IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Accountable Mortgage Investment Corp. v. Nanaimo 22 Development (BT) Ltd.,* 2023 BCSC 2337

Date: 20231116
Docket: H230160
Registry: Vancouver

Between:

Accountable Mortgage Investment Corp.

Petitioner

And

Nanaimo 22 Development (BT) Ltd., Coromandel Nanaimo 22 BT Ltd., Coromandel Nanaimo 22 Limited Partnership, Coromandel Nanaimo 22 Development Ltd., Zhen Yu Zhong also known as Zhenyu Zhong, Junchao Mo also known as Jun Chao Mo, Lauan Capital Ltd., Coromandel Holdings Ltd., Coromandel Properties Ltd., Silverstone Investment Corp, Sky Team Capital Limited, John Doe, all tenants or occupiers of the subject lands and premises

Respondents

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:	A.A. Frydenlund, K.C.
Counsel for the Respondent, Junchao Mo, also known as Jun Chao Mo:	R. Clarke, K.C.
No other appearances	
Place and Date of Trial/Hearing:	Vancouver, B.C. November 16, 2023
Place and Date of Judgment:	Vancouver, B.C. November 16, 2023

[1] **THE COURT:** When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.

[2] The application before the Court today is for an order approving sale in these foreclosure proceedings.

Background

[3] The petitioner is the second mortgagee owed approximately $28 million pursuant to the order *nisi* pronounced July 27, 2023, which provided for a one day redemption period, immediate conduct of sale and a redemption amount as of that day of $25,852,930.50, with interest to accrue at the per diem rate of $7,715.16.

[4] The first mortgagee is owed approximately $11 million under its own foreclosure proceedings in which an order *nisi* has been pronounced, meaning that that approximately $39 million is secured up to this petitioner's secured position, as of now.

[5] The interest accruing on the first mortgage is approximately $2,300 per day, meaning that interest continues to accrue on the two mortgages at approximately $10,000 per day, or close to $300,000 per month.

[6] There are further financial encumbrances registered after this petitioner. However, none of those other charge holders are in attendance today or taking any position on this application.

[7] The petitioner seeks to sell the property to the BC Transportation Financing Authority, for the sale price of $22,500,000, pursuant to an offer accepted on October 4, 2023.

[8] The covenantor, or guarantor, Jun Chao Mo (the "Guarantor"), against whom personal judgment was granted in the order *nisi*, opposes the sale. He is facing significant exposure on that judgment if the sale is approved as sought, given the shortfall on what I can safely describe as this failed real estate development project.

[9] In terms of marketing, the lands themselves were listed for sale by the petitioner through their listing realtor, NAI Commercial, on July 26, 2023 initially with an unpriced private listing, which is not unusual for development properties such as this. The marketing letter which is attached to an affidavit sworn by the listing agent confirming its contents. Among other marketing steps, the following was undertaken:

a) marketing materials were distributed by way of a brochure being sent to over 2200 property owners, investors, users, influencers, although I am not sure what that would entail, and realtors;

b) a for sale sign was listed on the lands on July 28, 2023;

c) a commercial broadcast email was sent to all members of the commercial division of the Real Estate Board of Greater Vancouver; and

d) a data room with respect to the due diligence materials was established with a requirement for a confidentiality agreement to be signed in order to gain access.

[10] Thereafter, the properties were then listed on the MLS Service on August 11, 2023, at a price of $30 million. That list price was consistent with an appraisal that had been obtained by the petitioner from Saran Appraisals & Consulting on March 8, 2023, which provided an estimated market value of the property as at March 1, 2023, of $30 million. In this appraisal, the appraiser states that an appropriate exposure time for the property would be between three and six months.

[11] As part of the MLS listing, there was again a broad-based marketing program which included, in addition to the usual advertising on the Internet, on MLS Services and in the Western Investor, there was a direct calling campaign to approximately 150 large, mid, and small developers, as well as municipal and provincial governments.

[12] The listing price was reduced to $27 million on September 14, 2023, with emails then being sent to the various contacts to confirm that listing price reduction.

[13] The realtor's evidence is that there were 16 parties who signed confidentiality agreements to gain access to the data room. However, despite several letters of interest being received, the only clean offer, or offer that was finally able to be concluded and accepted subject to court approval, was the subject offer received October 4, 2023, in the amount of $22,500,000, for which a $5 million deposit has been paid with a closing of seven business days following court approval.

[14] With respect to the reference to other interested parties and those offers that were not capable of being accepted, I note that the particulars of those, including as to amount, are not in the marketing report.

[15] The position of the Guarantor is principally that the properties have not been fully and properly exposed to the market, which is required as a condition of any sale being approved by this court. The reason for this is independent of a side issue which is that on November 8, 2023, so approximately a week ago, Bill 47 received first reading, which is a Bill that has been brought forward for the purpose of stimulating development of multi-family units and development projects such as could be done on the subject property.

[16] Specifically, the subject property is commercial development property that is close to the Nanaimo and 29th Street Skytrain stations. Bill 47 contemplates that property that is within a certain area, which this would fall, ought to be given at a much higher density rating, or gross floor space ratio ("FSR"). I am advised that currently this property has a density rating of up to 1.04 FSR, whereas the Bill 47 contemplates that it could be anywhere from 5 to 10 FSR.

[17] Notably, Bill 47 was given first reading after the subject offer was accepted, meaning that the impact of it receiving first reading was not in specific contemplation of these particular purchasers, although perhaps they would have known from media accounts that that was a possibility. In any event, there is nothing before the court today to suggest that the possibility of this was before the potential purchasers or in their minds when the offer was made, or for that matter any of the parties that were engaged in the process.

[18] Nonetheless the position of the Guarantor here today is that as a result of that change in the marketability of the property, the property has not been fully and properly exposed in accordance with what the current conditions of the property are. The Guarantor argues that the first reading of Bill 47 may have had a significant impact on the interest in and likely value of the property.

[19] In support of that position, the Guarantor has tendered into evidence an opinion letter of Mr. Hart Buck from Colliers. Mr. Buck sets out a relatively detailed summary of the Bill 47, and opines that the property would be affected by those amendments, and makes the following recommendation:

> I understand that the existing offer on the property from the BC Transit Authority carries impressive terms with a very strong 5-million-dollar deposit and a seven-day closing period after court approval. However, I'm of the opinion that the purchase price of $22.5M may prove to be below market value given the recent Bill 47 announcement. Accordingly, I would recommend additional market exposure for the property by seeking an amendment to the current BC Transit offer to allow court approval on a pre-determined date in the middle of January. This timeline will allow the listing broker to explore the opportunity of additional bids from the development community, provide developers the opportunity to underwrite the opportunity, considering the newly announced provincial policy, and in turn, ensure that the maximum value and a fair process is achieved for each of the property stakeholders.

[20] The petitioner's listing agent did, in his marketing report, comment as to the impact of Bill 47 as follows:

> The Province's announcement on November 8th, 2023 about the proposed legislation for minimum density and close proximity to the transit, generally in Skytrain stations specifically, created a buzz in the marketplace with an uptick in interest at least from a discussion perspective.

[21] More recently and since Bill 47's first reading, on November 15th, 2023, the petitioner's realtor provided further detail with respect to what the Bill is intended to achieve and that:

> We are confident that the property has been properly exposed and that notwithstanding Bills 46 and 47, there are still unquantifiable issues relative to the development timing and costs that other market participants have been unwilling to speculate on.

Legal Analysis

[22] The parties do not disagree as to the appropriate considerations for the court on an application for approval of sale. In the interests of time, I will only briefly summarize those.

[23] In a court ordered sale, the court must be satisfied:

a) that the sale process was conducted in a business-like manner; and

b) that the proposed sale is provident in all of the circumstances as noted in *Mission Creek Mortgage Ltd. v. Angleland Holdings Inc.*, 2013 BCCA 281 at para. 40, and *Kokanee Mortgage MIC Ltd. v. 669655 B.C. Ltd.,* 2014 BCSC 458 at para. 24 and more recently *Institutional Mortgage Capital Canada Inc. v. Plaza 500 Hotels Ltd*., 2020 BCSC 888, at para. 34.

[24] As to whether or not the proposed sale is provident in all the circumstances, a provident sale is not necessarily one that achieves the highest price that could be achieved if certain assumptions are made, including as to future improvements being contemplated.

[25] In this respect, property does not need to be marketed or sold in the same manner that a mortgager would sell their own property. A mortgagee need not go to the ends of the earth to market, nor does it have to wait for a more provident time to sell the property. Rather, a mortgagee can act at any time to realize upon its secured interest, even when that timing may not be the best timing or ultimately ends up being adverse to that of the mortgagor.

[26] This is because a mortgagee is entitled to realize on their security and sell as-is when they deem appropriate provided they are in all instances acting in good faith and in a commercial manner, as noted in *430707 B.C. Ltd. et al. v. Royal Bank of Canada*, 2004 BCSC 350 (“*430707 B.C. Ltd.”)*:

> [43] The law in British Columbia can be found in ***J. & W. Investments Ltd.* v. *Black et al.*** (1963), 1963 CanLII 471 (BC CA), 38 D.L.R. (2d) 251

(B.C.C.A.) where the issues before the court were whether the plaintiff had properly exercised a power of sale and if not what damages arise. Sheppard J.A. said this at pp. 261-262:

> ... The results may be summarized as follows:
>
> (1) The fault which is the basis of liability is a wilful default or lack of good faith.
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> (2) This test is subjective and is quite distinct from the objective test at common law -- the care of a reasonable and prudent man according to the circumstances: *Vaughan v. Menlove* (1987), 3 Bing. (N.C.) 468, 132 E.R. 490.
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> (3) The evidence of such fault may be summarized as such lack of due care and diligence or acting fraudulently or wilfully or recklessly as would be proof of wilful default or lack of good faith.
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> (4) The foregoing must be qualified by reason that the mortgagee has the right to sell the mortgaged chattels to realize the moneys due to him. Having the right to payment, he is not obliged to wait as the reasonable merchant, until the full price is offered and therefore may wilfully sacrifice the mortgaged chattels in order to realize thereon. Whether the suit be to charge the mortgagee personally or to set aside the sale on the grounds of fraud or collusion with the purchaser, as in Haddington Island Quarry Co. v. Huson, [1911] A.C. 722; Farrar v. Farrars, Ltd. (1888), 40 Ch.D. 395; Nutt v. Easton, [1899] 1 Ch. 873; affirmed [1990] 1 Ch. 29, the Courts have held the mortgagee to be not a trustee for the mortgagor of the power of sale: *Farrar v. Farrars, Limited*, at p. 772. That is the mortgagee has an interest and the right to protect that interest by selling to realize the moneys due, notwithstanding such sale may be at an undervalue, provided always that he exercises such power of sale "in good faith, without any intention of dealing unfairly by his mortgagor": *Kennedy v. De Trafford et al.*, [1897] A.C. at p. 185. That is so stated in *Farrar v. Farrars, Ltd.*, by Lindley, L.J., at pp. 410-1 as follows:
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> > A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers upon the mortgagee the right to realize his security and to find a purchaser if he can, and if in exercise of his power he acts *bona fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed: *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 182; *Warner v. Jacob*, 20 Ch.D. 220.

[27] There is some inherent circularity in applying the test as noted above, in that whether or not a sale is provident requires that the property be fully and properly

exposed to the market, meaning that the process was conducted in an appropriate business-like manner.

[28] In determining whether or not it was exposed in a proper manner one has to have regard to the effect and the results of the process. Thus, saying that "the market has spoken", for example, to support that it must be market value because there are offers before the court is not a complete answer as to whether or not there has been a provident sale and a full and proper marketing of the property. The court must be satisfied in the first instance as to the property's proper exposure.

[29] Here, the Guarantor here puts an emphasis on the exposure time that is set out in the appraisal, that being three to six months, noting that the timing here is with an offer being accepted on October 4, 2023, with the initial listing being July 26, 2023, or approximately 2 and a half months earlier, in support of its argument that the property was not fully or properly exposed. Although not stated as such, if another month had passed before any offer was accepted the first reading of Bill 47 would have occurred.

[30] In support of the position the Guarantor relies on the comments made in *366671 British Columbia Ltd. v. Arbutus Bay Estates Ltd.*, 2021 BCSC 884 ("*Arbutus Bay*"), which was an appeal of a Master's decision approving a sale. In that case, the property had been exposed to the market for years prior to the petitioner taking over conduct. The list price went from $6.5 million in 2014 down to $2.99 million in 2020.

[31] An appraisal was obtained by the petitioner appraising the value at $2.16 million, with the following opinion as to exposure time:

> **Exposure Time**
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> In my view, the subject property ought to trade within a time typical for its market. On the current market, this exposure time would be in the order of 6 to 18 months for the subject property assuming it were reasonably priced and professionally marketed. This estimate does not include the time for typical due diligence and closing time subsequent to an agreement in principle.

[32] The property was then listed pursuant to an order of conduct of sale on September 3, 2020 at a price of $2.19 million with what appears to be, roughly,

monthly reductions thereafter of about $100,000 each until an offer was received at $1.8 million. Conditions on that offer were not removed. The list price was then reduced to $1,799,000, and ultimately an offer at $1.63 million was then accepted. After competing bids in court, the sale of the property was approved at $1.83 million.

[33] The basis for the appeal was that there had been too many price reductions in too quick of a time frame, with the respondent relying on the fact that there was expected exposure to the market of six to eighteen months based on the appraisal, with the offer having been accepted within that lower end, six months.

[34] In considering the appeal, the court emphasized the findings of the appraiser that an appropriate exposure time would be six to eighteen months, along with the definition included in the appraisal as follows:

> **Definition of Exposure Time**
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> Exposure time is the time a property remains on the market. In an appraisal, the term means the estimated length of time an owner would likely need to market the appraised property interest before the hypothetical consummation of a sale at market value on the effective date of the appraisal. An opinion of exposure time is a retrospective estimate that has its basis in an analysis of past events assuming a competitive and open market.
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> The period of exposure time occurs immediately before the effective date of the appraisal. The overall concept of reasonable exposure time encompasses not only adequate, sufficient and reasonable time, but also adequate, sufficient and reasonable marketing effort. Exposure time is different for various types of real estate and value ranges and under various market conditions.
>
> [emphasis added]

[35] The court concluded as follows:

> [21] I agree with the respondents that “Exposure Time” is a backward-looking concept. The Snell Appraisal did not offer an expert opinion as to how the market conditions would change once the Lands were listed, or how long the Lands would likely take to sell. But that does not mean the stated Exposure Time has no implications for the ongoing marketing of the Lands. Clearly, the Exposure Time – which is an indication of how long the Lands would have to have been marketed, up to the effective date of the appraisal, to obtain the appraised value – implies that if the same market conditions continue to pertain, a reasonable seller must have an expectation that obtaining the appraised value might necessitate marketing the property for as long as the Exposure Time.

> [22] Seen in this light, there must be some justification offered for the listing price of the Lands having been so substantially reduced, so quickly. Within three months of having been listed, the price was dropped to $1,899,000 – less than the low end of the Snell Appraisal's estimated range (96.02 x $20,000 = $1,920,400) – which was the third successive reduction in that time period. Surely this pattern of price decreases would have signalled to the market that the seller was highly motivated to sell, and if anything, was likely to consider "low ball" offers. There was yet another price reduction before a firm offer was in place.
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> [23] As proof that the marketing of the Lands was "businesslike", 671 relies on the Innes Marketing Report, which offered the explanation that the price reductions were because of the "low level of interest". That report did not divulge when the 27 inquiries and 11 booked viewings occurred in relation to the price decreases; nor how that level of interest compared to the pattern of inquiries and viewings on similar properties under similar – or any – market conditions. No evidence is offered as to why the Exposure Time of 6 to 18 months given in the Snell Appraisal should not have continued to be viewed as reasonable. The evidence is simply insufficient to demonstrate that the sales process conducted in respect of the Lands was businesslike.
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> [24] The Master considered that the sale ultimately approved of was only 15% less than the appraised value. That is of course the case; but that offer was the highest of a series of bids that began with an offer that was only 75% of the appraised value. The Master's reasons did not account for how the sales process may have been tainted by the pattern of steady successive price reductions; had the price not been lowered in that manner, the bidding may very well have started from a higher floor.

[36] The petitioner argues that this case is distinguishable and not much should be taken of the fact that the court seemed to have relied on the exposure period as set out in the appraisal because the property in issue in that case was a difficult property to sell, that being a property on Mayne Island, and that there were, as noted, successive and quick price reductions without there being inquiries between each to indicate that the market was concerned with the price.

[37] In contrast, the petitioner argues, the property before the court today is a development property in Vancouver, where developers are plentiful and generally well known by commercial realtors such as that retained by the petitioner. Given the number of market players, the market can be determined quicker with, as is the case here, a robust direct marketing campaign and reasonable expectation of competing bids if there remains interest at a price higher than that offered.

[38] The petitioners stated in their submissions that the exposure to the obvious market is evident in that 16 people signed confidentiality agreements to enter into the data room which meant that a large portion of the developing market was aware of this project, had an opportunity to conduct their own due diligence and that they had knowledge of the offer received and that it would be coming to court for approval on November 16, 2023, that being over three and a half months since marking started on July 26, 2023.

[39] As to the impact, if any, of Bill 47, the petitioner argues that whether or not it will have an effect on the market is speculative at best. At this point, it is a first reading Bill. There is no indication that it will be passed into law or how long that will take.

Conclusion and Order Made

[40] While the first reading of Bill 47 may create, to use the word used by the petitioner's realtor, a "buzz" in the marketplace, if it is to provide any sort of meaningful change in the market values, then it is reasonable to expect that there would be parties presenting competing bids to that currently before the court.

[41] While the fact that no one is competing is not, in and of itself, evidence that an offer is provident, the fact that no one is doing so is, similarly, not in and of itself evidence that the property has not been fully and properly exposed to the market.

[42] In the circumstances of this case, the evidence shows that there was media attention to the legislation prior to this application. The argument is that anybody, including the 16 parties who had access to the data room and were specifically interested in this property would be aware of Bill 47. If the value of the property had increased between then and now as a result of Bill 47 receiving first reading those parties would have participated in the bid process.

[43] In the overall analysis as to whether or not a person is acting in a business-like manner in conducting a sale process, and whether or not a property has been fully and properly exposed to the market, regard must be had to not only the strict

history of the marketing itself but the entirety and context of all circumstances surrounding that marketing up to the court approval.

[44] In this case, those circumstances include both the financial positions as to the parties and a potential change to the properties as a result of a potential change in legislation.

[45] As to the former, the petitioner is facing a considerable shortfall on this property. There is no indication or even a suggestion by the Guarantor that this property could be sold for some amount that would put the petitioner in a position that they would expect to be paid out in full. Rather, the Guarantor rests his argument on the fact that there has been a very recent change, or potential of a change which *may,* and I emphasize “may” because that is the word used by Mr. Buck in his report, have an impact on the market.

[46] Whether or not it will and whether or not it is appropriate to wait to see if it will, comes at a cost. That cost is the continuing accrual of interest on the first mortgage at approximately $3,000 a day, or $90,000 per month, while this process plays out, which means the petitioner is out of pocket $90,000 a month for whatever time of marketing is put in, plus the further loss of its own interest recovery, even if there is a slight increase in value. To impose a delay on the petitioner to see if a change happens is to compel the petitioner to, as the saying goes, play with its own money. As noted in *430707 B.C. Ltd.,* the petitioner is not required to do so, on the chance that it might be more profitable for them.

[47] With respect to the latter, that being a change of circumstances, in my view, it would lead to commercially untenable results if minor changes required the party who accepted an offer subject to court approval to, instead of presenting it to court, advise that party that their contract was not going to be presented (leaving aside whatever obligations arise in the contract itself to do so).

[48] There has to be some certainty in the court sale process, which is why the court places such significance on the integrity of the process.

[49] Circumstances do often change between the offer being accepted and the application being brought. For example, and relevant in today's financial climate, interest rates change. An interest rate could decrease between offer acceptance and court approval, which means that the buying public may be able to afford a higher price. However, based on the continued exposure to the market from the time of acceptance to court approval, it would be reasonable that such changes would be taken into account by virtue of the competing bid process.

[50] Counsel for the Guarantor acknowledged that minor changes would not affect whether the marketing process was properly carried out. However, he argued that the first reading of Bill 47 was a significant change, and one that sufficiently changed the entire foundation on which the offer was based.

[51] While I agree that there may be a change in market circumstance through no fault of the petitioner that is significant enough that an offer obtained, no matter how full and proper the marketing process, can no longer be reasonably considered to represent fair market value. However, such a circumstance would likely have to be one that market participants could not have reasonably foreseen or responded to by the bid deadline.

[52] There was media discussion of proposed legislative changes prior to Bill 47 receiving first reading. There are 16 parties that have entered into confidentiality agreements and entered into the data room, meaning that they have undertaken due diligence, with no evidence to suggest that they did not know of the possibility of Bill 47, or its first reading, prior to the bid deadline.

[53] At this point Bill 47 is still speculative as it is not yet in effect. I also note that there is no indication in Mr. Buck's opinion that anyone has indicated that if the property is exposed to the market again, that they would bid against this offer if given a further opportunity.

[54] In short, anybody that would wish to capitalize on the speculation that Bill 47 may make development more lucrative, was able and could have come to this Court and submitted a competing bid.

[55] Bill 47 receiving first reading is not a change in circumstance that undermines the marketing process that was undertaken sufficiently so as to justify interfering with the integrity of that process.

[56] Finally, as to the marketing exposure time set out in the appraisal, even if I was satisfied that a reference to an exposure period in an appraisal is some indication of how long it should take before an offer should be accepted, I do not accept that it means that no offer may be accepted by this court until that period is completed. I do not agree that the appeal judge in *Arbutus Bay* went so far as to suggest that would be the case. However, even so, it has now been over three and a half months since marketing started, which is within the period referenced in the appraisal report.

[57] I am satisfied that the property has been fully and properly exposed to the market.

[58] As such, I am prepared to approve the sale as presented to the court today. The order is granted as sought.

"Master Robertson"