary security for the loan was intended to be two other properties, one of which has been listed for sale at $1.95 million and the other which was purchased in November of 2006 for $3.6 million. CTC has also taken collateral security on several other properties which have been listed for sale in amounts totalling $13.25 million. It is entirely possible that one or more of these properties will be sold and that CTC will be paid out without the necessity of receiving anything from the property secured to Computershare.

[16] Based on the information from its architect, the receiver estimates that the costs anticipated to be incurred over the next two to three months to have the site plan documentation and construction drawings prepared will be in the order of $30,000. If it turns out that the appeal is allowed and the receiver is not entitled to construct any expansion of the Canada Post premises, it is unlikely that the amounts that will have been spent by the receiver to that point will substantially affect the prospects of CTC being paid on its outstanding loan. If, however, it is necessary for CTC to access the sale proceeds of the Wasaga properties mortgaged to Computershare in order to have its loan

retired and if the receiver has drawn down any loans under the authority granted to it on August 25, 2010, any damages suffered by CTC could be remedied by an order that Computershare pay any such proven damages. Mr. Loucks conceded that if CTC's appeal is allowed and money has been spent by the receiver, there will be no prejudice to CTC if a remedy for proven damages is permitted.

[17] There is, of course, nothing to prevent CTC from moving expeditiously on its appeal and, if thought necessary, to apply to a judge of the Court of Appeal to have the appeal expedited. The material on both motions before me was not at all extensive.

[18] The receiver has stated in its third report that it is not concerned if the order permitting the receiver to market the property for sale is stayed so long as the receiver is able to request marketing proposals. The receiver is content to not listing the property for sale without CTC's consent until CTC's appeal is resolved.

[19] In the circumstances the order to be taken out reflecting my endorsement of August 25, 2010 is to provide that it is subject to provisional execution excepting that without further order, the receiver may not list the property for sale pending the disposition of CTC's appeal to the Court of Appeal without CTC's consent.

[20] If the parties are unable to agree as to costs, brief written submissions including a costs outline in accordance with the rules may be made by Computershare within ten days and by the respondents within a further ten days.

Newbould J.

Date: September 3, 2010

TAB 3

CITATION: THE CLOVER ON YONGE INC, 2020 ONSC 5444
COURT FILE NO.: CV-20-00642928-00CL
DATE: 20200727

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF THE CLOVER ON YONGE INC. AND THE CLOVER ON YONGE LIMITED PARTNERSHIP

Applicants

BEFORE: Koehnen J.

COUNSEL:

David Gruber for the CCAA Applicants and Concord Land Developments Limited

Steven Graff and Jeremy Nemers for the CCAA Applicants

Geoff R. Hall, Heather L. Meredith and Alexander Steele for the Monitor, PWC

Matthew P. Gottlieb, Andrew J. Winton and Zain Naqi for a group of unit purchasers

Kenneth Kraft for a group of unit purchasers

Karen Groulx for Altus Group Limited

Aaron Grossman for certain brokers

Mark Dunn for Maria Athanasoulis

Jonathan Rosenstein for Aviva Insurance Company of Canada

Fred Tayar for OTB Capital Inc

Nick Stanoulis for Stancorp Properties Inc. and certain unit purchasers

Christopher Henderson for the City of Toronto

HEARD: July 22, 2020

ENDORSEMENT

[1] This motion arises in the context of a *CCAA* proceeding involving a condominium project known as The Clover on Yonge. I will refer to the project in these reasons as either Clover or the debtor. Clover has approximately 522 residential units plus commercial and parking units and is in the course of being built on Yonge St. in Toronto. Clover has scheduled a motion to disclaim the agreements of purchase and sale that it had entered into with approximately 496 purchasers. Clover says it is economically unfeasible to complete the project with the pricing contained in the purchase agreements because construction prices have increased dramatically since the contracts were entered into in 2015.

[2] Clover commissioned a cost report and an appraisal report, from Altus Group, a consultant, quantity surveyor and appraiser specializing in real estate.

[3] Counsel for the unit purchasers have received a complete copy of the cost report and a redacted copy of the appraisal report. On this motion, the purchasers seek production of an unredacted appraisal report. In addition, Maria Athanasoulis seeks production of only the cost report and a number of real estate brokers seek production of both the cost and appraisal reports.

[4] Clover resists further production to any of the moving parties. It submits that the redacted portions of the appraisal report contain sensitive information which would be detrimental to the debtor if it became public, particularly if the *CCAA* plan fails and the project has to be sold. In those circumstances, dissemination of the information contained in the appraisal report would be prejudicial to the ability to sell the project. Counsel for the purchasers have signed non-disclosure agreements in respect of the cost report and are prepared to do the same for the appraisal report. The non-disclosure agreements restrict the availability of the reports to counsel, experts and a two-person steering committee. The debtor nevertheless is of the view that there is too much risk involved in the production of the unredacted appraisal report. The Monitor shares this view.

[5] For the reasons set out below, I grant the purchasers' motion for production of the unredacted appraisal report and dismiss the motions of Ms. Athanasoulis and the brokers for production of the cost and appraisal reports.

A. The Purchasers' Motion

[6] The purchasers point out that the debtor's deponent, Mr. McCracken, referred to the Altus reports in his affidavit supporting the disclaimer motion as a result of which they say production of the report must be ordered. The purchasers rely on rule 30.04 (2) which provides:

> (2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party.

[7] The purchasers submit that this is a mandatory provision that applies in all circumstances without exception. In support of this proposition they rely on language of D.M. Brown J. (as he then was) in *Timminco v. Asensio*, (2009), 95 O.R. (3d) 547 (Sup. Ct.) at para. 28, where he noted that a request to inspect must lead to "immediate and mandatory" production. There are no "[c]arve-outs" for "certain types of documents." Indeed, "[e]ven where a party has referred to an otherwise privileged document in its pleading, it must be produced if inspection is requested."

[8] Nordheimer J. (as he then was) articulated similar views in *R. v. Vijaya*, 2014 ONSC 1653 at para. 35:

> It is a basic principle that a party who files an affidavit as evidence in a proceeding is obliged to produce any material referred to in that affidavit at the request of any other interested party. Normally, any such material should properly be marked as an exhibit to the affidavit, and therefore be automatically available to any other interested party, but the failure to mark the material as an exhibit does not shield it from production. The entitlement to see such material is codified for civil proceedings in rule 30.04 (2)…

[9] The debtor and the Monitor submit that those cases did not involve *CCAA* applications and that a judge within the context of a *CCAA* proceeding has more discretion than the language of *Timminco* and *Vijaya* suggest. I am inclined to agree with the debtor and the Monitor in this regard. It strikes me that a federal statute that permits a court to disclaim contracts based on discretionary considerations and to develop a process for the resolution of litigious disputes within the *CCAA* proceeding that departs significantly from the *Rules of Civil Procedure*, also affords the court the discretion to depart from other "mandatory" provisions of the rules such as rule 30.04 (2).

[10] The question then becomes whether I should exercise my discretion in favour of production or maintain the more limited production that the debtor and the Monitor advocate.

[11] Although I have found that I have the ability to exercise discretion and am not absolutely bound by rule 30.04 (2), the rule remains a relevant factor in the exercise of my discretion. One factor relevant to the exercise of discretion is to consider the way in which a party has used the contested document in its affidavit. A passing, incidental reference to a document may lead a court to exercise its discretion against production. Reliance on the document for a material issue before the court may incline the court towards production. Reference to the Altus appraisal in the debtor's materials tends more in the latter direction.

[12] In Mr. McCracken's affidavit sworn July 8, 2020, he deposes in paragraph 8 that the project cannot be built with the original contracts in place "because the available revenue would

be insufficient to repay the financing required; but it would be a viable project if the Pre-Sale Contracts were not in place." He goes on in paragraph 19 to state that if the original purchase agreements remain in place, the developer would need to generate approximately $2,125 per square foot from the unsold commercial units and parking units just to break even which, in his view, is impossible.

[13] Mr. McCracken goes on in paragraph 45 of his affidavit to say:

> Altus Group is in the process of preparing an appraisal report providing their view of the anticipated market revenues of the various components of the Clover project, and which I anticipate will be generally in line with Concord's[1] view. I understand it will become available to counsel for unit purchasers and their steering committees who have entered into non-disclosure agreements with the Monitor."

[14] A number of factors emerge from Mr. McCracken's affidavit. First, Mr. McCracken deposes that the revenues from the project make it unfeasible without disclaiming the original contracts. He supported that view by invoking the authority of the Altus appraisal. Thus, the Altus appraisal was not referred to inadvertently or incidentally, but as a means of according legitimacy to Mr. McCracken's views about revenue. It would be unfair to permit a party to influence the court by referring to independent expertise but then decline to produce that expertise.

[15] Second, Mr. McCracken stated in his report that the appraisal report would be available to counsel for the unit purchasers and their steering committees. That affidavit was used in a hearing at which parties made submissions on the process to be followed for the disclaimer motion and I made rulings in that regard. The strategies that parties pursue in respect of a disclaimer motion could reasonably be expected to be influenced by the commitments that an opposite party makes. It would be unfair to have a party and the court be influenced by a statement of the sort Mr. McCracken makes in his affidavit only to have him resile from that commitment later. While it became clear on the scheduling motion that the debtor would not disclose the unredacted appraisal report without a court order, that hearing occurred on July 17, 2020. Mr. McCracken's affidavit was delivered to counsel for the purchasers shortly after July 8, 2020. This is a real-time litigation. As set out in greater detail below, the debtor seeks a speedy determination of the disclaimer motion and of its proposed plan. In those circumstances, for the purchasers to be under a misunderstanding about whether they would get the appraisal for even a few days, can seriously prejudice their ability to mount an effective case.

---

[1] Concord is the new owner of Clover. Concord acquired Clover in the course of the *CCAA* proceeding. When doing so it made clear that it would proceed with the *CCAA* only if it were permitted to disclaim the contracts. If not, it indicated that the *CCAA* proceeding could not succeed.

[16] Third, the disclaimer motion has been scheduled for August 20, 2020. Even that date is several weeks later than the debtor had asked for. The debtor and its new owner, Concord, have been aware of the disclaimer issue since at least February 2020. It has taken them until late June or July to complete the Altus report. It submits, however, that the purchasers do not need production of the Altus appraisal because they can obtain their own appraisal. The unfairness in this approach is manifest. Although Concord is one of the most sophisticated development companies in the world and has had six months to prepare an appraisal, it suggests that a disparate group of 496 purchasers be given approximately one month to do the same.

[17] Fourth, the debtor seeks the protection of the court. In doing so it obtains substantial advantages. It has prevented creditors from commencing lawsuits against it, it has prevented creditors from assigning it into bankruptcy, all with the object of restructuring in the hope of creating a profitable enterprise out of what it says is now an insolvent one. As part of that process, the debtor wants to disclaim the contracts that it entered into with 496 purchasers without facing any liability.

[18] It strikes me that production of the unredacted appraisal report accompanied by a non-disclosure agreement is a fair price for the debtor to pay for: (i) the right to argue disclaimer of 496 contracts; (ii) on a real-time basis; (iii) that does not give the purchasers adequate time to commission their own appraisal; (iv) after giving those purchasers a false sense of security that they would receive the appraisal report. There is a price to pay for the extraordinary benefits that the debtor seeks. Here the price is merely transparency.

[19] The debtor and the Monitor submit that the issue of producing the appraisal does not require the court to balance the interests as I have done above because the appraisal is not relevant to the disclaimer motion. The debtor notes that, if it is successful on the disclaimer motion, it will offer the units back to the original purchasers on a cost plus formula. It is for that reason that they have produced the unredacted Altus cost report to the purchasers. Clover and the Monitor submit, that the cost report gives the purchasers sufficient information with which to make decisions.

[20] Section 32 (4) sets out the factors the court should consider when determining whether to disclaim contracts and provides:

> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the Monitor approved the proposed disclaimer or resiliation;
>
> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[21] It strikes me that, at a minimum, the appraisal is relevant to the factors (b) and (c). It may well also irrelevant to any other relevant factors that the court is permitted to consider by virtue of the reference to "among other things" in the opening passage of section 32 (4).

[22] When I asked counsel for the Monitor whether production of the appraisal report would not enhance the prospects of a viable arrangement by providing both parties with information that might enable them to reach a mutually acceptable compromise, he responded that this was not the issue on the disclaimer motion. The Monitor submits that the disclaimer motion is a threshold issue which is conceptually distinct from the negotiation or approval of a plan.

[23] While I agree with that in theory, the distinction here is somewhat artificial. Disclaimer cannot necessarily be decided in a vacuum. It strikes me that both the purchasers and the court need to know what range of alternatives is available to decide whether to agree to or permit disclaimer; especially when the debtor proposes to seek plan approval within weeks of the disclaimer motion.

[24] A more extreme example helps make the point. If the value of the property in a *CCAA* sale generated enough profit to pay the unitholders their full damages on the sale, that might lead a court to reject disclaimer because there was no particular benefit associated with it. If, however, sale without disclaimer left nothing for unit purchasers then disclaimer might be more acceptable because it does not put the unit purchasers into any worse position than they would otherwise be in. The commercial reality may be considerably muddier than those two extremes. The two ends of the spectrum do, however, at least demonstrate conceptually why appraisal information is relevant even on the disclaimer motion.

[25] Having appraisal information on the disclaimer motion will assist in determining whether disclaimer will enhance the chance of a compromise and whether it causes significant financial hardship to any party to the agreement.

[26] The debtor and the Monitor note that the Altus reports were commissioned to help obtain financing and help the sales process, if needed. While that may be, Mr. McCracken appeared to recognize its relevance to the purchasers when he stated that it would be disclosed to them.

[27] A further dynamic applies in this case. As noted earlier, the debtor was acquired by Concord in the course of this proceeding. In that light, this is not a situation of the debtor stakeholder having been victimized by economic circumstances beyond its control, but rather where the true stakeholder within the debtor is an entity that came into the situation with eyes wide open in the hope of making a profit with the benefit of the court protection that the *CCAA* affords. The disclaimer involves, as counsel for the purchasers put it, a transfer of wealth from the purchasers to Concord. There is nothing inherently wrong with that. If the project truly is economically unfeasible on its original pricing, Concord is entitled to a reasonable profit on its investment. That might be the only way to permit the purchasers to retain their units. At the same time, however, if a developer wants the court's assistance in facilitating a wealth transfer to itself, the court should have the benefit of full information associated with that wealth transfer.

[28] Neither the Monitor nor the debtor submit that the purchasers would have some unfair advantage if they obtain the appraisal. Rather, their concern is that if recipients of redacted appraisal information inadvertently leaked it, creditors could suffer significant prejudice if the contracts were not disclaimed and the project had to be sold or if certain units had to be re-sold if their original purchasers did not participate in with whatever compromise may be negotiated. Those are valid concerns. It strikes me, however, that they can be addressed through appropriate non-disclosure mechanisms. By way of example, the debtor and Monitor have already agreed to disclose the cost report to purchasers with non-disclosure mechanisms that limit access to counsel, experts and a two-person steering committee. The purchasers agree that the appraisal report should be subject to the same type of restrictions. Neither the Monitor nor the debtor have identified any particular risks of doing so other than the general proposition that risk of disclosure increases as more people receive the information.

[29] Ms. Groulx stated on behalf of Altus, that the appraisal was prepared for a specific purpose and for a specific party. Altus is concerned about being exposed to liability if others use the report. That too is a fair concern. It can however be addressed by a provision in the production order to the effect that giving the purchasers access to the appraisal does not give them any right of action against Altus. Any use of the appraisal by any party for any purpose other than as originally contemplated when Altus was retained should not give rise to any liability against Altus

[30] For the reasons set out above I order that the Altus appraisal report be disclosed to counsel for the purchasers, their expert and their two-person steering committee in unredacted form. No such recipient is to communicate any of the contents of the appraisal report to anyone other than an authorized recipient of the appraisal report.

B. The Claim of Maria Athanasoulis

[31] Maria Athanasoulis is the former president of Cresford. She has a claim against Cresford and others for wrongful dismissal of $1,000,000. In addition she claims that she was entitled to 20% of the profits of the project.

[32] Ms. Athanasoulis seeks production of the Altus cost report that has already been delivered to counsel for the purchasers. She does not seek production of the appraisal because she agrees that she may be part of a purchaser group who may be interested in acquiring the project if the *CCAA* proceeding is not successful.

[33] Ms. Athanasoulis submits that she needs the cost report to help evaluate the debtor's proposed plan. At this point, the debtor envisages presenting a plan that would offer unit purchasers new contracts, would pay out all secured debt, would pay out all trade creditors and leave remaining unsecured creditors with a dividend of 3% of their claim amount.

[34] Ms. Athanasoulis is in a different equitable position than the purchasers. Clover never agreed to share either of the reports with her. She has only a potential claim as a judgment creditor. Her claim has not been adjudicated. She is not a unit purchaser and has no particular interest in whether the purchase contracts are or are not disclaimed.

[35] Ms. Athanasoulis is the former President and Chief Operating Officer of Cresford, the holding company with overall control of Clover before Concord acquired it. She is clearly a sophisticated individual with inside knowledge about the project.

[36] Paragraph 61 of her statement of claim states:

> By the fall of 2018, Ms. Athanasoulis, and the rest of Cresford's senior management team, advised Mr. Casey that Clover would require an additional $50 million to complete construction. Though this additional funding requirement would mean that no profit would be earned on this project, all lenders, trades and costs would be paid in full and Cresford could continue as a going concern with a solid reputation. Cresford funded some of the Clover obligations using fees earned on other projects, but a shortfall of $37 million remains.

[37] In other words, she admits the project was losing money. As a result, as of the time she left Cresford her 20% profit share would have had no value.

[38] In addition, her wrongful dismissal claim of $1,000,000 is subject to some ambiguity. Ms. Athanasoulis admits in her statement of claim that she was not paid out of the Clover entities but from another corporation that formally employed Cresford employees. There are 13 corporate parties in her statement of claim against which she claims wrongful dismissal. There would appear to be an issue about how her claim should be allocated between Clover and the other defendants.

[39] As a result of the foregoing, Ms. Athanasoulis is a contingent creditor and a potential purchaser of the debtor in any sale of the property and a party without an economic interest in the disclaimer issue.

[40] Those factors make the cost report significantly less important for Ms. Athanasoulis to have than it is for the purchasers to have the cost and appraisal reports. Given that Ms. Athanasoulis is a potential purchaser of the project, the difficulties posed by her having the Altus cost report are significant. Ms. Athanasoulis admits that it would be improper for her to have the appraisal given that she is a potential bidder in any sale of the project. Giving her the cost report raises similar conflicts.

[41] Given the degree of need that Ms. Athanasoulis has for the cost report, the conflict created by giving her the cost report, her limited interest (if any) in the disclaimer motion and the absence of any commitment by Clover to share the report with her, I dismiss her motion for production of the Altus cost report.

C.

D. The Real Estate Brokers

[42] The real estate brokers at issue are those who are entitled to commissions under the original purchase agreements. They claim their commissions in the *CCAA* proceeding. If the contracts are disclaimed, they would lose their commissions and also be limited to a 3% dividend under the plan the debtor proposes. The brokers seek both the cost and appraisal reports.

[43] They too have a significantly lesser need for the reports than do the unit purchasers.

[44] Most significantly, the debtor has already agreed that, if the contracts are disclaimed and the original unit buyers re-purchase them, the brokers will be deemed to be the broker and will earn commissions under the new purchase. That significantly reduces the financial impact of a disclaimer to them. If the contracts are not disclaimed, the brokers would likely lose their right to commission in any event in a subsequent receivership or bankruptcy sale.

[45] Even if the contract(s) in respect of which a broker has a commission claim is/are not re-purchased, having cost and appraisal information from Clover would give that broker an advantage over others and over Clover when the unit is re-sold. That subsequent sale to another purchaser is one in respect of which the purchaser is not entitled to transparency because it is an ordinary, arm's length purchase in respect of which Clover has not obtained any advantage vis a vis the new purchaser through the *CCAA* process.

[46] The brokers have articulated no particular reason for needing the reports other than the general proposition that they would be helpful when they are considering their position on the plan. Their claims to the reports are, like those of Ms. Athanasoulis, weaker given that the debtor never promised to produce the reports to them, arguments for and against disclaimer are already being advanced by highly qualified counsel and they stand to earn commissions even if the contracts are disclaimed. As a result, I dismiss the brokers' motion for production of the cost and appraisal reports.

Other Relief

[47] The debtor also sought other relief on the hearing which was not contested and in respect of which I signed orders immediately after the hearing. The principal issue involved an increase to the DIP facility. The increase was clearly necessary. It provided funding to take out the previous secured lender. To that extend it does not prime any other stakeholders. The interest rate on the DIP loan is also more favourable to the debtor than the interest rate on the previous loan. To the extent that the DIP funds ongoing construction and does prime other stakeholders, that construction preserves the value of the project and is in all stakeholders' interests. In

approving the DIP I am not, however, deciding whether the conditions in the DIP that call for further court rulings or orders have been satisfied. Those will be issues for another day.

Conclusion

[48] For the reasons set out above, I grant the purchasers' motion to have access to the unredacted Altus appraisal provided access is restricted to counsel, their expert and the two person steering committee and provided all those who receive access sign a satisfactory non-disclosure agreement. I am available to resolve any disagreements about terms of access or use. I dismiss the motions of Ms. Athanasoulis and the brokers for access to either the cost or appraisal reports.

Koehnen J.

Date: July 27, 2020

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIPAND YSL RESIDENCES INC.

Estate/Court File No.: 31-2734090

ONTARIO
SUPERIOR COURT OF JUSTICE
(IN BANKRUPTCY AND INSOLVENCY)
COMMERCIAL LIST

Proceedings commenced in Toronto

BOOK OF AUTHORITIES OF CONCORD PROPERTIES DEVELOPMENTS CORP. (Returnable July 16, 2021)

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