

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE

JUSTICE P. PERELL

)
)
)

THURSDAY, THE 19TH

DAY OF JANUARY, 2023

BETWEEN:

(Court Seal)

ARLENE MCDOWELL

Plaintiff

- and -

FORTRESS REAL CAPITAL INC., FORTRESS REAL DEVELOPMENTS INC., EMPIRE
PACE (1088 PROGRESS) LTD., BUILDING & DEVELOPMENT MORTGAGES CANADA
INC., ESTATE OF ILDINA GALATI by its Trustee in Bankruptcy CROWE SOBERMAN
INC., DEREK SORRENTI, SORRENTI LAW PROFESSIONAL CORPORATION and
MICHAEL CANE

Defendants

Proceeding under the *Class Proceedings Act, 1992*

ORDER

(BDMC Certification and Settlement Approval – Progress)

THIS MOTION, made by the Plaintiff for an order certifying this action as a class proceeding for settlement purposes only as against the Defendants Building & Development Mortgage Canada Inc. (“BDMC”) and the Estate of Ildina Galati by its Trustee in Bankruptcy Crowe Soberman Inc. (“Galati”) (collectively, the “Settling Defendants”), and approving the settlement agreement between the Plaintiff and the Settling Defendants, approving the form and content of the notice of certification and hearing for settlement approval, and approving the notice

Refered Jan 26, 2023

of settlement approval and counsel fee approval (the "Notices"), and the method of dissemination of the Notices, and dismissing this action as against the Settling Defendants with prejudice and without costs, was heard this day by judicial videoconference at the court house, Osgoode Hall, 130 Queen Street West, Toronto, ON M5H 2N5.

ON READING the materials filed, including the settlement agreement dated November 18, 2022 attached to this Order as **Appendix A** (the "Settlement Agreement"), and on hearing the submissions of the Plaintiff and the Settling Defendants;

AND ON BEING ADVISED that the Plaintiff and the Settling Defendants consent to this Order and that the Non-Settling Defendants take no position;

1. **THIS COURT ORDERS** that, for the purposes of this Order, the definitions in the Settlement Agreement apply to, and are incorporated into this Order.
2. **THIS COURT ORDERS** that, in the event of a conflict between this Order and the Settlement Agreement, this Order shall prevail.
3. **THIS COURT ORDERS** that this action is certified as a class proceeding as against the Settling Defendants for settlement purposes only.
4. **THIS COURT ORDERS** that the Settlement Class is defined as:

All persons in Canada who invested in a syndicated mortgage in respect of the Progress/Ten88 Project (the "Progress Project"), registered against title to lands located at 1088 Progress Avenue in Toronto, Ontario as Instrument AT3101004 or AT3127137.

5. **THIS COURT ORDERS** that Arlene McDowell is appointed as the representative plaintiff.

6. **THIS COURT ORDERS** that MSTW Professional Corporation and Waddell Phillips Professional Corporation are appointed as Class Counsel.

7. **THIS COURT DECLARES** that the following claims are asserted as against the Settling Defendants on behalf of the Settlement Class:

- (a) breach of contract;
- (b) breach of fiduciary duty;
- (c) negligence;
- (d) negligent misrepresentation;
- (e) fraudulent misrepresentation; and
- (f) conspiracy.

8. **THIS COURT DECLARES** that the relief sought by the Settlement Class as against the Settling Defendants is declarations, general damages, punitive damages, interest, and costs.

9. **THIS COURT ORDERS** that the following issues are common to the claims asserted as against the Settling Defendants on behalf of the Settlement Class:

- (a) Did BDMC breach its contracts with the Class members? If so, how?
- (b) Did BDMC owe a fiduciary duty to the Class members, and if so, in what respect?
If yes, did BDMC breach its fiduciary duty owed to the Class members, and if so, how?
- (c) Did BDMC and/or Galati owe a duty of care to the Class members with respect to the claims asserted against them in negligence or negligent misrepresentation?

- (d) If BDMC and/or Galati owed a duty of care to the Class members with respect to the claims in negligence or negligent misrepresentation, what was the applicable standard of care for the Settling Parties?
- (e) If BDMC and/or Galati owed a duty of care to the Class members with respect to the claim in negligence or negligent misrepresentation, did the Settling Parties breach the applicable standard of care? If so, how?
- (f) Did BDMC make fraudulent misrepresentations to the Class members, and, if so, is BDMC liable to the Class with respect thereto?
- (g) Did BDMC conspire with any one or more of Fortress Real Capital Inc., Fortress Real Developments Inc., Jawad Rathore, Vincenzo Petrozza, or others, with the intent to cause harm to the Class members? If so, did the conspiracy cause harm to the Class members?
- (h) Can the Class members' damages be assessed, in whole or in part, in the aggregate, and if so, what is the quantum of their aggregate damages?

10. **THIS COURT DECLARES** that a class proceeding is the preferable procedure for the resolution of the common issues as against the Settling Defendants.

11. **THIS COURT ORDERS** that FAAN Mortgage Administrators Inc. is appointed as the Claims Administrator to deliver the Notices and to disseminate the Settlement Funds to the Settlement Class Members in accordance with the Distribution Plan, which is approved.

12. **THIS COURT ORDERS** that the Plaintiff shall give notice of the certification of this action as against the Settling Defendants and the opt-out process, and notice of the approval of the Settlement Agreement to the Settlement Class Members in substantially the form set out in

Appendix B hereto and in the manner set out in the Notice Protocol attached as **Schedule B** to the Settlement Agreement.

13. **THIS COURT ORDERS** that no information regarding this Action other than the Notices may be disseminated to the Settlement Class by any Defendant during the opt-out period, unless approved by Class Counsel and, failing the approval of Class Counsel, then as approved by the Court.

14. **THIS COURT ORDERS** that Settlement Class Members may opt out of this class proceeding by following the opt-out process set out in the Notices, by no later than 5 pm E.T. on Friday, March 10, 2023 (the "Opt-Out Deadline").

15. **THIS COURT ORDERS** that any person who opts out of this action in accordance with the provisions for doing so in the Notices and paragraph 14 of this order shall be excluded from the Settlement Class and excluded from the action.

16. **THIS COURT ORDERS** that, within thirty (30) days of the Opt-Out Deadline, Class Counsel shall provide to the Defendants and the Court a report containing the name of each person who has validly and timely opted out of the proceeding.

17. **THIS COURT ORDERS** that the dismissal of this Action as against the Settling Defendants shall not relieve the Settling Defendants from their obligations under the Settlement Agreement.

18. **THIS COURT ORDERS** that no person may bring any action or take any proceeding against the Settling Defendants, FAAN Mortgage Administrators Inc. in its capacity as notice administrator under this Order, counsel for the Settling Defendants or Class Counsel or any of their

respective past and current officers, directors, employees, parents, subsidiaries, agents, partners, associates, representatives, predecessors, successors, beneficiaries or assigns for any alleged fault or liability in any way relating to the administration of this Order or the administration of the Settlement Agreement, except with leave of this Court.

19. **THIS COURT ORDERS** that this Order, including but not limited to the certification of this action as against the Settling Defendants for settlement purposes only, the definition of the Settlement Class, and the certified Common Issues, and any reasons given by the Court in connection with this Order, is without prejudice to the rights and defences of the Non-Settling Defendants in connection with this Action or any related litigation or proceeding and, without restricting the generality of the foregoing, may not be relied on by any person to establish the criteria for certification (including class definition) or the existence or elements of the causes of action asserted in the Action, as against the Non-Settling Defendants.

20. **THIS COURT ORDERS** that this Order, including the Settlement Agreement, is binding upon the Settling Defendants in accordance with the terms hereof, and upon each member of the Settlement Class who does not validly opt out of this action, including those persons who are minors or mentally incapable, and that the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194 are dispensed with in respect of the Action.

21. **THIS COURT ORDERS** that the Settlement Agreement is fair, reasonable and in the best interests of the Settlement Class.

22. **THIS COURT ORDERS** that the Settlement Agreement is hereby approved pursuant to s. 27.1 of the *Class Proceedings Act, 1992*, SO 1992, c 6, and shall be implemented and enforced in accordance with its terms.

23. **THIS COURT ORDERS** that, on the date on which any appeal of this Order is finally disposed of, or the time to bring any appeal of this Order, if any, has expired (the "Effective Date") each Settlement Class Member and any of their past and current successors, heirs, executors, administrators, trustees, or assigns ("Releasors") releases and shall be conclusively deemed to have forever and absolutely released the Settling Defendants and their respective past and current officers, directors, employees, parents, subsidiaries, agents, partners, associates, representatives, predecessors, successors, insurers, beneficiaries and assigns ("Releasees") from any and all claims, demands, actions, suits, or causes of action that have been brought or which could have been brought against the Settling Defendants in this Action, whether known or unknown, asserted or unasserted, under or pursuant to any statute, regulation, common law or equity, and inclusive of all claims for damages, punitive damages, loss, disgorgement of profit, restitution, interest, taxes, costs, disbursements, legal fees, and expenses arising out of or relating in any way to the facts and matters that are the subject of this Action (the "Released Claims").

24. **THIS COURT ORDERS** that, upon the Effective Date, each Releasor shall not now or hereafter institute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other person, any proceeding, cause of action, claim or demand of any nature whatsoever against any Releasee, or against any other person who may claim contribution or indemnity or other claims over relief from any Releasee, arising out of, in respect of or relating in any way to any Released Claim, and all such claims are hereby forever barred, prohibited and enjoined.

25. **THIS COURT ORDERS** that the use of the terms "Releasors" and "Released Claims" in this Order does not constitute a release of claims by those members of the Settlement Class who

are resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors.

26. **THIS COURT ORDERS** that all claims for contribution, indemnity or other claims over, whether asserted, unasserted, or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to or arising from the Released Claims, which were or could have been brought in this Action or any other actions, or otherwise by any Non-Settling Defendant, any named or unnamed co-conspirator that is not a Releasee or by any other person or party, including Olympia Trust Company ("Olympia"), against a Releasee, or by a Releasee against any Non-Settling Defendant or any named or unnamed co-conspirator that is not a Releasee or any other person or party, including Olympia, are barred, prohibited and enjoined in accordance with the terms of this Order (unless such claim is made in respect of a claim by a person who has validly opted out of the Action).

27. **THIS COURT ORDERS** that, for greater certainty, the claims made by Olympia Trust Company as against the Settling Defendants in respect of the Progress Project in its Third Party Claim issued October 1, 2021 in the *Raponi v. Olympia Trust Company* action, bearing Court File No. CV-20-006453593-0A52, and all future claims which could be asserted by Olympia against the Settling Defendants arising out of or relating to the Progress Project are forever barred, prohibited and enjoined.

28. **THIS COURT ORDERS** that, for greater certainty, all claims of the Settlement Class members of any nature whatsoever arising out of or relating in any way to the professional services provided by, or any actions or omissions of the Settling Defendants relating to or arising from the syndicated mortgage loans that are the subject of this Action, and which could have been brought

in this Action or in a separate proceeding, including in the *Raponi v. Olympia Trust Company* action are barred, prohibited and enjoined.

29. **THIS COURT ORDERS** that, for greater certainty, this Order does not preclude the Settlement Class from continuing this action against any Non-Settling Defendant or named or unnamed alleged co-conspirators that are not Releasees, or the continuation of the claims asserted in this Action on an individual basis or otherwise against any Non-Settling Defendant or named or unnamed co-conspirator that is not a Releasee, nor does it preclude continuing the action *Raponi v. Olympia Trust Company*, Court file No. CV-20-00643593-00CP, provided that no relief for or arising from any Released Claims is sought against any Non-Settling Defendant, named or unnamed alleged co-conspirator, or other party in those proceedings, or against Olympia Trust Company in the *Raponi v. Olympia Trust Company* action.

30. **THIS COURT ORDERS** that, in the event of any claim by any Non-Settling Defendant, named or unnamed alleged co-conspirator, or other person for contribution and indemnity or other claim over against any Releasee, whether in equity or in law, by statute or otherwise or if, in the absence of this Order, any Non-Settling Defendant, named or unnamed alleged co-conspirator, or other person made or could have made a claim for contribution, indemnity or other claim over from or against any Releasee, whether in equity or in law, by statute or otherwise:

- (a) the Plaintiff and Settlement Class Members shall not be entitled to claim or recover from any Non-Settling Defendant, named or unnamed alleged co-conspirator or other person, including Olympia Trust Company in the *Raponi v. Olympia Trust Company* action, that portion of any damages (including punitive damages, if any), restitutionary award, disgorgement of profits, interest and costs that corresponds to the proportionate liability of the Releasees proven at trial or otherwise;

- (b) the Plaintiff and Settlement Class Members shall limit their claims against any Non-Settling Defendant, named or unnamed alleged co-conspirator or other person, including Olympia Trust Company in the *Raponi v. Olympia Trust Company* action, to include only, and shall only seek to recover from any Non-Settling Defendant, named or unnamed alleged co-conspirator or other person, including Olympia Trust Company in the *Raponi v. Olympia Trust Company* action, such claims for damages (including punitive damages, if any), restitutionary award, disgorgement of profits, interest and costs attributable to the aggregate of the several liability to the Plaintiff and Settlement Class Members of each Non-Settling Defendant, named or unnamed alleged co-conspirator or other person, and of Olympia Trust Company in the *Raponi v. Olympia Trust Company* action, and, for greater certainty, the Settlement Class Members shall be entitled to claim and seek to recover on a joint and several basis as between each Non-Settling Defendant(s), named or unnamed alleged co-conspirator and/or any other person or party that is not a Releasee, including Olympia Trust Company in the *Raponi v. Olympia Trust Company* action, if any, if permitted by law; and
- (c) this Court shall have full authority to determine the liability and the proportionate liability of the Releasees at the trial or other disposition of this action and at the trial of the *Raponi v. Olympia Trust Company* action, whether or not the Releasees remain in such action or appear at the trial or other disposition of such action, and the liability and the proportionate liability of the Releasees shall be determined as if the Releasees are parties to such action and any determination by this Court in respect of the proportionate liability of the Releasees shall only apply in this action,

or in the *Raponi v. Olympia Trust Company* action, as the case may be, and shall not be binding on the Releasees in any other proceeding.

31. **THIS COURT ORDERS** that nothing in this Order is intended to or shall limit, restrict or affect any arguments which any Non-Settling Defendant, named or unnamed alleged co-conspirator or other person, including Olympia Trust Company in the *Raponi v. Olympia Trust Company* action, may make regarding the reduction of any assessment of damages (including punitive damages, if any), restitutionary award, disgorgement of profits, interest and costs or judgment against them in favour of the Settlement Class Members in this action or in the *Raponi v. Olympia Trust Company* action, or the rights of the Plaintiff and the Settlement Class Members to oppose or resist any such arguments, except as provided for in this Order.

32. **THIS COURT ORDERS** that, for greater certainty, to the extent that the Settling Defendants are found or could have been found to have any liability to any of the Non-Settling Defendants, named or unnamed alleged co-conspirator or other person, including Olympia Trust Company in the *Raponi v. Olympia Trust Company* action, for contribution or indemnity arising from or related to amounts for which the Non-Settling Defendants, named or unnamed alleged co-conspirator or other person are found liable to the Class, the Class Members' recovery from the Non-Settling Defendants, named or unnamed alleged co-conspirator or other person, including Olympia Trust Company in the *Raponi v. Olympia Trust Company* action, shall be reduced by the amount(s) for which the Settling Defendants are found or could have been found liable to the Non-Settling Defendants, named or unnamed alleged co-conspirator or other person.

33. **THIS COURT ORDERS** that nothing in this Order shall preclude Olympia Trust Company from bringing a motion in the *Raponi v. Olympia Trust Company* action seeking to

conduct pre-trial documentary and oral discovery of any Releasee in respect of the facts surrounding the Released Claims and/or to compel any Releasee to appear at the trial in that proceeding pursuant to Rule 53.04 of the Ontario *Rules of Civil Procedure* as if the Releasee was a third party in that proceeding in respect of the Released Claims, and the obligations of the Releasees to retain and preserve copies of any relevant documents relating to the Released Claims shall continue as though they remained parties to the Third Party Claims issued in the *Raponi v. Olympia Trust Company* action in respect of the Released Claims.

34. **THIS COURT ORDERS** that, for purposes of administration and enforcement of the Settlement Agreement and this Order, this Court will retain an ongoing supervisory role and the Settling Defendants acknowledge and attorn to the jurisdiction of this Court solely for the purpose of implementing, administering and enforcing the Settlement Agreement and this Order, and subject to the terms and conditions set out in the Settlement Agreement and this Order.

35. **THIS COURT ORDERS** that, without further order of the Court, the parties to the Settlement Agreement may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

36. **THIS COURT ORDERS** that, except as provided herein, this Order does not affect any claims or causes of action that any members of the Settlement Class have or may have in the action against any Non-Settling Defendant(s) or named or unnamed co-conspirators who are not Releasees.

37. **THIS COURT ORDERS** that, other than that which has been provided in the Settlement Agreement, no Releasee shall have any responsibility or liability whatsoever relating to the administration of the Settlement Agreement.

38. **THIS COURT ORDERS** that, in the event that the Settlement Agreement is terminated in accordance with its terms or otherwise fails to take effect for any reason, this Order shall be declared null and void and of no force or effect without the need for any further order of this Court but with notice to the Class.

39. **THIS COURT ORDERS** that, upon the Effective Date, this Action is hereby dismissed as against all Settling Defendants, without costs and with prejudice.

40. **THIS COURT ORDERS** that there shall be no costs of this motion.

A handwritten signature in dark ink, appearing to read 'Perell, P.', is written above a horizontal line.

The Honourable Justice P. Perell

ARLENE MCDOWELL
Plaintiff

-and- FORTRESS REAL CAPITAL INC. et al.
Defendants

Court File No.: CV-16-560268-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

ORDER

(BDMC Certification and Settlement Approval - Progress)

MSTW PROFESSIONAL CORPORATION

36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5

Mitchell Wine (LSO No.: 23941V)

mwine@mstwlaw.com

Tel: 416.477.5524

WADDELL PHILLIPS PROFESSIONAL CORPORATION

36 Toronto Street, Suite 1120
Toronto, ON M5C 2C5

Margaret L. Waddell (LSO No.: 29860U)

marg@waddellphillips.ca

Patti Shedden (LSO No.: 46210W)

patti@waddellphillips.ca

Tina Q. Yang (LSO No.: 60010N)

tina@waddellphillips.ca

Tel: 647.261.4486

Lawyers for the Plaintiff