

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

**AND IN THE MATTER OF AN APPLICATION MADE BY
JADE-KENNEDY DEVELOPMENT CORPORATION FOR THE
APPOINTMENT OF A TRUSTEE UNDER SECTION 68(1) OF THE
CONSTRUCTION LIEN ACT, R.S.O. 1990, c.30, AS AMENDED**

FACTUM OF ANNA ANDREW and ROGER DOL

Part I -The Motion

1. The Trustee seeks to terminate or disclaim two legally binding agreements of purchase and sale (the “Agreements”) between Jade-Kennedy Residential Corporation and each of Anna Andrew and Roger Dol (the “Buyers”) in respect of 2 condominium units (the “Units”) on the basis that the sales are improvident.
2. This Court has no basis for determining if the sale of the Units was improvident because the Trustee puts forth no evidence of the true market value of the Units.
3. Furthermore, the Trustee puts forth no evidence of any bad faith or improper conduct on the part of the Buyers.
4. In the circumstances, this Court should order the Trustee to complete the Agreements.

Part II- The Facts

5. The Buyers accept the facts set out in the Trustee's Factum except as specified below:

- (a) The Trustee puts forth no basis for its understanding that the net purchase price for the units (the "Units") would each be \$190,114.07;
- (b) The Buyers deny that the sale of the Units constitute improvident sales at amounts materially below market value and would prejudice the mortgagees, lien claimants and other JKDC creditors;
- (c) The Buyers have no knowledge of whether JKDC was insolvent at the time the Agreements were executed;
- (d) The Buyers cannot accept that the previous listing agent informed the trustee that she has received many inquiries for the Units and has indicated that she can bring in an offer for unit 117 materially higher than the net purchase price on the table; and
- (e) The Buys have no basis for verifying whether unit 118, 217 or 318 sold on the dates and for the net amounts claimed by the Trustee.

6. The Buyers also point out that the Trustee has:

- (a) forth no appraisal of the Units;
- (b) provided no evidentiary basis for the net sale prices of units 118, 217 Or 318;
- (c) provided no details of the many inquiries received by the previous listing agent; and

- (d) not provided the Buyers with a copy of the offer it claims to have received for one of the remaining residential units, nor advised which unit the offer was for.

7. It is undisputed that:

- (a) Christopher Andrew, the person who negotiated the Agreements on behalf of the Buyers, was unaware of JKRC's financial situation until I was advised of this proceeding by a representative of Collins Barrow in early March, 2015;

Affidavit of Christopher Kit Andrew sworn May 19, 2015, para. 3

- (b) The Trustee's representation to the Court made in its First Report that it had been informed by Mady Group management that Mr. Andrew is a former employee of JKRC is incorrect;

Trustee's Third Report para. 27

- (c) The financial arrangements of the Agreements were reached in early 2015;

Affidavit of Christopher Kit Andrew sworn May 19, 2015, para. 3

Part III- The Law

8. A court-appointed receiver is an officer of the Court and is in a fiduciary capacity to all stakeholders. The Trustee has the same status.

Pinnacle Capital Resources Ltd. v. Kraus Inc., 2012 CarswellOnt 14138 (S.C.J.) at para. 27

9. Given the Trustee's duty to all stakeholders, which includes the Buyers, the Court should exercise any discretion it has to terminate legally binding agreements sparingly, after careful consideration of the legal and factual basis put forth by its appointed receiver or trustee, and placing emphasis on the fact that the Buyers are innocent parties that acted in good faith in entering into the Agreements¹.

10. The Trustee borrows the term improvident sale from the body of law regarding a mortgagee's duty when selling real property. The law imposes a duty on the mortgagee to take reasonable precautions to obtain the true market value of the mortgaged property, failing which the sale can be said to be improvident.

Montemurro v. Jardim, 2012 CarswellOnt 13582 (S.C.J.) at paras. 48-53

11. The Buyers submit that the Agreements should not be terminated in this case for the reasons set out in the following paragraphs.

12. It matters not that JKDC was on the eve of insolvency at the time the Agreements were entered into. There is nothing in the Trustee's reports to even suggest that the Buyers or Mr. Andrew were aware of JKDC's financial situation. In fact, the undisputed evidence is that they were unaware. There is nothing in the Trustee's reports to suggest bad faith on the part of the Buyers or to even suggest that Mr. Mady had any improper intention or acted in bad faith when entering into the Agreements on behalf of JKRC.

¹ The Trustee sought and was granted permission from this Court to complete the sale of 18 units in the development. Given the absence of evidence of the true market value of the Units, the Court ought not treat the Buyers differently from the buyers of the other 18 units.

13. The Units went on the market 6 years ago and remained unsold until February, 2015. There could be no better evidence that the listing prices of \$270,900 and \$271,900 were above market price.

14. The Trustee puts forth that similar units sold for a net selling price of \$252,925.38 (unit 318) in April, 2014 and \$251,071.76 (unit 118) in June, 2014. These sales similarly evidence that the listing prices of the Units was too high. Why did the Units not sell between these dates in 2014 and February, 2015?

15. The Buyers still do not know the net sale price that Tradeworld Realty Inc. indicates it can sell the Units for. Is it really materially higher? In any event, the Agreements are binding, while the net sale price that Tradeworld Realty Inc. claims to be able to fetch (for just one of the Units) remains hypothetical. The Tradeworld deal may not materialize. A bird in the hand, as the saying goes.

16. Based on the time the Units sat unsold, this Court simply cannot accept the listing prices as the true market value.

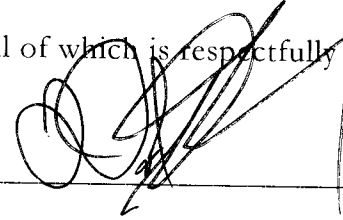
17. The Trustee has put forth no evidence of the true market value of the Units.

18. Without evidence of true market value, the Court simply cannot determine if the sale of the Units is improvident.

19. To discharge its duties, the Trustee also ought to have done an analysis of the costs that will be incurred to remarket the Units if the Agreements are terminated. While more

funds in the future may be of benefit, that ought to have been weighed against the costs associated with obtaining that benefit.

All of which is respectfully submitted



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