

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lanyard Investments Inc. v. 3771 No. 3
Road Inc.*,
2024 BCSC 1664

Date: 20240808
Docket: H240485
Registry: Vancouver

Between:

**Lanyard Investments Inc. as general partner of
LFC 3Road21 Limited Partnership
City Mortgage Investment Corporation**

Petitioners

And:

**3771 No. 3 Road Inc., 3771 No. 3 Road Properties Limited Partnership,
3771 No. 3 Road Properties GP Ltd., 3771 No. 3 Road Investment Limited
Partnership, 3771 No. 3 Road Investment GP Ltd., Aimforce Development
Holding Ltd., Davidson Guo, Amber Mortgage Investment Corp.,
and All Tenants or Occupiers of the Subject Lands and Premises**

Respondents

- and -

Docket: H240523
Registry: Vancouver

Between:

Amber Mortgage Investment Corp.

Petitioner

And:

**3771 No. 3 Road Inc., 3771 No.3 Road Properties GP Ltd., 3771 No.3 Road
Properties Limited Partnership, 3771 No.3 Road Investment GP Ltd.,
3771 No.3 Road Investment Limited Partnership, Aimforce Development
Holding Ltd., Davidson Guo and All Tenants or Occupiers of the Lands and
Premises**

Respondents

Before: Associate Judge Robertson

Oral Reasons for Judgment

In Chambers

Counsel for Ambert Mortgage Investment Corp.:

T.Y. Chen

Counsel for Lanyard Investments Inc. and City Mortgage Investment Corporation:

A.A. Frydenlund, KC

Counsel for 3771 No. 3 Road Inc., 3771 No. 3 Road Properties Limited Partnership, 3771 No. 3 Road Properties GP Ltd., 3771 No. 3 Road Investment Limited Partnership, 3771 No. 3 Road Investment GP Ltd., Aimforce Development Holding Ltd., and Davidson Guo:

J.F. Gray

Place and Date of Hearing:

Vancouver, B.C.
August 8, 2024

Place and Date of Judgment:

Vancouver, B.C.
August 8, 2024

[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.

Applications Before the Court

[2] There are two applications before the court today in two separate foreclosure proceedings:

- a) In action H240523 *Amber Mortgage Investment Corp. v. 3771 No. 3 Road Inc.* (the “Amber Proceedings”), where Amber Mortgage Investment Corp. (“Amber”) seeks Order *Nisi*; and
- b) In action H240485, *Lanyard Investments Inc. v. 3771 No. 3 Road Inc.* (the “Lanyard Proceedings”), where Amber, as second mortgagee, is seeking an order for conduct of sale on the basis that there is a risk to their security, having regard to the amount owing to Lanyard Investments Inc. (“Lanyard”) in priority to it.

[3] In the Lanyard Proceedings order *nisi* was pronounced on July 11, 2024. The amount to redeem was set at \$11,735,685 with a redemption period expiring January 11, 2025. In the Amber Proceedings, the order *nisi* being sought seeks the usual relief, with the amount to redeem being \$2,499,247 and a shortened redemption period.

[4] The relief being sought in respect of Amber’s order *nisi*, is not opposed, except as to what an appropriate redemption period ought to be, based on the value of the mortgage security.

[5] Thus, in both applications, the primary issue is whether or not Amber’s security is sufficiently at risk and it was that point on which the parties concentrated their submissions, to support it having conduct of sale at this mid-way point of Lanyard’s redemption period, and a shortened redemption period itself.

Evidence as to Value

[6] The subject properties are two adjacent lots that have development potential. They are currently used for commercial purposes and are subject to a long-term lease with a car dealership, which is operating on the lands with a large parking lot being used on the lands with respect to that dealership, and other commercial properties.

[7] None of the parties disagree that the highest and best use of this property is development potential. One of the reasons for that is that it is close to the Aberdeen SkyTrain station, which is subject to the new legislation promoting density increases in the areas next to transit services such as the SkyTrain station.

[8] Currently, however, the Floor Space Ratio (commonly referred to as the FSR) for this property is currently 3.0 given that it is not currently zoned for residential use.

[9] The dispute between the parties as to the value of the subject property, and thus whether Amber is at risk, is largely based on the consideration of the appraisers as to the value of the potential for an FSR increase based on development potential, as well as an appropriate price point for the price per buildable area.

[10] There are three competing appraisals before the court.

[11] The first is the appraisal commissioned by the borrower from LW Appraisals, which provides the highest value. It uses a buildable area price of \$160, values the property based on an FSR of 3.5 for a building and land value of \$18,440,000. In addition to that value, the appraisal was specifically asked to add in the holding value of the improvements, i.e. the value of the long-term lease with the car dealership, which is I believe in place until 2028 with an option to renew for five years thereafter. The appraisers therefore valued the value of that lease from July 1, 2023 (i.e. a year in the past) to June 30, 2028, or the entire life of initial term of the lease, at \$988,000, bringing the total appraisal value to \$19,428,000.

[12] The second appraisal is that commissioned by Amber, which was authored by Colliers. It bases its appraisal on a \$145 per billable area value, with a FSR of 3.0, based upon the current village plan, for a total appraised value of the property at \$14,300,000. There is nothing in the Colliers appraisal as to a holding value for the car dealership lease. While Colliers does base its appraisal on the current village plan of a 3.0 FSR, with an assumption of construction of the Aberdeen SkyTrain station for a new line, and does acknowledge that FSR could go up to 3.5 it notes that for that to happen various conditions must be met, one being the bylaw requirements for contribution by the owner to the transit hub that is needed.

[13] In addition, there is some reference to an additional 1.0 FSR increase depending on how the development is ultimately done. For example, if a larger format grocery store, drugstore, medical services, or other services which are deemed viable to the village to the satisfaction of the city are put in place, then the FSR increase may occur.

[14] Colliers does, in conducting its current as-is valuation, note that despite those potential changes, residential use is not permitted right now. One of the reasons for that, as acknowledge in all parties' appraisers, is that it is within an aircraft noise area such that residential use is not permitted at this time.

[15] The third appraisal was commissioned by Lanyard, and was authored by Garnett Wilson. It provides the lowest appraised value of the three. Specifically, it provides a billable value of \$120 such that, although it does use a 3.5 FSR, given that lower billable area value the final appraised value for the property amounts to \$13,890,000.

[16] All of the appraisers are consistent, as I noted, that the highest and best use is development potential. Where they differ is the per billable area price and, with respect to the Colliers opinion, whether or not the FSR ought to be 3.0 or 3.5 in valuing this property.

Analysis

[17] The starting point, in so far as the conduct of sale application is concerned, is that the “rule of thumb” is that a subsequent mortgagee should generally seek conduct of sale at the mid way, or three-month mark in the standard six month redemption period, of a prior mortgagee’s redemption period even where the value of the property adequately secures “all encumbrances”, as noted by McEachern, C.J.S.C., as he then was, in *On Foreclosure Practice*, (1983) 41 Advocate 583 (“*On Foreclosure Practice*”):

If there is adequate security for all encumbrances, there should not be an order for conduct of sale until part way through the redemption period so that the mortgagor may have a chance to sell his property or redeem it. If he does not do so, when should the second or subsequent encumbrancers have an opportunity to protect themselves from being foreclosed by the first mortgagee? Halfway through the redemption period is a useful rule of thumb in this connection.

[18] In terms of Amber’s redemption period, the starting point is a six month redemption period, with any order for a shortened period to be exceptional as it is “contrary to the ancient principle that a defaulting mortgagee should have a six-month grace period to redeem the property”, as noted in *On Foreclosure Practice*, where the test was stated this way:

The redemption should not be less than six months unless:

- (a) the premises are abandoned or suffering waste. The fact that premises are vacant does not necessarily mean that they are abandoned; or
- (b) the mortgagor has no equity and is unlikely to be able to refinance and the mortgagee will likely suffer a loss or increased loss if the usual order is made.

Even in these circumstances, an immediate order absolute or a shortened redemption period will not always be made, particularly in the case of residential premises where the mortgagor is in occupation. The court retains a discretion in this connection, but, in most cases, the position of the mortgagee should not be worsened materially.

[19] This was cited with approval in *CIBC Mortgage Corp. v. Gomez*, 1997 CanLII 1823, at para. 4 and *Tri City Capital Corp. v. 0942317 B.C. Ltd.*, 2016 BCSC 1514, at para. 172.EE

[20] Taking the order *nisi* amounts alone, i.e. without considering the accrued interest from now until sale, commission and other recoverable costs, in order for Amber to not be at risk, the property would need to sell for over \$14,234,932. Thus, if the court accepts either of the lenders' appraisals at \$14,300,000 or \$13,890,000 there is sufficient evidence before the court to find that Amber's security may be at risk. If the court accepts the borrower's appraisal at \$18,440,000, or even a discounted amount from that value, the evidence will support that Amber's security is not at risk such that the court should not exercise its discretion to reduce its redemption period.

[21] Counsel sought to distinguish many of the comparables used by the other parties' appraisers in order to establish that its value should not be given as much weight.

[22] The court is not an expert on property valuation. As such, it is not in a position to determine if one comparable is a more accurate comparable than another, or whether or not the appraiser has applied the proper discount or gross up to that comparable to bring it in line with the subject property. That is precisely the role of the appraiser. It would be the exceptional case in which the court could adequately critique a report based on a preference over comparables or adjustments to such comparables that one or another appraiser has used, using their skill and expertise, to form their opinions as to value.

[23] However, an appraisal is not always definitive, as has been noted by this court in various cases, including *Romspen Mortgage Corporation v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222, at para. 20:

[20] An appraisal is no more than an expert's opinion on what a property's sale price is likely to be if properly exposed to the market for an appropriate length of time. In a case where property has received a proper and lengthy exposure to the market, as I find this property has, there comes a point where the market speaks loudly and the appraisals become relegated to not much more than well-meant but inaccurate predictions. See *RBC v. Marjen Investments Ltd.* (1998), 1998 NSCA 37 (CanLII), 155 D.L.R. (4th) 538 (N.S.C.A.).

[24] In applications at this conduct of sale stage, appraisal evidence may, however, be the only evidence as the property will not have a purchaser before it who has made an offer based on marketing, with the marketing history and conditions being in evidence before the court.

[25] As such, appraisals are generally the best evidence available when determining a lenders risk to their security at this early stage, despite that they are nothing more than an educated guess as to what a market *may* do in the future.

[26] As such, to the extent an opinion as to value is based on possibilities, and a court is presented with competing opinions in that respect, the court is left in the unenviable position of weighing the relative strengths and weaknesses of expert reports.

[27] To the extent the appraiser has applied large adjustments to the comparables used by them in forming their opinion, it may be that their educated guess falls more within the category of art than science. That may be a consideration for the court in assessing the weights of the respective reports.

[28] In addition, one way for the court to assess the opinions is to consider the assumptions that are being made and, in this case, the instructions that are being given by the commissioning party.

[29] I do have a concern as to the instructions given to appraiser commissioned by the borrower. While I agree with the borrower that it makes commercial sense that an investor looking to buy commercial property is going to be more inclined to buy property where they may be able to earn an income while it is being developed, particularly where there may be a lengthy process of getting approvals, zoning, and acceptances, particularly with changes to city plans to fit within a potential community plan's overall objectives, the fact that the appraiser did not do that on his own volition is of note.

[30] It is clear in the appraisal commissioned by the borrower, given that the appraiser makes that comment a number of times, that he would not have otherwise included that as part of the appraisal.

[31] In addition, that appraisal is noted to be for lending purposes. It is not clear whether or not that affects the assumptions, although I would hope that an appraisal would be the same whether it is being provided to a lender or to the court for fair-market-value purposes. It is, however, a notable difference.

[32] Thus, other than the inclusion of the holding value of the lease, there is no obvious difference in the assumptions. I think it goes without saying that reasonable minds may differ, and certainly appraisers can often differ in their views as to value with, as noted, the determination as to value ultimately being made by the market.

[33] In this case, the swing is considerable. The difference between \$120 and \$160 as the price of per-billable area is significant and largely unexplained. The Colliers report, as commissioned by Amber, appears to be the one that essentially splits the difference at \$145.

[34] In this case, where there are not assumptions being made which can be established on the evidence to be obviously erroneous, the court must achieve a form of rough justice in assessing the evidence of risk, having regard to the “rule of thumb” that Amber should seek conduct of sale in the Lanyard Proceedings at this point, but that the redemption period in its own proceedings should be six months absent evidence risk.

[35] Although not in any way a scientific method, using a mid way point of the various parameters used by the experts is appropriate in the circumstances of this case. Given that the appraisals are all educated predictors of future value based on assumptions, none of which are obviously erroneously (except as to the addition of the leave value) it is reasonable to proceed on the basis that the final reality will be somewhere in the middle of those conclusions.

[36] Using Collier's price of \$145 per billable area, and the two competing FSRs of 3.0 and 3.5, the value would be between \$14,300,000 and \$16,712,482. The mid point of those two values is \$15,506,241.

[37] As of today, the amount to satisfy both the petitioner and Amber, after accounting for the commission that would be payable, the property would have to sell for over \$15M, today.

[38] The burn rate in terms of the current holding costs is approximately \$150,000 per month, and will rise even further after December 2023 when Lanyard's interest rate increased from 11.75% to 16% per annum which, on a \$12M principal balance means an increase of \$50,000 per month or so.

[39] The appraisals of Colliers and Garnett Wilson both assume a marketing period of nine to twelve months.

Conclusion

[40] The onus is on Amber to establish to this court that there is a risk to its security in order to obtain a shortened redemption period.

[41] The evidence to establish that need not show that it is an absolute certainty. Such evidence would not be possible on an application such as this, where there has been no marketing resulting in an offer.

[42] Assuming a value of \$15,506,241, Amber will be facing a shortfall within three months. By the end of a full nine to 12-month marketing period, with time required for closing, they would be at risk even with a value of \$16,712,482.

[43] While I agree that developers do make purchases based on their own reasonable assumptions and, I would say, hopes as to the future given that developers are speculators at heart and generally optimistic ones when they are making those analysis, they are also businessman and will factor in the risk that development may not be possible.

[44] I am satisfied that Amber has met the onus upon it to establish that its security is at risk.

[45] Turning then to the second part of any test in setting a redemption period as is relevant to Amber's petition hearing, the evidence as to an intention to redeem is quite limited. There is nothing in the materials to show what the owner intends to do during a redemption period if the redemption period were six months or between now and the end of Lanyard's redemption period, other than to say that he has been looking at, or having some discussions with, some people that may or may not be investors.

[46] Those discussions can continue to be had, notwithstanding that a redemption period has expired or a lender marketing under a conduct of sale order.

[47] Any order made today would not prevent a borrower from redeeming, as they are entitled to do so until an order is pronounced by which such rights are foreclosed, either by order absolute or order approving sale.

[48] Given the risk of security as I have found, an appropriate redemption period is one-month. The order *nisi* in the Amber Proceedings is granted as sought, with the relief as set out in the statement of accounting, with a one month redemption period.

[49] Conduct of sale is granted to Amber in the Lanyard Proceedings.

[50] Given that this was an opposed application, costs of today's application will be at Scale B.

"Associate Judge Robertson"